



Observations and comments of Sri Lanka on the draft Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his mission to Sri Lanka from 10 – 14 July 2017

The Government of Sri Lanka (GoSL) is pleased that its policy of constructive engagement and dialogue with the UN Human Rights Mechanisms including Special Procedure Mandate Holders led to close and active interactions, including country visits following a Standing Invitation extended in December 2015. In addition to visits from 6 SR/Independent Experts/Working Groups since 2015, further visits are planned for 2018 and 2019 in continuation of this policy. This constructive approach of the GoSL also extends to review of reports submitted by the Special Procedure Mandate holders following visits to Sri Lanka in the same spirit with a view to finding the way forward for continuing dialogue on critical issues.

The GoSL considered the Report of the Special Rapporteur on the Promotion and Protection of the Human Rights and Fundamental Freedoms while Countering Terrorism (A/HRC/40/XX/Add.3) following the Special Rapporteur's visit to Sri Lanka, and will remain engaged with the newly appointed Special Rapporteur in addressing matters raised in the Report under review, keeping in mind the importance of arriving at a judicious balance between promotion of human rights and fundamental freedoms and security imperatives.

Against this backdrop, the GoSL wishes to provide the following observations and comments based on factual analysis of the contents of the Report, as well as clarifications and additional information on developments since the visit in July 2017;

I. General context

1. Regarding **Paragraph 6 of the Report**, which refers pejoratively to '*majority Sinhalese Government*' it is important to note that Sri Lanka is a parliamentary democracy where representatives of political parties, including those representing minorities are engaged in all spheres of decision-making. These representatives are elected through a proportional representation system which ensures greater opportunities for election of minorities and political parties that are numerically smaller in size. The parties that form a government are determined based on the support that each party commands among the representatives elected to the Parliament.

The same paragraph also refers to '*armed uprising among large segments of the marginalized and disenfranchised Tamil population*', which assertion, to say the least, is not reflective of the factual situation. It is submitted that the *armed uprising* referred to was of a separatist nature and the main terrorist group refused to accept mediated political solutions on numerous occasions. While some sections of the Tamil community may have joined the LTTE voluntarily, as a terrorist organization, it is a well recorded fact that the LTTE conscripted Tamil men and women including children by force. The assumption inherent in the paragraph that the LTTE had the backing of 'large segments' of the Tamil community is far from the truth, as the LTTE assassinated a large number of Tamil politicians pursuing a democratic path, as well as civilians and academics who held a dissenting view on issues. Further, the UNSG's Special Representatives on Children and Armed Conflict and the Working Group of the UN Security Council on Children and Armed Conflict had recorded that the LTTE had used children as combatants.

II. Key human rights challenges in countering terrorism under Prevention of Terrorism Act

2. **Paragraph 11** of the Report, referring to the Prevention of Terrorism Act (PTA) speaks of *'the Special Rapporteur remain[ing] concerned that it is still, however sporadically, used to arrest suspects, and that a number of individuals are still detained'*. In this context, it is observed that while there is a process in place to repeal and replace the PTA to adhere to international standards, an administratively enforced moratorium on arrests under PTA has been in operation since July 2017.
3. The Report, in **Paragraph 16**, makes reference to *'administrative detention'* and *'detention without judicial control'* of suspects under PTA. In this regard, as stated above, since July 2017, no suspects are held in administrative detention under the PTA and no arrests have been made, and accordingly, all suspects arrested under the PTA previously have been in judicial detention since July 2017, and have been periodically produced before a Magistrate while they are in remand custody pending trial/ during the hearing. The Human Rights Commission of Sri Lanka (HRCSL) has unrestricted access to detainees as a further safeguard to ensure that detainees are free from torture and/or other ill-treatment. Further, Sri Lanka has undertaken to grant the UN Sub Committee on Prevention of Torture, with the recent ratification of the OPCAT ;
 - (a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
 - (b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;
 - (c) Unrestricted access to all places of detention and their installations and facilities in accordance with the OPCAT;
 - (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information;
 - (e) The liberty to choose the places it wants to visit and the persons it wants to interview.

The national preventive mechanism (i.e. the Human Rights Commission of Sri Lanka) shall be granted, at a minimum, the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- (c) To submit proposals and observations concerning existing or draft legislation.

