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**INTERNATIONAL COMMISSION OF JURISTS' (ICJ) SUBMISSION TO THE UN
HUMAN RIGHTS COMMITTEE IN ADVANCE OF THE EXAMINATION OF SRI
LANKA'S SIXTH PERIODIC REPORT UNDER ARTICLE 40 OF THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

Submitted on 30 May 2022

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

Rue des Buis 3, P.O. Box 1740, 1211 Geneva 1, Switzerland
Tel: +41(0) 22 979 3800 – Fax: +41(0) 22 979 3801
Website: <http://www.icj.org> - E-mail: info@icj.org

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Introduction

1. During its 135th session, from 27 June to 29 July 2022, the UN Human Rights Committee ('the Committee') will examine Sri Lanka's implementation of the provisions of the International Covenant on Civil and Political Rights (Covenant), including in light of the State party's sixth periodic report under article 40 of the Covenant.
2. The International Commission of Jurists (ICJ) welcomes this opportunity to submit the following observations to the Committee. In the context of this review, the organization brings to the Committee's attention a select range of areas where Sri Lanka has failed to comply with obligations to respect and ensure respect with certain provisions of the ICCPR, and their consequences for the protection of certain Covenant rights. This limited submission is without prejudice to numerous other areas where the State Party may not be in compliance with the Covenant. In particular, this submission addresses:
 - i) Constitutional and legal framework within which the Covenant is implemented (arts. 2, 9 and 14)
 - ii) Gender discrimination (arts. 2, 3, 25 and 26)
 - iii) Gender-based harassment and violence (arts. 2, 3, 6, 7, 9 and 26)
 - iv) Discrimination on the basis of sexual orientation and gender identity (arts. 2 and 26)
 - v) Accountability for serious human rights violations and the right to an effective remedy (arts. 2, 6, 7, 9, 14, 16, 18, 19, 26 and 27)
 - vi) Independence of the Judiciary, administration of justice and fair trial (arts. 2, 9 and 14)

Constitutional and legal framework within which the Covenant is implemented (arts. 2, 9 and 14)

3. It must be stated at the outset that since the State party submitted its reply to the list of issues on 06 May 2022 (CCPR/C/LKARQ/6), a change in governance leadership has taken place, with President Gotabaya Rajapaksa having appointed Ranil Wickremesinghe as a new Prime Minister on 12 May, with the support of the ruling Sri Lanka Podujana Peramuna (SLPP). The President who is the Head of State continues to hold office and wields extensive power following the passing of the 20th Amendment to the Constitution in October 2020.

4. The report by the State Party and its reply to the List of Issues indicate that several commitment and priorities announced by the previous government have been set aside. The contents of the State Party's periodic report, especially in terms of its transitional justice agenda, the constitutional amendments, the National Action Plan for the Protection and Promotion of Human Rights and specific policy decisions of the former Cabinet must be reassessed considering this changed political landscape.

5. The Sri Lankan Government has already reneged on its commitments made to the UN Human Rights Council at its 43rd session in February 2020 in relation to Human Rights Council Resolutions 30/1, 34/1 and 40/1 promoting reconciliation, accountability and human rights in Sri Lanka, including the setting up of a truth

commission, a hybrid judicial mechanism, an office for missing persons and an office for reparations. Even though the Government stated that it “remains committed to achieving the goals set by the people of Sri Lanka on accountability and human rights, towards sustainable peace and reconciliation”,¹ there has been no tangible progress since and the Government has actively undermined transitional justice efforts in the past few years.

6. The ICJ has previously expressed concern that the Government’s official refusal to implement the Human Rights Council resolutions came at a time when the human rights situation in Sri Lanka was rapidly deteriorating. The organization has noted that this official refusal threatens to undermine even the meagre progress made over the previous years, which albeit slow and wholly insufficient, has been primarily due to the continued engagement of the Council, OHCHR and international community.²

7. The 20th Amendment to the Constitution which was passed in Parliament on 22 October 2020 with a two-thirds majority repealed almost all significant changes brought about by the 19th Amendment to the Constitution. The 20th Amendment replaced the Constitutional Council with a Parliamentary Council, an entirely political body, which is required only to advise the President in relation to key appointments to independent institutions (including the Election Commission, Human Rights Commission, and the Commission to Investigate Allegations of Bribery and Corruption), the judiciary, the Attorney General and the Inspector General of Police. Moreover, several checks placed on the President’s powers by the 19th Amendment were also removed, while giving the President greater legal immunity.

