Written submission to the Human Rights Committee


Submitted by the Tamil Civil Society Forum on 20 December 2013.

About the authors of the report:

This report is filed by the Tamil Civil Society Forum (TCSF1), a network of more than 100 civil society activists from the North & East of Sri Lanka in response to the Government of Sri Lanka's (GoSL) fifth periodic report to the Human Rights Committee (HRC) highlighting developments relevant to the period from 2003 to October 20122. The Tamil Civil Society Forum’s purpose is to recreate spaces in the north and east of Sri Lanka for democratic articulation and debate.

A. Scope of this report:

The Government of Sri Lanka claims in its fifth periodic report that the Liberation Tigers of Tamil Ealam have been defeated and that the GoSL pursued a ‘zero civilian casualty’ policy in persecuting the war. The Tamil Civil Society Forum does not seek to engage in a lengthy contestation of the GoSL’s claim in this report, except to refer the HRC to the UN Secretary General’s Panel of Experts report of March 20113 and the Report of the UN Internal Review Panel on United Nations in Sri Lanka of November 2012,4 which point to between 40,000-70,000 Tamil civilians being killed in the last stages of the war. The UNSG’s Panel of Experts found that credible charges of ‘persecution’ and ‘extermination’ could be made out against the GoSL. The finding with regard to persecution was that conditions imposed on civilians in the final months of the war were calculated to bring about the destruction of a significant part of the civilian population5. The finding with regard to extermination

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2 Doc No. CCPR/C/LKA/5 submitted on 29 October 2012
5 Para 251 (b) of the report
was that it was ‘committed on racial or political grounds against the Tamil population of the Vanni’\textsuperscript{6}. These, in the view of the Tamil Civil Society Forum, are modest conclusions and the Tamil Civil Society Forum has insisted on the need for a full, impartial, international, independent investigations into all three categories of crimes identified by International Humanitarian and Criminal Law, i.e the crimes of genocide, war crimes and crimes against humanity committed by the warring parties.

The Tamil Civil Society Forum invites the HRC to look at the conclusions of the UNSG Panel of Experts Report on ‘persecution’ and ‘extermination’ of the Tamil people and the impact of such a finding on the right to self determination of the Tamil people in the island of Sri Lanka with special reference to the notion of ‘remedial self-determination’\textsuperscript{7} which we emphasise is relevant to the HRC’s evaluation of the Sri Lankan State’s adherence to Article 1(1) of the ICCPR. We wish to state nothing further regarding this, owing to the fear of persecution under Article 157A of the Constitution of Sri Lanka, with regard to which we make detailed submissions in this report.

The GoSL also provides lengthy information on the post-war status of the Tamil people in its report to the HRC. The assertions of the Government are a distortion of the truth, to say the least. \textit{Inter alia}, the land grab project continuing unabated\textsuperscript{8}, Tamil political prisoners continuing to linger in prison (two were killed in custody in 2012), civil society and political activists continuing to be intimidated and arrested, lack of any progress in tracing disappeared persons\textsuperscript{9}, the specific targeting of female-headed households with sexual violence\textsuperscript{10} in the Vanni, systematic and wide

\textsuperscript{6} Para 251 (d) of the report

\textsuperscript{7} For the inter relationship between between External self determination and remedial self determination see Sarah Joseph and Melissa Castan, \textit{International Covenant on Civil and Political Rights: Cases, Materials and Commentary} (OUP: Oxford, 2013) para. 7.14

\textsuperscript{8} See for example, ‘Adjournment motion titled, ‘Land Issues In Northern and Eastern Provinces’, moved by Hon. R. Sambanthan, Parliamentary Group Leader of the Tamil National Alliance’ in the Sri Lankan Parliament, Hansard, 08 August 2013, Columns 327-8


spread torture specifically targeting Tamils and particularly ‘rehabilitated’ ex-LTTE cadres\(^{11}\), the continuous destruction of the economic and cultural fundamentals of the Tamils, the continuous denial of psycho-social support for the war affected Tamils, the ever increasing role of the military in the daily lives of the Tamil people – in education, higher education, health, agriculture and fisheries, the conversion of war-time high security zones into permanent high security zones (including the Sampur High Security Zone in Trincomalee, Palaly and KKS in Jaffna, Mullikulum in Mannar and Keppapulavu in Mullaitivu), a significant number of Tamils continuing to live as displaced people in ‘relocated’ villages and the continuous neglect of the livelihood of those resettled are examples of the state of the Tamil people in the North and East in the post war context. These violations restrict the exercise of most if not all rights enshrined in the ICCPR by the Tamils in the island of Sri Lanka. The TCSF is of the opinion that the post-war conduct of the GoSL is aimed at destroying the fundamental aspects of the identification and existence of the Tamil people as a collective/ a nation.

