



UNDERSTANDING RULE OF LAW, HUMAN SECURITY AND PREVENTION OF TERRORISM IN SRI LANKA

ERMIZA TEGAL



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Contents

1. Introduction	1
2. Context	3
2.1 History of the PTA	3
2.2 Sri Lanka's prolonged experience of extraordinary unchecked executive power	4
2.3 Abuse of police power and delays in the ordinary criminal justice	6
2.4 A failed political moment for reform	6
2.5 Context after the Easter attacks of 2019	7
3. Legal Framework	10
3.1 International standards on anti-terror law and human rights	10
3.2 Domestic legal framework	15
4. Some lessons learnt from 40 years of PTA	21
(a) Manner of Arrest	21
(b) Access to legal representation	21
(c) No judicial review of reasons for arrest or justification of detention	22
(d) Length of detention	23
(e) Distance from families	24
(f) Torture	24
(g) Multiple cases against the same person in different courts	26
(h) A rehabilitation policy	26
(i) Injustice of acquittal after a long period incarceration	27
(j) Stigmatization of entire communities and acts of peaceful criticism or dissent as terrorist or terrorism	27

5. Experiences of arrests and detention under the PTA in 2019	28
Description of the cases observed	28
(a) Refusal to provide legal representation	28
(b) Arrests	29
(c) Clustering cases impeding finalization of investigations	33
(d) Distance from families	33
(e) Torture	34
(f) Judicial oversight over arrests	35
(g) Representations to the Attorney General	35
(h) Socio-economic impact on the families of the detainees	37
(i) Social isolation of families of suspects	38
(j) More hardship and uncertainty in the COVID-19 context	38
(k) Unequal treatment	39
6. Conclusion	40

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This work is dedicated to the individuals and families from across all ethnic groups in Sri Lanka whose lives have been unjustly harmed by the Prevention of Terrorism Act.

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Abbreviations

BASL	- Bar Association of Sri Lanka
CID	- Criminal Investigation Department
CTA	- Counter Terrorism Act
HRC	- Human Rights Commission of Sri Lanka
HRW	- Human Rights Watch
ICCPR	- International Covenant on Civil and Political Rights
ICJ	- International Crisis Group
ICRC	- International Committee of the Red Cross
LST	- Law and Society Trust
LTTE	- Liberation Tigers of Tamil Eelam
PSO	- Public Security Ordinance
PTA	- Prevention of Terrorism Act
SLR	- Sri Lanka Law Report
TID	- Terrorist Investigation Department
UN	- United Nations
UNCAT	- United Nations Convention Against Torture, Cruel, Inhuman and Degrading Treatment
UNWGAD	- United Nations Working Group on Arbitrary Detentions

1. Introduction

The Law and Society Trust (LST) initiated this report to understand the ongoing implementation of the Prevention of Terrorism Act of 1979 (PTA), with special focus on its use after the Easter Sunday bombings on 2019.

This report is based on the observations drawn from the cases against 44 individuals, all of whom were arrested and detained under the Prevention of Terrorism Act in the months following the bombings carried out at three churches and three luxury hotels by an extremist group on Sunday 21st April 2019. The law and order response was swift. The reluctance by certain quarters of the legal profession to appear for those arrested and detained, the accounts by families of arbitrary arrests, the uncertainties in relation to detention orders and periods of administrative detention were the all too familiar signs that the counter terrorism legal framework of Sri Lanka was skewed against detainees. The presumption of innocence till proved guilty does not operate in the context of the PTA.

LST believes in the importance of learning about the legal and social experience of these detentions and in sharing these learnings with stakeholders committed to upholding the rule of law and human rights. LST recognizes that the arrests and detentions associated with the Easter Sunday attacks are articulated within a national security framework which permits restrictions of rights in the interest of a broader public good that is referred to as 'national security'.

However, within any such framework or context, an adherence to rule of law is an absolute minimum standard that is expected from the state. This requires that there is a basic check on executive power through the opportunity to review the exercise of public power. Executive action must be reviewable for, (a) whether it is permitted by law and whether it is exercised within the limits provided for by law, and (b) whether fundamental rights are infringed and whether restrictions of rights are permissible in law. Over and above this, policy makers and people's representatives must also be interested in the question of the human, social and political consequences of the use and abuse of executive power. In the case of the broad and significant powers embedded in national security legislation, there ought to be heightened scrutiny of how these are exercised. The fundamental assumption, that has repeatedly been proven true, is that power, especially with limited checks, is frequently abused. Public security powers which tend to be vague, which are open to interpretation to permit a broad range of actions and which are typically unchecked, are amongst the most susceptible to abuse. Human security must not suffer in the name of national security. Indeed, ensuring human security is the very aim of national security. This fact justifies the close scrutiny of public security powers to ensure that inevitable restrictions of rights are in actuality necessary, justifiable and proportionate.

This report is not a study of the merits of the cases against the individuals whose arrests and detentions it examines, and it is the position of LST that these can only be established by a timely, fair and proper trial. The cases under review for this report have been evaluated in terms of compliance with due process and impacts of human suffering and others costs to those affected. Based on the available information, it is clear that the observations and impressions are of a preliminary nature and require closer and continued study. However, familiar patterns of violence, discrimination, abuse of power, disregard for due process and human life associated with previous use of the PTA are visible in these cases.

This report looks at (1) what the international legal standards are in relation to arbitrary arrest and detention particularly in the context of countering terrorism (2) what Sri Lanka's domestic legal framework is in relation to protecting the rights of persons relating to arbitrary arrests and detentions with respect to countering terrorism and (3) what the practical and lived experiences are of people who have been impacted by terrorism related legislation prior to 2019 and also after the attacks of 21 April 2019?

This report situates Sri Lanka's long experience with the PTA within in the broad context of its socio-economic politics, the criminal justice system and public confidence in the rule of law, recognising the adverse impacts that the PTA has had on the rule of law, due process and human security. The observations and narratives in this brief report are presented in a way that seeks to build on and contribute to the available literature and understanding of the PTA.

LST believes that future law reform on the subject of countering terrorism must be informed by the practices, trends and legacies of the implementation of existing laws and gaps in the protection of fundamental human rights.

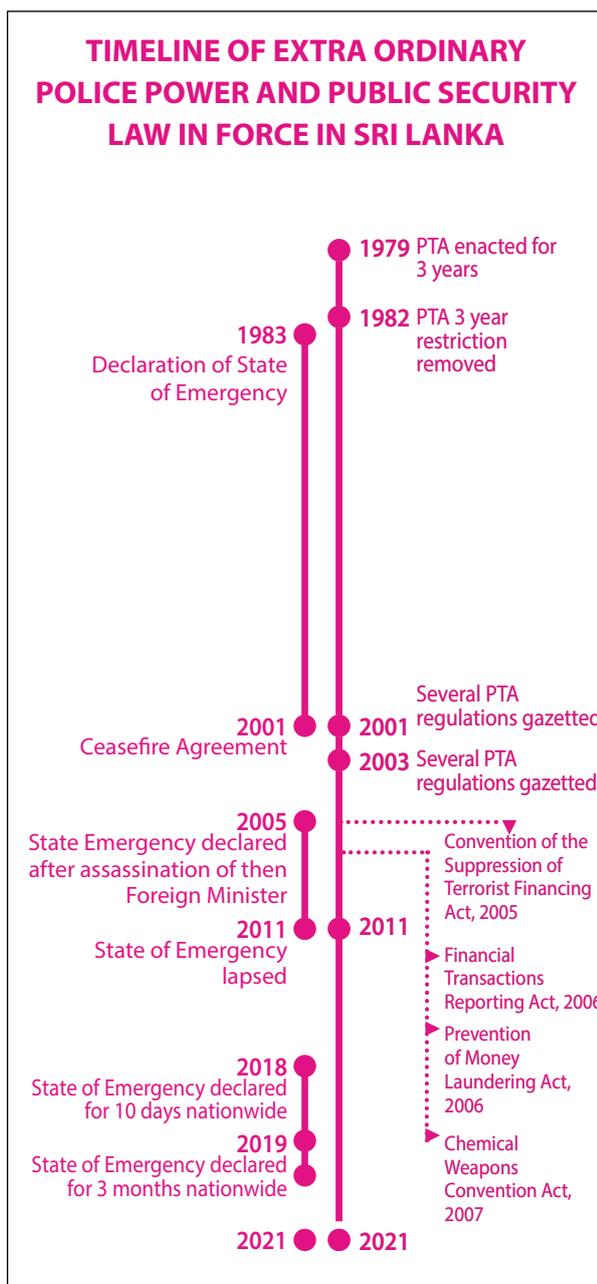
2. Context

2.1 History of the PTA

The Prevention of Terrorism Act was introduced in 1979 as temporary emergency legislation, to address the danger caused by “*elements or groups of persons or associations that advocate the use of force or the commission of a crime as a means of, or as an aid in, accomplishing governmental change within Sri Lanka*”. It was acknowledged as requiring and was passed by a two-thirds majority of those in Parliament in recognition of the curtailment of fundamental rights in the provisions of the Act. It was made permanent in 1982 and continues to be in force today. The context in which the PTA was enacted was one of strong opposition to secessionist aspirations from within the Tamil polity and of escalating violence between the state and separatist Tamil militant groups.

The PTA was enacted one year after a new constitution, i.e., the Second Republican constitution, was adopted. The government of the day, having secured an unprecedented majority in Parliament, installed an executive president with wide and largely unchecked executive powers. It was a constitution that marginalized the role and powers of the judiciary and did not secure its independence. It was also a constitution that did not recognize judicial

review of post enactment legislation, and which permitted the enactment of ‘urgent bills’ allowing only a three day window within which judicial review over constitutionality of bills could be invoked.



When the PTA was enacted, Sri Lanka had in place the Public Security Ordinance of 1947 (PSO), and emergency regulations enacted under the PSO were also in force. The PSO itself had been passed as an 'urgent bill' in ninety minutes¹ and at the time drew warnings from the floor of the house that the matter required more careful consideration.² The PSO is a broadly framed piece of colonial legislation which empowers the President to enact emergency regulations during declared states of emergency.

2.2 Sri Lanka's prolonged experience of extraordinary unchecked executive power

Sri Lanka's emergency rule and permanent state of crisis has been well documented.³ Sri Lanka's first declaration of formal emergency since British rule was in 1953. Since gaining independence, Sri Lanka has been governed longer under emergency powers than it has been without, with the longest period of emergency rule being from 1983 to 2001 with a five-month suspension in 1989. In July 2001, the state of emergency lapsed⁴ following a ceasefire agreement being entered into between the then-government and the LTTE to provide for an opportunity for negotiating a peaceful settlement of the issues fueling the conflict. It has been noted that emergency powers continued to be exercised by the government regardless of the absence of a formal declaration of a state of emergency.⁵ Section 27 of the Prevention of Terrorism Act enabling ministerial enactment of regulations was used to gazette a series of regulations which brought into operation the very powers under the emergency regulations that had lapsed. In 2003, regulations in force under the PTA included creation of 'high security zones'⁶, restriction of areas for fishing⁷ and police powers to keep in custody persons who had surrendered.⁸

¹ N. Manoharan, "Counterterrorism legislation in Sri Lanka: evaluating efficacy", Policy Studies Vol. 28 Washington, D.C.: East-West Center, (2006), at page 22. Found at <http://hdl.handle.net/10125/3495>. (Accessed on July 1, 2009).

² Parliamentarian Dr. A. P. de Zoysa, Member of Colombo South, noted, "An unscrupulous Minister, and unscrupulous Prime Minister, could make use of this very law to detain innocent people". - Hansard of the State Council debate, 10 June 1947. Quoted in Manoharan, Counterterrorism legislation in Sri Lanka, at page 22.

³ Refer Radhika Coomaraswamy and Charmaine de los Reyes, Rule by emergency: Sri Lanka's postcolonial constitutional experience, *International Journal of Constitutional Law*, Volume 2, Issue 2, April 2004, Pages 272–295; Asanga Welikala, State of permanent crisis: Constitutional government, fundamental rights and states of emergency in Sri Lanka, Center for Policy Alternatives, 2008; Deepika Udagama, An Eager Embrace: Emergency Rule and Authoritarianism, *Republican Sri Lanka in Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* edited by Asanga Welikala, Center for Policy Alternatives, 2015.

