



Submission to the Committee against Torture in relation to its examination of  
the Sri Lanka's Fifth State Party Report

**October 2016**

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## I. Introduction

1. In advance of the Committee against Torture's forthcoming review of Sri Lanka, it is critical that the Committee pay particular attention to the disproportionate and abhorrent affects certain of Sri Lanka's laws have on women and girls. The issues addressed herein, namely Sri Lanka's abortion law, rape law and child marriage law, represent only a small cross-section of many of the gender-specific issues in the country, but together show in general the legislative obstacles to ensuring women and girls are free from torture and cruel, inhuman or degrading treatment in Sri Lanka.

## II. Criminalization of Abortion

2. Sri Lanka's Penal Code, dating back to 1883, criminalizes abortion services. Section 303 provides that anyone voluntarily causing a pregnant woman to miscarry is subject to up to three years imprisonment and/or payment of a fine, unless it was caused in good faith to save the woman's life.<sup>1</sup> Under this law, doctors as well as women who induce their own miscarriage are subject to the same penalties.<sup>2</sup>
3. Despite being an old, antiquated and discriminatory law, section 303 is applied and enforced. The Sri Lankan government noted in its 2016 report to the Committee on the Elimination of Discrimination against Women (CEDAW Committee) that the number of abortion "offenses" processed by the police increased from 2012 (46) to 2013 (68).<sup>3</sup>
4. Where the Sri Lankan authorities have made sure to take aggressive action to enforce section 303, they have done almost nothing to ensure that when abortions are performed, they are done in a safe and medically responsible way. For instance, there are no legal or policy frameworks supported by the government that cover the provision of abortion services within the narrow limits of the law. This means that there are no regulations, provisions or guidelines specifying the facilities in which abortions are to be performed or even the qualifications of those authorized to perform abortions.<sup>4</sup>
5. These restrictions and the very real threat of prosecution deter women from seeking health care and result in substandard services without mechanisms of accountability for Sri Lanka's women.
6. Denial of access forces Sri Lankan women to resort to clandestine abortion services. A 2014 survey of women hospitalized for abortion complications showed most abortions were performed by unqualified persons (36.1% self-proclaimed abortionists; 26.2% of providers did not reveal their qualifications) for a wide range of payments in non-sterile environments (45.9% unknown place) using septic procedures (38.5% trans-vaginal insertions; 24.6% unaware of the procedure).<sup>5</sup> None took place in government hospitals or clinics run by non-governmental organizations.<sup>6</sup>
7. Abortion's prohibition, prosecution, and women's resort to unsafe services create a harrowing situation for women in Sri Lanka. Unsafe abortion contributes considerably to maternal mortality in Sri Lanka<sup>7</sup> and the Ministry of Health estimates that up to 16% of all female hospital admissions are attributed to complications of abortions.<sup>8</sup> In particular, the lack of exception for abortion services in cases of rape and incest expose

women to be constantly reminded of the violation committed against them, causing serious traumatic stress and long-lasting psychological problems.<sup>9</sup>

8. This Committee has found that conditions currently present in Sri Lanka are violations of the Convention against Torture. Specifically, this Committee has established that restrictions to abortion access, especially in cases of rape, incest, fetal unviability and where the health of the woman is at risk, can amount to cruel and inhuman treatment and violations of articles 2 and 16 of the Convention.<sup>10</sup>
9. Thus, Sri Lanka's law prohibiting abortion is too restrictive and must be addressed by the Sri Lankan government.

