

EVERYDAY EMERGENCIES: ON SRI LANKA'S EXCESSIVE USE OF EMERGENCY PROCEDURE

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Abstract: A generation of Sri Lankans has grown up in the shadow of the 26-year long Civil War which began in 1983 and was undoubtedly the culmination of centuries-long ethnic tensions between the majority Sinhalese and minority Tamil populations on the Island. The Government of Sri Lanka passed the *Prevention of Terrorism Act (Temporary Provisions) Act of 1979 (PTA)* under its emergency procedure to curb these tensions. The Government of Sri Lanka has, during its recent history, capitalised on the spectre of terrorism perpetrated by the Liberation Tigers of Tamil Eelam (LTTE) in order to keep the *PTA* in force for over 40 years and to indiscriminately declare states of emergency, even when such a declaration may not be warranted by the necessary conditions precedent set by international standards. In fact, the Government of Sri Lanka has shirked its duties on the international stage when it comes to declaring states of emergency, and has, as a result, been condemned by the international community including the United Nations. The over-arching question is this: What is an "emergency"? Flowing from this question as regards the situation in Sri Lanka is "Why, and how, is the *PTA* still utilised fifteen years after the LTTE were militarily defeated?" Most importantly, "Can the citizens of Sri Lanka expect their Government to minimise its use of emergency procedure?" This article attempts to answer these questions.

Keywords: Emergency, emergency procedure, Sri Lanka, state of emergency, terrorism, prevention of terrorism, international law, law, Government of Sri Lanka, procedure

INTRODUCTION: WHAT IS AN EMERGENCY?

Sri Lanka has a rich and storied history, which unfortunately has been fraught with ethnic tensions between the majority Sinhalese and minority Tamil populations. These strained relations boiled over on the 23rd of July 1983 with the beginning of the decades-long civil war between the Government of Sri Lanka (GoSL) and the separatist Liberation Tigers of Tamil Eelam (LTTE) which aimed to create a separate nation-state for the Tamil

population in the North and East of the Island. As discussed in depth below, the Government attempted to curb these escalating tensions by passing the *Prevention*

of *Terrorism (Temporary Provisions) Act of 1979 (PTA)*¹ under its emergency procedure.

This article aims to offer critical reflections of the Government's use of emergency procedure, arguing that a vague definition of a "state of emergency", along with what, in my view, is a mislabelling of the LTTE as a terrorist organisation, has allowed the GoSL to indiscriminately declare states of emergency.

I begin by reviewing the general legislative procedure for the passage of laws in Sri Lanka before analysing emergency regulations, particularly the PTA, in the context of the Civil War. I will then conclude with a critique of the GoSL for its failure to honour its obligations under international law and allowing states of emergency to become a way of life for the Sri Lankan people.

The President of Sri Lanka is granted emergency powers under section 2(1) of Public Security Ordinance No. 25 of 1947, which reads, in pertinent part, "Where, in view of the existence or imminence of a state of public emergency, the President is of the opinion that it is expedient to do so in the interests of public security and the preservation of public order..., the President may declare that the provisions of Part II of this Ordinance shall come into operation throughout Sri Lanka, or in such part or parts so specified."²

Therefore, instead of the concrete terms used by the International Convention on Civil and Political Rights (ICCPR)³ or the South African Constitution⁴, the declaration of an emergency in Sri Lanka offers only "a general description of the conditions which would occasion the President to proclaim an emergency, as well as the aims for which such powers are to be used."⁵

¹ Prevention of Terrorism (Temporary Provisions) Act [1979]

² Public Security Ordinance [1947], s. 2(1)

³ International Convention on Civil and Political Rights, Art. 4(1)

⁴ The Constitution of the Republic of South Africa [1996], Art.37(1)

⁵ Asanga Welikala, "A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka" [2008] 200

Crucially, Article 155(2) of the Constitution allows for Emergency Regulations made under the Public Security Ordinance to over-ride, amend, or suspend the provisions of any law, save the Constitution.⁶ Given the broad powers granted the President in a state of emergency by the Public Security Ordinance, and the fact that such a decision is not subject to judicial review⁷, it is critical to properly define a “state of emergency.”

Unfortunately, the ICCPR and the Constitution of South Africa seem to be exceptions to the norm as, generally, there has been considerable difficulty and a lack of consensus on the global stage in determining what conditions constitute a “state of emergency.” Welikala⁸ mentions that most constitutional democracies do provide for procedures during states of emergency and provides the example of the Israeli Basic Law as being similar to that of Sri Lanka in that it neither defines a “state of emergency” nor enumerates the conditions under which a declaration becomes legally available.⁹ This has allowed the GoSL to indiscriminately declare states of emergency in spite of an international outcry.¹⁰

AN EMERGENCY IN LANKA: LEGISLATIVE PROCESS LOST

It may be prudent here to briefly lay out the normal legislative process for the passage of laws in Sri Lanka. I will address the passage of an “Ordinary Bill”, which is one of the three types of Government Bills.¹¹

⁶ The Constitution of the Democratic Socialist Republic of Sri Lanka [1978], Art. 155(2)

⁷ Indian Express (State of Emergency Explained) [Accessed 9th April 2023]

⁸ Asanga Welikala, “States of Emergency: Issues for Constitutional Design”, Centre for Policy Alternatives Working Paper No. 5 [2016] 5

⁹ Ibid.