⁴ Interestingly, this coincided with the only time when the main opposition party and not the President enjoyed majority support in Parliament. Declaring a state of emergency requires a proclamation by the president which will continue in force only if it is made every month and approved by Parliament. For more on this history see Ermiza Tegal (2009) *Emergencies, Constitutions and Autochthonous Solutions: A comparative study of emergency power in South Africa and Sri Lanka*, LL.M, School of Oriental and African Studies, University of London.

⁵ Saliya Edirisinghe, 'Addendum, Lapse of Emergency Rule and resort to other measures', In *Sri Lanka: State of Human Rights 2004*, Law and Society Trust, 23-26, at page 23. Edirisinghe states that the government resorted to implementing arrest and detention powers provided for in Part II of the Public Security Ordinance and utilized Section 27 of the Prevention of Terrorism Act to enable ministerial enactment of regulations.

⁶ PTA regulation No. 3 of 2001 declaring Colombo a high security zone and prohibiting lorries and trailers entering or parking therein without a permit.

⁷ PTA regulations No 7 and 8 of 2001 (applicable to certain areas).

⁸ PTA regulation No.11 of 2001.

A state of emergency was declared in 2005 in response to the assassination of the then-Foreign Minister, and continued in place by way of monthly renewal by Parliament. In 2006 the President issued a new set of Emergency Regulations with the declared aim of *giving effect to Sri Lanka's international legal obligations in particular the UN Security Council Resolution 1373 (2001) in relation to terrorism*. In April 2009, the government of Sri Lanka declared victory over the LTTE but continued to extend the declaration of a state of emergency. By 2009, it could be said that there existed overlapping or double enforced provisions of emergency power in the form of both emergency regulations issued in terms of the PSO and the provisions of and regulations under the PTA. The growth of emergency power and anti-terrorism measures in the three years preceding 2009 were described as a system that was becoming 'more complex and Byzantine.'⁹

By 2009, the legal framework in Sri Lanka on counter terrorism was extensive. The following are some of the associated laws that had been incorporated since the enactment of the PTA: (1) Offences Against Aircraft Act No. 24 of 1982, (2) SAARC Regional Convention on Suppression of Terrorism Act No. 70 of 1988, (3) Prevention and Punishment of Crimes Against Internationally Protected Persons No. 15 of 1991, (4) Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation No. 31 of 1996, (5) Suppression of Terrorist Bombings Act, No. 11 of 1999, (6) Prevention of Hostage Taking No. 41 of 2000, (7) Suppression of Unlawful Acts Against the Safety of Maritime Navigation No. 42 of 2000, (8) Convention on the Suppression of Terrorist Financing Act No. 25 of 2005, (9) Financial Transactions Reporting Act No. 6 of 2006, (10) Prevention of Money Laundering No. 5 of 2006 and (11) Chemical Weapons Convention No.58 of 2007.

On 25th August 2011, the President of Sri Lanka announced that the government will not be seeking an extension to the state of emergency.¹⁰ By operation of law, the state of emergency lapsed by 30th August 2011. At the same time four separate regulations were gazetted under the Prevention of Terrorism Act relating to extension of application, detainees and remandees, rehabilitation of surrendees and proscription of the LTTE.¹¹

Six years and 7 months later, in March 2018, a ten-day nationwide emergency was declared in response to anti Muslim riots in the Kandy District.¹² The next time a state of emergency would be declared was on 22 April 2019, on the day after the Easter Sunday attacks.

⁹ Sri Lanka: Briefing Paper – Emergency Laws and International Standards, Geneva: International Commission of Jurists, 2009, at page ii. Available at <http://www.icj.org/IMG/SriLanka-BriefingPaper-Mar09FINAL.pdf>. Accessed on 10th August 2009.

¹⁰ Center for Policy Alternatives, "CPA statement on the termination of the state of emergency" 27 August 2011 found at <https://www.cpalanka.org/cpa-statement-on-the-termination-of-the-state-of-emergency/>

¹¹ Extraordinary Gazettes numbered 1721/02, 1721/03, 1721/04 and 1721/05 dated 29th August 2011.

¹² Human Rights Watch, State of Emergency Declared: Violence By Anti-Muslim Mobs Highlights Interethnic Strife, 7 March 2018, found at <https://www.hrw.org/news/2018/03/07/state-emergency-declared-sri-lanka#>

2.3 Abuse of police power and delays in the ordinary criminal justice

It is necessary to recall that laws such as the PTA are implemented within and by actors that form the criminal justice system of Sri Lanka. As a consequence, all the infirmities of the existent criminal justice system, including abuse of power, corruption, limitations of investigation methods, laws delays, lack of protections for victims and witnesses and failing to provide due process rights to suspects, are replicated and exacerbated in the context of this system's administration of the PTA.¹³

Sri Lanka's conviction rate for grave crimes was 13.8% in 2019, 16.5% in 2018 and 18.6% in 2017.¹⁴ The rate of cases that remain 'investigation pending' was 57% in 2019, 55.3% in 2018 and 50.8% in 2017. These figures underscore the fact that the criminal justice system faces serious challenges in investigating cases and is unable to establish guilt in over 80 percent, on average, of the cases deemed ready for prosecution. A report to Parliament by a committee headed by a Supreme Court Judge found that a serious criminal case initiated in the High Court and availing itself of the two allowable appeals would, on average, take 17 years in the current criminal justice system.¹⁵ Providing a snapshot view of judicial process delays, the Justice Minister informed Parliament in December 2020 that there were 4620 unresolved cases in Sri Lankan courts were pending for more than 20 years.¹⁶ For PTA cases in particular, the Human Rights Commission highlighted the trend of prolonged pre-trial detentions, reporting some suspects languishing in remand prison for periods of 11 to 15 years.¹⁷

2.4 A failed political moment for reform

There had been a consistent call for repeal of the PTA from critics of its abuses and failings. In 2015, the then-government of Sri Lanka pledged to repeal the PTA in the UN Human Rights Council Resolution 30/1 which states in item 12 that the Council "*Welcomes the commitment of the Government of Sri Lanka to review the Public Security Ordinance Act and to review and repeal the Prevention of Terrorism Act, and to replace it with*

¹³ For more information refer Chapter on PTA detainees in the Prison Study by the Human Rights Commission of Sri Lanka, Human Rights Commission of Sri Lanka, 2020. Found at https://www.hrcsl.lk/wp-content/uploads/2020/01/Prison-Study-by-HRCSL_Concise-Version.pdf (Referred to as "HRCSL Prison Report 2020").

¹⁴ The rates were calculated based on Plaintiff filed and Ending in conviction figures disclosed by the Sri Lanka Police in the Disposal of Grave Crimes Abstract for the years 2019, 2018 and 2017. The assumption is made that the number of cases said to be 'Ending in conviction' directly relate to cases represented as 'Plaintiff filed'. The rates were calculated based on Total true cases and Investigations pending figures disclosed by the Sri Lanka Police in the Disposal of Grave Crimes Abstract for the years 2019, 2018 and 2017. The assumption is made that the number of cases said to be 'Total true cases' directly relate to cases represented as 'Investigations pending'.

¹⁵ Recommendations Pertaining to the Expedient and Efficient Administration of Criminal Justice by the Sectoral Oversight Committee on Legal Affairs (Anti Corruption) and Media dated 20th September 2017.

¹⁶ "Over 4000 cases filed 20 to 25 years ago still heard in Sri Lanka" dated 6th December 2020, Newswire website. Found at <http://www.newswire.lk/2020/12/06/over-4000-cases-filed-20-25-years-ago-still-heard-in-sri-lanka-cours/>

¹⁷ HRCSL Prison Report 2020 at page 525.

anti-terrorism legislation in accordance with contemporary international best practices” (emphasis added).

On 9th October 2018, a Bill proposing a Counter Terrorism Act (CTA), which had not been informed by any process of public consultation, was placed on the Order Paper of Parliament. Although the Bill was presented as a progressive alternative to the PTA and enjoyed the support of some groups, there was resistance from others to provisions in the proposed CTA both prior to and after the tabling of the Bill.¹⁸ It is important to note that the lived experiences of people, of unchecked abuses of power, or of torture and prolonged detention under the PTA did not appear to have informed the drafting of the CTA. It was observed that the broader context of laws delays, lack of guarantees to legal aid, limitations on legally protecting and securing fundamental rights and the existence of a strong legal framework of counter terror measures had not been taken into consideration.¹⁹ The Bill was challenged in the Supreme Court from a number of diverse standpoints, and the Court delivered its determination²⁰ on 14th November 2018. The Court held among other things, that the provision failing to impose the death penalty, permitting remand if a suspect were to refuse to make a statement to the Magistrate and the provision that interpreted law as including international human rights instruments that Sri Lanka was signatory to, violated the guarantee of equality in the Constitution and as such required to be passed by a two-third majority in Parliament. The CTA was not enacted into law at the time.

On 4th January 2020, two months after the Presidential election returning Gotabaya Rajapaksa as President, Cabinet Spokesperson Bandula Gunawardene said that the Cabinet had decided to retain the PTA and had approved a proposal to withdraw the proposed CTA. He explained that the CTA “would have stopped the Armed Forces and Police from dealing effectively with the threat of terrorism, and instead curbed the rights guaranteed to the people by the Constitution, such as political trade union rights, *and their freedom of expression.*”

2.5 Context after the Easter attacks of 2019

The violent suicide bombings of 21 April 2019 caused the deaths of 269 civilians in Sri Lanka. The country was ten years into recovering from the end of a war and the years leading up to it had seen intermittent communal violence, predominantly against Muslims.

¹⁸ News articles cited Opposition parties, National Trade Union Center (NTUC), Inter University Students’ Federation (IUSF), Free Media Movement, Liberation Movement, and human rights activists as raising concerns regarding the CTA. Commentaries by Kishali Pinto Jayawardene in *The Sunday Times* titled “Skullduggery, Secrecy and the Counter Terrorism Act” dated 30th April 2017 found at <http://www.sundaytimes.lk/170430/columns/skullduggery-secrecy-and-the-counter-terror-draft-act-238848.html>, D Withanage and S Gunadasa, “Sri Lankan Government Prepares New Anti Terrorism Laws” [World Socialist Website, 9th April 2019] accessed at <https://www.wsws.org/en/articles/2019/04/09/ctas-a09.html>.

¹⁹ For a discussion of the proposed counter terrorism law as available in 2017 and relevant also at the time the CTA was tabled in October 2018 see “A Knockout Punch by Security on Liberty: The Proposed Counter Terror Law”, Ermiza Tegal, LST Review, December 2017, Law and Society Trust.

²⁰ Supreme Court Special Determination no. 41 to 47/ 2018 dated 14th on November 2018.

Soon after the bombings, the perpetrators of the Easter attacks were widely identified as 'Muslim'. The scale of the attacks plunged the country back into familiar feelings of fear, loss and uncertainty.

On 22 April, a day after the attack, President Maithripala Sirisena declared a state of emergency, by declaring that Part II of the Public Security Ordinance(PSO), would come into effect.²¹ On the same date the President called out all members of the armed forces to maintain public order²² and promulgated a series of Emergency Regulations²³. Some corrections to these regulations were issued on 24th April.²⁴ The regulations were further amended on 29th April²⁵ and 13th May.²⁶

On 22nd May²⁷ and 22nd June²⁸, the President issued proclamations declaring a state of emergency for a month, in effect extending the state of emergency that was in force. On 27th June Parliament approved the declaration of emergency by one month,²⁹ and on 13th July, Parliament approved extending the emergency by another month, with the motion being passed with 40 members of Parliament voting for and 2 against it.

The Emergency regulations expanded the already broad police powers under the PTA, including detention orders that extended for a year (Regulation 19(1)), explicit provisions that detention orders cannot be questioned by a court (regulation 19(10)), person aggrieved by an order could only lodge objections to an Advisory Committee and make representations to the President (who also held the Defence portfolio at the time), President was given power to prohibit holding of public processions or meetings that in his opinion were 'likely to cause a disturbance of public order or promote dissatisfaction' (Regulation 13). Regulation 15(1) sought to severely restrict freedom of expression, including by permitting a competent authority to restrict the publication of certain matters or the transmission of such matters from Sri Lanka to a place outside. The regulations further prohibited concealment of the full face in public, which in effect banned face veils and burqas.

