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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 FIFTH PERIODIC REPORT UNDER ARTICLE 40 OF THE  
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

Submitted on 12 September 2014

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**Introduction**

1. During its 112<sup>th</sup> session, from 7 to 31 October 2014, the Human Rights Committee ('the Committee') will examine Sri Lanka's implementation of the provisions of the International Covenant on Civil and Political Rights (ICCPR), including in light of the State Party's fifth periodic report under article 40 of the Covenant. The International Commission of Jurists (ICJ) welcomes the opportunity to submit these observations to the Committee.
2. In this brief submission, the ICJ expresses concern that the State party has violated and is continuing to violate its obligations under article 14 of the ICCPR through actions that undermine the independence and impartiality of the judiciary, and therefore impede the access of everyone to competent, independent and impartial tribunals established by law.
  - a. In particular, unfair and politicized impeachment proceedings against Chief Justice Shirani Bandaranayake, following her authoring a judgment unfavourable to the interests of certain powerful members of the executive branch of government, constituted an unjustified attack on her reputation and resulted in her removal from the judiciary. This was followed by the highly politicized appointment of Mohan Peiris as her successor.
  - b. Former Chief Justice Bandaranayake continues to face a variety of undue restrictions arising from corruption proceedings that, in the circumstances, must be presumed are being pursued for political reasons.
  - c. The treatment of Chief Justice Bandaranayake is emblematic of a broader undermining of the independence of the judiciary in Sri Lanka, and has sent a message to other judges in the country, that they may face similar treatment if they exercise their independence by ruling against the interests of the executive in particular cases.
  - d. The concerns under article 14 are deepened by a series of other incidents against judges and lawyers in the country since the last review of Sri Lanka more than a decade ago.
3. The ICJ provides copies of the following documents, together with these written submissions:
  - International Commission of Jurists, *Authority without accountability: The crisis of impunity in Sri Lanka* (November 2012).
  - Open letter concerning the removal of Chief Justice Dr Shirani Bandaranayake issued by the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists and more than 50 senior judges and eminent jurists from around the world (23 January 2013).

## ICJ's submission to the UN Human Rights Committee on Sri Lanka, September 2014

- International Bar Association Human Rights Institute, *A crisis of legitimacy: The impeachment of Chief Justice Bandaranayake and the erosion of the rule of law in Sri Lanka* (April 2013).
- International Bar Association Human Rights Institute and International Commission of Jurists, *Briefing: Attacks on judiciary and legal profession undermine the rule of law and prevent accountability within Sri Lanka* (25 February 2014).

### **ARTICLE 14: Undermining of the independence of the judiciary and interference with the role of lawyers**

4. In its Concluding Observations of 1 December 2003 on Sri Lanka's fourth periodic report,<sup>1</sup> the Committee expressed "concern that the procedure for the removal of judges of the Supreme Court and the Courts of Appeal set out in article 107 of the Constitution, read together with Standing Orders of Parliament, is incompatible with article 14 of the Covenant, in that it allows Parliament to exercise considerable control over the procedure for removal of judges." The Committee recommended that, "[t]he State party should strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct".<sup>2</sup>
5. In its fifth periodic report, submitted on 29 October 2012, Sri Lanka responded to the Committee's recommendation stating, among other things that: "It should be noted that although three decades have passed since the present Constitution came into being, no judge of the Superior Court has ever been impeached by Parliament. This fact underscores the strength of the independence of the judiciary in Sri Lanka".<sup>3</sup> The authorities also stated that, "the essence of the Sri Lankan Constitution is the checks and balances between the three organs", i.e. the legislative, executive and judicial branches of power.<sup>4</sup>
6. On 1 November 2012, only a few days after the Sri Lankan authorities submitted the fifth periodic report that is currently under consideration, a resolution was presented to the Speaker of the House, Chamal Rajapaksa (who is an older brother of President Rajapaksa) to initiate impeachment proceedings against the Chief Justice. The resolution contained 14 allegations of misconduct and non-disclosure of financial assets. All signatories to the resolution were members of the ruling United People's Freedom Alliance (UPFA).
7. The proceedings initiated against Chief Justice Bandaranayake came against the background of a conflict between the Chief Justice and the Sri Lankan authorities that had begun almost a year earlier.
  - a. In December 2011, the Supreme Court, sitting in a panel chaired by the Chief Justice, ruled that the Town and Country (Amendment) Bill could become law only after consultation of Sri Lanka's nine Provincial Councils. The executive branch abandoned the measure as a consequence.
  - b. In August 2012 the ruling UPFA introduced the Divineguma Bill, which aimed to extend central control over the provinces and expand the regulatory powers of the Minister of Economic Development (a post held by Basil Rajapaksa, a younger

