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**INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION TO THE
UNIVERSAL PERIODIC REVIEW OF
SRI LANKA**

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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, in consultative status with the Economic and Social Council since 1957, and active on the 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.

ICJ submission to the Universal Periodic Review of Sri Lanka

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ICJ submission to the Universal Periodic Review of Sri Lanka

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Human Rights Council's Universal Periodic Review (UPR) of Sri Lanka. In this submission, the ICJ brings to the attention of the Human Rights Council's Working Group on the UPR (Working Group) and to the Human Rights Council (Council) the need to address the ongoing and systemic impunity for serious human rights violations in Sri Lanka. This UPR submission will focus on six issues: (1) the failure of the LLRC and previous national commissions of inquiry to hold accountable those responsible for serious human rights violations; (2) the systemic barriers affecting the efficacy of the *habeas corpus* writ as legal remedy for arbitrary detention and enforced disappearance; (3) the ongoing detention of Sri Lankans in "rehabilitation camps" and the lack of any independent monitoring mechanism; (4) Sri Lanka's failure to implement witness protection measures as recommended in its previous UPR; (5) Sri Lanka's failure to properly incorporate the Convention Against Torture into domestic law as recommended in its previous UPR and in the Concluding Observations of the Committee Against Torture (UNCAT); and (6) international human rights mechanisms.

ACCOUNTABILITY FOR SERIOUS HUMAN RIGHTS VIOLATIONS: COMMISSIONS OF INQUIRY AND THE LESSONS LEARNED RECONCILIATION COMMISSION

2. National commissions of inquiry (NCOIs) have generally been used as a vehicle for impunity in Sri Lanka. Of the nine NCOIs formed between 1977 and 2006, few have yielded prosecutions and even fewer have yielded convictions. In the Sansoni Commission, no State authorities were prosecuted for the deaths of the nine civilians.¹ The Kokkadicholai Commission, which investigated Sinhalese military officers for their alleged roles in the death of approximately 152 Tamil civilians in Batticaloa, recommended against civilian prosecutions. When the matter went before a military court, 17 of the 18 military officers were acquitted.² In the NCOIs on enforced disappearances between 1994 and 1998, thousands of cases were heard before the Commissions, yet a dismally low number of prosecutions were instigated based on the findings of the Commission.³

3. Commissions of Inquiries in Sri Lanka have also continually disregarded international standards. It has not been uncommon for NCOIs to be given a limited mandate with insufficient funding. It's also not uncommon for Commissioners to have glaring conflicts of interest. In the Udalagama Commission, an International Independent Group of Eminent Persons (IIGEP) established to observe the COI, resigned in protest due to: (1) the lack of political will from the Government of Sri Lanka to support the Commission's mandate to search for the truth; (2) the conflict of interest in the proceedings with officers from the Attorney General playing an influential role in the Commission; (3) the lack of victim and witness protection measures; (4) the lack of financial independence in the Commission's operation; and (5) the lack of transparency - the final recommendations were never published and the Commission wound up prematurely in 2009.

4. Systemic weaknesses in the criminal justice system, including a lack of witness protection laws, inadequate command responsibility provisions and an absence of a crime of enforced disappearances also contribute to the overall ineffectiveness of Commissions of Inquiry.⁴

5. The Lessons Learned Reconciliation Commission (LLRC) was set up to address the alleged human rights and humanitarian law violations occurring in the late stages of the war. The LLRC report contains some promising recommendations, including: (1) its acknowledgment that considerable civilian casualties had in fact occurred the last days of the war; (2) its recommendation that findings in the Udalagama Commission and previous

NCOIs be implemented; (3) its call for the Government to consider a crime of enforced disappearance; and (4) its recommendation that Police be de-linked from the Department of National Defence. Despite this, the LLRC falls short of ensuring accountability in many respects. First, it does not properly explain or apply the principle of distinction under international humanitarian law.⁵ Second, the composition of the LLRC does not reflect the ethnic or gender composition of Sri Lanka with a glaring underrepresentation of Tamils. Third, the conclusions of the LLRC are drawn from a small number of witnesses, accepting without question the testimony of many Government officials. Thousands of witnesses did not come forward due to the lack of witness protection as well as the LLRC's restricted access to the final war zone areas. Fourth, at least three members of the LLRC have serious conflicts of interest that directly comprise their ability to function with independence and impartiality.⁶ In the absence of an impartial and effective mechanism to investigate allegations, the cycle of impunity goes unbroken and perpetrators of serious human rights violations and violations of humanitarian law go unpunished.