¹⁰ See List of Special Rapporteurs of the United Nations, “Sri Lanka: UN human rights experts condemn repeated use of emergency measures to crackdown on protests”
<https://www.ohchr.org/en/press-releases/2022/08/sri-lanka-un-human-rights-experts-condemn-repeated-use-emergency-measures#:~:text=On%2015%20July%2C%20President%20Gotabaya.against%20%E2%80%9Ctrouble%2Dmakers%E2%80%9D>. [Accessed 11th April 2024]

¹¹ <https://www.parliament.lk/en/how-parliament-works/government-bills?showall=&limitstart=> (Accessed 20th April 2023]

Article 78 of the Constitution enforces the publication in the Gazette, seven days after which, on the request of any Minister, the Bill is set down for a First Reading.¹² After the First Reading, but before the Second Reading, the Bill is then referred to the relevant Sectoral Oversight Committee for consideration.¹³ The Sectoral Oversight Committee releases its report on the perspective *Act*, before a scheduled Second Reading.¹⁴

After the Second Reading, and on motion by a Minister, the Bill is referred for consideration by the whole Parliament, a Select Committee, a Legislative Standing Committee, or to the appropriate Sectoral Oversight Committee.¹⁵ At the Committee Stage, all clauses of a Bill are considered.¹⁶ A Bill then goes to a Third Reading and becomes an *Act* upon the endorsement of the Speaker on the Bill.¹⁷

The use of the emergency procedure, then, allows the President to bypass consideration of an *Act* by other members of Parliament. Critically, review by the Sectoral Oversight Committee is lost. Sectoral Oversight Committees assist Parliament in, *inter alia*, “its analysis, appraisal, administration, execution, and effectiveness of legislation passed by Parliament, including circumstances which may indicate the necessity or desirability of enacting new legislation.”¹⁸

As discussed in further depth below, it seems that judicial review of the PTA would go for naught, as Article 84 of the Constitution allows for the passage of laws inconsistent with it, upon passage by special majority of not less than two-thirds of the Members of Parliament.¹⁹

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ <https://www.parliament.lk/en/component/committees/categories?id=6&Itemid=533> [Accessed 20th April 2023]

¹⁹ The Constitution of the Democratic Socialist Republic of Sri Lanka [1978], Art. 84(2)

The Constitution of Sri Lanka does not formally define a “state of emergency,”²⁰ as only the President can declare one.²¹ Although Sri Lanka’s emergency procedure is consistent with international standards as they relate to the principle of proclamation, “the formulation of section 2(1) does not seem to reflect the principle of exceptional threat that is a condition precedent for a valid declaration of a state of emergency under section 4(1) of the ICCPR”,²² which Sri Lanka ratified on the 11th June 1980.²³ As is to be expected, “the concluding provisions of the Covenant do not provide for denunciation of the Treaty...and rights and freedoms cannot be withdrawn once confirmed.”²⁴

The legislative process is stymied in large part because the Constitution of Sri Lanka prevails over all other law, including international legal instruments. The invocation of emergency powers not only removes the Legislative branch from the law-making equation by allowing the President to declare states of emergency unilaterally, the Constitution also allows laws inconsistent with it to be made, as discussed below. Therefore, there is no way for the power of the President to be effectively checked in emergency situations.

THE EMERGENCY PROCEDURE & THE PREVENTION OF TERRORISM ACT OF 1979

The PTA entered into force in Sri Lanka at the heels of other, less effective legislation²⁵ as a proposed solution to the growing civil unrest between the majority

²⁰ Asanga Welikala, “A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka” [2008] 199

²¹ Public Security Ordinance [1947], s. 2(1)

²² Asanga Welikala, “A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka” [2008] 200

²³ https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=164&Lang=EN [Accessed 23rd April 2023]

²⁴ Asanga Welikala, “A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka” [2008] 224

²⁵ Criminal Justice Commission Act [1972]; Criminal Procedure (Special Provisions) Act [1978]; Proscription of Liberation Tigers of Tamil Eelam and Similar Organisations Act [1978]

Sinhalese and the minority Tamil populations.²⁶ Although the GoSL originally faced opposition from both Sinhala and Tamil militancies,²⁷ eventually the LTTE stood as the main opposition as even the Sinhala majority “viewed the PTA as the key to tackling Tamil terrorism.”²⁸

Although judicial opinion was sought on the constitutionality of the PTA ²⁹, it was rushed³⁰ due to being considered “urgent in the national interest.” The Supreme Court of Sri Lanka ultimately ruled that “the Bill did not require the approval of the People at a referendum, nor is it one within the contemplation of Article 83 of the Constitution. As a result, the PTA was passed in a day.”³¹

Nevertheless, emergency regulations have been labelled as “disproportionate to the actual situation.”³² Given that the PTA was, in fact, meant to be temporary,³³ it could be argued that the *Act* reads as an emergency regulation. This is especially true in the context of criminalisation. This is to say that the punishment for crimes was dependant on whether they were prosecuted under the Criminal Code or under the PTA .³⁴ The differences in penalty may be an attempt to show that the PTA is “less harsh,”³⁵ but this is not necessarily the case. The PTA became permanent in 1982,³⁶

²⁶ W.A Wiswa Warnapala, “Sri Lanka 1979: New Stresses in the Economy and the Polity”, *Asian Survey*, Vol. 20 No. 2 [1980] 206,209

²⁷ N. Manoharan, *Counterterrorism Legislation in Sri Lanka: Evaluating Efficacy* (East-West Center 2006) 18-20