This report however does not go into detail with regard to each of these issues at this stage. It seeks to highlight particular issues with regard to Article 1 of the ICCPR and other related articles of the ICCPR that impinges on the Tamil people’s exercise of all rights that are contained in the ICCPR. As the HRC identifies in General Comment 12, the right to self-determination and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law.

This report is focused on providing reasons for the HRC to recommend to the relevant state party, to repeal the 6\(^{th}\) amendment to the Sri Lankan Constitution and the Prevention of Terrorism Act No. 48 of 1979, as amended by Act Nos. 10 of 1982 and 22 of 1988, as steps that are immediately required for the restoration of normalcy and for the Tamil people to be able to pursue peace and justice in post-war Sri Lanka and to address those post-war issues identified above.

B. Constitution/National Legislation in dispute:

B.1. Article 157A of the Constitution of Sri Lanka (introduced by way of the 6\(^{th}\) Amendment to the Constitution)

The Sixth Amendment to the Second Republican Constitution of Sri Lanka provides that no person shall directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka\textsuperscript{12}. The consequences of criminal conviction of violating the said provision include being subjected to civic disability for seven years, forfeiture of both movable and immovable property, if he or she is a Member of Parliament, forfeiture of such membership\textsuperscript{13}.

The same amendment provides that it would be criminal for any political party, association or organization to entertain as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka\textsuperscript{14}. The Supreme Court on application can declare such political party or other association or organisation to be proscribed. Any person who holds office in the organization can be prosecuted and if convicted be subjected to the consequences referred to above\textsuperscript{15}.

All public officials and lawyers (attorneys-at-law) are also required to take an oath not to violate the said amendment and if they refuse have to forfeit their positions\textsuperscript{16}.


The Act as a whole has many problematic features. For example Section 6 (1) provides for arrest without warrant, section 7(1) provides for detention of a person arrested initially for 72 hours before producing before a magistrate, section 9(1) provides for detention for a period of three months extendable to eighteen months and Section 16 provides for confession given to a police officer not below the rank of an Assistant Superintendent of Police as admissible evidence. Of particular concern is section 2 (1) (h) of the PTA provides that any person who by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups has committed an offence which per section 2(2) is liable to be punished for a minimum of seven years and a maximum of seven years. In

\begin{itemize}
  \item Article 157 (a) (1) of the Second Republican Constitution of Sri Lanka as amended by the 6\textsuperscript{th} Amendment certified on 08 August 1983
  \item Article 157 (a) (3) read with Article 161(d)
  \item Article 157 (a) (4)
  \item Article 157 (a) (5)
  \item Article 157 (a) (7)
\end{itemize}
the Human Rights Committee noted that Section 16 was in violation of articles 14, paragraphs 1, 2, 3, (c), and 14, paragraph (g) of the Covenant. In *Nallaratnam Singarasa v Attorney General* the Supreme Court of Sri Lanka refused to reconsider its decision based on the observations of the HRC and further found that Sri Lanka’s accession to Optional Protocol 1 was *contra* the Constitution of Sri Lanka.

C. Background to the legislation:

The mass violence unleashed out against Tamils all over the island of Sri Lanka in July and August 1983 culminated in the enactment of the Sixth Amendment to the Constitution certified on 08 August 1983. The violence was described by the International Commission of Jurists then as amounting to acts of genocide. The immediate objective of the Sixth Amendment was to disseat the 16 Members of Parliament of the Tamil United Liberation Front who were elected on a separatist manifesto in 1976 that called for the establishment of a separate state for the Tamils in the island. The idea of the amendment was mooted by President JR. Jayawardena, in an address to the nation on 28 July 1983 in which he made no reference to the genocidal acts perpetrated by the Sinhala majority community supported by his Government.

The Prevention of Terrorism Act was enacted in 1979 as a temporary measure, as an aspect of the then government’s military strategy in dealing with the early stages of the Tamil militant movement and more broadly as a political strategy to contain and narrow down the political space for the Tamil self determination movement. The sunset clause - Section 29 of the original enactment expressly provided that it would be in force only for a period of three years, but this was repealed by the Prevention of Terrorism (Temporary Provisions) Amendment Act No. 10 of 1982, making the PTA a permanent measure, although incongruously, the short title of the Act continues to contain the words ‘temporary provisions.’