<sup>1</sup> UN Human Rights Committee, Concluding Observations on Sri Lanka, UN Doc. CCPR/CO/79/LKA.

<sup>2</sup> UN Human Rights Committee, Concluding Observations on Sri Lanka, UN Doc. CCPR/CO/79/LKA, para. 16.

<sup>3</sup> UN Human Rights Committee, Fifth periodic report submitted by Sri Lanka, UN Doc. CCPR/C/LKA/5, para. 314.

<sup>4</sup> UN Human Rights Committee, Fifth periodic report submitted by Sri Lanka, UN Doc. CCPR/C/LKA/5, para. 309.

brother of the President). In response to a challenge by numerous parties to the Bill's constitutionality, the Supreme Court chaired by Chief Justice Bandaranayake ruled, in a judgment that was communicated to Parliament on 18 September 2012, that the government was required to submit the Divineguma Bill to the Provincial Councils for the expression of the latter's views, before it could be enacted into law.<sup>5</sup> According to reports received by the International Bar Association, the Divineguma Bill would have also had the effect of authorizing the transfer of 480 billion rupees into an executive-controlled fund exempt from ordinary parliamentary oversight; secrecy about some of its key features was to be enforced by fines and prison terms.<sup>6</sup>

- c. Prior to the ruling of the Supreme Court on the Divineguma Bill, the government had undertaken a number of measures that appear to have been intended to interfere with the proceedings challenging the Bill:
  - i. Just before the proceedings began, Dr Bandaranayake's husband was asked by the Bribery Commission to make a statement in connection with alleged irregularities during his chairmanship of the National Bank.
  - ii. Further, President Rajapaksa requested a meeting on 13 September with the Judicial Service Commission (JSC), a body comprised of the Chief Justice and two other Supreme Court Justices. The Judicial Service Commission refused the request and issued its first public complaint about interference ever, decrying threats and intimidation of the Commission.
- d. After the Supreme Court's ruling on the Divineguma Bill in mid-September, the Secretary of the JSC, District Court judge Manjula Tillekaratne, publicly stated that he and the Commission had been threatened and were the victims of a mud-slinging campaign. He reportedly received further anonymous threats in the days that followed, and President Rajapaksa apparently used a breakfast meeting with senior media editors to try to taint judge Tillekaratne's reputation. Judge Tillekaratne was hospitalized following an attack by four armed assailants on 7 October; the crime remains unsolved (see also para. 16, below).<sup>8</sup>
- e. After the Supreme Court's mid-September 2012 ruling, the government continued its efforts to have the Divineguma Bill enacted into law, submitting the draft legislation to the Provincial Councils. On 31 October 2012, a Supreme Court panel chaired by Chief Justice Bandaranayake ruled that the Bill could not yet become law, as it had been insufficient for the government to seek the views of the governor in the case of one state that lacked a Provincial Council.

The motion to remove the Chief Justice was initiated within Parliament the following day.

8. On 22 November 2012, the Supreme Court of Sri Lanka requested that Parliament suspend the impeachment proceedings against Chief Justice Bandaranayake until the

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<sup>5</sup> International Bar Association Human Rights Institute, *A crisis of legitimacy: the impeachment of Chief Justice Bandaranayake and the erosion of the rule of law in Sri Lanka* (April 2013), p. 20. <http://www.ibanet.org/Document/Default.aspx?DocumentUid=F4E48C69-F851-459E-8681-2E5FC50C61BC> (last accessed 11 September 2014).