²⁸ N. Manoharan, *Counterterrorism Legislation in Sri Lanka: Evaluating Efficacy* (East-West Center 2006) 28

²⁹ The Constitution of the Democratic Socialist Republic of Sri Lanka [1978], Art. 122(1)(b)

³⁰ The Constitution of the Democratic Socialist Republic of Sri Lanka [1978], Art. 122(1)(c)

³¹ N. Manoharan, *Counterterrorism Legislation in Sri Lanka: Evaluating Efficacy* (East-West Center 2006) 28

³² Radhika Coomarasamy & Charmaine de los Reyes, “Rule by emergency: Sri Lanka’s postcolonial constitutional experience”, Oxford University Press and New York University School of Law, *I.CON*, Vol. 2, No. 2, [2004], 272,273

³³ N. Manoharan, *Counterterrorism Legislation in Sri Lanka: Evaluating Efficacy* (East-West Center 2006) 28

³⁴ N. Manoharan, *Counterterrorism Legislation in Sri Lanka: Evaluating Efficacy* (East-West Center 2006) 27

³⁵ *Ibid.*

³⁶ Radhika Coomarasamy & Charmaine de los Reyes, “Rule by emergency: Sri Lanka’s postcolonial constitutional experience”, Oxford University Press and New York University School of Law, *I.CON*, Vol. 2, No. 2, [2004], 272,276

and the state of emergency under which the *Act* was conceived simply became a justification for a draconian law.

Some of the more problematic provisions of the *Act*, such as those involving indefinite detention³⁷, forfeiture of property³⁸, and the arrest of any person³⁹, have caused the international community to call for the repeal or amendment of both the PSO and the PTA for violating fundamental principles governing detention, due process, and other well-established principles of fair trial.⁴⁰ Instead, the PTA has remained in force for over 40 years.

It may be useful for me to evaluate some cases which challenged the validity of the emergency provisions of Public Security Ordinance No. 25 of 1947. The first such case was *S. Weerasinghe v. G.V.P. Samarasinghe and Others*,⁴¹ in which the Court held that the Public Security Ordinance was *intra vires*, and, therefore, any regulations made under it were valid. Another case was *Hirdanaramani v. Ratnavale* [1972]⁴², in which the Court suggested that it could not question a detention order if made in good faith.

Indeed, “the Sri Lankan judiciary has traditionally been conservative in holding the Executive to account, especially in respect of the exercise of powers under emergency law.”⁴³ Welikala notes three categories of accommodation as a way of comparing democratic responses to states of emergency.⁴⁴ One of these, interpretive accommodation, is “the response judiciaries may adopt in interpreting constitutional and legal provisions in a way that addresses challenges of a crisis and facilitates the

³⁷ Prevention of Terrorism (Temporary Provisions) Act [1979], s.9

³⁸ Prevention of Terrorism (Temporary Provisions) Act [1979], s. 4

³⁹ Prevention of Terrorism (Temporary Provisions) Act [1979], s. 6

⁴⁰ International Commission of Jurists, “Sri Lanka Briefing Paper: Emergency Laws and international Standards “ [i]

⁴¹ *S. Weerasinghe v. G.V.P. Samarasinghe and Others* [1966] N.L.R. 361

⁴² *Hirdanaramani v. Ratnavale* [1972] 75 N.L.R. 67

⁴³ Asanga Welikala, “A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka” [2008] 192

⁴⁴ Asanga Welikala, “A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka” [2008] 45

government's reaction."⁴⁵ This allows the judiciary to "give an expansive, emergency-minded interpretive spin to existing norms, transforming them into counter-insurgency facilitating norms."⁴⁶

One of the most important cases regarding the use of emergency regulations and the PTA in Sri Lanka is *Singarasa v Attorney General*⁴⁷ in which the Supreme Court found that "no enforceable rights as a matter of domestic law could flow from the ICCPR⁴⁸, discussed in further detail below. At this juncture, suffice it to say that "the *Singarasa* judgment is directly at odds with the Human Rights Committee's views as the authoritative interpreter of the meaning of the ICCPR."⁴⁹ Further, "the Supreme Court's attitude in *Singarasa* is rendered all the more incomprehensible because there is precedent for this (the Supreme Court taking the lead in the protection of human rights) in its own case law."⁵⁰

It is clear, then, that judicial deference has played a large part in allowing the PTA to remain in force, largely unchanged, for over forty years. The key is to balance the need to protect the citizenry from extra-ordinary circumstances, while also protecting their democratic rights. This is where Sri Lanka has failed.

EMERGENCY POWERS AND DEMOCRATIC RIGHTS: A PRECARIOUS BALANCING ACT

Ambiguity surrounding the circumstances necessary for a declaration of a state of emergency in Sri Lanka allows the President to abuse his power to declare one, and, historically, judges have had little power to stop it. The PTA is still in force despite the

⁴⁵ Asanga Welikala, "A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka" [2008] 48

⁴⁶ Ibid.

⁴⁷ *Singarasa v Attorney General* [2006] S.C. SpL(LA) No. 182/99

⁴⁸ Asanga Welikala, "A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka" [2008] 226

⁴⁹ Asanga Welikala, "A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka" [2008] 228

⁵⁰ Asanga Welikala, "A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka" [2008] 229

fact that it “flies in the face of almost every human rights norm”⁵¹, and was unconstitutional, but saved using the Article 84 procedure.