D. The International Legal Framework

The principles of law as found relevant to this submission as discerned from authoritative commentary on the ICCPR, case law of regional human rights courts

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18 SC Special Leave to Appeal 182/99 decided on 15.09.2006
and national courts in brief are as follows:

- In General Comment 12, commenting on paragraph 1 of article 1, the CCPR noted that States parties should describe the constitutional and political processes which in practice allow the exercise of this right and noted that a mere description of election laws are not sufficient. This submission addresses a serious constitutional, legal and political obstacle to the exercise of the right to self-determination of the Tamil people in the island of Sri Lanka.

- In General Comment 11, commenting on article 20, paragraph 1 of the ICCPR, the HRC has noted that the prohibition of propaganda of war contained in the said article should not be read to prohibit the right of peoples to self-determination and independence in accordance with the Charter of the United Nations20.

- In Brandenburg v. Ohio, the US Supreme Court on the advocacy of the use of force stated that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action [...]21.

- The European Court of Human Rights in Sunday Times v UK22 on the need for law to be sufficiently precise, “[...] the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

- In Seren v Turkey23 the European Court of Human Rights held that Turkey’s criminal prosecution of a Kurdist activist for disseminating material that referred to a part of Turkey as "Kurdistan" in his material violated the freedom of expression guaranteed by Article 10(2) of the European

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20 General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) : 29/07/1983. CCPR General Comment No. 11. (General Comments)
22 ECHR, Sunday Times v. United Kingdom, 26 April 1979, para. 49.
23 18 July 2000, Application No. 26680/95 (European Court of Human Rights)
Convention on Human Rights. The particular provision of the law relied upon was Section 8 of the Prevention of Terrorism Act 1991 (Law no. 3713 of 12 April 1991) that criminalised the ‘undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation through written and spoken propaganda, meetings, assemblies and demonstrations, irrespective of the methods used and the intention’. The court held that the domestic authorities failed to give sufficient weight to the public’s right to be informed of a different perspective of the situation in Southeastern Turkey, irrespective of how unpalatable that perspective might be for them.

- The case of *Nallaratnam Singarasa v Sri Lanka*\(^{24}\) has already been referred to wherein, the Human Rights Committee noted that Section 16 of the Prevention of Terrorism Act was in violation of articles 14, paragraphs 1, 2, 3, (c), and 14, paragraph (g) of the ICCPR.

**E. The inconsistency with Article 1 and Article 19 of the ICCPR:**

**E.1. Article 157A of the Constitution:**

Article 157A of the Constitution, this submission alleges is in violation of *inter alia* Article 1 and 19 of the ICCPR. The sixth amendment does not deal with incitement to violence or the actual committing of violent acts. In fact the sole purpose of the sixth amendment is to criminalise the peaceful and political advocacy of a separate state and more broadly the Tamil advocacy for self-determination. It is submitted that the sixth amendment has this broader purpose because five years prior to the enactment of the sixth amendment, by the enactment of the ‘Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organizations Law’, No. 16 of 1978 the parliament had not only banned the Liberation Tigers of Tamil Eelam (LTTE) but also any other organization that advocated the use of violence and is either directly or indirectly concerned in or engaged in any unlawful activity\(^{25}\). Hence the submission that the purpose of the 6th amendment needs to be seen in light of the state’s border purpose of criminalizing the advocacy and espousal of self-determination by the Tamil people.

The sixth amendment both criminalises direct and indirect means of advocacy of a separate state. While this submission alleges that while criminalizing direct methods of advocacy for a separate state on their own constitute an infringement of

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\(^{25}\) Section 2(2) of the Law.
Article 1 and 19 of the Covenant, the ambiguous wording that refers to ‘indirect methods’ creates an atmosphere of insecurity where any advocacy, for the political rights of the Tamil people in the island becomes a potential violation of the sixth amendment, leave alone the demand for a separate state. The Tamils who have consistently through democratic elections expressed themselves as a nation (per language of Article 1 of the ICCPR as a ‘people’ having the right to self determination) have been denied their individual and collective freedom of expression within the island to be able to advocate for self-determination, leave alone a separate state.