Additionally, with the approval of the Cabinet of Ministers granted on 22 May 2018, the Government of Sri Lanka and the International Committee of the Red Cross (ICRC) have entered into an agreement on “cooperation and humanitarian activities to benefit persons deprived of their liberty”, on 07 June 2018. This action further confirms and consolidates access by ICRC to all detainees and all detentions under the purview of GoSL, other than Sri Lankan military personnel detained under military law in military establishments.

The Agreement enables Sri Lanka to benefit from the international experiences and expertise of the ICRC in its endeavours to improve the conditions of detention and treatment of detainees in the country and to align its penitentiary system with internationally recognized standards.

4. With regard to **Paragraph 23**, which states that ‘*access to lawyers for individuals in detention under the PTA is patchy and far from systematic*’, it is noted that in terms of **section 15(2) of the International Convention for the Protection of all Persons from Enforced Disappearance Act No. 5 of 2018** enacted in March 2018, all persons deprived of liberty have now been guaranteed “the right to 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.”

It is clear that in terms of this provision, an arrested person would *inter alia* have the right to communicate with his attorney-at-law, and his attorney-at-law would have the right to visit such person.

5. In **Paragraph 25**, there is an assertion by the Special Rapporteur that ‘*following his visit, allegations that torture took place since the election of the current government against 50 Tamils, emerged*’. In this context, it is clarified that the GoSL does not condone any act of torture, and is committed to ensuring that allegations of torture will be investigated and prosecuted to the full extent of the law. It is further stressed in this regard that the Government takes these allegations seriously, especially as they relate to incidents that are said to have taken place in 2016 and 2017, after the establishment of the National Unity Government in 2015. It was also suggested that such information is provided to the independent Human Rights Commission of Sri Lanka for examination, respecting the confidentiality of sources. The organization which published the information on allegations of torture post -2015 is yet to share the relevant information/details, required to initiate investigations to the Human Rights Commission of Sri Lanka. The Government, therefore, continues to urge all parties that may have information in respect of these concerns, to share such information with the HRCSL which has been accorded ‘Grade A’ status by the Global Alliance of National Human Rights Institutions in May 2018.
6. **Paragraph 27** of the Report states ‘*PTA still has not been repealed or replaced*’. In this regard, it is important to reflect on the progress made in the process leading to repeal and replacement of PTA. A consultative process was initiated in April 2016, aimed to repeal and replace the PTA with a Counter Terrorism Act that would be in line with international standards. The process involved many consultations including with officials from the UN Counter Terrorism Executive Directorate (CTED), experts, bilateral partners as well as EU officials. The draft framework of the Counter Terrorism Act (CTA) which emerged through such consultations, has been approved by the Cabinet of Ministers, and the draft legislation has been prepared accordingly, by the Legal Draftsman’s Department. The draft Bill, with the Attorney General’s certification with respect to constitutionality, was submitted to the Cabinet of Ministers on 3 July 2018. The draft Bill is presently before Cabinet awaiting receipt of Sinhala and Tamil translations, for consideration. Once Cabinet approval is received, the Bill will be

gazetted and placed in the Order Paper of the Parliament in accordance with the mandatory procedure stipulated in the Constitution.

It is stated in the same paragraph that *'moratorium on the use of this Act [PTA] must be immediately established'*. As clarified earlier, since July 2017, an administratively enforced moratorium on arrests under the PTA continues to be in operation.

7. The Report in **Paragraph 30** refers to *'central flaws in the current framework'*. In this context, it is submitted that the Draft Counter Terrorism Act seeks to address the many concerns that have arisen in relation to the PTA and has been evolved to be in line with international standards, keeping in mind, as stated, the importance of arriving at a judicious balance between the promotion of human rights and fundamental freedoms and security imperatives.
8. In **Paragraph 42**, it is noted that *'SR (thus) calls on the government to conduct prompt, thorough and effective investigations ...ensure that any individual who alleges he has been subjected to torture has right to complain to, and to have his case promptly and impartially examined by, a competent and independent authority'*. The same concern is repeated in **Paragraph 48** of the Report.

