

Joint Stakeholders Submission for the Universal Periodic Review of Sri Lanka

Submitted by the Asian Legal Resource Centre (ALRC), the Rehabilitation and Research Centre for Torture Victims (RCT) and ACAT France

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The ALRC is a regional NGO with general consultative ECOSOC status. It was founded in 1986 by a prominent group of jurists and human rights activists in Asia, and is committed to the development of legal self-reliance and empowerment of people. It conducts research concerning human rights from the perspective of the functioning of states' institutions of the rule of law and justice delivery mechanisms, and issues reports and conducts local and international advocacy with the aim of protecting human rights and combatting impunity across Asia.

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RCT was established in 1982 and is a Danish, independent, self-governing non-profit institution, with special consultative ECOSOC status. RCT envisions 'a world free of torture' and operates globally. It investigates and documents torture on a health professional basis. In Denmark, it provides comprehensive rehabilitation to refugees who are survivors of torture. RCT's international program is carried out in cooperation with local organisations, through projects aiming at diminishing torture's after-effects and preventing future abuses, based on the exchange of experiences and expertise. RCT has contacts in a wide network of Danish and other European organisations working on health, human rights, refugees and development aid.

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ACAT France is a human rights organisation fighting against torture since 1974 by documenting this practice throughout the world, advocating for its eradication and raising awareness among the public opinion. It brings assistance to victims of torture seeking asylum in France and lodges complaints and communications before the international courts and UN mechanisms.

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1. Sri Lankan Constitution's incompatibility with the international obligations under the ICCPR and international treaties.

- 1.1 The Constitution of the Democratic Socialist Republic of Sri Lanka (Certified on 31 August, 1978) has many articles which are incompatible with the international obligations of Sri Lanka as a state party to the ICCPR and other international covenants and conventions relating to human rights.
- 1.2 Article 35 (1) of the Constitution places the executive president of Sri Lanka above the law and provides him with absolute immunity. This absolute immunity is incompatible with Sri Lanka's international obligations which places the duty of accountability on the state and therefore on the head of the state. This section reads as follows: 35 (1) *While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.* By virtue of this article as the executive president of Sri Lanka is made absolutely immune from any kind of prosecution many of the decisions of the government which may be in violation of the human rights obligations are placed outside the jurisdiction of the Sri Lankan courts and thus, no liability is attached to many of the violations of human rights by any of the state agencies such as the armed forces and the police as the decisions are made in the name of the executive president.
- 1.3 By virtue of the above mentioned article 35 (1) the separation of power principle is made legally irrelevant in Sri Lanka and the judiciary and the parliament are placed in a subordinate position to the executive. The Sri Lanka judiciary does not, since the promulgation of the 1978 Constitution enjoy the independence of the judiciary as it did under the Constitution of 1948, that is at the time when the Sri Lankan state, as an independent nation, came into existence. The loss of the independence of the judiciary affects every aspect of the implementation of human rights in Sri Lanka.
- 1.4 The Constitution of 1972 followed by that of 1978 has removed the power of judicial review from the judiciary. Under the 1948 Constitution the Sri Lankan judiciary enjoyed the power of judicial review at the onset of Sri Lanka becoming an independent nation. The absence of judicial review allows many laws which may be inconsistent with Sri Lanka's obligations under the international laws relating to human rights to remain operative in Sri Lanka.
- 1.5 There are many provisions in the Sri Lankan law, particularly in relation to emergency laws and anti-terrorism laws which have a clause stating that the provisions of such laws shall not be liable for any law suit in any court or tribunal. Such clauses are inconsistent with the principle of the independence of the judiciary and the power and the duty of the courts to safeguard human rights. By such ouster clauses the laws relating to arrest, detention and even on the holding of a post mortem which are inconsistent

with the human rights obligations of the state are kept out of the jurisdiction of the courts.