It is dangerous not to clearly define a “state of emergency.” As Welikala cautions, this means that emergency regulations straddle, and may perhaps over-step, the line separating the Executive and the Legislature⁵², especially when the judiciary has been cautious in attempting to curtail the emergency powers of the President. In fact, “the Supreme Court has a mixed record as a checking mechanism”⁵³, although there has been some improvement.⁵⁴ Also, the case of *Joseph Perera v Attorney General [1992]* established the test of “rational or proximate nexus between the impugned emergency regulation and the mischief sought to be averted.”⁵⁵ This is important because it is a check on the President’s seemingly absolute power to enact law in emergency situations.

The idea of a “rational nexus” ensures that there is some close connection between an action and the use of emergency procedure in ending it. In other words, a rational nexus is meant to stop the arbitrary use of emergency powers. Indeed, the judge in *Perera* invoked Article 15(7) of the Constitution to state that , where an emergency regulation seeks to impede upon a fundamental right, it is only those regulations which are in the interests of national security, in the public interest, or in a similar vein, which would be deemed valid.⁵⁶ This is an objective test, and where there is a contest of validity, the President’s evaluation is not sufficient to lend validity to the regulation.⁵⁷

⁵¹ Asanga Welikala, “A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka” [2008] 190

⁵² Asanga Welikala, “Understanding a State of Emergency: March 2018”, Centre for Policy Alternatives [2018]

⁵³ Ibid.

⁵⁴ See *Edisuriya v Navaratnam* [1985] and *Nanayakkara v Perera* [1985]

⁵⁵ Asanga Welikala, “A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka” [2008] 196

⁵⁶ Asanga Welikala, “A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka” [2008] 197

⁵⁷ Ibid.

Rights are limited, and there are numerous examples of the same including section 1 of the Canadian Charter of Rights and Freedoms⁵⁸, more commonly referred to as the “reasonable limits” clause. However, the GoSL could be credibly accused of doing only the bare minimum to comply with its international obligations.

Fundamental rights such as the presumption of innocence, and burden of proof are some of those which can be stymied by law, including emergency regulations.⁵⁹ Also, the Constitution does not require restrictions on fundamental rights to be proportionate to the legitimate aims of national security.⁶⁰ This is contrary to most modern constitutions which recognise that rights can be limited in pursuit of a legitimate aim if the limit is proportionate.⁶¹ While the Constitution of Sri Lanka guarantees fundamental freedoms,⁶² and limits them as prescribed by law or in the interest of national security,⁶³ it also seemingly contradicts itself through the use of Article 84, which allows inconsistencies with the Constitution to stand through Parliamentary approval.⁶⁴

Further, with regards to the Canadian Charter of Rights and Freedoms, “the values and principles which guide the Court in applying section 1, include, *inter alia*, the dignity of the human person and respect for cultural identity.⁶⁵ Sri Lanka has effectively attempted to do the opposite of Canada in this regard, especially when it comes to the treatment of Tamils post-war.

Given Sri Lanka’s state as a war-torn country, it is critical to note that “there is no requirement in Sri Lankan law that emergency measures be consistent with the state’s international obligations, in particular, international humanitarian law (IHL)

⁵⁸ *Canadian Charter of Rights and Freedoms*, s. 1, Part 1 of the *Constitution Act, 1982* being Schedule B of the *Canada Act (UK)*, 1982 c. 11

⁵⁹ Asanga Welikala, “Understanding a State of Emergency: March 2018”, Centre for Policy Alternatives [2018]

⁶⁰ Ibid.

⁶¹ *Canada (Attorney General) v. JTI-MacDonald Corp.* [2007] 2 S.C.R. 610 at para. 36

⁶² The Constitution of the Democratic Socialist Republic of Sri Lanka [1978], Arts. 10-14

⁶³ The Constitution of the Democratic Socialist Republic of Sri Lanka [1978], Art. 15(1)

⁶⁴ The Constitution of the Democratic Socialist Republic of Sri Lanka [1978], Art. 84(1)

⁶⁵ *R. v. Oakes* [1986] 1 S.C.R. 103 at para. 136

and the law of armed conflict.”⁶⁶ The twenty-six years-long civil war against the LTTE has no doubt given the Sri Lankan government the idea that it can shirk its duties on the international stage, as its continued use of the PTA has shown. This is not necessarily the case.

EMERGENCY POWERS: THE CIVIL WAR AS CATALYST

When hearing the story of its birth at the outset of the Civil War, it is not a stretch to say that the PTA is the ultimate emergency regulation. In fact, it could be argued that the fact that law in Sri Lanka does not require compliance with international standards in times of armed conflict is a direct result of the use of the PTA in the war against the LTTE.

As a civil war, the war in Sri Lanka can be characterised as a non-international armed conflict (NIAC). As such, its conduct is governed by both the Common Article Three to the Geneva Conventions⁶⁷, and the Additional Protocol II to the Geneva Conventions.⁶⁸

In order to properly discuss the nature of armed conflict, it becomes necessary to properly define it. This is to say that “armed conflict” must be separated from “riots” or “internal disturbances”, which are seen as less serious.⁶⁹ It is best to look to the Geneva Conventions to better appreciate this distinction.