It is pertinent to observe in this context that since May 2017 to date, there have been 5 findings on fundamental rights violations under Article 11 of the Constitution¹, which have held the respondents guilty of violations and ordered compensation.

Further, in May 2017, the High Court of Jaffna convicted six police officers including the OIC of the Chunnakam Police Station, and sentenced them to ten years rigorous imprisonment, which is the maximum punishment prescribed under the Convention Against Torture Act. Similarly, the High Court of Badulla convicted and sentenced to death six (06) Police officers of the Kandaketiya Police Station in 2017.

In addition to these measures, it is noted that, within the Police Department, action has been taken to deal with allegations of torture through disciplinary proceedings against Police Officers against whom such allegations of torture have been made.

All these and other measures and initiatives taken by the GoSL form part of the GoSL's zero tolerance policy on torture.

9. In **Paragraph 46** of his Report, referring to the use of confessions under PTA, the Special Rapporteur states that *'this raises extremely serious doubts as to the fairness of the trials that have already been concluded, and the possibility of severe miscarriage of justice that ensues'*. It is important to clarify in this regard that the 19th Amendment to the Constitution enacted in 2015 reinstated the independence of the Judicial Services Commission (JSC), which is vested with authority over the appointment, transfer, dismissal and disciplinary control of judicial officers in the lower courts. As per the constitutional provisions, Judges of the High Court are appointed by the President on the recommendation of the JSC. Further, judges are selected and appointed exclusively on a merit-based system, with a view to ensuring utmost reasonableness and recognition of excellence in the process.

It must be reiterated that Judges hearing trials, including those under the PTA, are responsible for determining whether a confession has been made by a suspect voluntarily, and if not, to reject its admissibility. It is noted that while making this

¹ Article 11 states "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

assertion, the Report, in the same paragraph, explains how Judges of the High Court have discharged this duty and have not accepted the majority of confessions placed by the Police before them.

III. Transitional justice

10. The SR has alleged in **Paragraph 51** that there is '*inertia*' in implementing the reform package under HRC Resolution 30/1. This observation of the SR has been made with little regard for developments that have taken place in Sri Lanka with regard to reform. A brief description of the process followed in this regard is summarised below;
- Following extensive public consultations, the Consultation Task Force (CTF) Report was submitted on 3 January 2017. The CTF's findings were, among others, based on 291 written submissions, sectoral consultations with 11 civil society organizations and groups representing families of the missing and disappeared, and 11 focus group discussions.
 - The process set in motion by the Government to set up reconciliation mechanisms is informed by the findings of the CTF. Pursuant to consultations, a permanent Office on Missing Persons (OMP) has already been established by an Act of Parliament (Act No. 14 of 2016 as amended).
 - Following the operationalisation of the OMP, the Commissioners of the OMP have now commenced a process of consultations with the families of the missing, throughout the island, to explain to them, the role and functions of the office and their future work plan, and also obtain the views of the families regarding the organisation and functioning of the office and its work. Five such consultations have already taken place in Trincomalee, Mullaitivu, Mannar, Jaffna and Matara.
 - Draft legislation for setting up an Office for Reparations was approved by the Cabinet of Ministers on 12 June 2018. The Bill was gazetted on 25 June 2018 and entered in the Order Paper of Parliament on 16 June 2018. On 17 July 2018, a Special Determination petition challenging the enactment of the Bill was filed by an Attorney-at-Law in the Supreme Court. The petitioner is seeking a declaration that the Bill shall become law only through a two thirds majority in Parliament and approval at a referendum. The Parliament has to await the determination of the Supreme Court which is required to be submitted to the Speaker of Parliament within three weeks, for the consideration of the Bill.
 - The draft legal framework on the proposed truth seeking commission (TRC) is under discussion, and consideration of models and options has commenced with regard to right to justice.
 - The Office for National Unity and Reconciliation (<http://onur.gov.lk/>), after a one-year comprehensive consultation process with multiple stakeholders including Government officials, ministries, departments, members of provincial councils, civil society, academia, experts and grass-roots activists drafted a National Policy for Reconciliation (<http://www.onur.gov.lk/images/download/NationalPolicy-English.pdf>), which was approved by the Cabinet on 2 May 2017, and launched on 1 March 2018.