- 1.6 Under Article 168 (5) of the Constitution the past operation of any laws in force prior to the commencement of the Constitution will remain in force shall not in any manner be affected or deemed to be affected by the Constitution coming into force. By the operation of this article any laws which way be in violation of the human rights obligations of Sri Lanka will continue to be in operation irrespective of such incompatibilities.
- 1.7 Under Article 122 (b) & (c) when the president makes a written reference to the chief justice requiring the special determination by the Supreme Court as to whether the bill or any provision thereof is inconsistent with the Constitution, the Supreme Court is under obligation to make its determination within 24 hours (or such longer period not exceeding 3 days as the president may specify). Due to this clause the Sri Lanka citizens may be deprived of the right to express their views relating to important laws including amendments to the Constitution which may adversely affect the state obligations for the safeguarding of human rights. Even important constitutional amendments have been passed, for example, the 18th Amendment to the Constitution, which has drastically affected the situation of the human rights with such speed that neither the people of Sri Lanka nor the courts have had adequate time to address their minds to the adverse impact of such laws on human rights obligations.

2. The incompatibility of the behaviour of the Sri Lankan state with its international obligations to protect the rights of the citizens.

2.1 Sri Lanka has consistently refused to implement any of the recommendations made by the United Nations Human Rights Committee relating to the communications filed by Sri Lankan citizens on violations of their rights. The following is a list of cases where the HRC has made recommendations relating to violations of the ICCPR by the Sri Lankan state and which the Sri Lankan state has refused to implement:

- i) Human Rights Committee - Case of S.K.A. Sugath Nishanta Fernando -- Communication No. 1862/2009
- ii) Human Rights Committee - Case of Mr. Dalkadura Arachchige Nimal Silva Gunaratna -- Communication No. 1432/2005
- iii) Human Rights Committee - Case of Mr. Vadivel Sathasivam and Mrs. Parathesi Saraswathi -- Communication No. 1436/2005
- iv) Human Rights Committee - Case of Soratha Bandaranayake - Dismissed Judge -- Communication No. 1376/2005
- v) Human Rights Committee - Case of Dissanayake, S.B. -- Communication No. 1373/2005
- vi) Human Rights Committee - Raththinde Katupollande Gedara Dingiri Banda v Sri Lanka -- Communication NO. 1426/2005
- vii) Human Rights Committee - Lalith Rajapakse v Sri Lanka (Decision) -- Communication NO. 1250/2004

- viii) Human Rights Committee - Tony Fernando v Sri Lanka -- Communication No. 1189/2003
- ix) Human Rights Committee - Lalith Rajapakse v Sri Lanka -- Communication No. 1250/2004
- x) Human Rights Committee - Wannakuwatte Perera v Sri Lanka -- Communication No. 1091/2002
- xi) Human Rights Committee - Victor Ivan Majuwana Kankanamge v Sri Lanka -- Communication 909/2000
- xii) Human Rights Committee - Nallaratnam Singarasa v Sri Lanka -- Communication No. 1033/2001
- xiii) Human Rights Committee - S. Jegatheeswara Sarma v Sri Lanka -- Communication No. 950/ 2000

2.2 In the recent years Sri Lanka has consistently refused to make any replies to the communications received from Sri Lankan citizens and admitted by the Human Rights Committee. The excuse given by the Sri Lankan state for such non-participation is that on the basis of the judgement of the Supreme Court in the Singarasa case (S.C. SpL(LA) No. 182/99) the state will be violating the principle of the independence of the Supreme Court by participating in the proceedings relating to communications filed by Sri Lankan citizens before the Human Rights Committee under the Optional Protocol to the ICCPR.

2.3 Several of the special treaty bodies have after examining Sri Lanka's compliance with its obligations under such treaty bodies have made many recommendations to Sri Lanka for the improvement of its investigative and prosecutorial obligations against the violations of specific human rights obligations. However, none of the recommendations of such treaty bodies for investigations into violations and for prosecution of offenders and payment of compensation for victims have been complied with by the Sri Lankan state.