Two criteria are typically used to define “armed conflict.” The first is that the hostilities must reach a certain level of intensity to the point that the State is obliged to use military force as opposed to mere police forces.⁷⁰ Secondly, non-governmental groups taking part must be considered “parties to the conflict.” This means that they

⁶⁶ Asanga Welikala, “Understanding a State of Emergency: March 2018”, Centre for Policy Alternatives [2018]

⁶⁷ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12th August 1949, Art. 3

⁶⁸ Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8th June 1977

⁶⁹ International Committee of the Red Cross, “How is the Term “Armed Conflict” Defined in International Humanitarian Law?”, Opinion Paper, (2008), 3

⁷⁰ *Case IT-03-66-T, Prosecutor v. Fatmir Limaj* [2005]

are under an organised command structure and have the capability of sustaining military operations.⁷¹ Further, a more restrictive definition of NIAC can be found in Additional Protocol II to the Geneva Conventions, where “an armed conflict takes place in the territory of a High-Contracting Party between a State and a dissident armed group, or other organised group under responsible command, exercising control over territory as to enable a sustained military effort.”⁷²

Sivakumaran⁷³ notes that one of the distinguishing features between an international armed conflict (IAC) and a NIAC is who takes part in them. Non-international armed conflicts take place largely between the State and non-state armed groups.⁷⁴ Non-state armed groups are, in a sense, compelled to comply with IHL, which is drafted by the States. This means that IHL can be described as “statist”⁷⁵ in its approach, whether or not that is by design.

The question then becomes how to properly define the LTTE. This is to say that they can either be described as a “liberation movement”, which took part in terrorist activities, or as a “terrorist organisation” attempting to gain acceptance internationally as a “liberation movement” and non-State armed group (NSAG).

Saravanathan argues that the LTTE was primarily a terrorist organisation based on a list of factors including reliance on suicidal armed attacks, and armed struggle overwhelmingly based on acts of violence, devoid of mass mobilisation, political agitations, or popular participation.⁷⁶ Whilst this may be true, it would be my contention that the LTTE’s propensity towards terrorism was driven by a lack of substantive results through other avenues, and, as Christian Walter points out, a liberation movement receives more respect than a terrorist organisation.

⁷¹ D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, RCADI. Vol. 163 [1979]

⁷² Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8th June 1977, Art. 1

⁷³ Sandesh Sivakumaran, *The Law of International Armed Conflict*, (Oxford University Press, 2014) 3

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Muttukrishna Saravanathan, “Terrorism or Liberation?-Towards a Distinction: A Case Study of the Armed Struggle of the Liberation Tigers of Tamil Eelam”

All this is to say that the Sri Lankan government has used the decades-long civil war as an excuse to utilise the PTA, which is an emergency regulation for all practical purposes, primarily against its Tamil population, all while somewhat mislabelling the LTTE as a “terrorist” organisation, rather than as non-State actors embroiled in a non-international armed conflict, which would put them on equal footing with the Government and provides them more legitimacy on the international stage.

In fact, Nadarajah and Sriskandarajah⁷⁷ suggest that deploying the rhetoric of terrorism had three distinct advantages for the Sri Lankan State. These were first, the de-legitimisation of Tamil agitation for political independence, secondly, it mobilised Sinhala sympathy for the regime and its actions, and, lastly, did the same abroad.⁷⁸

However, NSAGs often represent an oppressed segment of the population. Organisations such as the LTTE do not choose conflict but see it as a last-resort response to years of oppression. As Neil DeVotta puts it, “the assertion that Sri Lanka’s ethnic conflict is merely a ‘terrorist problem’ masks successive governments’ ethnic malpractices and delinks the civil war from Tamils’ ethnic grievances.”⁷⁹

A STATE OF EMERGENCY: THE NEW NORMAL

Ideally, emergency powers should only be used in exceptional circumstances, and yet, the people of Sri Lanka have effectively been under a state of emergency since the beginning of the Civil War in 1983, so much so that it has become normalised. Indeed, “many of the widespread abuses in past emergency periods occurred in the context of a protracted war.”⁸⁰

However, with the war having come to an end in 2009, one must question why the use of emergency powers, especially the PTA, is necessary, seemingly now more

⁷⁷ Suthaharan Nadarajah & Dhananjayan Sriskandarajah, “Liberation struggle or Terrorism?-The Politics of Naming the LTTE”

⁷⁸ Ibid.

⁷⁹ Neil DeVotta, “The Liberation Tigers of Tamil Eelam and the Lost Quest for Separatism in Sri Lanka”, *Asian Survey*, Vol. 49 No. 6 [2009] 1021, 1022

⁸⁰ Asanga Welikala, “Understanding a State of Emergency: March 2018”, Centre for Policy Alternatives [2018]

than ever. Whilst the Civil War would certainly qualify for the use of emergency regulations, it is unclear that Sri Lanka's more recent use of emergency procedures would.⁸¹ Ranil Wickremesinghe, who became President in 2022, has unfortunately followed in the footsteps of his predecessors with an arbitrary use of emergency powers.

As Acting President, Wickremesinghe declared a state of emergency on the 17th July 2022⁸² in an effort to crack down on protests ahead of the Presidential election resulting from the ouster of former President Gotabhaya Rajapaksa.

Former President Gotabhaya Rajapaksa had declared several states of emergency as a result of the 2022 economic crisis. However, this is an overstep, especially because protests can be quelled by police forces. In fact, "while Sri Lanka has been facing a situation of economic crisis for months, none of the instances in which the Presidents declared a State of Emergency warranted such a declaration."⁸³ States of emergency were declared in response to food shortages⁸⁴ in August 2021, and due to scheduled protests against the President⁸⁵ in April 2022. Crucially, none of these instances rise to the level of a threat to public or national security required for a declaration of emergency.