8. Sri Lanka’s draconian Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (PTA) continues to be in place. The Act which on its face is non-compliant with Sri Lanka’s Covenant obligations under articles 7, 9 and 14 has been primarily used by successive governments in Sri Lanka against political opponents and members of ethnic and religious minorities.³ The continued use of the Act has created a separate class of persons languishing in detention, some for decades, without charge or trial.⁴ The most egregious provisions of the Act which are non-compliant with the Covenant relate to detention without charge for extended periods of time at irregular places of detention, the broad denial of detainees’ rights, admissibility of “confessions” in judicial proceedings, the shifting of the evidential burden of proof to the defendant, and disproportionate penalties.⁵

9. In February 2022, ahead of the 49th UN Human Rights Council session, the Government introduced certain paltry amendments to the PTA. These amendments

¹ High Level Segment Statement by Hon. Dinesh Gunawardena, Minister of Foreign Relations of Sri Lanka: 43rd Session of the UNHRC, 26.02.2020, [<https://mfa.gov.lk/43rd-session-hrc/>]

² ICJ Statement on Sri Lankan Government’s Refusal to Implement UN Resolutions, 27.02.2020, [<https://www.icj.org/sri-lanka-government-refusal-to-implement-un-resolutions-strengthens-case-for-international-justice-mechanisms/>]

³ Human Rights Watch, *In a Legal Black Hole: Sri Lanka’s failure to reform the Prevention of Terrorism Act*, 07.02.2022, [<https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act>]

⁴ *Ibid.*

⁵ ICJ (2012). *Authority without Accountability: The crisis of impunity in Sri Lanka*. pp. 46-53 [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LKA/INT_CCPR_CSS_LKA_18216_E.pdf]

do not in any way address the fundamental deficiencies of the Act,⁶ as they still allow for persons to be deprived of liberty for an entire year without being given the opportunity to be heard before a court, a violation of ICCPR article 9. Furthermore, the new amendments allow enforcement authorities to obtain an order from the High Court to keep suspects in remand custody until the end of the trial, in violation of article 14. Amendments also fail to deal with Section 16 of the PTA relating to the admissibility of “confessions”, in violation of articles 7 and 14 of the ICCPR and in direct contravention of ordinary rules of evidence as it shifts the burden of proof of coercion on to the accused. Further, the vague and overbroad definition of terrorism contained in the PTA remains in place and the lack of judicial oversight in relation to investigation and arrest of suspects continues to be unaddressed.

10. In light of the above considerations, and in view of Sri Lanka’s obligations under the Covenant, the ICJ requests the Committee to recommend that the State party:

- i. Reaffirm its commitments it had previously made under UN Human Rights Council Resolution 30/1 to strengthen independent institutions, to establish accountability mechanisms, to repeal the Prevention of Terrorism Act and to take necessary measures to fulfill its ICCPR obligations and those undertaken before the Council and international community.**
- ii. Act to repeal the 20th Amendment and ensure that any future constitutional amendment be in compliance with human rights, the rule of law and democratic principles.**
- iii. Repeal of the Prevention of Terrorism Act in full, and, in the interim, desist from applying the PTA and instead address terrorist or terrorist related offenses through ordinary criminal procedures that comply with the rule of law.**

Gender discrimination (arts. 2, 3, 25 and 26)

Gender discriminatory laws, in violation of articles 2(1), 3 and 26 of the Covenant

11. While steps were taken under the current government to repeal the gender discriminatory provisions of the Muslim Marriages and Divorce Act No. 13 of 1951,⁷ the entire Act remains on the statute books today. Some of the discriminatory provisions include not stipulating a minimum age of marriage, non- requirement of written consent from the bride for her marriage, and different conditions of divorce for men and women.⁸

⁶ Sri Lanka: UN experts call for swift suspension of Prevention of Terrorism Act and reform of counter-terrorism law, 02.03.2022, [<https://www.ohchr.org/en/press-releases/2022/03/sri-lanka-un-experts-call-swift-suspension-prevention-terrorism-act-and?fbclid=IwAR13po5n3ifGi4mrhp-8imqVnvJFcMa8nFUtffl DeVmc441p560HuAWyOU>]

⁷ The report of the Committee appointed to consider amendments to the Muslim Marriage and Divorce Act, which was appointed in 2009 was finally released by the previous Government in February 2018.

⁸ What is the Muslim Marriage and Divorce Act (MMDA) 1951?, 31.12.2021, [<https://www.mmdasrilanka.org/faqs-about-the-mmda/>]

12. Thesawalamai law is applicable to the Tamil inhabitants of the Northern Province and to lands in the same Province. Thesawalamai was made applicable to Matrimonial rights and Inheritance by the Jaffna Matrimonial Rights and Inheritance Ordinance (JMARIO) of 1911. The JMARIO discriminates against women, on its face and in practice. The law does not apply to a woman from Jaffna if she marries someone who is not from the Jaffna Province. But, at the same time it is applicable to a woman who is not originally from Jaffna if she is married to a Jaffna Tamil male. This means a woman from another ethnicity or area could become subject to the law on occasion of her marriage to a man to whom the law applies. There is no opting out provision to this law. According to Section 6 of the Ordinance, a married woman needs the written consent of her husband to transact (sell, alienate or mortgage) her immovable properties such as land, buildings and machinery attached to the land. The only recourse for women, whose husbands have unfairly withheld or are unable/unavailable to grant consent, is to obtain the same by filing a petition with the district court.⁹ The law presents an additional problem in the post-war context, where women whose husbands have been “disappeared” cannot effect transactions involving their immovable property.