<sup>6</sup> International Bar Association Human Rights Institute, *A crisis of legitimacy: the impeachment of Chief Justice Bandaranayake and the erosion of the rule of law in Sri Lanka* (April 2013), p. 20.

<sup>7</sup> International Bar Association Human Rights Institute, *A crisis of legitimacy: the impeachment of Chief Justice Bandaranayake and the erosion of the rule of law in Sri Lanka* (April 2013), p. 20-21.

<sup>8</sup> International Bar Association Human Rights Institute, *A crisis of legitimacy: the impeachment of Chief Justice Bandaranayake and the erosion of the rule of law in Sri Lanka* (April 2013), p. 21, 41.

Court could decide on the constitutionality of Parliamentary Standing Orders 78A (prescribing the procedure for removal of judges of the Supreme Court and Court of Appeal). Parliament disregarded the Supreme Court's request. The Chief Justice appeared before the Parliamentary Select Committee for the first time on 23 November 2012.

9. On 6 December 2012, Chief Justice Bandaranayake walked out of the impeachment hearing in protest over the denial of a fair hearing. The Chief Justice was reportedly not provided timely and full disclosure of the evidence in relation to the charges; was not given adequate time to respond to the charges; was denied the right of cross-examination; and was treated in a derogatory and disrespectful manner by Members of Parliament and denied the right to a public hearing. On the same day, the four opposition Members withdrew from the Parliamentary Select Committee.
10. On 7 December 2012, the seven remaining members of the Parliamentary Select Committee concluded their consideration of the first five charges, finding the Chief Justice guilty on three charges.
11. On 1 January 2013 the Supreme Court ruled that the impeachment procedure that had been followed, set out in Standing Orders 78A, was not constitutionally valid. On 7 January 2013 the Court of Appeal issued a writ quashing the findings of the Parliamentary Select Committee.
12. On 11 January 2013 the Parliament passed a motion with 155 votes (out of 225 seats) to impeach Chief Justice Bandaranayake. The Bar Association of Sri Lanka issued a statement strongly condemning the impeachment and issued several resolutions expressing concern and calling on the President to reconsider the impeachment or to enact a new procedure that guarantees the right to a fair trial.<sup>9</sup> On 13 January 2013, President Rajapaksa signed a decree removing the Chief Justice from her post.
13. In addition to contravening Sri Lankan law, as set out in the Supreme Court judgment and Court of Appeal order referred to in paragraph 11, the impeachment proceedings breached international standards on the independence of the judiciary, including the UN Basic Principles on the Independence of the Judiciary:
  - a. To guarantee independence of the judiciary, judges should be subject to suspension or removal, "only for reasons of incapacity or behaviour that renders them unfit to discharge their duties",<sup>10</sup> and such proceedings "shall be determined in accordance with established standards of judicial conduct".<sup>11</sup>
  - b. Further, any process must provide a fair hearing in accordance with international standards.<sup>12</sup> In addition to the structural deficiencies in Sri Lanka's legal regime, which both the Committee and the Sri Lanka Supreme Court have highlighted, other aspects of the proceedings against Shirani Bandaranayake have reportedly violated her right to a fair hearing. Among other things, she was reportedly: not provided timely and full disclosure of the evidence in relation to the charges; denied the right to a public hearing; not allowed to be defended by counsel of her choice; not given adequate time to respond to the charges; denied the right to

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<sup>9</sup> See International Commission of Jurists, 'Bar Association of Sri Lanka calls for a two-day strike to protest impeachment motion' (10 January 2013). <http://www.icj.org/bar-association-of-sri-lanka-calls-for-a-two-day-strike-to-protest-impeachment-motion> (last accessed 8 September 2014).

<sup>10</sup> UN Basic Principles on the Independence of the Judiciary, Article 18.

<sup>11</sup> UN Basic Principles on the Independence of the Judiciary, Article 19.

<sup>12</sup> UN Basic Principles on the Independence of the Judiciary, Articles 17 and 20. Also see Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Articles 26-31; Universal Charter of the Judge, Article 11.

cross-examination; and treated in a derogatory and disrespectful manner by Members of Parliament.