This is just one example of the "exception becoming the norm"⁸⁶ in Sri Lanka, and despite calls from the international community, including from Amnesty

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<https://www.aljazeera.com/news/2022/7/27/sri-lankas-parliament-extends-state-of-emergency-amid-crackdown> [Accessed 29th April 2023]

⁸² "Sri Lanka: UN human rights experts condemn repeated use of emergency measures to crackdown on protests"

<https://www.ohchr.org/en/press-releases/2022/08/sri-lanka-un-human-rights-experts-condemn-repeated-use-emergency-measures#:~:text=On%2015%20July%2C%20President%20Gotabaya,against%20%E2%80%9Ctrouble%2Dmakers%E2%80%9D.> [Accessed 11th April 2024]

⁸³ "Emergency Regulations promulgated in May and July 2022", Centre for Policy Alternatives [2022] (Accessed 5th December 2023)

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Asanga Welikala, "Normalising the Exception: The State of Emergency in Peacetime", Centre for Policy Alternatives [2009]

International⁸⁷, Human Rights Watch⁸⁸, and The United Nations Office of the High Commissioner for Human Rights⁸⁹, to repeal the PTA and end the unnecessary use of emergency procedures, the Government of Sri Lanka has refused to do so, largely due to the lingering threat of LTTE terrorism.⁹⁰ Put plainly, until the last LTTE cadre is killed or captured the GoSL will continue to use the extra-ordinary powers granted to it under both the emergency procedure and the PTA.⁹¹

Welikala also notes that Sri Lanka being under a perpetual state of emergency has allowed the Government to gradually increase its powers, including the ability to arrest people for broadly-drawn speech-related offences⁹², and allowing as evidence confessions given to the police, and often obtained under torture,⁹³ all under the spectre of terrorism.⁹⁴ Indeed, Presidents of Sri Lanka “have shown a pattern of abusing emergency powers, thereby vesting more power in the already over-powerful executive.”⁹⁵ The reluctance of the judiciary to curb the Government’s emergency powers, as well as a redefining of acceptable boundaries for the use of emergency powers, has played a role in its continual use.

⁸⁷ Amnesty International, “End the use of and Repeal the Draconian PTA”
<https://www.amnesty.org/en/wp-content/uploads/2022/02/ASA3752412022ENGLISH.pdf> [2022] (Accessed 18th December 2023)

⁸⁸ Human Rights Watch, “Repeal Draconian Security Law: Failure to meet Pledges on Accountability, Counterterrorism Reforms” [29th January 2018] (Accessed 18th December 2023)

⁸⁹ The United Nations Office of the High Commissioner for Human Rights, “UN Experts call for swift suspension of the Prevention of Terrorism Act and reform of counter-terrorism law”
<https://www.ohchr.org/en/press-releases/2022/03/sri-lanka-un-experts-call-swift-suspension-prevention-terrorism-act-and> [2nd March 2022] (Accessed 18th December 2023)

⁹⁰ Asanga Welikala, “Normalising the Exception: The State of Emergency in Peacetime”, Centre for Policy Alternatives [2009]

⁹¹ Ibid.

⁹² Human Rights Watch, “In a Legal Black Hole: Sri Lanka’s Failure to Reform the Prevention of Terrorism Act” [7th February 2022] (Accessed 18th December 2023)

⁹³ Ibid.

⁹⁴ Asanga Welikala, “Normalising the Exception: The State of Emergency in Peacetime”, Centre for Policy Alternatives [2009]

⁹⁵ Emergency Regulations promulgated in May and July 2022”, Centre for Policy Alternatives [2022] (Accessed 5th December 2023)

A sense of normalcy for the Sri Lankan people with regard to emergency procedure does not negate the fact that Sri Lanka's use of it does not comply with international standards, especially when it comes to the protection of fundamental rights, to the extent that it should.

The GoSL is entitled to deal with threats in the way it deems fit, including through emergency regulations, as State sovereignty, particularly territorial sovereignty, allows a State exclusive competence over an area where coercive acts may be performed under international law.⁹⁶

Additionally, States are afforded the right to self-defence.⁹⁷ However, using LTTE terrorism as the backbone of the decision to continue invoking emergency procedure is disingenuous, given that the war has been over for more than a decade.

Sri Lanka, though, operates on a "presumption of exceptionalism"⁹⁸ rather than one of normalcy, which allows for a blatant disregard for international norms. This is to say that, if the terrorism perpetuated by the LTTE is the reason for a continuous state of emergency, there is no reason to presume the exceptional circumstances which allow for emergency regulations, as the LTTE has been militarily defeated.