2.4 On the previous review of Sri Lanka under the Universal Periodic Review (UPR) there were a series of recommendations for Sri Lanka to improve the implementation of its obligations. However, Sri Lanka, which accepted the recommendations did not implement any of them. Of particular importance are the recommendations by the Human Rights Council under the UPR Review for ensuring investigations into human rights violations, prosecution of the violators and the payment of compensation to the victim. None of such recommendations have been complied with.

2.5 Under article 2 of the ICCPR Sri Lanka is under obligation to take legislative, judicial and administrative measures to ensure the enjoyment of the rights under the ICCPR by the Sri Lankan citizens. However, these provisions have not been complied with by Sri Lanka as a state party. On the legislative area Sri Lanka has failed to improve its laws to include its paramount law which is the Constitution to be consistent with its state obligations; Sri Lanka has also failed to bring about judicial remedies to be made available for implementation of its obligations and instead has

restricted even the judicial remedies which previously existed; Sri Lanka has failed to provide adequate budgetary allocations for the administration of justice relating to human rights violations, that is, it has not provided adequate funding for maintaining an adequate complaint mechanism to receive complaints on human rights violations, to allocate adequate resources for the Attorney General's Department to perform its obligation for prosecuting violations of human rights and has also failed to provide adequate funding for the judiciary to perform its functions efficiently and without undue delay. As the result of the failure to honour the obligations under article 2 of the ICCPR all the institutions of the administration of justice have lost the confidence of the people.

3. The failure to respect the obligations under Article 6 of the ICCPR

- 3.1 According to the UN Working Group on Disappearances there are 5,671 cases of disappearances referred to the committee which have not been explained by Sri Lanka as the state party.
- 3.2 Since the beginning of 2012 there are reported 35 reported cases of abductions. In several of these cases the disappeared victims are reported to have been killed. On many others their whereabouts remain unknown. In none of these cases have there been any credible investigations into the abductions or disappearances. In one of the cases the intended victim was the mayor of Kolonnawa. His brother was abducted earlier and remains missing. In the case of the attempt to abduct the mayor the people managed to capture the alleged culprits. According to published reports and the testimony of the mayor himself, two of the alleged perpetrators are captains in the Sri Lankan army. The other two are a lieutenant and a corporal. Despite of the alleged perpetrators being caught, arrested by the police and held for a few hours in detention, there is no credible investigation into the issue or a manifestation of any attempt to prosecute these persons. The alleged perpetrators were released after a few hours of detention.
- 3.3 Two of the persons who were abducted and remain missing are Lalith Kumar Weeraju and Kugan Murugan who were abducted around the first week of December, 2011. Despite of calls from local and international sources for investigations nothing credible has been done and the two men remain missing.
- 3.4 On 27 October 2011 Mohamed Niyas, a well-known astrologer was abducted by seven or eight persons carrying weapons and thereafter for several days his whereabouts were unknown. The circumstances under which his body was discovered a few weeks later reveals details of the way in which the bodies are disposed of in such a way that they would not be discovered. His wife described the manner in which his body was found thus: *According to the post mortem, he was strangled and his throat slit. He had also been pounded in the head and stabbed a number of times. He was also administered 3 injections of unknown chemicals. I am still unable to imagine how brutal that had been. The body had over 100 kgs of weight*

strapped on to it which was wrapped with barb wire. The body was then covered with polythene and secured further with chicken fencing. It also had something like an anchor attached to the body. In spite of all that it had washed ashore to Akkarai Paththu. The body was flown back home and the funeral proceedings conducted.

- 3.5 In January, 2012, Mohammad Nistar was abducted by a group who arrived in a white van from San Gartikulam at Puttalam. Sometime later his body was found with bullets wounds to the head.
- 3.6 One of the best known cases of disappearance is that of Prageeth Eknaligoda. His case was reported to all the relevant UN agencies and government authorities. However, there has not been a credible investigation into his disappearance. He has now been missing for over two years.
- 3.7 A large number of persons have disappeared from the north and the east. Some are alleged to have been missing after arrest and detention. The parents and relatives of these disappeared persons have been demanding information relating to them from the Sri Lankan government and for investigations. However, no serious investigations have been instigated.
- 3.8 In Sri Lanka forced disappearances have not been recognised as a crime. There have been many requests and recommendations for UN agencies to make forced disappearances a recognised crime in the country. However, the Sri Lankan government has so far refused to take any action in that direction. Sri Lanka has also not become a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance.
- 3.9 There have been many cases of alleged extrajudicial killings. However, despite of calls for investigations and recommendations for investigations by UN agencies there has not been credible investigations into any of these extrajudicial killings.