6. The ICJ welcomes the resolution of the Human Rights Council on promoting reconciliation and accountability in Sri Lanka, in which the Government of Sri Lanka is called upon to implement the LLRC recommendations and take all necessary additional steps to fulfil its relevant legal obligations and commitment to initiate credible and independent actions to ensure justice, equity, accountability and reconciliation for all Sri Lankans.⁷ The Government should in this regard rectify the deficiencies identified in the preceding paragraph and, in particular, undertake prompt, independent and effective investigations into allegations found credible by the UN Panel of Experts on Accountability in Sri Lanka.⁸

ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS: HABEAS CORPUS

7. The first comprehensive study on the *habeas corpus* remedy in Sri Lanka was undertaken in 2011. After examining 880 judgments, the study concluded that the efficacy of the remedy is mired in dysfunction, a lack of political will, delays and Court backlogs, a disregard for witness protection and a manifest lack of sensitivity or concern for victims. The study found that it was not uncommon for the Court of Appeal to dismiss *habeas corpus* petitions on the basis of the word of counsel for the respondent (State authorities) without any other corroborating evidence. Of the 844 *habeas corpus* petitions examined, 676 cases were dismissed of which 390 were on the word of counsel for the State.⁹ Also, the discretionary language of the Appellate Court's jurisdiction in *habeas corpus* petitions has allowed the Court to dismiss applications on the grounds of late filing.¹⁰ Furthermore, the Sri Lankan courts have at times insisted that the burden of proof in *habeas corpus* applications be placed on the petitioner who must show beyond a reasonable doubt that the victim has been arrested and taken into State custody. While it is standard practice to place the burden of proof on a petitioner, the standard of proof is generally a balance of probabilities. To impose the highest standard of proof, even if applied inconsistently, on a petitioner who is challenging the State and seeking justice for a serious human rights violation is an insurmountable barrier. It denies a victim access to justice and violates the right to an effective remedy under article 2 of the ICCPR.

ABSENCE OF WITNESS AND VICTIM PROTECTION MEASURES

8. The absence of witness and victim protection measures significantly impacts victims and victims' families right to access justice and to an effective remedy. Petitioners in torture or ill-treatment cases are often forced into changing their testimony or dropping their case after being subjected to arbitrary detention, torture or ill-treatment. As noted above,

thousands of witnesses refused to appear before the LLRC out of fear of repercussions from State authorities in the absence of any witness protection mechanisms. In the first UPR of Sri Lanka conducted in June 2008, Recommendation 28 recommended that Sri Lanka adopt measures to ensure the effective implementation of legislative guarantees and programmes for the protection of witnesses and victims.¹¹ The Sri Lankan delegation voluntarily committed to introducing a Witness and Victim Protection Bill in Parliament and to implement legislation to establish the necessary witness protection mechanisms.¹² A Witness Protection Bill was tabled before Sri Lankan Parliament in June 2008. Unfortunately, Parliament was prorogued in early 2010 before it was passed and the Bill dissolved.¹³ The Minister of Justice recently promised at the 19th Session of the United Nations Human Rights Council to expedite the passing of a Witness Protection Bill.¹⁴ Unfortunately, however, there has been no public consultation on the Bill and it is not clear whether the current proposed Bill cures the many defects of the initial 2010 Bill tabled before Parliament.¹⁵

CONVENTION AGAINST TORTURE OBLIGATIONS

9. In the 2008 UPR of Sri Lanka, it was recommended that Sri Lanka ensure the full incorporation and implementation of international human rights instruments at the national level, specifically the ICCPR and the CAT.¹⁶ The Committee Against Torture (UNCAT), in its November 2011 Concluding Observations on Sri Lanka, reiterated “its view that the definition of torture in section 12 of the 1994 Convention against Torture Act... does not... reflect the internationally agreed definition set out in the Convention”.¹⁷ The UNCAT reiterated the recommendation in its previous Concluding Observations that Sri Lanka should expand the definition of torture to include all acts of torture, including those that cause severe suffering. It also noted the absence of a provision to guarantee *non-refoulement* of asylum-seekers or refugees. Sri Lanka has yet to fully incorporate these recommendations.