In an effort to better incentivise compliance with IHL, States have been encouraged, in part, to grant immunity from prosecution for mere membership in hostilities.⁹⁹ This is to be done with "the broadest possible amnesty granted at the end of an armed conflict to those who have participated."¹⁰⁰ However, the explicit reference to "the end of the armed conflict" makes a promise of amnesty difficult to keep, especially

⁹⁶ Rafael Nieto-Navia. "State Sovereignty in Times of Terrorism" in *The Diversity of International Law* (Brill, 2009)

⁹⁷ Charter of the United Nations, Art. 2(4)

⁹⁸ Asanga Welikala, "Normalising the Exception: The State of Emergency in Peacetime", Centre for Policy Alternatives [2009]

⁹⁹ International Committee of the Red Cross, "Improving Compliance with International Humanitarian Law", Background Paper for the Informal High-Level Expert Meeting on Current Challenges in International Humanitarian Law, Program on Humanitarian Policy & Conflict Research (HPCR) at Harvard University, Cambridge, Massachusetts, 25th-27th June 2004, 4

¹⁰⁰ International Committee of the Red Cross, "Improving Compliance with International Humanitarian Law", Background Paper for the Informal High-Level Expert Meeting on Current Challenges in International Humanitarian Law, Program on Humanitarian Policy & Conflict Research (HPCR) at Harvard University, Cambridge, Massachusetts, United States, 25th-27th June 2004, 5

because IHL does not operate post-war, making any concessions by the State discretionary. In order to remedy this, it has been suggested that “mandatory amnesty should be granted for mere participation, except for acts which violate humanitarian law.”¹⁰¹ By declaring that emergency regulations will rule the day until the last LTTE cadre is killed¹⁰², this is what Sri Lanka is seeking to avoid.

DEROGATIONS OF POWER UNDER THE INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS (ICCPR): SRI LANKA'S SHAME

Returning to the brief mention of the ICCPR above, it is clear that, in its effort to extend states of emergency beyond their usefulness, the GoSL has ignored its principles.

In the interest of maintaining the principles of legality and rule of law, The ICCPR requires that two fundamental conditions be met before States invoke Article 4¹⁰³ and works on the assumption that States desire a return to normalcy and it allows temporary derogations from its principles in order to assist States in achieving it.

The required conditions are that the situation must amount to a public emergency which threatens the life of the nation and that the State must have officially proclaimed a state of emergency.¹⁰⁴ Most States, such as the United States¹⁰⁵, stay within this framework. Sri Lanka seems to be the exception.

¹⁰¹ Ibid.

¹⁰² Asanga Welikala, “Normalising the Exception: The State of Emergency in Peacetime”, Centre for Policy Alternatives [2009]

¹⁰³ International Covenant on Civil and Political Rights, “General Comments No. 29, States of Emergency (Article 4)”, UN Doc. CCPR/C/21/Rev. 1/Add. 11, 31st August 2001 at para 2

¹⁰⁴ Ibid.

¹⁰⁵ Zeke Miller & Amanda Sietz, “President Biden to end COVID-19 emergencies on May 11th” (23rd January 2023)

<https://apnews.com/article/biden-united-states-government-district-of-columbia-covid-public-health-2a80b547f6d55706a6986debc343b9fe> [Accessed 15th December 2023]

Importantly, “not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by the Covenant”¹⁰⁶ for the invocation of emergency procedure. The Civil War would no doubt qualify in this regard but IHL applies even in a time of armed conflict and works in conjunction with the Covenant to prevent the abuse of a State’s emergency powers.¹⁰⁷

Derogating from the commitments of the ICCPR requires exceptional circumstances, but any derogations, or relaxations of normal commitments, must also be temporary and, fundamentally, limited to the extent strictly required by the exigencies of the situation.¹⁰⁸ Sri Lanka’s recent use of emergency procedures to deal with the economic protests may have been an unnecessary use of the emergency procedure.

Even where a State’s Constitution does not define a “state of emergency”, the ICCPR requires that “no measure derogating from the Covenant may be inconsistent with the State’s other international obligations, particularly those under IHL.”¹⁰⁹

Sri Lanka has failed to live up to its obligations in this regard, especially when it comes to its use of the PTA , as some of the more problematic provisions of the *Act* involved indefinite detention¹¹⁰, forfeiture of property¹¹¹, and the arrest of any person.¹¹²

There are a number of non-derogable rights under section 4(2) of the ICCPR including the right to life¹¹³, freedom from torture¹¹⁴, and prohibition from retroactive

¹⁰⁶ International Covenant on Civil and Political Rights, “General Comments No. 29, States of Emergency (Article 4) , UN Doc. CCPR/C/21/Rev. 1/Add. 11, 31st August 2001 at para 3

¹⁰⁷ Ibid.

¹⁰⁸ International Covenant on Civil and Political Rights, “General Comments No. 29, States of Emergency (Article 4) , UN Doc. CCPR/C/21/Rev. 1/Add. 11, 31st August 2001 at para. 4

¹⁰⁹ International Covenant on Civil and Political Rights, “General Comments No. 29, States of Emergency (Article 4) , UN Doc. CCPR/C/21/Rev. 1/Add. 11, 31st August 2001 at para. 9

¹¹⁰ Prevention of Terrorism (Temporary Provisions) Act [1979], s.9

¹¹¹ Prevention of Terrorism (Temporary Provisions) Act [1979], s. 4

¹¹² Prevention of Terrorism (Temporary Provisions) Act [1979], s. 6

¹¹³International Convention on Civil and Political Rights, Article 6(1)

¹¹⁴ International Convention on Civil and Political Rights, Article 7

penal sanction¹¹⁵, which are protected even during states of emergency. These are in addition to other substantive conditions imposed by the ICCPR which Sri Lanka has avoided using the PTA . These include the principle of proportionality and the principle of non-discrimination.