4. Violations of article 7 of the ICCPR -- torture and cruel and inhuman treatment

- 4.1 The Asian Human Rights Commission wrote 106 letters to the UN Rapporteur against torture cruel and inhuman treatment in 2011 alone. Similar letters were written to all Sri Lankan authorities. However, so far there has not been an investigation into any of these cases under the Convention against Torture Act (Act No. 22 of 1994).
- 4.2 In 2011 the Asian Human Rights Commission published a report summarizing 323 cases submitted to the Sri Lankan authorities since 1998 up to May of 2011. These cases manifest a pattern of the use of torture at police stations of Sri Lanka during criminal investigations as a frequent practice. The injuries suffered by many of the victims are of a serious nature. Most of these cases have not led to prosecutions against the alleged perpetrators.

- 4.3 Sri Lanka has abandoned the practice of investigation into torture by a Special Unit of Inquiry (SIU) of the Criminal Investigation Division. This happened after the SIU investigations led to the filing of about 60 cases against police officers in many police stations. This led to a protest by the police officers and thereafter serious criminal investigations into allegations of torture have been abandoned. The basic explanation is that the nature of the policing system in Sri Lanka is such that without the use of torture it is not possible to conduct criminal investigations. If torture is abandoned it is assumed that there will be a total breakdown and the law and order situation will suffer. Thus, on policy grounds investigations into torture have been abandoned. This is evident there being not a single case being prosecuted on complaints of torture since 2009.
- 4.4 In the past there was the practice of torture victims making complaints to police officers above the rank of Assistant Superintendent of Police (ASP). However, in recent years the ASPs do not show any serious interest in receiving or investigating allegations of torture. Very often the victims who attempt to make complaints have been harassed.
- 4.5 The fundamental rights jurisdiction of the Supreme Court has not proved to be an effective remedy due to many factors. As there is a practice now of informing the Attorney General of new applications under fundamental rights before the court issues notice, the Attorney General's Department informs the police officers concerned about the applications made and this in most instances leads the police officers to engage in reprisals against the complainants. Besides the Attorney General now directly or indirectly assists the alleged perpetrators of torture, thus abandoning the earlier policy of not appearing for these officers. In any case fundamental rights take a long time before disposal and during this period the police officers make use of the situation to harass the victims. The number of successful cases have become less and even where they succeed a declaration under the fundamental rights does not lead to any action against the officers who have been found to have violated rights. They remain in the police force and the adverse judgements from the courts is not a reason that deters promotions. Further, the compensation meted out by the courts in torture cases that succeed are paltry. All these factors discourage victims from pursuing their cases.
- 4.6 The Human Rights Commission of Sri Lanka (HRCSL) has not proved to be capable of being an effective agent for investigations into torture complaints.
- 4.7 The HRCSL does not also use their official capacity for education of the public and the police officers for the elimination of torture. The HRCSL lacks political determination, capacity and resources and the independence to be an effective agent against torture.

5. Violation of Article 9 of the ICCPR relating to illegal arrest and detention

- 5.1 Since the adoption of the 1978 Constitution (which was referred to above), an authoritarian system of governance was introduced and as a

result the safeguards that existed under the 1948 Constitution have been severely tampered with.