Women and Political Representation (articles 2, 3, 25 and 26)

13. Sri Lanka’s female representation at all political levels remains among the lowest in the world.¹⁰ In the August 2020 parliamentary elections, there were 75 women fielded by the six main political parties. Eight of these women were elected through the preferential voting system. Four women have been added through the national list, bringing the total number of women sitting in parliament to 12 out of 225. The previous parliament from 2015-2020 had a total of 13 women, which accounted for 5.7 percent of the total number of members.

14. Under the Local Authorities (Amendment) Act of 2017, a mandatory 25 percent quota for women was introduced for local government positions. If this quota were faithfully applied, there would be at a minimum 2,000 local government positions out of a total of 8690 that are occupied by women. During the 2018 elections, at least 17,000 women ran for local government positions, and 535 of them were elected. To fulfill the quota set by the law, additional women were appointed from the ‘closed list’ under the proportional representation system. It is noteworthy that prior to this female representation at local level had never exceeded two percent. For instance, in 2011, out of the 8500 local government representatives, only 82 were women.¹¹

15. Notwithstanding the above-mentioned developments, women candidates have been subjected to discriminatory gender-based harassment and verbal attacks in the context of the last parliamentary elections. Ambika Satkunanathan, Former member of the Human Rights Commission of Sri Lanka stated that “the political culture in Sri Lanka is misogynist, and women are subject to scurrilous attacks which are aimed at demeaning them.”¹² It is noteworthy that Ambika Satkunanathan and Nalini Ratnarajah, two potential women candidates in the 2020 Parliamentary elections,

⁹ Section 8 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911

¹⁰ Monthly ranking of women in national parliaments [<https://data.ipu.org/women-ranking?month=5&year=2022>]

¹¹ *Women’s Political participation in SL*, Ceylon Today, 04 November 2019, [<https://archive.ceylontoday.lk/print-more/44246>]

¹² *The political culture in Sri Lanka is misogynistic – Ambika Satkunanathan*, Daily Mirror, 15 July 2020, [<http://www.dailymirror.lk/opinion/The-political-culture-in-Sri-Lanka-is-misogynist-Ambika-Satkunanathan/172-191898>]

were subjected to vicious commentary by mainstream and online media.¹³ Most notably, crude remarks that were sexist and defamatory in nature were made about both candidates in a satirical programme of a Tamil television channel. Similarly, Chamila Thushari, who was a candidate for the National People's Power (NPP) party, acknowledged that female candidates are heavily harassed on social media when they engage in political campaign.¹⁴ No steps were taken by the Election Commission in relation to such conduct against female candidates.

16. Within the Parliament itself, in July 2021, a government minister allegedly made a remark of a sexual nature singing a lewd song lyric directed at Opposition female MP Thalatha Athukorala. Likewise, in November 2021, government MP Tissa Kuttiarachchi allegedly made a sexist remark on Opposition female MP Rohini Kaviratne and on the leader of the Opposition Sajith Premadasa's wife.¹⁵ .

17. In light of the above, and in view of Sri Lanka's obligations under articles 2(1), 3, 25 and 26 of the Covenant, the ICJ requests the Committee to recommend to the State party that it:

- i. Build on the positive measures taken by the government with respect to the discriminatory provisions of the Muslim Marriage and Divorce Act and ensure that these discriminatory provisions are promptly amended.**
- ii. Repeal the provisions in Muslim law as well as Thesawalamai that are gender discriminatory, or revise them to bring them in line with the right to equality as enumerated in Article 12 of the Constitution and with articles 2, 3 and 26 of the Covenant.**
- iii. Take proactive measures to eradicate the obstacles women encounter when participating in public life, including through political life.**
- iv. Ensure that the Election Commission address statements published in the media that slander women and perpetuate harmful gender stereotypes and biases, while at the same time continuing to uphold media freedom in compliance with article 19 of the Covenant.**
- v. Take immediate and effective steps to achieve gender parity at all levels of public life, including in advanced decision-making positions including Ministerial portfolios.**
- vi. Ensure that Parliament, take immediate disciplinary action against Members of Parliament who undertake gender-based and discriminatory harassment of women politicians.**

Gender-based harassment and violence (arts. 2,3,6,7,9 and 26)

18. According to the Centre for Equality and Justice, "Sexual bribery is an 'improper benefit' that is sexual in nature, demanded from a person by persons in positions of

¹³ Asylum Research Centre, *Sri Lanka: Country Report*, July 2020, available at https://www.ecoi.net/en/file/local/2033016/FINAL_ARC_COI_report_on_Sri_Lanka_July_2020PDF.pdf, page 166 (Accessed 08 September 2020)

¹⁴ *No space for women to join the political conversation: NPP candidate Chamila Thushari*, Economynext, 31.07.2020 [<https://economynext.com/no-space-for-women-to-join-the-political-conversation-npp-candidate-chamila-thushari-72561/>]