14. Since her impeachment as Chief Justice, Dr Bandaranayake has not received a salary or pension, despite her continuous service in the judiciary for a period of over sixteen years. It is suspected that her movements and communications have been monitored. Further, she remains on trial on corruption charges in what are presumed in the circumstances to be politicized proceedings. Her passport and that of her husband have been impounded. The authorities therefore are continuing to subject Dr Bandaranayake to apparent or potential violations of, at the least, Article 12 of the ICCPR (the right to freedom of movement), through the seizure of her passport and that of her husband on the basis of apparently arbitrary proceedings; Article 17 of the ICCPR (right to privacy), in relation to suspected monitoring of her movements and communications; and Article 19 of the ICCPR (right to freedom of expression), in so far the actions taken by the authorities against her appear to be based upon her expression of a judicial opinion in the course of her professional duties as Chief Justice.
15. The independence and impartiality of the judiciary was further undermined by the appointment of a replacement as Chief Justice.
  - a. The 18<sup>th</sup> amendment to the Constitution, which was passed in 2010, effectively gives the President unilateral authority to make all appointments to the Supreme Court, the Court of Appeal and the Judicial Service Commission.<sup>13</sup> The amendment abolished the Constitutional Council, which had a broader membership and whose approval for the appointment of the Chief Justice (as well as the other Supreme Court judges, Court of Appeal Presidents and judges and members of the Judicial Service Commission) had been previously required.<sup>14</sup> As has already been pointed out by the Human Rights Committee, an appropriate method of appointment that shields the judiciary from political interference by the executive and legislative branches is a constituent part of the requirement of independence.<sup>15</sup> The current procedure does not shield the judiciary from such interference in principle, and as described below the appointment of Chief Justice Bandaranayake's replacement further undermined the independence and impartiality of the judiciary in Sri Lanka.
  - b. On 15 January 2013, President Rajapaksa appointed Mohan Peiris, his former legal adviser and then-Attorney-General. Peiris had never served as a judge. The appointment of Mohan Peiris to the position of Chief Justice appears to have been based mainly on political loyalty and without due consideration of seniority, proven competence, integrity or independence as required under international standards.<sup>16</sup>
16. The politicized impeachment of Shirani Bandaranayake took place against a broader backdrop of intimidation of judges and lawyers.<sup>17</sup> A number of judges and lawyers who were openly critical of the impeachment received serious harassment and

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<sup>13</sup> Constitution, Articles 107(1) and 111D(1).

<sup>14</sup> See the 17th Amendment, L. D. - O. 47/2001, which had added Chapter VIIA to the Constitution.

<sup>15</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19. Also see, among others, Concluding Observations on the Congo, CCPR/C/79/Add.118, para. 14; Concluding Observations on Liechtenstein, CCPR/CO/81/LIE, para. 12; Concluding Observations on Tajikistan, CCPR/CO/84/TJK, para. 17; Concluding Observations on Honduras, CCPR/C/HND/CO/1, para. 16; Concluding Observations on Azerbaijan, CCPR/C/AZE/CO/3, para. 12; Concluding Observations on Kosovo (Serbia), CCPR/C/UNK/CO/1, para. 20.

<sup>16</sup> UN Basic Principles on the Independence of the Judiciary, Article 10.

<sup>17</sup> In a 24 Feb 2014 report to the UN Human Rights Council (UN Doc A/HRC/25/23), then-High Commissioner for Human Rights Navi Pillay concluded among other things that, "For the past several years, Sri Lankan courts have been compromised by politicization and interference by the executive" (para 68).

intimidation, including death threats. Impunity prevails regarding these incidents. Among the incidents were the following:

- a. The President of the Court of Appeal and another Justice received threatening phone calls on the eve before that Court heard the impeachment case.<sup>18</sup>
  - b. Four anti-impeachment lawyers received threatening letters and were defamed as terrorists in public posters across Colombo.<sup>19</sup> Another anti-impeachment lawyer was intimidated and threatened by four men carrying firearms.<sup>20</sup> Another lawyer circulating a petition against the appointment of Mohan Peiris as Chief Justice on grounds of alleged misconduct, received death threats on at least two occasions.<sup>21</sup> The Bar President, who is also an anti-impeachment lawyer, received death threats.<sup>22</sup> A human rights lawyer (and Board member of Transparency International) was intimidated by a group of individuals, and media website Lanka-e-News said that he was being targeted for assassination.<sup>23</sup> His home was attacked with grenades in 2008 and he has received several death threats.
  - c. Four men armed with a pistol and an iron bar assaulted the Secretary of the Judicial Service Commission (JSC) in his car on a public street, resulting in his hospitalization.<sup>24</sup> The attack came after the JSC refused a summons by the President for a private meeting with him days before the then-Chief Justice was to issue a judgment on the Divineguma Bill. The JSC had shortly thereafter complained of interference 'from all quarters' undermining the independence of the judiciary, and the Secretary had warned that JSC members were in danger. (See para. 7c and d, above.)
17. Interference and intimidation of lawyers by government officials, and the failure of the authorities to protect lawyers against such acts by private parties, is inconsistent with international standards including the UN Basic Principles on the Role of Lawyers,<sup>25</sup> and further deepens the concerns of authorities respect and protection of the rights of everyone to equal and effective access to justice guaranteed under article 14 of the Covenant.

## **Conclusion**

18. In summary, the ICJ is concerned at the implications of the unlawful and unfair impeachment of Chief Justice Bandaranayake, the politicized nature of the appointment of her replacement, and reported attacks and other interference with other judges and lawyers, for the independence of the judiciary and consequently for protection of the rights of everyone to access to fair hearings before independent and impartial courts guaranteed under article 14 of the Covenant.

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<sup>18</sup> Justice Sriskandarajah and Justice Anil Gooneratne. See International Bar Association Human Rights Institute and International Commission of Jurists, *Briefing: Attacks on judiciary and legal profession undermine the rule of law and prevent accountability within Sri Lanka* (25 February 2013).

<sup>19</sup> Romesh de Silva PC, Jayampathi Wickremarathna PC, JC Weliamuna and MA Sumanthiran. See International Bar Association Human Rights Institute, *A crisis of legitimacy: the impeachment of Chief Justice Bandaranayake and the erosion of the rule of law in Sri Lanka* (April 2013), p. 43.

<sup>20</sup> Gunaratne Wanninayake. See International Bar Association Human Rights Institute, *A crisis of legitimacy: the impeachment of Chief Justice Bandaranayake and the erosion of the rule of law in Sri Lanka* (April 2013), p. 42.

<sup>21</sup> Nagananda Kodituwakku. See International Bar Association Human Rights Institute, *A crisis of legitimacy: the impeachment of Chief Justice Bandaranayake and the erosion of the rule of law in Sri Lanka* (April 2013), p. 42.

<sup>22</sup> Bar President Upul Jayasuriya. See International Bar Association Human Rights Institute, *A crisis of legitimacy: the impeachment of Chief Justice Bandaranayake and the erosion of the rule of law in Sri Lanka* (April 2013), p. 42.

<sup>23</sup> JC Weliamuna. Lanka-E-News, *Weliamuna senior lawyer targeted for murder: MaRa plot leaks out* (17 January 2013). <http://www.lankaenews.com/English/news.php?id=13359>. (Last accessed 8 September 2014.)

<sup>24</sup> Judge Manjula Tillekaratne. See International Bar Association Human Rights Institute, *A crisis of legitimacy: the impeachment of Chief Justice Bandaranayake and the erosion of the rule of law in Sri Lanka* (April 2013), p. 41.

<sup>25</sup> UN Basic Principles on the Role of Lawyers, Principles 16 and 17.

19. The ICJ, like the Human Rights Committee has recommended that Sri Lanka reform its procedures for appointment and removal of judges to ensure the independence and impartiality of the judiciary. The authorities should also reverse and effectively remedy the removal and replacement of Chief Justice Bandaranayake, and ensure effective and independent investigation and remedy in relation to all other reported incidents of violence, intimidation and other interference with judges and lawyers in Sri Lanka.