REHABILITATION CAMPS - NEED FOR INDEPENDENT MONITORING

10. It is estimated that 12,000 individuals were arrested and detained in the final months of the civil conflict in May 2009.¹⁸ By the end of July 2010, it was believed that 8,000 adults were still being held in at least a dozen “rehabilitation” centres on the basis of alleged links with the LTTE. Another 1,300 individuals, identified as “hard-core” LTTE members, were indicted on criminal charges and held in detention pending trial. Of those 1,300 persons, 700 were being held in a special detention centre in Omanthai.¹⁹ The detainees in the “rehabilitation camps” do not have access to a lawyer or access to their families. The detainees do not have a right of *habeas corpus* or judicial review of the legality or conditions of their detention.

11. There is no independent monitoring body that has access to the rehabilitation centres. The International Committee for the Red Cross had access to the camps to the camps until early July 2009, however they were later denied access in 2010.²⁰ The recent enactment of the 18th amendment to the Sri Lanka Constitution, which places the appointment of the Human Rights Commissioner exclusively in the hands of the Head of State, significantly compromises the independence and impartiality of the Human Rights Commission of Sri Lanka as an independent monitoring mechanism. In its 2011 Concluding Observations, UNCAT noted with concern the absence of any independent monitoring mechanism for detention facilities.²¹ In the absence of any independent monitoring mechanism, there is currently no reliable information on the number of persons still detained in “rehabilitation centres”. Nor is there any reliable or credible information on the conditions and treatment of detainees in the “rehabilitation camps.” The continued detention of persons without any

criminal charge constitutes arbitrary detention and is a clear violation of article 9 of the ICCPR.

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND MECHANISMS

12. Sri Lanka is a party to several of the core human right treaties, but it is yet to ratify the ICRPD,²² and to become a party to the ICPED, the Rome Statute, the Second OP to the ICCPR, the OP to ICESCR and the OP to CAT.²³

13. Despite Sri Lanka's commitment to "continue to work towards the submission of its periodic reports to treaty bodies" when standing for election to the Human Rights Council in 2008,²⁴ Sri Lanka has failed to adhere to several reporting deadlines, namely: its fifth periodic report to the HRCtee²⁵ (due in 2007); its combined 10th and 11th periodic report, as well as its 12th and 13th reports, to the CERD²⁶ (due in 2003, 2005 and 2007); its second periodic report to the CMW²⁷ (due in 2011); and its initial report to the CRC²⁸ (due in 2008).²⁹

11. Sri Lanka has not extended a standing invitation to Special Procedures, and is yet to respond to requests for visits to Sri Lanka by eight Special Procedure mechanisms, despite several reminders in many instances.³⁰

RECOMMENDATIONS

12. The ICJ calls upon the Working Group and the Council to:

Concerning National Commissions of Inquiry

Calls upon the Sri Lankan Government:

- i). To publicly commit to the principles set out in the 2011 report of the Special Rapporteur on torture as well as the 2008 report of the Special Rapporteur on extrajudicial and summary executions prior to the establishment of any future NCOI;³¹
- ii). To implement the recommendations of the Lessons Learned Reconciliation Commission and past Commissions of Inquiry;
- iii). To hold criminally accountable all persons who were responsible for the violations of human rights law and humanitarian law amounting to crimes under international law, including in relation to the attacks on civilians, in the final stages of the civil war, including allegations found credible by the UN Panel of Experts on Accountability in Sri Lanka;
- iv). To incorporate the offence of enforced disappearance into Sri Lankan law as a specific criminal offence, clearly distinguishable from related offences such as abduction, kidnapping and be punishable by appropriately severe penalties;