The state of emergency was permitted to lapse on 22nd August 2019.

²¹ Gazette Extraordinary No. 2120/3 dated 22 April 2019 found at http://www.documents.gov.lk/files/egz/2019/4/2120-03_E.pdf

²² Gazette Extraordinary No. 2120/4 dated 22 April 2019 found at http://www.documents.gov.lk/files/egz/2019/4/2120-04_E.pdf

²³ Gazette Extraordinary No. 2120/5 dated 22 April 2019 found at http://www.documents.gov.lk/files/egz/2019/4/2120-05_E.pdf

²⁴ Gazette Extraordinary No. 2120/14 dated 24 April 2019.

²⁵ Gazette Extraordinary No. 2121/1 dated 29 April 2019.

²⁶ Extraordinary Gazette No. 2123/4 dated 13 May 2019.

²⁷ Extraordinary Gazette No. 2124/10 dated 22 May 2019 found at http://documents.gov.lk/files/egz/2019/5/2124-10_E.pdf

²⁸ Extraordinary Gazette No. 2128/35 dated 22 June 2019 found at http://documents.gov.lk/files/egz/2019/6/2128-35_E.pdf

²⁹ Hansard dated 27th June 2019, Volume 272 -No. 5 found at <https://www.parliament.lk/uploads/documents/hansard/1562229080015022.pdf>

There is limited information on arrests and detention following the Easter Sunday attacks, with reports like the following being amongst the only public information available. An International Crisis Group report in September 2019 stated that “Following the Easter attacks, **more than 1,800 Muslims** were arrested in connection to the **bombings or related incidents**, with **nearly 300 Muslims still in custody** as of early September(2019).”³⁰ In April 2020, a Daily News article reported that Police Spokesman SP Jaliya Senaratne confirmed that **hundred and ninety seven suspects** had been arrested during the course of the investigation into the Easter Sunday Attack, as at April 2020³¹ In June 2020, the Hindu reported that “The Colombo Crime Division, Criminal Investigation Department (CID) and the Terrorism Investigation Department (TID), who are investigating the attacks of last summer, have arrested over 200 suspects since.”³²

There is no publicly accessible information on the official total number of arrests under the PTA after April 2019. Even as this report was being finalised (December 2020), new information surfaced that 6 women, including two taken into custody along with their infant children, were arrested in Kattankudy under the PTA. Owing to the extraordinary nature of the law, it is especially important that the arrests and detention numbers be made public, and that these be monitored and studied.

³⁰ International Crisis Group (ICJ), ‘After Sri Lanka’s Easter Bombings: Reducing Risks of Future Violence’ (27 September 2019) Asia Report N 302.

³¹ Sandasen Marasinghe, ‘Easter attacks: 197 suspects arrested’ (*Daily News*) 15 April 2020 <<https://www.dailynews.lk/2020/04/15/law-order/216500/easter-attacks-197-suspects-arrested>> accessed 17 November 2020.

³² Meera Srinivasan, ‘Sri Lanka’s Easter bombings probe is at final stages, say police.’ (*The Hindu*) 20 June 2020 <<https://www.thehindu.com/news/international/sri-lankas-easter-bombings-probe-is-at-final-stages-say-police/article31878643.ece>> accessed 17 November 2020.

3. Legal Framework

3.1 International standards on anti-terror law and human rights

Sri Lanka is a party to eight core international human rights conventions³³ including the International Covenant on Civil and Political Rights (ICCPR) (1966). The ICCPR guarantees several basic rights to arrestees and detainees. Article 9 states that a person must not be arbitrarily arrested or detained unless there is a sufficient basis as provided by law.³⁴

- A person arrested should be **informed of the reason** for arrest at the time of such arrest and he should be promptly informed of any charges against him.³⁵
- Anyone arrested or detained on a criminal charge should be brought **promptly before a judge** and is entitled to trial within a reasonable time or release.³⁶
- Anyone deprived of liberty by arrest or detention is **entitled to judicial review** of the lawfulness of his detention and to an order of release where the detention is unlawful.³⁷
- In cases of unlawful detention, **the victim has an enforceable right to compensation**.³⁸
- The right to bring proceedings to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies is applicable to all situations of detention including military detention, security detention and detention under counter-terrorism measures.³⁹

The underlying presumption is a guarantee of liberty. The UN Human Rights Committee has observed that “liberty and security of person are precious for their own sake...”.⁴⁰ **Security of person** has been defined as concerning ‘freedom from injury to the body and the mind, or bodily and mental integrity’. An individual should only be deprived of her or his liberty where absolutely necessary.

³³ International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of Persons with Disabilities; the International Convention for the Protection of All Persons from Enforced Disappearance; and the Optional Protocol to the Convention against Torture.

³⁴ ICCPR art 9(1)

³⁵ ICCPR art 9(2)

³⁶ ICCPR art 9(3)

³⁷ ICCPR art 9(4)

³⁸ ICCPR art 9(5)

³⁹ Ibid para 47

⁴⁰ ICCPR General Comment No. 35 (CCPR/C/GC/35) para. 2

When deprivation of liberty occurs, it cannot be arbitrary. What constitutes arbitrary detention depends on considerations of inappropriateness, injustice and lack of predictability, and elements of due process of law, reasonableness, necessity and proportionality.⁴¹

The United Nations Working Group on Arbitrary Detentions (UNWGAD) recognizes

- a. **as arbitrary**, among others, instances where it is clearly impossible to invoke any legal basis to justify the deprivation of liberty, when the total or partial non-observance of the international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character and where the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on, *inter alia*, national, ethnic or social origin, language, religion, economic condition etc.,⁴² and
- b. a deprivation of liberty **as “unlawful”** when it is not based on grounds and procedures established by law. Such unlawful detentions include both detentions which violate domestic law and detention that is incompatible with the UDHR, general principles of international law, customary international law, international humanitarian law, as well as other international human rights instruments accepted by States.⁴³

Administrative detention

Detaining a person without a charge or trial goes against international human rights law. The ICJ Eminent Jurists Panel

Repeal all laws authorizing administrative detention without charge or trial outside a genuine state of emergency.

Recommended by the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights (2012)

on Terrorism, Counter-Terrorism and Human Rights recommends that States repeal all ‘laws authorizing administrative detention without charge or trial outside a genuine state of emergency.’⁴⁴ Administrative detention on the basis of public security is tolerated only in exceptional circumstances in a lawfully declared state of emergency pursuant to Article 4 of the ICCPR, which allows for derogation of human rights treaty obligations. Even in such circumstances, States must guarantee at all times, the rights afforded to persons deprived of their liberty under Article 9 of the ICCPR:

- (1) the right to be informed of the reasons for arrest (Article 9(2) of ICCPR);

⁴¹ ICCPR General Comment No. 35; para 12; UNWGAD Deliberation No 9 A/HRC/22/44 (24 December 2012).

⁴² Report of the Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court A/HRC/30/37 (6 July 2015) para 10.

⁴³ Report of the Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court A/HRC/30/37 (6 July 2015) para 12.

⁴⁴ International Commission of Jurists, Authority without Accountability: The Crisis of Impunity in Sri Lanka (November 2012) at page 146.

- (2) the right to be detained only on grounds and procedures established by law (Article 9(1) of ICCPR);
- (3) court control of the detention at all times (Article 9(4) of ICCPR); and
- (4) an enforceable right to compensation where the detention is found to be unlawful (Article 9(5) of ICCPR).

Using administrative detention as a counter-terrorism measure is unacceptable under international law. Detention of persons suspected of terrorist activities must be accompanied with concrete charges.

An absolute prohibition against arbitrary detention

The prohibition of arbitrary deprivation of liberty has acquired customary international law status and constitutes a *jus cogens* norm.⁴⁵ *Jus cogens* refers to a fundamental principle of international law that is accepted by the international community of States as a norm from which no derogation is permitted. The UNWGAD considers this prohibition as remaining “fully applicable in all situations”⁴⁶ which includes times of public emergency. The Human Rights Committee observes that “[t]he fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances.”⁴⁷ This translates in plain language to State parties being prevented from suspending the guarantee against arbitrary detention even during times of public emergency. The UNWGAD concludes that a State can never claim that illegal, unjust, or unpredictable deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end.⁴⁸

Arbitrary detention and combatting terrorism

According to the International Commission of Jurists (ICJ, Berlin), Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, States have an obligation to protect persons from acts of terrorism provided counter terrorism measures are in keeping with the principles of legality, necessity, proportionality and non-discrimination.⁴⁹ The Declaration also states that counter-terrorism measures

- should not be abused,
- those suspected of involvement in terrorist acts be only charged with crimes strictly defined by law,

⁴⁵ General Assembly, Human Rights Council report A/HRC/22/44, para. 43 and 51.

⁴⁶ Ibid para. 51.

⁴⁷ General Comment No. 35 (CCPR/C/GC/35) para 66. The reference to article 4 of the ICCPR is a reference to the recognition that State Parties may derogate from certain rights in a public emergency context.

⁴⁸ General Assembly, Human Rights Council report (A/HRC/22/44), para. 48

⁴⁹ International Commission of Jurists, Declaration on Upholding Human Rights and the Rule of Law in Combatting Terrorism (28 August 2004) para 1.

- that criminal responsibility for acts of terrorism must be individual and not collective.⁵⁰
- in no circumstance should a person be detained secretly or incommunicado and should provide prompt access to lawyers, family members and medical personnel.⁵¹
- in the case of administrative detentions, it should be an exceptional measure that is strictly time-limited and be subject to frequent and regular judicial supervision.⁵² Such administrative detentions on the basis of public security may be permitted only in exceptional circumstances in a lawfully declared state of emergency under Article 4 of the ICCPR, which allows States to derogate from their human rights treaty obligations.⁵³ Such public emergencies should be officially proclaimed, and derogations should be temporary, proportionate to meet a specific threat and should not discriminate.

The right to fair trial

According to the ICCPR, everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.⁵⁴ Where criminal charges are involved, the person concerned is entitled to be informed promptly and in detail in a language which he understands the charge against him,⁵⁵ to be tried without delay,⁵⁶ to not be compelled to testify against himself or confess guilt.⁵⁷ Everyone charged with a criminal offence should be considered innocent until proven guilty according to law.⁵⁸ The UN Convention Against Torture also specifically states the evidence obtained under torture must be inadmissible.⁵⁹

The right to legal representation

The ICCPR recognizes the right to legal aid⁶⁰ and to adequate time and facilities for the preparation of her or his defense and to communicate with a counsel of her or his own choosing.⁶¹ The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (hereinafter referred to as “Special Rapporteur on Countering Terrorism”) in a report on Sri Lanka specifically recommends that the State ‘Guarantee full and unimpeded access to counsel that speaks a language

⁵⁰ Ibid para 3

⁵¹ Ibid para 6.

⁵² Ibid para 6.

⁵³ International Commission of Jurists, Authority without accountability: The Crisis of Impunity in Sri Lanka (November 2012)

⁵⁴ ICCPR Article 14(1)

⁵⁵ ICCPR Article 14(3)(a)

⁵⁶ ICCPR Article 14(3)(c)

⁵⁷ ICCPR Article 14(3)(g)

⁵⁸ ICCPR Article 14(2)

⁵⁹ UNCAT Article 15

⁶⁰ ICCPR Article 14(3)(d)

⁶¹ ICCPR Article 14(3)(b)

understood by the person detained from the beginning of the deprivation of liberty and throughout all stages of criminal proceedings'.⁶²

According to the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, legal aid includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. Anyone who is detained, arrested, suspected of, or charged with a criminal offence is entitled to prompt legal aid at all stages of the criminal justice process regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status.⁶³ Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defense.⁶⁴ The provision of such legal aid should be free of undue State interference.⁶⁵

The UN Special Rapporteur on Extreme Poverty, in her 2012 report on Extreme Poverty and Human Rights, refers to the importance of access to legal aid services in criminal matters, noting that international human rights law explicitly established the right to legal aid for criminal proceedings which is “particularly important for those living in poverty, who face a range of obstacles in negotiating bail procedures, pretrial detention, trials and sentencing, and appeals. (United Nations General Assembly, Report by the Special Rapporteur on Extreme Poverty and Human Rights, 9 August 2012 (A/67/278).)