- 5.2 Under emergency regulations and anti-terrorism laws the provisions for arrest exist which make arrest without adequate inquiry to form a reasonable suspicion of an offence and arrest for purely political reasons possible; these provisions also make it possible to keep persons under detention without bail for long periods of time.
- 5.3 There is often use of the clause which states that arrest and detention under particular provisions of emergency regulations and anti-terrorism laws may not be challenged by way of any suit before any court of law and this restricts the possibility of judicial intervention for the protection of individuals.
- 5.4 In Sri Lanka the remedy of habeas corpus has proved an ineffective remedy due to many reasons such as long delays in the disposal of complaints under this provision of law, the lack of cooperation from security agencies such as the military, police and intelligence services with the courts, increasing unwillingness of the judiciary to exercise their duty to protect the liberty of the individual and other reasons. A recent study of over 800 cases of actions filed under habeas corpus applications shows the dismissal of these cases mostly for very trivial reasons.
- 5.5 The right against illegal arrest and detention is also being tampered with for the following reasons:
 - i) Torturing the arrestee before and during the process of arrest -- In almost all of the cases reported to the AHRC, the arrestees were tortured at the time of the arrest. Obscene language and threats were often used. Many of the arrestees were subjected to degrading treatment in public, such as assault by several officers despite the fact that the arrestee had not shown any objection to the arrest, or made any attempt to harm the officers involved.
 - ii) Illegal use of firearms on the arrestees before the arrest -- The AHRC has reported a series of cases over the past few years where police officers shot the arrestees before or during the arrest. Inevitably, this resulted in a number of extrajudicial killings. It was clearly reported that the arrestees who were shot at, including the now deceased, did not object to their arrests or move to intimidate the police officers.
 - iii) Failure to follow legal process relating to deaths during detentions -- There have been numerous cases over the past few years where arrestees have been extrajudicially killed while in custody of the police. In many cases, the police took the detained arrestee to an isolated location where she or he was then killed. These victims did not have access to a fair trial. The police are then known to issue a communiqué stating that the arrestee attempted to attack the officers, and that she or he was shot as a measure of self-defence on the part of the officers. It is difficult to understand how a handcuffed person could attack a police officer, but this remains the set of circumstances that is used as an explanation by the police.

- iv) Arresting innocent people without reasonable suspicion of a violation -- Sri Lanka's domestic laws allow for the arrest of suspects when there is reasonable suspicion to believe that the person in question has committed a crime. The necessity of reasonable suspicion has been repeatedly stressed by the Supreme Court in a number of rights violation applications in which innocent people were arrested without reasonable doubt.
- v) The denial of legal representation -- The AHRC has reported several cases in which detainees have not been allowed access to legal representation. Police officers, including the Officer-in-Charge (OIC) of the station have not allowed the detainee to seek legal counsel. In one case, when a lawyer visited the police station to meet with his client, he was subjected to torture by the police officers at the station. The issue was raised in the Supreme Court in 2011 and a circular was issued by the Inspector General of Police (IGP) detailing the guidelines that officers must abide by with respect to legal counsel. These guidelines have not been respected.
- vi) Illegal detention without judicial supervision -- Over the past few years, the AHRC and ALRC have reported a number of serious cases involving arbitrary, prolonged detentions. According to state officials, the majority of these detainees are being held under suspicion of involvement with terrorist organizations. However, it has often been reported to the AHRC and ALRC that these detainees were arrested in mass while protesting publicly against the government. Suspects are often arrested under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) and Emergency Regulations (ER). It is worth noting that while the Emergency Regulations lapsed in 2011, but most of the provisions that run contrary to human rights remain in force under the country's anti-terrorism law.
- vii) Detentions without Trials -- Thousands of detainees have been detained without access to legal counsel. The officers of the Terrorism Investigation Division (TID) of the Sri Lankan police have been accused for purposely delaying these cases in court.
- viii) Delays in the Attorney General's Department and the courts -- After the TID has concluded its investigations, the case files are submitted to the Attorney General's Department for further examination when indictment is being considered, or approval for release. Out of the thousands of innocent detainees who wait interminably to be released, it is only in a few hundred cases that people are allowed to go home.
- ix) Detainees prosecuted with illegally recorded confessions -- Particularly in cases under anti-terrorism laws detention on the basis of illegally statements has become frequent.
- x) Denying access to and communication with loved ones.
- xi) Failure to observe the presidential directives for informing of arrest and detention to close relatives of the victim.
- xii) Denial of medical facilities to arrested detainees.
- xiii) The failure to maintain proper medical reports of arrest and detention.