¹⁵ *Women MP's of Sri Lanka parliament call for action to prevent verbal harassment from male colleagues*, ColomboPage, 23 November 2021 [http://www.colombopage.com/archive_21B/Nov23_1637608531CH.php]

power in exchange for a service.”¹⁶ Sexual bribery remains a serious problem in Sri Lankan society with female heads of households being particularly vulnerable to it when seeking the assistance of public officials in fulfilling their day-to-day needs.¹⁷ However, there continues to be a lack of awareness in relation to sexual bribery even among groups that support and work with women. While the Bribery Act No. 2 of 1965 recognizes ‘gratification’ as a form of bribery, it does not make specific reference to sexual forms of gratification. While the recognition of sexual demands as a form of gratification in the High Court case of *Republic of Sri Lanka v. Abdul Rashak Kathubdeen*¹⁸ as affirmed by the Court of Appeal¹⁹ constitutes some incremental progress, sexual bribery has still not been recognized as an offence under the Bribery Act.

19. The curfews imposed due to the COVID-19 pandemic resulted in a spike of domestic violence cases. It became evident that the existing mechanisms to safeguard victims of sexual and gender-based violence were both insufficient and ill-equipped to handle the exigencies caused by the pandemic. Victims of domestic violence could not seek the assistance of the judiciary to obtain a protection order as the courts were closed during the entirety of the extended curfew. Similarly, women who benefitted from a maintenance order in their favour could not obtain their allowances as they were required to go to court to claim them.²⁰

20. The ICJ was informed by Women in Need (a Sri Lanka based women’s organization working with domestic violence victims) that as shelter homes are available only in a limited number of districts, in many instances women subject to domestic abuse could not even access these homes due to a ban on inter-district travel imposed in the context of the measures taken to respond to the COVID-19 pandemic. Moreover, police officers continue to seek to “mediate” between victims of domestic abuse and their perpetrators, especially during lockdown, instead of finding safer alternatives for these victims of SGBV. This puts the victims at increased risk of harm including threats to their lives.²¹

21. In light of the above, and in view of Sri Lanka’s obligations under articles 2, 3, 6, 7, 9 and 26 of the Covenant, the ICJ requests the Committee to recommend to the State Party that;

- i. Sexual bribery be made a distinct offence in the Bribery Act.**
- ii. The State adopt targeted measures to protect those who have suffered or at risk of domestic violence and other gender-based violence at times of extended lockdown or curfews.**
- iii. Amend the Prevention of Domestic Violence Act (2005) to allow third parties to petition the Court as a proxy of an aggrieved person in order to obtain a protection order on their behalf.**

¹⁶ Taking zero tolerance approach to sexual bribery, Daily News, 11.08.2020, [<http://www.dailynews.lk/2020/08/11/tc/225497/taking-zero-tolerance-approach-sexual-bribery>]

¹⁷ Quid pro quo: A study of sexual bribery in Sri Lanka, Daily FT, 24.01.2020 [<http://www.ft.lk/opinion/Quid-pro-quo-A-study-of-sexual-bribery-in-Sri-Lanka/14-694260>]

¹⁸ Republic of Sri Lanka v. Abdul Rashak Kathubdeen, B839/93

¹⁹ Kathubdeen v. The Republic of Sri Lanka, (1998) 3 Sri L.R. 107

²⁰ ICJ webinar highlights difficulties in responding to gender based violence during the COVID-19 pandemic, 02.06.2020, [<https://www.icj.org/icj-webinar-highlights-difficulties-in-responding-to-gender-based-violence-during-the-covid-19-pandemic/>]

²¹ *ibid.*

- iv. Ensure that domestic violence complaints are given priority and dealt with swiftly by the Police and Courts.**
- v. Provide the Police with appropriate training to handle domestic violence cases and to desist from mediation in serious SGBV cases**

Discrimination and violence on the basis of sexual orientation and gender identity (arts. 2, 7, 26)

22. The Penal Code continues to include Sections 365 and 365 (A), which criminalize consensual same-sex acts. The Vagrants Ordinance (1842) have been used to intimidate, extort, detain and interrogate individuals whose appearance do not conform to gender norms.²² The Government has stated before numerous UN treaty bodies including the Human Rights Committee that the right to equality and non-discrimination reflected in the Constitution implicitly includes non-discrimination on the grounds of sexual orientation.²³ ICJ notes that this approach has not been reflected on the ground with arrests, torture and ill-treatment, and demand for sexual bribery being used against those in same sex relationships.²⁴

23. In 2020, a special investigation by a local newspaper found that inhumane methods, including flogging and anal/vaginal examinations, which amount to torture or other ill-treatment, were being used against LGBT people by Sri Lankan authorities to obtain “evidence” of same-sex sexual relations.²⁵ Most recently, emergency regulations promulgated on 6 May 2022 (which have since lapsed) specifically mention, among others, Sections 365 and 365(A) of the Penal Code as offences attracting higher punishment than provided for in the Penal Code when committed during a civil disturbance or racially motivated riot situation.²⁶ This is indicative of the Government’s intent to retain under domestic law the criminalization of same sex relationships.