Standard of detention

The Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) applies.

Right to compensation

The United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court in Guideline 16 states that where a detention has been found to be arbitrary or unlawful the person must be notified of the procedures for obtaining reparations. The person has the right to full compensation for material harm, elimination of the consequences of material harm and restoration of all rights that were either denied or infringed. In the event of a detainee's

⁶² Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism visit to Sri Lanka (A/HRC/40/52/Add.3) 14 December 2018.

⁶³ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (June 2013), United Nations, Principle 6 para 26; Principle 3 para 20 and Principle 7 para 27.

⁶⁴ Ibid, Principle 7 para 28

⁶⁵ Ibid, Principle 2.

death, the right to compensation in accordance with established procedures falls to the detainee's heirs. Compensation shall also be made available to persons subjected to criminal charges that were subsequently dropped. Compensation out of the public treasury of the State for material damage suffered by a victim of arbitrary or unlawful detention may include earnings, pensions, social benefits and other monies lost as a result of the criminal prosecution and includes the victims legal costs.

3.2 Domestic legal framework

Constitutional guarantees relating to arrest and detention

The Constitution, in Article 13, sets out a series of rights related to arrest and detention to ensure that persons are protected from unjust treatment.

- Article 13(1) states that no person shall be arrested except according to procedure established by law and that any person arrested should be informed of the reason for his arrest.
- Article 13(2) states that every person deprived of personal liberty, whether held in custody, detained or otherwise, should be brought before the judge of the nearest competent court. He could be deprived of personal liberty further, only upon an order of the judge made in accordance with procedure established by law.
- Article 13(3) guarantees fair trial to a person charged with an offence, such as being entitled to be heard in person, or represented by an attorney-at-law, at a fair trial by a competent court.
- Article 13(4) states that no person shall be punished with death or imprisonment except by order of a competent court.
- Article 13(5) states that every person should be presumed innocent until proven guilty.

The constitution also recognizes instances in which the rights may be restricted. Article 15(1), permits the presumption of innocence (Article 13(5)) and the right not to be found guilty of an offence in retrospect (Article 13(6)) as long as such restrictions are "prescribed by law in the interests of national security."

Article 15(7) permits the restriction of rights guaranteed under Article 13(1) (arrested according to law and reasons for arrest) and 13(2) (brought before a court and detained only by court order) for reasons of "national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society." It further states that "law" includes regulations made under the public security law.

Arrest

The PTA permits arrests without warrant for “unlawful activities” which are not specified in the law.⁶⁶ According to section 6(1) of the PTA, any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorized in writing by him in that behalf may without a warrant arrest a person “notwithstanding anything in any other law to the contrary.” A person arrested under this section may be kept in custody for up to seventy- two hours and can be detained further until the conclusion of the trial, where the Magistrate makes an order to such effect.⁶⁷ However, such prolonged detention is permitted only where a “valid and proper arrest” has taken place under section 6(1). A “false assertion or a mere pretense” that an arrest has taken place under section 6(1) does not circumvent the constitutional safeguards under Article 13 applicable to arrests and detentions. Where a valid and proper arrest has not taken place under section 6(1),⁶⁸ the arrested person cannot be kept in custody for a prolonged duration. Instead, the constitutional safeguards laid down under Article 13(2) of the Constitution on producing the person before a judge and detaining them further only upon an order of the judge, should be adhered to.⁶⁹

INTERNATIONAL HUMAN RIGHTS STANDARDS	
COMPARED WITH PTA PROVISIONS	
Informed of reasons for arrest	No provision in PTA
Promptly informed of charges (crimes must be as defined by law)	No provision in PTA
Presented promptly before court	No provision in PTA
Entitled to judicial review & order of release if detention is unlawful	No provision in PTA
Enforceable right to compensation for unlawful detention	No provision in PTA
Right to a fair trial	No provision in PTA
Right to legal representation	No provision in PTA
Treatment of prisoners (Mandela Rules)	No provision in PTA

In the case of *Dissanayake v Superintendent Mahara Prisons and Others*⁷⁰, the Supreme Court recognised that

- the validity of an arrest is determined by applying the objective test, regardless of whether the arrest was under the normal law, Emergency Regulations or under the PTA.
- that the Court should determine whether there was material for a reasonable officer to cause the arrest and that the arresting authority was required to place sufficient material

⁶⁶ Human Rights Watch, *Locked Up Without Evidence: Abuses under Sri Lanka’s Prevention of Terrorism Act* (29 January 2018), at page 13. (Referred to as “HRW, Locked Up Without Evidence”)

⁶⁷ PTA section 7(1)

⁶⁸ *Weerawansa v The Attorney General* [2000] 1 SLR 387, 400.

⁶⁹ *Weerawansa v The Attorney General* [2000] 1 SLR 387, 400.

⁷⁰ *Dissanayake v Superintendent Mahara Prisons and Others* [1991] 2 SLR 247, 256. Judgment of Justice Kulatunga.

before the Court which would enable the Court to make a decision, such as notes of investigation, including statements of witnesses, observations etc., without relying on bare statements in affidavits.

- that while proof of the commission of the offence is not required, the existence of a “reasonable suspicion or a reasonable complaint of the commission of the offence” suffices.
- the Court recognised that during a period of emergency, a wider discretion is vested in the police in the matter of arrest, but asserted that it “will not surrender its judgment to the executive” as doing so would jeopardize the fundamental right to be free from arbitrary arrests as guaranteed under Article 13(1) of the Constitution.

In the case of *Vinayagamoorthy v Army Commander*, the Supreme Court held that the person arrested should be given the grounds on which the arrest is made which include the material facts and particulars for his arrest and detention and that this was necessary to enable the person to rebut the suspicion entertained by the arresting officer or show that there was some mistake as to identity.⁷¹

Detention

Section 6(1) states that a person arrested should be produced before a Magistrate within seventy-two hours, unless a detention order under section 9 has been made. The PTA mandates that the Magistrate make an order that the person be remanded till the conclusion of the trial, unless the Attorney General has consented to the release of the person.⁷² Where the Attorney General has consented to the release of the person before the conclusion of the trial, the Magistrate should release them from custody.⁷³ The report of the Special Rapporteur on Countering Terrorism on Sri Lanka observed that where a Magistrate makes an order to remand the suspect until the conclusion of the trial, this potentially allows for their indefinite detention.⁷⁴

Under section 9(1), the relevant Minister may order the detention of a person where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity. The Minister can order for the detention of the person for a period not exceeding three months in a place and determine the conditions for this. The Minister is further empowered to extend such detention from time to time for a period not exceeding three months at a time, provided the aggregate period of such detention does not exceed a period of eighteen months.⁷⁵ This, in effect, permits detention for up to 18 months without

⁷¹ *Vinayagamoorthy v Army Commander* [1997] 1 SLR 113, as per Justice Amerasinghe.

⁷² PTA section 7(1)

⁷³ PTA section 7(1)

⁷⁴ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism A/HRC/40/XX/Add.3 (23 July 2018) para 1.

⁷⁵ PTA section 9(1)

producing the suspect before a court.⁷⁶ Such detention orders are considered to be final and cannot be called in question in any court or tribunal.⁷⁷ They are not for the purpose of investigation but for the prevention of certain kinds of unlawful behaviour.⁷⁸

The Minister cannot abdicate this authority and nor may others usurp these powers.⁷⁹ In *Weerawansa v Attorney General*, Justice Mark Fernando ruled that since the Minister did not “independently exercise her statutory discretion, either upon personal knowledge or credible information” and that since she merely adopted the 2nd respondent’s opinion, that it was a “patent abdication of discretion.”⁸⁰

Confessions

The PTA permits confessions made to a police officer of or above the rank of Assistant Superintendent to be presumptively admissible unless the accused proves the statement was not made voluntarily.⁸¹

It has been observed that proving that the confession was not made voluntarily is almost impossible because torture almost always takes place behind closed doors and has no witnesses except its perpetrators.⁸² Practices of ill treatment, failure to exercise judicial supervision and evading oversight by the judicial medical officer in relation to PTA suspects have been documented by the Human Rights Commission.⁸³ It has also been found that judges have convicted persons on the basis of confessions under section 16 despite medical evidence suggesting that such confession was extracted under torture, the absence of legal representation during interrogation or before a Magistrate, and the absence of an independent and competent interpreter during interrogation.⁸⁴

Access to legal representation

The right to legal representation and legal aid if the person cannot afford legal representation is articulated in Section 4(1) of the ICCPR Act (No. 56 of 2007). It also provides for assistance of an interpreter during trial (Section 4(1) (d)). The International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED) Act No.5 of 2018

⁷⁶ HRW, Locked Up Without Evidence 13

⁷⁷ Section 10 of the PTA when read with Section 22 of the Interpretation (Amendment) Act No. 18 of 1972 decrees that the Minister’s decision in authorizing an arrest and detention is beyond judicial review: *Authority without Accountability: The Crisis of Impunity in Sri Lanka* (International Commission of Jurists 2012) 33.

⁷⁸ *Chandrasiri v Ranatunge SC Application 138/92 SC Minutes 3 February 1993.*

⁷⁹ *Channa Pieris and Others v Attorney General* [1994] 1 SLR 1

⁸⁰ *Weerawansa v Attorney General* [2000] 1 SLR 387.

⁸¹ PTA section 16; *Authority without Accountability: The Crisis of Impunity in Sri Lanka* (International Commission of Jurists 2012) 36.

⁸² Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism A/HRC/40/XX/Add.3 (23 July 2018) para 20.

⁸³ See HRCSL Prison Study Report 2020, pages 517 to 521 and 530 – 532.

⁸⁴ *Authority without Accountability: The Crisis of Impunity in Sri Lanka* (International Commission of Jurists 2012) 36.

sets out that *“Any person deprived of liberty shall have the right communicate with and be visited by his relatives, attorney-at-law or any other person of his choice, subject only to the conditions established by written law.”*

The Criminal Procedure Code in Section 195(g) states that the judge shall assign an Attorney-at-Law upon the defendant’s request in the High Court and Section 353 states a judge may assign a lawyer to the appellant in the Court of Appeal if court is of the opinion that it is in the interests of justice that the appellant should have legal aid. It is noted that, in the context of the PTA, there is no express legal provision and no practice regarding ensuring legal representation or legal aid or even informing the suspect of his right to legal representation.

2016 Directives on Arrests and Detentions under the PTA.

Following a series of arrests in April 2016, the Human Rights Commission of Sri Lanka issued ‘Directives on Arrest and Detention under the PTA’ in May 2016. The directives were admittedly issued in recognition of the fact that basic standards were not being met in arrests and detentions under the PTA. The Commission emphatically stated that the PTA should be narrowly construed and used in specific circumstances and should not be used to arrest persons for ordinary crimes. The directives affirmed the right to meet with counsel during interrogation, the right to be brought before the JMO within 48 hours of the arrest, the right to inform family members, the requirement that all places of detention be clearly gazetted and authorized, guarantees of medical and legal assistance, the right to registration of arrest, the right to language of the detainee’s choice, the right to security from torture and other ill-treatment, and special protection for women and children.⁸⁵ The directives reemphasized the Commission’s mandate to be promptly informed of all PTA arrests, to access any person arrested or detained under the PTA, and to access any place of detention at any time.⁸⁶

These Directives were incorporated into the Presidential Directive issued in June 2016. The Presidential Directive was notably issued immediately prior to the United Nation Human Rights Commissioner’s brief on Sri Lanka to the 32nd session of UN Human Rights Council (UNHRC) in Geneva on June 27.⁸⁷ The HRCSL reports that it was informed by the Director, Terrorism Investigation Department (TID), presumably in relation to an inquiry conducted by the HRCSL, that the Presidential Directives had not been received and that he was unaware of the Directives.⁸⁸

⁸⁵ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism A/HRC/40/XX/Add.3 (23 July 2018) para 41.