6. Violations of Article 14 of the ICCPR by way of denial of fair trial

6.1 Denial of fair trial in Sri Lanka takes place in the following ways:

- i) The absence of witness protection; despite of demands from the local population, UN agencies and international organisations to speedily enact the draft law on witness protection which has been before parliament since 2008 there is deliberate refusal to enact this legislation.
- ii) Even despite of recommendations from the United Nations Human Rights Committee on dealing with the delays in adjudication of cases there is extreme undue delays which virtually makes it impossible for many litigants to have a fair trial.
- iii) The High Courts of Sri Lanka have in most cases abandoned the practice of hearing a trial on a day-to-day basis from the beginning to the end, in which instance the trials used to finish within a week or so. However, now in most cases after recording part of the evidence of one witness the case is postponed for several months and in this manner by the end of evidence being recorded several years have passed. Often the judge who starts a trial is transferred before the end of the trial and in fact, in the same case there may be three or four trial judges hearing parts of the trial. The last judge who has to make the final judgement has not seen the demeanour of most of the witnesses and has to rely on reading the script of many hundred pages before making the judgement. There are instances of serious mistakes on errors of understanding facts due to this practice. In one torture case, that of Lalith Rajapakse at the Negombo High Court the judge stated that there was no record of injuries to the foot of the torture victim in order to corroborate the victim's statement that he was several assaulted on the foot. However, there was clear evidence by way of a medical report and detailed oral evidence by a judicial medical officer on that injury.
- iv) Fair trial is also denied due to the absence of an effective legal aid system and thus many litigants of poorer classes are denied of the possibility of having the legal services of a competent lawyer. The legal aid payments to lawyers are paltry and therefore often there is no equality of arms at trials.
- v) The practice of filling fabricated charges is very frequent. Many victims who are from poorer classes are unable to extricate themselves from such fabricated charges and therefore suffer due to unfair trials and convictions based on falsely obtained evidence. This is mostly done in order to get promotions for the officers or due to the pressure to resolve cases which are pending at police stations due to failures of investigations.
- vi) The practice of filing fabricated charges also happens due to political reasons and the Attorney General's Department being pressurized to file such charges by political authorities who initiate such cases for political reasons. The cases against General Sarath Fonseka who was the candidate for the opposition during the contest for election for the president are examples of this practice. However, there are many more cases where fabrication of charges for political reasons takes place.
- vii) Unfair trial process also takes place due to corrupt practices at the time of investigations, prosecution or adjudication.

7. Recommendations

- 7.1 That the Human Rights Council recommend to Sri Lanka to amend the Article 35 (1) of the Constitution so as to limit the immunity of the Executive President of Sri Lanka to be similar to the immunity available to a head of state that is compatible with the international law and the practices among countries that accept democracy and rule of law.
- 7.2 To institute the mechanisms for investigations, prosecution and adjudication relating to all complaints of violations of human rights and in particular violations of articles 6, 7, 9, 14 and 19 of the ICCPR.
- 7.3 To recommend to the Sri Lankan government to provide adequate funding for policing, for prosecutions under the Attorney General's Department and for the judiciary in terms of the obligations under article 2 of the ICCPR.
- 7.4 To implement all the recommendations of treaty bodies and in particular the recommendations of the Committee against Torture and become a party to the Optional Protocol to CAT.
- 7.5 Investigate into all complaints of abductions and forced disappearances and take effective action to stop all abductions and become a signatory to the International Convention for the Protection of all persons from Enforced Disappearances.
- 7.6 Remove all obstacles to the implementation of obligation as signatory to the First Optional Protocol to ICCPR.
- 7.7 To recommend that the Sri Lankan government implement the resolution No. A/HRC/19/L.2 of the Human Rights Council.