24. In light of the above, and in view of Sri Lanka’s obligations under articles 2, 7 and 26 of the Covenant, the ICJ requests the Committee to recommend to the State party that it:

- i. Take necessary measures to decriminalize consensual same-sex acts in keeping with its national law and Covenant obligations and commitments made before this Committee.**

²² ICJ, Sri Lanka’s Vagrants Ordinance No. 4 of 1841: A Colonial Relic Long Overdue for Repeal, [<https://www.icj.org/wp-content/uploads/2022/01/Sri-Lanka-Briefing-Paper-A-Colonial-Relic-Long-Overdue-for-Repeal-2021-ENG.pdf>]

²³ Sixth periodic report submitted by Sri Lanka under article 40 of the Covenant, UN doc. CCPR/C/LKA/6, para 28. See also *Sri Lanka Government says LGBT rights are constitutionally protected*, 20.10.2014, [<https://outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>]

²⁴ Human Rights Watch, *All five fingers are not the same*, 15.08.2016, [<https://www.hrw.org/report/2016/08/16/all-five-fingers-are-not-same/discrimination-grounds-gender-identity-and-sexual>]

²⁵ *JMOs and Police conducting forced anal and vaginal examinations on LGBT people*, Daily Mirror, 30.10.2020, [<https://www.dailymirror.lk/news-features/JMOs-and-Police-conducting-forced-anal-and-vaginal-examinations-on-LGBT-people/131-198911>]

²⁶ Regulation 12 of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2022 promulgated on 6 May 2022 [http://documents.gov.lk/files/egz/2022/5/2278-23_E.pdf]

- ii. **Act to amend Article 12 of the Sri Lankan Constitution so as to explicitly include non-discrimination on the grounds of sexual orientation and gender identity among the prohibited grounds of discrimination.**
- iii. **Repeal the Vagrants Ordinance and, should it consider that any aspects of the law should be retained in revised form, replace the Ordinance with specific legislation that complies with Sri Lanka's international human rights law obligations.**

Accountability for serious human rights violations and the right to an effective remedy (arts. 2, 6, 7, 9, 14, 16, 18, 19, 26 and 27)

25. Since November 2019, Gotabaya Rajapaksa has been the President of Sri Lanka. He was the Defence Secretary from 2005 to 2015 during the presidential tenure of his brother Mahinda Rajapaksa, at the height of the last phase of the armed conflict with the Liberation Tigers of Tamil Eelam (LTTE). As Defence Secretary, Gotabaya Rajapaksa has been credibly accused of conduct amounting war crimes and crimes against humanity, including ordering the killing of surrendering LTTE fighters, ordering strikes on civilians and hospitals.²⁷ Having someone facing such serious allegations at the apex of the Government does not bode well for accountability for war crimes, crimes against humanity and grave human rights violations during and in the aftermath of the armed conflict.

26. The Presidential pardon, in April 2020, of Former Staff Sergeant Sunil Ratnayake, who was convicted and sentenced to death in 2015 for the murder of eight Tamil civilians, is indicative of the State's commitment to accountability, especially of those in the Military. The prosecution of Staff Sergeant Ratnayake had been a rare exception to the near total-impunity that has prevailed for the gross human rights violations and abuses, many amounting to crimes under international law, committed during the armed conflict. It is noteworthy that the pardon was granted even after a five-bench Supreme Court upheld the conviction of the High Court in the murder trial. It remains unclear whether the detailed process set out in the Constitution regarding the pardoning of prisoners on death row was followed in the said case. The Presidential Pardon has now been challenged in the Supreme Court on the grounds that the decision to pardon Ratnayake was arbitrary, unreasonable, *ultra vires* and had not been taken in the of the public interest.²⁸

27. Upon assuming office, President Rajapaksa appointed a three-member Presidential Commission of Inquiry to Investigate Allegations of Political Victimization during the period commencing 8 January 2015 and ending 16 November 2019 (CoI).²⁹ In January 2020, the Commission issued a directive to the Attorney General (AG) to halt investigations into the case filed against Navy Chief Wasantha

²⁷ *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka*, 31.03.2011 [<https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20Rep%20on%20Account%20in%20Sri%20Lanka.pdf>] See also *Report of the OHCHR investigation on Sri Lanka*, A/HRC/30/CRP.2, 16.09.2015 [https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.CRP.2_E.docx]

²⁸ *Fundamental rights applications challenging the decision to pardon Sunil Rathnayake*, 22.04.2020, [<https://www.cpalanka.org/fundamental-rights-applications-challenging-the-decision-to-pardon-sunil-ratnayake/>]

²⁹ Gazette Extraordinary No. 2157/44, 09.01.2020 available at http://www.documents.gov.lk/files/egz/2020/1/2157-44_E.pdf

Karannagoda in relation to the alleged abduction and enforced disappearances of eleven persons. The AG had responded saying that the CoI had no statutory or legal authority to order the AG to refrain from performing his statutory functions.