⁸⁶ HRW, Locked up without evidence at page. 14

⁸⁷ HRC, ‘Human Rights Commission welcomes President’s directives for arrest under PTA’ 23 June 2016 <<https://www.hrcsl.lk/human-rights-commission-welcomes-presidents-directives-for-arrests-under-pta/>> accessed 24 November 2020.

⁸⁸ HRC, ‘Human Rights Commission welcomes President’s directives for arrest under PTA’, 23 June 2016.

It is useful to note that similar Directives have been issued in the past. In 1995, directives were issued by then-President Chandrika Bandaranaike. The Presidential Directives on Protecting Fundamental Rights of Persons Arrested and / or Detained issued by then-President Mahinda Rajapaksa to the Heads of the Armed Forces and the Police on the 7th July 2006 was re-circulated in April 2007 by the then-Secretary of the Ministry of Defence, Gotabaya Rajapaksa, to the Commanders of the Army, Navy and Air Force and as well as to the Inspector General of Police. Commentary on the directives by Human Rights Watch noted that “...directives remain largely declarations on paper—with no legal force and no penalties for non-compliance. Research conducted by Human Rights Watch and other organisations demonstrates that the security forces routinely ignore the instructions and face no consequences for doing so’.⁸⁹ The ICJ noted that “These directives, however, have no independent legal force and carry no penalties for non-compliance, and there continue to be numerous reports of arrests and detentions that have not followed the stated procedures.”⁹⁰

Oversight Role of the Human Rights Commission

In terms of Section 11(d) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996, the Commission is empowered to continuously monitor the conditions of persons in custody.

In 2018, the Special Rapporteur on countering terrorism stated that he was encouraged that the National Human Rights Commission had unfettered access to all places of detention and is notified within 48 hours of an arrest or a transfer made under the PTA. He regretted, however, that due to the high number of complaints and various administrative and logistical factors, the Commission is not always able to respond with the required timeliness that such complaints deserve. He also regretted that several past and current detainees informed him that they had never received a visit from the International Committee of the Red Cross (ICRC) during their lengthy periods of detention.⁹¹

Following the state of emergency declared after the Easter attacks, the Human Rights Commission made no public comment or statement calling for respecting of human rights standards in relation to the declaration or the emergency regulations that were issued.

In November 2020, the Human Rights Commission wrote to the Acting Inspector General of Police requesting that steps be taken to ensure the validity of statements made to the police. The letter makes note of complaints made by detainees of being pressured to place their signature on self-incriminating statements and refers to frequent accounts of trips to police headquarters where pre-prepared statements are offered to detainees in Sinhala for their signature, inducements such as promises of release if statements are signed, and threats such as charges based on falsehoods if they are not signed.⁹²

⁸⁹ HRW Report: ‘Return to War’, 2007, pp 39-40.

⁹⁰ ICG Report: ‘Sri Lanka’s Human Rights Crisis’, 2007.

⁹¹ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism A/HRC/40/XX/Add.3 (23 July 2018) para 23.

⁹² HRC ‘HRCSL writes to IGP on Detentions under the Prevention of Terrorism Act’ (HRCSL, 24 November 2020) <<https://www.hrsl.lk/hrsl-writes-to-igp-on-detentions-under-the-prevention-of-terrorism-act/>> accessed 25 November 2020.

4. Some lessons learnt from 40 years of PTA

This section summarises the available literature on the lived realities of those arrested and detained under the PTA in the past four decades.

(a) Manner of Arrest

Failure to follow due process during arrests is a general concern in Sri Lanka. The HRCSL reported that experiences of a lack of due process was widely reported by PTA detainees.⁹³ Bad practices reported include officials conducting the arrest being in civilian clothing and failing to identify themselves, failure to produce arrest warrants, failure to give reasons for arrest, arrests under the guise of questioning them, blindfolding arrestees, failure to provide families information of place of detention, failure to provide access to families, forcefully obtaining signatures, torture and families not kept informed of transfers between places of detention.

(b) Access to legal representation

Access to lawyers has been a significant concern for PTA detainees and remandees. In the first instance, due to families not being informed of the place of detention immediately after arrest, it has been difficult to ensure that lawyers or family members are able to visit and ensure the safety of the detainee. Thereafter, due to changes in place of detention, family members face the challenge of securing legal representation in areas that are unfamiliar to them. Most often they are unable to afford legal

INTERNATIONAL HUMAN RIGHTS STANDARDS	
COMPARED WITH EXPERIENCE UNDER PTA	
Right to legal representation	<ul style="list-style-type: none">● No information on place of detention● Lengthy administrative practice of getting permission weeks ahead of lawyer's visit● Lawyer had not been made available to detainees at every stage of the investigation● Lawyers experience fear and stigma associated with representing PTA detainees

⁹³ Prison Study by the Human Rights Commission of Sri Lanka, Human Rights Commission of Sri Lanka, 2020, at pages 639-644. Found at https://www.hrsl.lk/wp-content/uploads/2020/01/Prison-Study-by-HRCSL_Concise-Version.pdf (Referred to as "HRCSL Prison Report 2020")

advice or representation unless they come into contact with human rights organisations providing such assistance.

There is an administrative practice requiring lawyers to obtain written permission from the Director of Terrorist Investigation Department (TID) in order to visit their clients in detention. Families of detainees have experienced permission taking weeks or even months for this to be granted.

The Special Rapporteur on Countering Terrorism observed that counsel had not been made available to PTA detainees at every stage of the investigation and sometimes no counsel at all was available and that the counsel provided through legal aid did not speak a language that the detainee understood.⁹⁴ In 2020, the HRCSL noted that following indictment, due to the stigma attached to PTA cases, lawyers were reluctant to represent PTA detainees and also noted difficulties faced when court proceedings are not in the language understood by the suspect.⁹⁵

The Special Rapporteur also noted fear expressed by some Tamil lawyers to attend PTA trials, as many Tamils viewed these trials as taking place in hostile environments. Lawyers had also raised concern over the lack of impartiality and independence of the judges dealing with these cases, and had requested the transfer of these cases to majority Tamil areas, such as Jaffna or Vavuniya.⁹⁶

(c) No judicial review of reasons for arrest or justification of detention

There is no published information available which systematically studies all proceedings before Magistrate Courts in which provisions of the PTA are cited. From available literature, the following is noted.

The language of the PTA does not permit review of the reasonableness of reasons for arrest by the Magistrate before whom a suspect is produced in terms of Section 6(1) for detention until conclusion of a trial. However, the Supreme Court has recognized that court must be satisfied by the executive that there is '*reasonable suspicion or a reasonable complaint of the commission of the offence*'. Based on insights from legal practitioners, Magistrates do not routinely exercise this limited power of review as to whether there is reasonable suspicion of a specific offence or a reasonable complaint of an offence. The International

⁹⁴ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism A/HRC/40/XX/Add.3 (23 July 2018) para 23.

⁹⁵ HRCSL Prison Report 2020 at page 524.

⁹⁶ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism A/HRC/40/XX/Add.3 (23 July 2018) para 47.

Commission of Jurists also observes that whether detention is strictly necessary should be subject to judicial review on an individual basis and such review has been unavailable.⁹⁷

In the case of detention orders, the PTA explicitly ousts judicial review (Section 10 of the PTA). For those suspects detained under a detention order (Section 9 of the PTA), there is no review that the Magistrate can exercise. Habeas corpus and fundamental rights applications are the only form of judicial review that can be invoked. Even so, it has been noted that the 'Supreme Court and the Court of Appeal have fallen woefully short of subjecting the grounds cited for detention to strict review.'⁹⁸

(d) Length of detention

There is no overall information available to date about the total number of persons arrested, detained under detention order, remanded by court order, indicted, rehabilitated, acquitted after trial and convicted after trial since the enactment of the PTA.

In terms of available figures, the International Commission of Jurists in 2010, a year after the end of the war, stated that approximately eight thousand individuals were under administrative detention without charge or trial in Sri Lanka.⁹⁹ In 2018, the Special Rapporteur on Countering Terrorism noted that of 81 prisoners in pre-trial detention 70 had been in detention without trial for over five years and 12 had been in detention without trial for over ten years. The Special Rapporteur also reported that the Attorney General had not consented to granting of bail resulting in individuals with various real or imputed links or association to the LTTE detained for years without charge or trial, without any judicial review of their detention, and with almost no possibility of release.¹⁰⁰ In 2017, it was reported that PTA detainees were detained for as long as 18-19 years without having their cases concluded and that in certain instances it has taken upto 15 years to file charges.¹⁰¹

On 29 August 2011, twenty-four hours before the state of emergency expired, an emergency regulation enacted during the state of emergency was 'absorbed' under the PTA. This permitted the continued detention of individuals who had been detained under the emergency regulation for thirty more days, pending the issuance of detention orders under the PTA or remand by a magistrate. In practice, this meant transfer of detainees from

⁹⁷ International Commission of Jurists, *Beyond Lawful Constraints: Sri Lanka's Mass Detention of LTTE Suspects* (ICJ Briefing Note, September 2010) 05.

⁹⁸ Niran Anketell and Gehan Gunatilleke, *Emergency Law in the Context of Terrorism* (Venture Associates and South Asia for Human Rights), 2011.

⁹⁹ International Commission of Jurists, *Beyond Lawful Constraints: Sri Lanka's Mass Detention of LTTE Suspects* (September 2010).

¹⁰⁰ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism A/HRC/40/XX/Add.3 (23 July 2018)

¹⁰¹ Ruki Fernando, 'Court acquits Tamil mother after 15 years of detention under PTA' (Groundviews, 05 October 2015) <https://groundviews.org/2015/10/05/court-acquits-tamil-mother-after-15-years-of-detention-under-pta/#_ftn9> accessed 24 November 2020.

police to military authority or a change of place of detention and, crucially, a reset of the clocks so that administrative detention periods could start anew.¹⁰²

In 2020, the HRCSL released a report on the prison system which contained a chapter on PTA related prison inmates.¹⁰³ This report states that there are 121 individuals within the prison system under the PTA. Seventy one individuals (58%) are in remand and the rest are convicted. Of those in remand, 11 individuals (15%) have been in remand for periods between 10 and 15 years and 29 individuals (41%) have been in remand for periods between 5 and 10 years. The longest period of trial is reported as 14 years. The report also documents experiences of ‘no date’ cases in which the police request the Magistrate to ‘no date’ the case with the next date to be determined by the police when they ascertain that there is progress in the investigations, whilst detainees remain in custody.

(e) Distance from families

The HRC prison report of 2020 also observed the loss of contact with family members who live far away from places of detention and the lack of access to personal provisions such as hygiene products that are not provided by the Department of Prisons. In 2018, the Special Rapporteur on Countering Terrorism noted that while those most affected by the operation of the PTA are Tamils, detentions and trials under the Act rarely occur in Tamil-majority areas. With regard to court proceedings, there was general distress of families who are far away for very long periods of time and feel excluded from the process. The HRCSL prison report of 2020 observed that there is also an accumulation of legal fees having an impact on the financial situation of the families.¹⁰⁴ There appears to be a scarcity of information on the impact of the distance created between detainees and their families, in terms of impact on family members, including children, impact on social relations, livelihoods and even capacity to properly defend a prosecution.

(f) Torture

The enabling environment created for torture by the PTA is well documented. The extended period of 72 hours of detention in police custody, the provision for the police to remove detainees from fiscal custody for investigations, the admissibility of confessions

INTERNATIONAL HUMAN RIGHTS STANDARDS

COMPARED WITH EXPERIENCE UNDER PTA

Absolute right to be free from torture (No restrictions)	Torture, mainly associated with confessions, is well documented in PTA cases
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¹⁰² Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism A/HRC/40/XX/Add.3 (23 July 2018) para 14.

¹⁰³ Prison Study by the Human Rights Commission of Sri Lanka, Human Rights Commission of Sri Lanka, 2020. Found at https://www.hrcsl.lk/wp-content/uploads/2020/01/Prison-Study-by-HRCSL_Concise-Version.pdf

¹⁰⁴ HRCSL Prison Report 2020, at page 527.

made to an officer of the police, have all contributed to the increased practice of torture in relation to PTA detainees.