The sixth amendment was and continues to be an important stumbling block towards resolving the conflict through peaceful means. In the 2002-2006 peace process facilitated by Norway, the outlawing of the advocacy of a separate state placed the Tamils and their representatives at the talks – the Liberation Tigers of Tamil Eelam – at a structural disadvantage. The sixth amendment in fact functioned as a non-negotiable pre-condition in favour of the Sri Lankan state while the Government itself was not subjected to any pre condition. The sixth amendment and the law banning the LTTE, was also used to ban the Tamil Rehabilitation Organisation, a humanitarian organization for alleged links with the LTTE in 2007 just before the onslaught of the last phase of the war. The move was intended to prevent Tamils looking after their own rehabilitation and to discourage individual, organisational and international contribution to addressing Tamil humanitarian issues.

During the war, the sixth-amendment-framed-criminalization of Tamil self determination politics and the separatist project provided for the legal, political and social framework within which the Sri Lankan state justified the commission of what independent experts and the Tamil people owing to their lived experience have called the crimes of genocide, war crimes and crimes against humanity. The logic and rationale of the sixth amendment was important for the Sri Lankan state to justify the crimes it committed to the majority Sinhala Buddhist community.

In the post-war context the sixth amendment continues to be used as a tool to criminalise any form of Tamil self-determination politics. The following are instances of the use of Article 157A with the intention of criminalizing Tamil politics, in the post war context:

27 Findings of the Peoples Permanent Tribunal on Sri Lanka, Phase I and II available at http://www.ptsrilanka.org/
- Five organisations including the the Patriotic National Movement (PNM) and the Patriotic Buddhist Front (PBF) filed a case in the Supreme Court of Sri Lanka under Article 157A, in September 2013 against the Tamil National Alliance, (the single largest Tamil political party, repeatedly endorsed by overwhelming majorities by the Tamil people), for making reference to the right to self determination of the Tamil people in its Northern Provincial Council election manifesto\(^\text{28}\) (The TNA Manifesto in fact seeks for the application of the principle of self determination only in its internal dimension i.e Tamil self determination within the confines of a united Sri Lanka)\(^\text{29}\). These groups (Sinhala Buddhist organisations, representing *inter alia* monks) take up the position that Article 157A in fact does not allow the Tamils to even challenge the constitution. The Petitioners maintain that the reference to Tamil self-determination ‘challenges the unitary structure and the inalienable sovereignty of the State’, which they claim are ‘fundamental features of the Constitution’\(^\text{30}\). These groups are actively supported by the Government\(^\text{31}\). The case at the time of writing this report is still pending before the Supreme Court of Sri Lanka.

- In May 2012 the Sinhala Jathika Peramuna has petitioned the Supreme Court to proscribe the Tamil National Alliance, under Article 157A\(^\text{32}\). The case is still pending before the court at the time of writing this report.

- The Ministry of Defence in the recent past has published opinion pieces

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\(^{31}\) President Mahinda Rajapaksha himself accused the TNA of pursuing the LTTE’s separatist agenda and vowed, “I will not let anyone divide this country, the same way I did not allow Prabakran [leader of the LTTE] to do it” “MR accuses the TNA”, *Colombo Gazette*, 11 September 2013.

calling for the use of Article 157A against the Tamil National Alliance\textsuperscript{33}. Official Government Websites have published articles calling for action to be taken under the Article 157A against political actors who have spoken up for the right to collective memory of the Tamils\textsuperscript{34}.

The above mentioned demonstrates that the purpose of criminalizing Tamil self-determination politics through the Sixth amendment is to curtail open political communication of Tamil politics in its entirety. While the law itself has not been directly used to proscribe political parties or organisations in the post-war context, the environment of fear that it creates is a significant threat to the exercise of Article 1 of the ICCPR.

**E.2. The Prevention of Terrorism Act**

The provisions of the PTA referred to in Section of this report quite blatantly constitute serious infringements of Article 9, 10, 12 and 14 of the ICCPR but also impact upon Article 1 of the ICCPR.

The Prevention of Terrorism Act similar to Article 157A of the Constitution is used to curtail and criminalise Tamil politics. Four such recent cases are highlighted:

- The most high profile of such cases was the one against J.S. Tissanayagam, a Tamil journalist and editor, who was arrested in 2008 and convicted under Section 2(1) (h) for writing and publishing articles critical of the Sri Lankan military’s conduct of the war in violations of principles of humanitarian law. The state prosecutor argued in court that criticism of the Sinhala-only Army would create communal disharmony between the Tamils and the Sinhala community. Tissanayagam was sentenced to 20 years imprisonment and subsequently released on a Presidential pardon following international pressure and condemnation.