28. The Commission's final report, handed over to the President in December 2020, recommended the withdrawal of indictments filed by the Attorney-General and the discharge of several accused in cases that have been recognized as emblematic and referred to in the report of the UN High Commissioner for Human Rights and in UNHRC Resolution 46/1. It also included recommendations regarding the dropping of cases of serious financial misappropriation. Examples of emblematic cases where the COI recommends discharge of the accused include the case of alleged abductions of 11 persons by members of the Navy including Admiral Wasantha Karannagoda; unlawful killings of Tamil National Alliance MP Nadaraja Raviraj, Wasim Thajudeen, Sunday Leader Editor Lasantha Wickrematunge, Tamil National Alliance MP Joseph Pararajasingam; the alleged enforced disappearance of journalist Prageeth Ekneligoda; and the abduction of Editor Keith Noyahr.³⁰

29. In certain cases that have resulted in convictions for murder or torture, including one case affirmed on appeal to the Supreme Court, the COI has recommended that the Attorney-General review the convictions and discharge the accused. The COI also recommended the prosecution of investigators, lawyers and prosecutors in the above-mentioned cases under the Penal Code and the Bribery Act for "fabrication" of evidence and corruption.³¹ It also recommended action against current opposition politicians, including leaders of prominent Tamil and Muslim political parties.

30. On 9 April 2021 then Prime Minister Mahinda Rajapaksa, tabled a resolution in Parliament seeking the approval of Parliament to stop ongoing trials against military officials and other high-ranking officials accused of serious human rights violations, as well as family members of the President and Prime Minister facing charges of corruption. Subsequently, in almost all of these cases (including the emblematic ones) charges were withdrawn, or the accused discharged. In October 2021, the AG's Department formally withdrew the indictment against Karannagoda in the Navy Abduction case. Karannagoda was subsequently appointed Governor of the North - Western Province by the President in December 2021.

31. Senior officials of the CID, including former Director Shani Abeysekera, who were involved in the investigation of several high-profile cases, have been transferred out of the CID in the immediate aftermath of the Presidential Election.³² Abeysekera was later arrested and suffered from both COVID- 19 and a heart attack in prison. He was finally released on bail in June 2021. Inspector of Police Nishantha Silva, who had investigated several cases, including the aforementioned abduction case; the murder of journalist Lasantha Wickrematunge; and the rape and murder case of school

³⁰ *Controversy over Govt. Bill to withdraw cases against its supporters*, Sunday Times, 18.04.2021, [<https://www.sundaytimes.lk/210418/columns/controversy-over-govt-bill-to-withdraw-cases-against-its-supporters-440489.html>] See also *Full Text Of The Leaked Report: War Criminals, Murderers And Fraudsters Exonerated By Nandasena's Political Victimisation Commission*, Colombo Telegraph, 28.01.2021, [<https://www.colombotelegraph.com/index.php/full-text-of-the-leaked-report-war-criminals-murderers-and-fraudsters-exonerated-by-nandasenas-political-victimisation-commission/>]

³¹ ICJ. 2021. Sri Lanka: Parliament should reject resolution undermining accountability and judicial independence [<https://www.icj.org/sri-lanka-parliament-should-reject-resolution-undermining-accountability-and-judicial-independence/>]

³² *Shani Abeysekera transferred to Galle*, Lanka News Web, 21.11.2019, [<https://www.lankanewsweb.net/67-general-news/52201-Shani-Abeysekera-transferred-to-Galle>]

student Vidya Sivaloganathan, fled the country in the immediate aftermath of the Presidential elections due to death threats against him.³³ It is evident that the independence of the CID, which is crucial for the judicial process, has been significantly tampered through sudden and unwarranted transfers and the increasing exertion of political pressure.

32. In January 2020, President Gotabaya Rajapaksa appointed Court of Appeal Judge Dileep Nawaz as the President of the Court of Appeal. It is noteworthy that Justice Nawaz is the first sitting judge to have been charged with corruption by the Commission to Investigate Allegations of Bribery or Corruption³⁴ and that the Parliamentary Select Committee on Legal Affairs had begun an investigation on Justice Nawaz's conduct as a judge. However, before the Committee could finalize its report, there was a change in Government following the Presidential election in November 2019. Subsequently Justice Nawaz was elevated to the Supreme Court in December 2020.

33. On 21 January 2021, Sri Lankan President Gotabaya Rajapaksa appointed a three-member Commission of Inquiry (CoI), headed by Justice Nawaz to assess the findings and recommendations of preceding COIs and Committees on human rights violations, serious violations of international humanitarian law and other such serious offences. The Commission is tasked with the responsibility of identifying the "manner in which the recommendations have been implemented so far in terms of the existing law and what steps need to be taken to implement those recommendations further in line with the present Government policy."

34. COIs and similar bodies established by successive Sri Lankan governments have been ineffective and deeply deficient in terms of their mandate, functions, and independence. As the ICJ has previously documented,³⁵ such mechanisms have largely been partisan mechanisms for punishing political opponents or for shielding perpetrators and institutions from responsibility.