The practice of torture is the most well-known of the bad practices under the PTA. From the experiences of people, particularly of Sinhala youth during the insurgencies of the 70s and 80s, experiences of Tamil communities during the war and some experiences of Sinhalese, particularly from poor communities, it is evident that the PTA is an instrument that has been routinely abused, causing grievous harm to citizens.

In the HRCSL's October 2016 submission to the UNCAT Committee, the Commission reported *"Thirteen persons arrested under the PTA since April 2016 have complained of ill-treatment and torture, either at the time of arrest and/or during initial interrogation following arrest. Methods of ill-treatment and torture reported to the Commission include beating with hands, plastic pipes and sticks, being asked to strip and genitals being squeezed using plastic pipes, forced to bend and beaten on the spine with elbows, being strung upside down on a hook/fan and beaten on the soles of the feet, being pushed to the ground and kicked and stepped on, inserting pins on genitals, burning parts of the body with heated plastic pipes, handcuffing one hand behind the back and the other over the shoulder, inserting a stick between the handcuffs and pulling the hands apart. Detainees also stated they were handcuffed and blindfolded when transported to detention facilities and during this period, which could amount to at least six to eight hours, were not allowed to use sanitation facilities."*¹⁰⁵

The Special Rapporteur on Countering Terrorism reported that a senior judge had observed that in over ninety per cent of the cases dealt with in the first half of 2017, he had been forced to exclude essential evidence because it had been obtained through the use or threat of force.¹⁰⁶ Detainees signed documents in a language that they did not understand, or were simply asked to put their signature at the bottom of a blank piece of paper, after having been tortured, sometimes with the promise of transfer out of police or security service custody.¹⁰⁷

In 2020, the HRCSL reported that 92% of PTA inmates surveyed had experienced ill treatment by police or the arresting authority.¹⁰⁸

¹⁰⁵ Human Rights Commission of Sri Lanka Report to UN Committee Against Torture dated October 2016 found at https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/LKA/INT_CAT_NHS_LKA_25601_E.pdf

¹⁰⁶ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism A/HRC/40/XX/Add.3 (23 July 2018).

¹⁰⁷ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism A/HRC/40/XX/Add.3 (23 July 2018) para 18

¹⁰⁸ HRCSL Prison Report 2020 at page 521.

There are numerous studies on the physical methods of torture of persons in custody dating back to 1998.¹⁰⁹ There are also findings relating to the physical and psychological impact of torture, and also the long-term nature of recovery and reintegration.

The HRCSL also reported that 76% of PTA remandees and 86% of PTA convicts surveyed reported depression related self-harm or attempted suicide.¹¹⁰ This also indicates the high level and serious nature of the psychological impacts on persons in custody under conditions associated with the detention under PTA.

(g) Multiple cases against the same person in different courts

Another practice that has not been systematically documented is the maintaining of multiple cases against PTA suspects. In 2020, it was reported that multiple cases had been filed against one person in different courts in different districts, including 15 cases against one person.¹¹¹ The hardship that this practice poses is self-evident and yet detailed study is important to ensure that administrative practice develops to prevent it.

(h) A rehabilitation policy

In October 2009, the then-Government of Sri Lanka presented an Action Plan for the Reintegration of Ex-combatants by which almost 15,000 'former LTTE combatants' in detention at the time would be rehabilitated and reintegrated into civilian life. Rehabilitation was to involve three to 24 months at a Protective Accommodation and Rehabilitation Centre. The concerns regarding the rehabilitation policy implemented under regulations under the PTA are many: from compulsory rehabilitation, misuse of the law and lack of judicial oversight, motives to continue interrogations and the social stigmatization of released rehabilitees.¹¹²

The International Commission of Jurists expressed concerns that 'the rehabilitation regime sidelines ordinary criminal proceedings and fair trial related due process and fair trial rights.'¹¹³ Administrative detention for up to two years was prescribed even for low risk 'rehabilitees', indicating that the mass detention has the character of collective punishment, which is prohibited in any circumstances under international law.

¹⁰⁹ D Somersunderum, 'Torture in Sri Lanka - A method of physical, psychological and socio-political terror under PTA', In *Sri Lanka The Prevention of Terrorism Act - A critical analysis*, Center for Human Rights and Development at page 80.

¹¹⁰ RCSL Prison report 2020, at page 504.

¹¹¹ <https://srilankabrief.org/2020/04/sri-lanka-cprp-requests-government-to-include-pta-detainees-in-granting-bail-and-relief-to-prisons-due-to-pandemic/>

¹¹² Ambika Satkunanathan, *The treatment of former combatants in post-war Sri Lanka: A form of arbitrary detention or rehabilitation?*, Routledge Handbook Of Human Rights In Asia, 2018.

¹¹³ "Beyond Lawful Constraints: Sri Lanka's Mass Detention of LTTE Suspects", International Commission of Jurists, September 2010.

(i) Injustice of acquittal after a long period of incarceration

Even within the ordinary criminal justice system, long periods of incarceration are experienced routinely. Under the PTA, it is an established practice and as such there is a real danger of persons being subject to a long period of detention prior to trial. The impact of long periods of incarceration on the lives, families and futures of the suspects and their families does not appear to have been studied in detail. The psychological impact of long-term detention especially within the uncertain context of the PTA is indicated to some extent in the HRCSL prison report of 2020 which mentions alarming rates of self-reported ideation and experience of self-harm amongst PTA detainees.

A case reported in 2015 describes a mother of three who was remanded in 2000 and found not guilty by the High Court in 2015.¹¹⁴ In similar instances where people have been detained and acquitted after a long period of detention, the persons arrested and detained unjustifiably have not received any apologies or compensation.¹¹⁵ They remain psychologically and physically impaired and unable to easily resume their normal lives.¹¹⁶ They struggle to survive in the face of societal backlash.¹¹⁷ There appears to be no state sponsored program to study and address these long term impacts of the PTA.

(j) Stigmatization of entire communities and acts of peaceful criticism or dissent as terrorist or terrorism

The stigma experienced by family members and by community members due to detention under PTA has not been studied. The impact of stigma can have implications on the personal security of members of particular communities, and create an enabling environment for discrimination and risk of violence or further detention.

The Special Rapporteur on Countering Terrorism stated that the overly broad and vague nature of the definition of terrorist acts contained in the PTA has permitted authorities to stigmatise, brand and prosecute entire communities and members of civil society, as well as any form of peaceful criticism or dissent, as ‘terrorists.’ The Special Rapporteur noted that it has allowed the authorities to subject those suspected of association, even indirect with the LTTE, to arrest, detention, interrogation and lower standards of due process and fair trial guarantees.¹¹⁸

¹¹⁴ Ruki Fernando, ‘Court acquits Tamil mother after 15 years of detention under PTA’ (Groundviews, 05 October 2015) <https://groundviews.org/2015/10/05/court-acquits-tamil-mother-after-15-years-of-detention-under-pta/#_ftn9> accessed 24 November 2020.

¹¹⁵ HRW, Locked Up Without Evidence, at page 1.

¹¹⁶ HRW, Locked Up Without Evidence, at page 1.

¹¹⁷ Ruki Fernando, ‘Court acquits Tamil mother after 15 years of detention under PTA’ (Groundviews, 05 October 2015) <https://groundviews.org/2015/10/05/court-acquits-tamil-mother-after-15-years-of-detention-under-pta/#_ftn9> accessed 24 November 2020.

¹¹⁸ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism A/HRC/40/XX/Add.3 (23 July 2018) para 1.

5. Experiences of arrests and detention under the PTA in 2019

Description of the cases observed

The experience of 47 individuals was observed as part of this action research study. The 47 individuals were named as suspects in 24 cases. The cases observed were before 10 Magistrates in 5 provinces across Sri Lanka, Eastern province, Northern province, North Central province, North Western province and Western province.

Two sources of information informed the section of the report below: the information available from court records and lawyers appearing on behalf of all the individuals, and a report published by LST in November 2020 based on interviews with families of the individuals detained.

(a) Refusal to provide legal representation

It was observed that the families found it difficult to access legal representation on behalf of the arrested family member. The cases were referred to as ‘terrorist cases’ and retaining legal representation was met with the experience of the cases being referred to as “terrorist cases”, and associated refusal and reluctance of lawyers to appear on behalf of suspects. A family member mentioned that one lawyer had said that if there were ‘productions’ (meaning items considered to be evidence) in the case then he would not be able to appear. Another family member experienced being passed on to three lawyers who successively refused to appear in the case. The Human Rights Commission noted in a communication to the Bar Association of Sri Lanka “a pattern of refusal to appear for aggrieved parties of a particular community” and also referred to the specific report that at the Magistrate’s Court of Marawila, all the regular legal practitioners refused to appear on behalf of six people who were arrested under the Prevention of Terrorism Act in the aftermath of the April 21st attacks. In fact, when a visiting lawyer had agreed to appear for the limited purpose of requesting bail (the most standard work of a Magistrate’s Court Practitioner), the regular practitioners were very hostile to her as well.¹¹⁹ It is noted that in response to the HRC, the Bar Association took the position that Attorneys-at-Law are at will to decide on representation of clients under the proviso to Rule 5 of the Supreme Court (Conduct

¹¹⁹ Letter dated 27th July 2019 from the Human Rights Commission of Sri Lanka signed by Dr. Deepika Udugama, Chairperson to Mr. Kalinga Indatissa, P.C. President of the Bar Association of Sri Lanka reported in The Sunday Morning news website titled “HRCSL Concerned” 28 July 2019.

of and Etiquette for Attorney-at-Law) Rules 1988, and that the BASL could not take action regarding refusal to represent if not taken at an official level.¹²⁰

The abovementioned Rule 5 states *“An Attorney- at- Law may not refuse to act on behalf of a party or person in any matter or proceeding before any Court, Tribunal or other Institution established for the Administration of Justice or in any professional matter at his or her Professional Fee. Provided, however an Attorney at Law may refuse to act on behalf of a client in special circumstances which in his opinion would render it difficult for him to maintain his professional independence or would otherwise make acceptance of such professional matter incompatible with the best interest of the Administration of Justice.”*

In response the HRCSL made note that ‘positive action by the BASL in this regard would have sent a salutary message and reassured the public, especially the aggrieved parties, that they have the benefit of legal representation in keeping with the highest professional standards.’ and also drew attention to the deep tensions and divisions among the various communities in the country. No further steps appear to have been taken on this issue.

Another concern raised by some families was that they were informed by the local police not to retain lawyers as that would cause their family member’s case to be prolonged. This had dissuaded some families from securing a lawyer to visit the detainee and provide legal representation.

(b) Arrests

Manner of arrest

The failure to inform persons of the reasons for arrest at the time of detention was a common experience for families. Some were only given the impression that their family member was required for questioning by the police and thereafter found that on presenting himself to the police he was arrested.

Several families described that the police had reported to court that the suspect was in hiding when arrested, when they had in fact been arrested at their residence or they had actually presented themselves to the police.¹²¹ In one instance, a suspect had been taken to a vacant house in Ampara for questioning. He had been told that if he stated that he had undergone four months training with the NTJ, that he would be released. Having been compelled to say so, he was detained.¹²² In another instance, suspects from the North Central province stated that they had provided detailed statements days prior to their

¹²⁰ Letter dated 30th September 2019 by Human Rights Commission of Sri Lanka to President BASL, Kalinga Indatissa, PC. Found at <https://www.hrsl.lk/wp-content/uploads/2020/02/HRCSL-Letter-to-Bar-Association-of-Sri-Lanka.pdf>

¹²¹ Marisa de Silva, PTA: Terrorising Sri Lanka for 42 years, Law and Society Trust, November 2020, p 4.

¹²² Ibid, at page 12.

arrest and yet when the arrests were carried out no specific information was provided for the basis of their arrest.