Concerning the writ of Habeas Corpus

Calls upon the Sri Lankan Government:

- v). To ensure that any delay in instituting proceedings is not treated as a bar to the granting of relief;
- vi). To enact *habeas corpus* legislation clarifying the applicable standard of proof imposed on the petitioner as “a balance of probabilities”;
- vii). To ensure that where counsel for the State submits information that the victim (or petitioner) has been discharged, released, indicted or committed for rehabilitation, that such information is substantiated by material evidence placed before the court;

Concerning witness protection:

- viii). Calls upon the Sri Lankan Government to enact legislation and implement a mechanism to protect witnesses and victims;
- ix). Ensure that witness and victim protection legislation explicitly include protection and assistance to witnesses giving evidence or providing information before quasi-judicial proceedings, such as Commissions of Inquiry;

Concerning incorporation of the Convention Against Torture:

- x). Amend section 12 of the Sri Lanka Convention against Torture Act to include the term ‘suffering’ within the definition of torture;
- xi). Enact a *non-refoulement* provision within the Sri Lanka Convention against Torture Act that is in conformity with obligations under article 3 of the Convention against Torture;

Concerning Rehabilitation Camps:

- xii). Immediately provide access to a lawyer to all detained persons;
- xiii). Immediately provide all detained persons with the right to go before a Court of law to challenge the legality of their detention;
- xiv). Immediately release all persons who are being arbitrarily detained;

- xv). Provide an effective legal remedy before a Court of law to all persons who have been wrongfully or illegally detained;
- xvi). Allow detained persons regular visits with their families;
- xvii). Make public the number of persons detained in rehabilitation camps and the location of the rehabilitation camps;
- xviii). Allow international independent monitoring bodies, such as the International Committee for the Red Cross, access to the rehabilitation camps;
- xix). Comply with the Human Rights Commission of Sri Lanka Act No 21 of 1996, notifying the National Human Rights Commission of all detentions within 48 hours of the event;

Concerning international instruments and mechanisms

- xx). Become a party to the ICPED and ratify the ICRPD;
- xxi). Immediately sign, with a view to ratification, the Third Optional Protocol to the Convention on the Rights of the Child;
- xxii). Maintain the existing moratorium on executions, and take immediate steps toward abolition of the death penalty in law;
- xxiii). Provide without delay: its fifth periodic report to the HRCtee; its combined 10th and 11th, and 12th and 13th periodic reports to CERD; its second periodic report to CMW; and its initial report to CRC under the framework of OP-CRC-SC;
- xxiv). Accept at the earliest opportunity the requests to undertake official missions in Sri Lanka by the Special Rapporteur on independence of judges and lawyers, the Special Rapporteur on torture, the Independent Expert on minority issues, the Working Group on enforced or involuntary disappearances, the Special Rapporteur on human rights defenders, the Special Rapporteur on freedom of expression, the Special Rapporteur on enforced, summary or arbitrary executions, and the Special Rapporteur on freedom of association and assembly; and extend to them all reasonable cooperation and assistance to facilitate timely and effective country missions;
- xxv). Issue a standing invitation to the Special Procedures;
- xxvi). Present to the Council, as soon as possible after adoption of the outcome document for the UPR of Sri Lanka, a national plan of action for the implementation of accepted recommendations and voluntary pledges and commitments; and
- xxvii). Present to the Council, two years after adoption of the outcome document, a mid-term progress report on the status of implementation of recommendations and voluntary pledges and commitments.

ENDNOTES:

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- ¹ Kishali Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, International Commission of Jurists, January 2010, pp. 61-66.
- ² *Ibid*, pp. 97-98.
- ³ *Ibid*, pp. 99-102.
- ⁴ *Ibid*, pp 6-7.
- ⁵ Para 4.6 to 4.8 of the LLRC Report discusses the international humanitarian law principle of distinction in non-international armed conflicts, however does not explain or even set out the legal distinction between combatants and civilians in non-international armed conflict. The LLRC Report then goes on to apply the law to the facts without having properly distinguished between combatants and civilians. *Report of the Commission of Inquiry on Lessons Learnt and Reconciliation*, November 2011, pp. 38 - 40.
- ⁶ LST Review, Volume 21, Issue 284 & 285, June & July 2011, pp 14-15.
- ⁷ UN Doc A/HRC/19/L.2 (2012), para 1.
- ⁸ Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011.
- ⁹ Kishali Pinto-Jayawardena and Jayantha de Almeida Guneratne, *Habeas Corpus in Sri Lanka; Theory and Practice of the Great Writ in Extraordinary Times*, Law and Society Trust, 2011 at xxiii, accessed on 3 April 2012 at: http://www.lawandsocietytrust.org/PDF/HABEAS%20CORPUS%20IN%20SRIL%20LANKA_%20THEORY%20AND%20PRACTICE%20OF%20THE%20GREAT%20WRIT%20IN%20EXTRAORDINARY%20TIMES.pdf.
- ¹⁰ *Ibid*, pp 95-96.
- ¹¹ Recommendation by Austria.
- ¹² Universal Periodic Review: Report of the Working Group on the Universal Periodic Review of Sri Lanka, UN Doc. A/HRC/8/46, 5 June 2008, para 82(28), para 90.
- ¹³ Susan Appleyard, "Witness Assistance and Protection in Sri Lanka," *LST Review*, Vol. 21, Issue 286 & 287, August & September 2011, p 7.
- ¹⁴ "Government to enact witness protection bill" *Daily Mirror*, 5 March 2012, accessed on 3 April 2012 at: <http://www.dailymirror.lk/news/17278-govt-to-enact-witness-protection-bill.html>
- ¹⁵ Susan Appleyard, "Sri Lanka's Witness Protection Law, Recent Proposed Amendments, a Commentary and Comparative Standards" *Law and Society Trust*, Vol. 21, Issue 286 & 287, August and September 2011.
- ¹⁶ Recommendation by the Czech Republic.
- ¹⁷ Committee against Torture, Sri Lanka Concluding Observations, para 25.
- ¹⁸ ICJ Briefing Note, *Beyond Lawful Constraints: Sri Lanka's Mass Detention of LTTE Suspects*, International Commission of Jurists, September 2010, p 9.
- ¹⁹ *Ibid*, p 10.
- ²⁰ *Ibid*, p 11.
- ²¹ Consideration of reports submitted by States parties under article 19 of the Convention: Concluding Observations of the Committee against Torture, Sri Lanka, UN Doc. CAT/C/LKA/CO/3-4, 8 December 2011, para 16.
- ²² International Convention on the Rights of Persons with Disabilities, signed by Sri Lanka in 2007.
- ²³ International Convention for the Protection of All Persons from Enforced Disappearances; the Rome Statute of the International Criminal Court; the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, the Optional Protocol to the International Covenant for Economic, Social and Cultural Rights on Individual Communications; and the Optional Protocol to the Convention Against Torture on the Subcommittee on the Prevention of Torture.
- ²⁴ Voluntary pledges made by Sri Lanka in support of its candidacy to the Human Rights Council during the election of the 62nd session, 31 March 2008 (available at http://www.un.org/ga/search/view_doc.asp?symbol=A/62/778&Lang=E).
- ²⁵ Human Rights Committee.
- ²⁶ Committee on the Elimination of All Forms of Racial Discrimination.
- ²⁷ Committee on Migrant Workers.
- ²⁸ Committee on the Rights of the Child.
- ²⁹ Due under the framework of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRC-SC).
- ³⁰ The following requests and reminders are yet to be responded to by Sri Lanka: Special Rapporteur on independence of judges and lawyers (1999); Special Rapporteur on torture (2005); Independent Expert on minority issues (2007, 2009); Working Group on enforced or involuntary disappearances (2006, 2007 and 2008; reminders in 2009 and 2011); Special Rapporteur on human rights defenders (2008); Special Rapporteur on freedom of expression (2009); Special Rapporteur on enforced, summary or arbitrary executions (2009; reminder in 2010); and Special Rapporteur on freedom of association and assembly (2011).
- ³¹ UN Docs A/HRC/8/3 (2008) and A/HRC/19/61 (2012).