35. President Gotabaya Rajapaksa has appointed numerous military personnel to civil positions in the Government, including to the several Presidential Task Forces that he set up. The "Presidential Task Force to build a Secure Country, Disciplined, Virtuous and Lawful Society", whose membership is made up entirely by military and police personnel, includes officials credibly accused of war crimes, crimes against humanity and the most serious human rights violations. Most notably, Chairman Major General Kamal Gunaratne (also the current Defence Secretary), who was the commander of the 53rd division, and Major General Shavendra Silva (also the current Commander-in-Chief of the Army), who was the commander of the 58th Division of the Sri Lankan Army. Both units have identified by multiple UN investigatory bodies as having been

³³Top detective who investigated high profile cases flees Sri Lanka, Aljazeera, 26.11.2019, [<https://www.aljazeera.com/news/2019/11/top-detective-investigated-high-profile-cases-flees-sri-lanka-191126115850448.html>]

³⁴A case has been filed against the Former Chief Justice Mr. Mohan Peiris, PC and two other Higher Rank Officials, Commission to Investigate Allegations of Bribery and Corruption, [<https://www.ciaboc.gov.lk/media-centre/latest-news/588-a-case-has-been-filed-against-the-former-chief-justice-mr-mohan-maitree-peiris-pc-and-two-other-higher-rank-officials>]

³⁵ Kishali Pinto Jayawardena, *Post War Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry*, International Commission of Jurists, 2010. [https://www.icj.org/wp-content/uploads/2010/01/srilanka_impunity_18_01_20102.pdf]

involved in the commission of serious crimes and human rights violations during the last stages of Sri Lanka's decades-long armed conflict which ended in 2009.³⁶

36. In September 2021, State Minister of prison management and prisoners' rehabilitation Lohan Ratwatte was accused of entering a prison in Anuradhapura and threatening to kill Tamil prisoners. Tamil politicians stated that Ratwatte got two of the prisoners to kneel in front of him and pointed his personal firearm at them and threatened to kill them on the spot.³⁷ Ratwatte thereafter resigned his post of State Minister of Prisons Management at the request of the President.³⁸ However, he continued to hold other ministerial portfolios till April 2022. Eight prisoners filed a fundamental rights application with the Supreme Court challenging their treatment by the State Minister.³⁹ This case is still ongoing.

37. President Gotabaya Rajapakse came to power with the promise of 'One Country One Law,' whereby the entire country would be governed by a general set of laws instead of the current system of personal laws, which apply separately to Muslims (Muslim Law), the Northern Tamils (Thesawalamai) and the Kandyan Sinhalese (Kandyan Law). On 26 October 2021, the President appointed a 'One Country One Law' Task Force to study the implementation of the concept and prepare a draft Act for this purpose. The President appointed Buddhist monk Gnanasara Thero as the Chairperson of this task force. Gnanasara has been accused of playing a key role in instigating the Aluthgama riots in 2014⁴⁰ against the Muslims and has continued to employ hate speech to instigate violence against the Muslim, Christian and Hindu communities. He had been sentenced to imprisonment for six years by the Court of Appeal on 8 August 2018 for four contempt of court charges for berating the judge who found him guilty of accosting the wife of disappeared journalist Prageeth Ekneliyagoda. Gnanasara received a pardon from former President Maithripala Sirisena in May 2019. A coalition of 24 Muslim organizations issued a joint statement condemning the appointment of Gnanasara Thero as Chairperson.⁴¹ Catholic bishops have also expressed their disappointment with the 'One Country, One Law' concept, and have called for the drafting of a new, inclusive Constitution to ensure that all minority communities be treated as equal before the law.⁴² ICJ considers that the work of such a biased Task Force risks impairing the enjoyment of religious rights protected under article 18 and article 27 of the Covenant.

38. Emergency Regulations and the Prevention of Terrorism Act have been used to arbitrarily arrest and detain hundreds of Muslims following the April 2019 Easter

³⁶Report of the OHCHR Investigation on Sri Lanka, 16 September 2015, A/HRC/20/CRP.2, available at <https://www.refworld.org/pdfid/55ffb1d04.pdf>, para 116

³⁷ <https://twitter.com/GGPonnambalam/status/1437795560023547916>

³⁸ *Sri Lankan prison minister resigns after alleged inmate threats*, Al Jazeera, 15.09.2021, [<https://www.aljazeera.com/news/2021/9/15/sri-lankan-prison-minister-resigns-over-prisoner-threats>]

³⁹ *SC grants leave to proceed with FR petition for allegedly being threatened by State Minister Lohan Ratwatte*, The Island, 22.10.2021, [<https://island.lk/sc-grants-leave-to-proceed-with-fr-petition-for-allegedly-being-threatened-by-state-minister-lohan-ratwatte/>]

⁴⁰ LST (2014), *Where have all the neighbours gone? : Aluthgama riots and its aftermath*, [<https://www.lstlanka.org/publications/reports/where-have-all-the-neighbours-gone-aluthgama-riots-and-its-aftermath>]

⁴¹ *Sri Lankan Church opposes government's 'one country, one law' plan*, Vatican News, 04.11. 2021 [<https://www.vaticannews.va/en/church/news/2021-11/sri-lanka-bishops-oppose-government-one-law-one-law-plan.html>]

⁴² *ibid.*

bombings contravening the protections provide by article 9 of the Covenant. Many of their cases are still ongoing. Refugees and asylum-seekers from Pakistan, Afghanistan, and Iran were also physically attacked by mobs while there was a rise in social media posts advocating violence against Muslims.⁴³ ICJ notes that authorities have failed to undertake prompt, effective and thorough investigation and bring the perpetrators of these incidents before justice as required under article 2(3) of the Covenant.