It is of serious concern that the failure of giving reasons for arrest appears to have become a commonplace practice. This becomes the first instance in what becomes a continuous experience of uncertainty about the case levelled against the detainee, and places the detainee in a near impossible situation of having to defend himself without any information. In one case record, it is clear that several allegations are made at various different stages in the one case.¹²³

Reasons for arrest

The following is drawn from five selected case studies revealing purported reasons for arrests made after the Easter attacks:

- i) A 21-year-old suspect was arrested for being a member of a WhatsApp group that transmitted allegedly a message that advised members to 'attach a high-tension electrical wire to the gate if searches are conducted'. The suspect maintains that the message that had been received in the group had instead expressed fear of rioters during this period. The arrest made at the end of May, after the suspect voluntarily went to the police station on being asked to come in and make a statement. Even by August 2019, the suspect continued to be in detention regardless of his phone having been taken into custody for investigations which ought to have clarified the suspected conduct. Eventually the suspect has been released on bail.
- ii) A father and son arrested in mid-May 2019 for allegedly having the explosive substance C4 at their home. The suspects maintained that the substance was in fact chlorine. When the suspects were represented in the Magistrate court, they were informed in June 2019 that the substance had been sent to the Government Analysts department for verification. Even after 7 court dates as at end August, the report from the Government Analyst Department was not available for a decision to be taken. Subsequently, the suspects were released.
- iii) A 25-year-old was arrested in early May 2019 after voluntarily presenting himself to a police station after being requested to make a statement relating to a post on Facebook in 2014 (the time of the Aluthgama violence) and was given the impression that the content was considered to be related to a terror group. He was supporting his mother and two younger siblings at the time of arrest. He was later informed that a detention order had been issued in his name, although the detention order was not shown to any lawyer that visited him nor submitted to the Magistrate when he was presented in Court in June 2019. He also came to

¹²³ Case number B323/19 before the Magistrate Court of Kebeththigollawa.

know that a person bearing his first name was a key suspect in the attacks. He harbours the belief that his detention may have been a case of mistaken identity. A fundamental rights application was filed in the Supreme Court. Thereafter the suspect was released on 10th July 2019.

- iv) A suspect from the North Western Province was arrested at the end of April 2019 for information received by the intelligence division of the police as to interactions between Zaharan (identified as person who planned and carried out the terror attack) and the suspect. On questioning, the suspect was found to have taught at an Arabic school over ten years previously. The B report states that the suspects were arrested ‘on suspicion for questioning’.
- v) A 40- year- old farmer from the North Central Province was arrested for allegedly involved in the transfer of one billion rupees to Zahran (identified as person who planned and carried out the terror attack). He had voluntarily responded to questions and given statements to the police regarding any concerns they had and at no time had it transpired that he had any involvement in such a transaction. After his arrest, a photograph of his face was published in a national newspaper implicating him in transacting with terrorists. The suspect states that he has no bank account and has never met or dealt with Zaharan. He is a farmer and supports his wife, three children and elderly parents in law. He was detained for 7 months before being released on bail. He had never been informed of any information or bank records that reveal the transaction that he is accused of. The B reports reveal that although a case in which he was the sole suspect was instituted in the Magistrate, his name was later transferred to another case in which he is made one of ten suspects, in which investigations are mainly in relation to the first two suspects to whom this individual has no connection.
- vi) In the prominent and emblematic case of Hejaaz Hisbullah, the detention order against the 39-year-old lawyer was reportedly for the reason that he *“is being investigated for allegedly ‘aiding and abetting’ the Easter Sunday bombers and for engaging in activities deemed ‘detrimental to the religious harmony among communities”*. No credible evidence has been placed before a court at the time this report was prepared. Instead, accusations levelled also in the media have included indirect involvement in a school that fed “extremist” ideas and thoughts to children and a relationship with one Yusuf Mohammad Ibrahim, a business owner, whose sons Inshaf and Ilham were two of the seven perpetrators of the Easter Sunday bombings. Hizbullah was Ibrahim’s lawyer.¹²⁴
- vii) Another case reported in the media is that of Mannaramudhu Ahnaf Jazeem, a 25-year-old poet from Mannar. He was arrested on 16th May 2020 and it was

¹²⁴ “Why Sri Lanka jailed a Muslim lawyer for 6 months” [Al Jazeera dated 15th October 2020] found at <https://www.aljazeera.com/news/2020/10/15/sri-lanka-muslim-lawyer>

reported that charges levelled against him were promotion of extremism and terrorism. Ahnaf's family believes that a collection of poems titled 'Navarasam' authored and published in Tamil by Ahnaf in July 2017 is being used to justify the arrest. Even seven months after the arrest, Ahnaf continued to be in detention without investigations leading to clarify or justify the arrest.

- viii) There were also cases of female family members, mothers, wives and sisters, of suspects being taken into custody. Their families have not been informed of any evidence levelled against them and as such the only conclusion to be drawn about their arrests, is that it was on the basis of the family relationship. In some instances, infant children depending for care on these female detainees have also been taken into custody.

The seven case studies demonstrate the lack of detail in charges levelled against the individuals. They also demonstrate that where it was possible to ascertain without delay whether the substance was in fact C4 or not, or whether the WhatsApp message amounted to criminal conduct or not, or whether a suspect's bank accounts disclosed transaction of money in the sums alleged, there were no steps taken to mitigate the damage of a possibly unjustified detention. It speaks to a blindness of the consequences and impact of unjustified arrests.

In case study 3 above, the suspect is detained on the basis of a detention order (administrative detention), which means that the Minister was of the opinion that administrative detention was necessary as a preventive measure. However, it appears that there is no clarity as to whether he was detained for an act committed or an act to be committed. While in custody he is questioned about a Facebook post and lawyers visiting him are also informed about the Facebook post which is a post from 2014. It must be inferred that if the post amounted to criminal conduct, he would have been charged in 2014 or thereabouts. However, it appears that once he was detained under the Detention Order for which no reasons are given, the police having investigated the individual are only able to refer to the purported Facebook post as reasons for arrest.

Similarly, in the case of Ahnaf, the collection of poems published in 2017 alone cannot amount to reasons for arrest and detention, the charges must clarify that if the suspect had been involved in promoting extremism and terrorism the dates, times and audiences involved. The vagueness of the allegations even as known to the family, seriously prejudices the family's ability to present information in his defense.

The LST report, PTA: Terrorising Sri Lanka for 42 years, revealed that several families were informed that the basis of the arrest of their family member was the attendance of a bayan or sermon by the National Thowheed Jamath in Nuwara Eliya.¹²⁵ The vagueness of the allegation and the lack of clarity as to the criminal elements (act and intention) involved

¹²⁵ Marisa de Silva, PTA: Terrorising Sri Lanka for 42 years, Law and Society Trust, November 2020.

in attending a sermon noticeably contributes to a sense of unfairness and injustice which is held by these families. The report also highlights the case of an individual who was a computer teacher for 20 years, arrested for creating a web page in 2015 for a charitable organisation managed by a National Thowheed Jamaath Mosque.¹²⁶

(c) Clustering cases impeding finalization of investigations

In a case from the North Central Province, the case against the suspect when first arrested bore his name as the sole suspect named in the case relating to moneys transferred to Zaharan. A month after the arrest and institution of the case, the suspect is transferred as a suspect under another case. He becomes one of ten suspects in the new case and further court dates are only in relation to the main suspect in the new case. Notably the new case appears to be mainly against one individual against whom some facts have been presented as evidence. As the case progresses in the Magistrate court, there appear to be no steps to present investigations or information in evidence against this suspect. This procedure can be perceived as a deliberate move to maintain the suspect in detention without investigating and determining the specific charges made against him.

In the case of the computer teacher arrested for creating a web page for a charity run by the National Thowheed Jamaath, he has been named as one of 65 suspects named in one case in the Eastern Province. This has meant that investigations relating to any specific charges levelled against him have not been presented to court and the accusations against the several others have taken prominence. His family also maintains there is no apparent link between the accusations made against him and the several others. It has been extremely difficult in this situation to direct the attention of the prosecution to the specifics of his and ensure that investigations that could potentially clear him are conducted without any delay.¹²⁷

(d) Distance from families

Similar to the experience of PTA detainees in the past, families of detainees in 2019 have experienced difficulties in accessing detainees. Families have described instances in which detainees that were originally held in in the area of residence having been moved across provinces for example from Batticaloa to Badulla. This has result in complete loss of contact between detainees and their families. Some have described the cost of travel and the time taken to travel as prohibitive.

¹²⁶ Ibid at page 10.

¹²⁷ Ibid at page 11.

The range of experiences reported includes:

- Travelling an entire day and having less than 20 minutes to speak to the detainees.¹²⁸
- Permitted only five minutes to talk and involves shouting across as the detainee and family member are kept quite a distance apart.¹²⁹
- Not being permitted to touch a photograph of his son's first day at school¹³⁰
- two sons and the eldest son's wife have been detained in three different locations (Kegalle, Colombo and Trincomalee), result in travel costs that affect the supporting of their other two children one of whom is physically challenged¹³¹
- a mother of a 16- year- old who has been denied permission to visit her son.¹³²
- Travelling 55km and being permitted to see her husband for 5 minutes through a small net screen and the detainee prevented from physically meeting his children¹³³

The nature of access and the experiences described above can be described as punishment as opposed to lack of facilities, particularly the failure of authorities to make arrangements for meaningful visits and engagement with detainees' children and spouses. The fact that these are suspects without specific charges having been levelled against them, demands a treatment respecting their dignity.

(e) Torture

No formal complaints of torture or ill treatment have been made to the Magistrates within the available court proceedings. At the time this report was prepared, there is no information available on complaints of torture made to the HRCSL. The HRCSL did recognize that pressure to 'confess' and torture was likely in a written communication in November 2020 to the Acting Inspector General of Police requesting for steps taken to ensure the validity of statements made to the police. Given past experiences of the incentivization of torture and ill treatment under the PTA, it is observed that instances of torture under the current use of the PTA must be considered likely, and that conditions must be created for victims and families to feel safe to come forward to report such violations. At present it appears that no such safe conditions exist. The independence of the HRCSL is also affected by the incorporation of the 20th Amendment to the Constitution and has created further concerns amongst victims and activists. In private communications with families

¹²⁸ Ibid at page 4.

¹²⁹ Ibid at page 6.

¹³⁰ Ibid at page 7.

¹³¹ Ibid at page 9.

¹³² Ibid at page 13.

¹³³ Ibid at page 14.

of detainees, there was confidential disclosure in a few instances of violence in custody, especially immediately after arrest and while in detention.

(f) Judicial oversight over arrests

In the months immediately following the attacks, Magistrates in different parts of the country were compelled to supervise cases of arrests and detentions under the PTA. Based on information available, there were no judicial guidelines issued with regard to the exercise of this supervision. Magistrates were seen to respond in different ways towards these cases, ranging from closely supervising and insisting that the court be informed of credible or at least specific accusations against the suspects, to providing all parties a hearing and informing the suspects that the Magistrate had no powers in relation to these arrests and detentions. Some lawyers appearing in these cases perceived that Magistrates that had asserted a more rigorous supervisory approach later appeared to be more hesitant. One observation was the heavy presence of armed personnel who sometimes accompanied suspects and were seen around the court premises, which also created an intimidatory setting.

In one case from the Western Province in which the police had failed to produce a detention order which they claimed had been issued over a month previously, and even after they were given time to submit it to court and had failed to do so, the Magistrate did not make an order to discharge or release the suspect despite the lack of legal basis for his detention.

One observable reason for delay in deciding even on the granting of bail is that the prosecution has not received the respective suspect's file from the Attorney General's department. Since the court has no jurisdiction to decide the case without the direction from the Attorney General's department, these cases merely go through the motion of being called up and postponed. As the Magistrate court is the transparent and public forum in which the families of detainees can ensure that their side of the case is heard, this is a frustrating experience that also places a heavy financial and logistical burden on the families who are compelled to secure legal representation on all court dates not knowing whether any progress will be made on each day.

(g) Representations to the Attorney General

A form of legal representation available to the detainee is to have her or his legal representative bring to the attention of the Attorney General any information that pertains to the legality of the detention including facts that demonstrate that the arrest and detention has no basis in law. The Attorney General is the chief prosecuting officer of the country and is the office in which the PTA explicitly reposes power to consent to bail.