IV. Non- discrimination and stigmatization

11. There is a specific assertion in **Paragraph 54** of the Report to the effect that *'Tamils are severely under-represented in all institutions, particularly in the security sector and the judiciary...'*, while stating that there was in addition *'pervasive and insidious form of stigmatization of the Tamil community'*. In fact, however, fair representation in all spheres of public service has been ensured while further measures continue under the relevant recruitment schemes to ensure the quality of the representation and service.

Further, it is noted that in the post conflict period, **2153 Tamil speaking police officers** including **159 female officers** have been recruited to the Sri Lanka Police. Following the completion of training, they have been posted to their respective provinces and they perform police functions including entertaining complaints, and recording them in Tamil language.

All documents, in respect of police investigations, are prepared in Tamil language as well, in the areas where the population is predominantly Tamil speaking. Tamil speaking officers have also been deployed to centralized investigation units such as the Criminal Investigation Unit.

However, a difficulty has been experienced in recruiting Tamil speaking officers due to lack of interest and non-satisfaction of the minimum recruitment requirements. The Sri Lanka Police has commenced several programmes to encourage people to join law enforcement, such as poster campaigns and awareness creating programmes for school leavers, to attract Tamil speaking youth.

With regard to the judiciary, it may be noted that, as already stated, in Sri Lanka, judges are selected and appointed exclusively on a merit-based system, with a view to ensuring utmost reasonableness and recognition of excellence in the process.

12. The Special Rapporteur, in **Paragraph 55** of his Report, alleges an *'absence of reaction'* in the context of hate speech. The Government maintains a zero tolerance policy on acts in violation of the law including those targeting minority religious groups. The Government does not condone any act of religious hatred or intolerance.

In addition to the provisions of the Penal Code, the ICCPR Act No.56 of 2007 criminalises advocating religious hatred that constitutes incitement, discrimination, hostility or violence. The following needs to be noted in this context :

- i. The laws are strictly enforced on those committing violence against religious groups or practicing hate speech.
- ii. Action has been taken to investigate and initiate legal action against perpetrators of attacks on religious minorities, with parallel measures aimed at preventing tensions through awareness programmes.
- iii. Through a circular issued in June 2017, the Inspector General of Police (IGP) has issued instructions to all 498 Officers-in- Charge (OICs) to the following effect: (i) take immediate and appropriate action wherever hate speech is reported or occurs; and (ii) where the type of expression that may cause harm to/disturbs national harmony and peace. The circular stipulates that it is the personal responsibility of each OIC to take action in this regard in his police area; and any failure on the part of the OIC in this regard will make him liable to be dealt with under the relevant law.

- iv. Following the adoption of the National Reconciliation Policy and activities conducted by the Ministry of National Integration and Reconciliation, awareness is being generated among the different communities in Sri Lanka against resort to hatred and violence against each other. Participation of religious and community leaders help bring all communities together on a platform of reconciliation and peacebuilding.
- v. There have been incidents concerning the targeting of the Muslim community reported during the post-conflict period. Pursuant to the recent incidents of religious violence in Kandy in March 2018, suspects were arrested and produced before Magistrates Court under Section 03 of the ICCPR Act No 56 of 2007 (on hate speech) and relevant penal provisions.
- vi. On 19 March 2018, the Government paid Rs. 9.8 million in compensation to dozens of people affected by the communal clashes in Kandy, including sixty-six home-owners who each received Rs. 50,000 and sixty-five business owners who received Rs.100,000 each.
- vii. On 25 July 2018, over 130 persons were paid a total of Rs. 186 million as compensation in respect of incidents in Aluthgama and Beruwala in 2014.
- viii. On 24 July 2018, the Cabinet of Ministers approved the payment of compensation in respect of damaged properties and damaged places of worship as a result of incidents in Gintota in November 2017, and in Ampara in February 2018.

V. Conclusion

The GoSL has made the foregoing observations and comments with the objective of furthering the dialogue in continuation of its policy of constructive engagement, while providing clarifications, additional information or perspectives that the SR may not have had access to during his country visit, and also taking note that the visit took place about one year ago from this Report.