Sri Lanka has continuously discriminated against its Tamil population and punished it disproportionately for things which would not normally threaten national security or be in the public interest, as required under the ICCPR, using the threat of civil war as justification. Examples of this discrimination, in addition to its use during the recent economic protests, include the use of the PTA to crack down on commemorations of “Maaveerar Naal,” a day of remembrance for fallen LTTE soldiers.¹¹⁶

The Siracusa Principles¹¹⁷, based on the ICCPR, are considered the gold-standard for best practices on restrictions of fundamental rights.¹¹⁸ The Principles set out general interpretive guidelines on limitation clauses,¹¹⁹ especially with regards to scope¹²⁰ and remedies for abusive application.¹²¹ Crucially, “national security cannot be used as a pretext to impose arbitrary limitations”¹²², and “cannot be used as a justification for measures aimed at suppressing opposition or at perpetuating repressive practises against its population.”¹²³

Forty years under the PTA has enabled Sri Lanka to stretch its use of emergency powers beyond practicality. In 2011, the Parliament of Sri Lanka allowed emergency

¹¹⁵International Convention on Civil and Political Rights, Article 15

¹¹⁶ Pitasanna Shanmugathas, “Crackdown on Tamil Commemoration: How Sri Lanka’s Use of Terrorism Law Sparks International Concern” [8TH December 2023]
[https://www.jurist.org/features/2023/12/08/crackdown-on-tamil-commemoration-how-sri-lankas-use-of-terrorism-law-sparks-international-concern/#:~:text=In%20the%20aftermath%20of%20their,of%20Terrorism%20Act%20\(PTA\).](https://www.jurist.org/features/2023/12/08/crackdown-on-tamil-commemoration-how-sri-lankas-use-of-terrorism-law-sparks-international-concern/#:~:text=In%20the%20aftermath%20of%20their,of%20Terrorism%20Act%20(PTA).) (Accessed 18th December 2023)

¹¹⁷ The Siracusa Principles on Limitations and Derogations

¹¹⁸ Asanga Welikala, “A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka” [2008] 220

¹¹⁹ Asanga Welikala, “A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka” [2008] 221

¹²⁰ The Siracusa Principles on Limitations and Derogations, Principle 2

¹²¹ The Siracusa Principles on Limitations and Derogations, Principle 8

¹²² The Siracusa Principles on Limitations and Derogations, Principle 31

¹²³ The Siracusa Principles on Limitations and Derogations, Principle 32

regulations continuously in place since roughly 1971 to expire.¹²⁴ However, detention powers as under the PTA remain in place.¹²⁵

It is clear that the GoSL has used the Civil War as an excuse to utilise emergency procedure. However, the Siracusa Principles require the maintenance of fundamental rights even in a time of armed conflict. Even more importantly, Sri Lanka has not informed other States of its desire for derogation, as required by Article 4(3) of the ICCPR,¹²⁶ nor has it informed other States of the date of the termination of the derogation.¹²⁷

This is the main point when it comes to the use of the PTA . Even when emergency powers were relaxed in 2011, the detention powers under the *Act* remained. The *Act* is a de-facto emergency regulation which has been kept alive by Sri Lanka's refusal to honour its international obligations. The *Act* is in force whether or not there is a declared emergency.¹²⁸ This means that, despite the formal withdrawal of the Emergency Proclamation by the President, he has kept the emergency legal regime going,¹²⁹ despite the fact that the Sri Lanka has been in a state of relative peace for nearly 15 years.

CONCLUSION

An entire generation of Sri Lankans have grown up in the shadow of the 26-year-long Civil War, so it makes sense that a state of emergency is considered normal. Nevertheless, the GoSL has used the Civil War, and the threat of terrorism to unnecessarily maintain a state of emergency.

¹²⁴ "Sri Lanka: 'Bait and Switch' on Emergency Law-Abusive Detention Powers Remain in Place"
<https://www.hrw.org/news/2011/09/07/sri-lanka-bait-and-switch-emergency-law> [Accessed 3rd May 2023]

¹²⁵ Ibid.

¹²⁶ International Convention on Civil and Political Rights, Article 4(3)

¹²⁷ Ibid.

¹²⁸ <https://www.justice.gov/sites/default/files/eoir/legacy/2014/03/06/LKA103837.E.pdf> [Accessed 4th May 2023]

¹²⁹ Ibid.

As the war ended in 2009, states of emergency, and, effectively, the use of the PTA is not always required. Indeed, international efforts to aid Sri Lanka in reforming the PTA , led by Ben Emmerson, the United Nations Special Rapporteur on Human Rights and Counter-Terrorism, who stated in his 2017 Statement that “progress in achieving key goals out of the Resolution, is not only slow, but seems to have ground to a virtual halt.”¹³⁰

Although Sri Lanka is party to international legal instruments, such as the ICCPR, which clearly define accepted practises necessary for the proper declaration of emergency, Sri Lanka has maintained a state of emergency through a culture of fear and distrust based on the lingering effects of the war and the spectre of LTTE terrorism.

This is possible because the Constitution of Sri Lanka, which was drafted just a year before the invasive PTA, prevails over all other laws, and, it could be argued, was written with an eye towards allowing the Government to effectively suppress disturbances which it has had throughout its recent history.

Indeed, the GoSL has taken every legal opportunity to allow itself to declare a state of emergency, from unilateral declaration and the Article 84 override provision to judicial deference and skirting its international obligations in a time of armed conflict.

Therefore, although there has been an international outcry against Sri Lanka’s use of emergency regulations, the Government cannot be compelled to comply with international humanitarian norms, so it is very likely that the people of Sri Lanka will be facing an emergency every day.

¹³⁰ Ben Emmerson, “Full Statement of Preliminary Finding on Visit to Sri Lanka

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