- In November 2012, in the post-war context four students attached to the

\textsuperscript{33} Ministry of Defence Official Website, (18 August 2013) http://www.defence.lk/new.asp?fname=When_TNA_leaders_go_shopping_for_separatist_sponsorship_in_Canada_and_US_20130818_03

University of Jaffna were arrested\(^{35}\) and sent for ‘rehabilitation’ for more than four months, under the newly enacted regulations promulgated under the PTA for holding events at the university in remembrance of the dead in the war\(^{36}\).

- Dr. E. Shivashankar, Senior Medical Doctor from Jaffna, attached to the the Regional Director for Health Services (RDHS) office in Jaffna was transferred to Anuradhapura on 12 December 2012 by the Ministry of Health on the 'recommendation' of the Northern Province Military Governor for writing an article in a local newspaper in which he expressed his views regarding the current plight of the Tamil people. Later in December 2012 he visited Mullaitivu to find out more regarding allegations that Tamil women recently recruited from Killinochchi to the SLA had been sexually harassed by the SLA. One such family he met wanted him to accompany them to the Kokkavil Army camp in Mullaitivu to seek the release of their daughter. He accompanied them primarily to help with Sinhala translation. Dr Shivshankar was arrested on the 29th of December 2012 under the PTA. He was charged with ‘for having entered the camp without permission and for having in possession a voice recorder’. Detention order was continuously extended. A Fundamental Rights Petition was filed in the Supreme Court and the Attorney General withdrew case on 17.06.2013 and he was subsequently released. The arrest and 6 months detention of a senior citizen of high standing has had a significant impact on the Tamil civil society.


\(^{36}\) The students though arrested were treated as "surrendees". Clause 3.(2) of PTA Regulations no. 5 of 2011 provides "Any person who surrenders (hereinafter referred to as the "surrendee") in connection with any offence under the Explosives Act, the Offensive Weapons Act, No. 18 of 1966, the Firearms Ordinance, the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 or under Chapter VI, Chapter VII or Chapter VIII of the Penal Code or under any emergency regulation which was in force prior to August 30, 2011, or through fear of terrorist activities, to any police officer, or any member of the armed forces, or to any public officer or any other person or body of persons authorized by the President by Order, shall be required to give a written statement to the officer or person authorized to the effect that he is surrendering voluntarily". The regulations provide that a person who has thus 'voluntarily surrendered' to be assigned for rehabilitation by the Defence Secretary acting through the Commissioner General for Rehabilitation. A person who voluntarily surrenders can be held for an initial period of 12 months and a maximum period of two years at the Defence Secretary's discretion. Given that the security establishment claims that the students are being 'rehabilitated', it was assumed that the students are being held for rehabilitation under these regulations.
• In November 2013 the Police arrested Poet and Actor VIS Jeyabalan for addressing a press conference in Jaffna wherein it was alleged that he propagated ‘extremist views’. Jeyabalan was subsequently released and deported owing to his status as a Norwegian Citizen.

The above instances are merely examples. Arrest and re-arrest of ‘rehabilitated’ ex-combatants, warning conference space providers not to rent out for conferences, seminars organized by independent civil society groups whose content might not be in line with Government’s agenda for the North and East, direct threats by senior officials of the military not to organize cultural, drama or educational programmes that relate to Tamil problems, summoning for inquiries or visits by the Terrorism Investigation Department (for example the Catholic Bishop of Mannar, the President of the Jaffna University Teachers Union have been summoned to the TID in Vavuniya in 2012 a number of times for inquiries or been visited at their residences), issuing of posters, pamphlets warning activists not to engage in political work are examples of the other forms in which the PTA is directly and indirectly used in preventing the normalizing of the North and East of Sri Lanka. Even where the PTA is not directly used it creates an environment of fear and keeps the North and East in what is constantly referred to by Tamil Civil society actors as an open prison.

F. Conclusion and Recommendations:
Article 157A of the Constitution of Sri Lanka (the Sixth Amendment to the constitution) and the Prevention of Terrorism Act have a direct and indirect impact on Article 1, 9, 10, 12, 14 and 19 of the ICCPR for both individuals and the peoples/nations in the island of Sri Lanka. Both the PTA and Article 157A of the Constitution jointly are preventing the emergence of democratic space in the North and East in the post-war context. The repeal of these legal instruments is required for the Tamil people to be able to self-address most of the post-war issues that have been identified in Section A of this report.

Hence it is recommended that the HRC recommend to the Sri Lankan Government to:
1. Repeal Article 157A and the 6th Amendment to the Constitution as a whole.