39. In April 2021, the Government promulgated anti-terror regulations which arbitrarily outlawed 11 Muslim organizations and those who associate with them as well as other organizations which were to be identified later.⁴⁴ The arbitrary arrest and detention of lawyer Hejaaz Hizbullah, poet Ahnaf Jazeem and activist Ramzy Razeek during the pandemic period show the targeting of minority communities through the use of legislation and a pattern of discrimination, intimidation and harassment of vocal members of the Muslim community.⁴⁵ While all three of them have since been released on bail, the cases against them are still ongoing. The use of hate speech provisions in Sri Lanka's ICCPR Act in these cases, while ignoring real instances of hate speech made by extremist Buddhist forces like the Bodu Bala Sena led by Gnanasara Thero suggests arbitrary and discriminatory application of the law.

40. In light of the above, and in view of Sri Lanka's obligations under articles 2, 6, 7, 9, 14, 16, 18, 19, 26 and 27 of the Covenant, the ICJ requests the Committee to recommend to the State Party that it:

- i. Act immediately, in line with the recommendations of the Report of the OHCHR investigation on Sri Lanka and the UN Secretary General's Panel of Expert Report on Accountability in Sri Lanka to ensure that there be thorough, fully independent and impartial investigations of all persons alleged to have engaged in human rights violations amounting to crimes under international law, both in the context of the internal armed conflict and afterwards; and that those determined to be responsible be brought to justice in fair trials.**
- ii. Agree to an independent international involvement in these criminal processes, through the establishment of an international criminal tribunal or a referral to the International Criminal Court.**
- iii. Vet military personnel credibly accused of gross human rights violations and crimes under international law and ensure that they are no longer permitted to serve in military or security positions, pending the outcome of an effective investigation and, where warranted, prosecution.**
- iv. Strictly circumscribe the role of the military in public life in matters pertaining to civil administration, which should be executed by**

⁴³ *Sri Lanka: Refugees Threatened, Attacked*, Human Rights Watch, 29.04.2019, [<https://www.hrw.org/news/2019/04/29/sri-lanka-refugees-threatened-attacked#:~:text=Since%20the%20April%2021%2C%202019,primarily%20Muslim%20South%20Asian%20migrants>]

⁴⁴ ICJ. 2021. Sri Lanka: New anti-terror regulations aimed at organizations further undermine the rule of law. [<https://www.icj.org/sri-lanka-new-anti-terror-regulations-aimed-at-organizations-further-undermine-the-rule-of-law/>]

⁴⁵ From burning houses to burning bodies: Anti-Muslim violence, discrimination, and harassment in Sri Lanka. Amnesty International. 2021. ASA 37/4863/2021. Pp. 71-75. Available at <https://www.amnesty.org/en/documents/asa37/4863/2021/en/>

civilian civil servants in compliance with the rule of law and principles of democratic governance.

v. Act to ensure that *ad hoc* bodies instituted by the President should not replace, supersede, or be allowed to interfere with the functioning of the ordinary judiciary.

vi. Ensure that victims of Covenant violations have access to effective remedies and reparation.

Independence of the judiciary, administration of justice and fair trial (arts. 2, 9 and 14)

41. The independence of the judiciary has been compromised under the current administration. The President's power to appoint and remove superior court judges had been marginally curbed by the 19th Amendment to the Constitution. The Constitutional Council was introduced as a check on the President's power to appoint superior court judges. However, the 20th Amendment to the Constitution removed these checks placed on the President.

42. Through this Amendment, the President has unfettered discretion to appoint the superior judiciary, including the Chief Justice, the President and Judges of the Court of the Appeal and those members of the Judicial Service Commission (JSC). The JSC is the body entrusted with the power to appoint, promote, transfer, exercise disciplinary control and dismiss judicial officers of the subordinate courts. This inevitably results in the significant erosion of the independence and impartiality of the Sri Lankan judiciary and its capacity to serve its role in protecting all Covenant Rights, pursuant to article 2, as well as its particular function in supervising deprivation of liberty (article 9) and the right to a fair trial by a competent, independent and impartial tribunal established by law (article 14).

43. In light of the above, and in view of Sri Lanka's obligations under articles 2, 9 and 14, the ICJ requests the Committee to recommend to the State party that it:

i. Act to repeal the provisions in the Constitution allowing the President unfettered discretion in the appointment of superior court judges and curtail executive and legislative interference in appointments and removals to the judiciary.

ii. Call on the judiciary to develop and implement a code of conduct for all judges, to be administered only by the judiciary.