In the cases observed several representations were made on behalf of suspects to the Attorney General. Some representations drew urgent attention to failure to produce any credible evidence, and danger of prolonged detention.

Once representations are made and sometimes followed up with an interview with the officer in charge of the respective case file at the Department, the requests made are reviewed and responded to. Often in these cases, the Attorney General decides on whether there is sufficient information for the consenting to bail or whether the suspect can be discharged or not.

The experience of some of the lawyers making representations on behalf of the cases reviewed is that there was no written response received for the written representations made and decisions taken. In a few instances, lawyers were verbally informed that bail would be consented to.

Around June 2020, after just over one year of interacting with one of the Deputy Solicitor General who was in charge of the files relating to arrests and detentions relating to the post Easter attacks, the files appeared to have been transferred to another Senior Deputy Solicitor General. There was no formal notification of such change. It had to be ascertained by making verbal inquiries from the Department. One lawyer remarked *“When I had a conversation with the new officer in charge of the files, the officer had no idea about the representations we had made to the previous officer and said she had not received the files. I was in a situation of having to make representations from the beginning to the new officer”*. It is a known practice that the officers of the Department maintain entries or notes on all actions taken on each case file. Therefore, there ought to be no need for lawyers to make multiple or repetitive representations. It is necessary for families of detainees to have clear and formal communication from the Attorney General regarding decisions relating to the suspect, regardless of whether the communication states that a decision cannot be taken at this time, that bail will be consented to or that there is a decision not to consent to bail in the case. The lack of clarity, and moreover the lack of certainty attached to verbal communications fuels fears of prolonged detention in poor detention conditions for the suspect.

Three lawyers related experiencing of being denied an interview to pursue representations after the change in custody of files.

There is also a need for the Attorney General to prioritize and take expeditious decision regarding PTA detainees owing to the broad powers of arrest and detention that have been exercised, because the likelihood of arbitrary or illegal arrests or detentions is greater. The role of the Attorney General is of paramount importance in ensuring that all citizens are protected equally in terms of the law. The office is also acutely aware of the presumption of innocence and how it operates. The role of the office is succinctly described as follows: *“As Attorney-General he has a duty to the Court, to the State and to the subject to be wholly*

*detached, wholly independent and to act impartially with the sole objective to establish the truth.*¹³⁴

(h) Socio-economic impact on the families of the detainees

The LST report titled PTA: Terrorising Sri Lanka for 42 years revealed that all families stated that they faced financial difficulties owing to the arrest of the income earner. Family members spoke of indebtedness as a result of the detention.¹³⁵ They also found it difficult to secure the money needed to visit the detained family member and to pay for legal representation. Some had experienced being duped by lawyers who neither appeared for them nor returned the money paid as a consequence of the non-representation.¹³⁶

The report highlights an example of the multiple stresses families bear. A woman spoke of how she was compelled to rely on her in-laws, while previously her husband provided for her and their three children.¹³⁷ The wife used to be a private tutor. However, following the arrest of her husband and having lost their child at birth after the arrest she no longer emotionally and physically was capable of continuing to be a tutor. She was also burdened with attending to the legal case and visiting her husband in detention, and taking care of their children.¹³⁸ Another example is of a wife who has been compelled to sell household and personal items to survive, having lost her means of income as her husband had undertaken the distribution of the garments she sewed for sale.¹³⁹

Women family members expressed feeling helpless when their children asked about the absence of their father.¹⁴⁰ The education of children of detainees was also affected. The LST PTA Social Impact Report 2020 speaks of a 16- year-old minor suspect was detained at the Probation Centre in Keppettipola, was not facilitated to sit for his Ordinary Level Examination.¹⁴¹ Two mothers who described their daughters as capable students and being unable to study or attend classes after the father's arrest.¹⁴²

It is important that these stresses and impacts are raised as legitimate concerns that policy makers, administrators and the justice sector respond to these concerns.

¹³⁴ *Land Reform Commission v Grand Central Ltd.* [1981] 1 SLR at 250.

¹³⁵ Marisa de Silva, PTA: Terrorising Sri Lanka for 42 years, Law and Society Trust, November 2020, at page 17.

¹³⁶ *Ibid* at page 6.

¹³⁷ *Ibid* at page 5.

¹³⁸ *Ibid* at page 6.

¹³⁹ *Ibid* at page 7.

¹⁴⁰ *Ibid* at page 14.

¹⁴¹ *Ibid* at page 12.

¹⁴² *Ibid* at page 14.

(i) Social isolation of families of suspects

Marginalization and social stigmatization was experienced by families of detainees. The LST report titled PTA: Terrorising Sri Lanka for 42 years describes:

- A mother telling her son not to inform his school friends of the father's imprisonment.¹⁴³
- A woman who made handmade flowers was not hopeful of resuming her income generation activity as she felt people looked at her differently after the arrest of her husband.¹⁴⁴
- A child had been bullied in school saying his father was in 'ISIS'.
- A midwife stopped visiting the family to check on the progress of an infant after the arrest of the father.¹⁴⁵
- A wife was taunted and called a terrorist and was also refused loans on the basis that she was identified as 'ISIS'.¹⁴⁶
- A suspect who was a tutor prior to the arrest, found that after he was released on bail families in the community did not want to send their children to him for tutoring.¹⁴⁷

These experiences describe much needed attention at the community level to ensure that arrests and detentions do not cause further and secondary victimization. The loss of social supports is mentally distressing and can lead to destitution, isolation and have serious consequences on the well-being family members. It may also result in disputes causing further loss and harm to these families.

(j) More hardship and uncertainty in the COVID-19 context

In the wake of fears of Covid-19 spreading in the already congested and overcrowded prisons, the President appointed a Committee in March 2020 to look into the possibility of providing relief to prisoners in custody for minor offences and unable to pay bail.¹⁴⁸ Civil rights activists urged the President and the Minister of Justice for a fair and transparent process and to consider as priority for release those with particular vulnerabilities.¹⁴⁹ By April 2020, 2961 prisoners were released on bail.¹⁵⁰ By September, over 400 prisoners held

¹⁴³ Ibid at page 7.

¹⁴⁴ Ibid at page 13.

¹⁴⁵ Ibid at page 16.

¹⁴⁶ Ibid at page 15 and 16.

¹⁴⁷ Ibid at page 19.

¹⁴⁸ 'President seeks relief for prisoners amidst fears of Covid-19 spreading to prisons' (Daily FT, 25 March 2020) <<http://www.ft.lk/news/President-seeks-relief-for-prisoners-amidst-fears-of-COVID-19-spreading-to-prisons/56-698004>> accessed 25 November 2020.

¹⁴⁹ Letter dated 31st March 2020 by Seneka Perera, Committee for Protecting Rights of Prisoners, Fr. Nandana Manatunga, Human Rights Office, Kandy, Ambika Satkunanathan, Thyagi Ruwanpathirana and Ruki Fernando, INFORM Human Rights Documentation Centre.

¹⁵⁰ 'Nearly 3,000 released from Sri Lanka prisons' (The Associated Press, 05 April 2020) <<https://apnews.com/article/27d53bcdd57f205837cb5d64694d11bb>> accessed 25 November 2020.

for minor offences were released by granting presidential pardons.¹⁵¹ The Committee for Protecting the Rights of Prisoners in an open letter requested the Attorney General to expedite decisions on sanctioning bail for detainees held under the PTA.¹⁵²

There are no reports of these PTA detainees having their cases reviewed for lack of merit and afforded consent to be released on bail or released in the context of the threat of the Covid-19 infection. Families have been denied opportunity to visit or talk to their family members who are in detention during the pandemic. Some have been told that they would be able to secure a five-minute phone call if they paid prison personnel. For the detainees and families, the risk of Covid-19 infection and the perceived failure or refusal to take adequate precautions has resulted in mental distress. For those who believe that there is no information and no evidence against their detainee family members, the risk of Covid-19 infection while in custody is perceived as an avoidable risk that they are compelled to take. The fact that PTA detainees such as Attorney at law Hejaaz Hisbullah, who is reported as having contracted Covid-19 while in the custody of the State,¹⁵³ has exacerbated distress for their families. The sole responsibility of caring and providing safety to detainees lies with the State, and detainees contracting an infectious disease can be construed as a failure of this responsibility.

(k) Unequal treatment

The inequality of treatment between those in the custody of the State under the PTA, is a serious concern from a rule of law perspective. Prisoners charged with specific crimes under the PTA or convicted of serious crimes have been released on bail or released. For example, in March 2020 Sergeant Sunil Rathnayake who was convicted for the murder in December 2000 of eight Tamil internally displaced civilians, was pardoned and released¹⁵⁴ and five persons including MP Sivanesathurai Chandrakanthan alias Pillayan arrested under the PTA for the assassination of parliamentarian Joseph Pararajasingham were released on bail.¹⁵⁵ There is no systematic evaluation based on merit that addresses the arbitrariness of the decisions taken regarding persons in State custody. For those in administrative detention and those held under the PTA for unspecified offences, this inequality of treatment re-emphasizes the unfair and arbitrary nature of their custody.

¹⁵¹ PTI, 'Over 400 prisoners granted presidential pardon in Sri Lanka' (The New Indian Express, 01 September 2020) <<https://www.newindianexpress.com/world/2020/sep/01/over-400-prisoners-granted-presidential-pardon-in-sri-lanka-2191114.html>> accessed 25 November 2020.

¹⁵² Ruwan Laknath Jayakody, 'Covid-19 based social distancing: Rights group calls for the release of prisoners' (Ceylon Today, 1 April 2020) <<https://ceylontoday.lk/news/covid-19-based-social-distancing-rights-group-calls-for-the-release-of-prisoners>> accessed 25 November 2020.

¹⁵³ "Hejaaz Hizbullah has Covid" Lankasara website dated 8th January 2021 found at <https://lankasara.com/en/news/hejaaz-hizbullah-has-covid/>

¹⁵⁴ 'Justice reversed for victims of the Mirusuvil massacre, Sri Lanka' (Amnesty International, 26 March 2020) <<https://www.amnesty.org/en/latest/news/2020/03/justice-reversed-for-victims-of-the-mirusuvil-massacre-from-sri-lanka/>> accessed 25 November 2020.

¹⁵⁵ <https://island.lk/pillayan-and-four-others-granted-bail-after-five-years-in-remand/>

6. Conclusion

This report aimed to respond to three main questions (1) what are the international legal standards in relation to arbitrary arrest and detention particularly in the context of countering terrorism? (2) what is Sri Lanka's domestic legal framework in protecting the rights of persons relating to arbitrary arrests and detentions with respect to countering terrorism? and (3) what are the practical and lived experiences of people who have been impacted by terrorism related legislation prior to 2019 and after the Easter attacks of April 2019?

In responding to these questions, this report contributes to a conversation on the impact of terrorism related law on society. A key observation is the complete failure by the State to transparently document the implementation of the PTA. The main finding of this study is that the manner in which terrorism related laws are applied in Sri Lanka results in potentially long-term human suffering and represents legal and administrative practice that undermines the rule of law. The costs have been high and many appear to be irreversible for those affected.

LST's vision is for a country in which citizens are assured of certainty of legal processes, are secure in the knowledge that all protections will be afforded to suspects who are part of a process of determining guilt, and that punishment will not be extra judicially meted out to citizens by use or misuse of administrative and legal measures. This report hopes to contribute to the development of policy, legal and administrative discourse that must take place to secure human security and rule of law when countering terrorism.

This report seeks to add to the body of literature on the implementation and impacts of the Prevention of Terrorism Act (PTA) of Sri Lanka (1979) by offering some preliminary documentation of the ongoing experiences of deprivation of liberty of citizens after the Easter Sunday attacks of April 2019. The report connects these experiences with the long-standing use of the PTA over the past four decades. The report compares the use of the PTA against international human rights standards and domestic legal protections. The report also serves as a reminder that the experiences of suspects under the PTA are situated within the broader context of malaise of criminal justice administration in Sri Lanka. This work, dedicated to the individuals and families affected by the PTA, underscores the need for a complete rethink of the counter terrorism legal framework in Sri Lanka and the introduction of one that is centered on ensuring rule of law and ensuring human security for all people in Sri Lanka, including those who are accused of 'terrorism'.

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