### Recommendations

10. With respect to laws addressing abortion services and other sexual and reproductive health and rights issues, this Committee should recommend to the Sri Lankan government to:
  - a. Repeal, without delay, Section 303 of Sri Lanka's Penal Code;
  - b. Undertake a review of other legislative and administrative laws, regulations and policies to identify and remedy legal obstructions to women's access to reproductive health care;
  - c. Provide universal access to a full range of the safest and most technologically advanced methods of contraception, ensure rights-based counseling and information on reproductive health services to all women and adolescents and guarantee access to contraceptives for victims of sexual violence;
  - d. Create and promulgate policies, regulations and frameworks governing the safe provision of abortion services, including detailing the qualifications of those authorized to perform abortions and the facilities in which the procedures are to be performed;
  - e. Develop a confidential complaints mechanism for women denied abortion services or subjected to discrimination, harassment or ill-treatment while seeking abortion, post-abortion or post-pregnancy treatment or other reproductive health services;
  - f. Investigate, prevent and punish all incidents of ill-treatment of women seeking abortion services or post-abortion care.

### **III. Antiquated and Flawed Rape Law**

11. Sri Lanka's rape law, Penal Code section 363, is a relic inherited from India's criminal code in the 1800s. As such, it is outmoded and fails to fully prohibit and criminalize a multitude of acts that constitute contemporary understandings of rape.<sup>11</sup>
12. The law narrowly defines the act of rape as "sexual intercourse" by a "man" against a "women."<sup>12</sup> While the Code notes that "penetration is sufficient to constitute the sexual intercourse," there is no further clarification for the extent of penetration required and which types of penetration may arise to "rape." Reflecting a patriarchal approach to sexual violence, this construction leaves out a wide array of conduct by a multitude of

perpetrators that amount to rape (e.g. rape of a man by a man, or of a man by a woman; rape of other parts of the body).

13. Additionally, the law puts the burden of proof on the victim who has to substantiate that she did not consent. While this requirement is common in domestic legislation, it is contrary to international standards and fully excluded in the International Criminal Court's definition of the crime (which supplants "lack of consent" with "use of force").<sup>13</sup>
14. Further, marital rape is not a crime in Sri Lanka unless a judge has ordered a spousal separation. In its last review of Sri Lanka, this Committee raised concern over this failure of the Penal Code noting that "marital rape is recognized only following a judge's legal recognition of the separation of the spouse."<sup>14</sup> However, Sri Lanka has not yet implemented this recommendation.
15. Finally, according to section 363, sexual intercourse with a girl below the age of 16, with or without consent, amounts to statutory rape.<sup>15</sup> At the time this provision was adopted (1995) pushback from religious leaders and politicians in Sri Lanka's Muslim community resulted in the community's exemption from this provision. As a result, the age for statutory rape of a Muslim girl is 12.<sup>16</sup>
16. In its state report, the Sri Lankan government justifies this provision by stating that "there are cultural sensitivities relating to the criminalization of 'marital rape' in all circumstances within Sri Lankan society."<sup>17</sup> However, this explanation ignores the fact that the prohibition against torture and cruel, inhuman or degrading treatment is absolute and limitations based on cultural practices are not permitted.<sup>18</sup>
17. This excuse further reflects the Sri Lankan government's failure to understand both the broader issues with the problematic rape law and the prevalence of sexual violence in Sri Lankan society. For instance, in 2014 Sri Lanka's Minister of Child Development and Women's Affairs proposed a new law that would force rapists to marry their victims, on the condition the victim consents in court.<sup>19</sup>
18. This Committee has routinely expressed particular concern for the absence of marital rape provisions and repeatedly found that widespread and high rates of sexual violence are violations of articles 2, 12, 13, 14 and 16 of the Convention.<sup>20</sup>
19. Accordingly, Sri Lanka's rape law is too narrow, excluding too many forms of rape in particular marital rape and with an overemphasis on consent, and must be amended to reflect the Sri Lankan government's international obligations.

### Recommendations

20. With respect to legislation on rape and sexual violence, this Committee should recommend to the Sri Lankan government to:
  - a. Criminalize all acts of rape in line with international definitions of the crime, including by adopting a gender neutral definition;
  - b. Extend criminalization of marital rape regardless of judicial acknowledgement of separation;
  - c. Criminalize rape of a child under all circumstances.

#### **IV. Inadequate Marriage Laws Allowing Child Marriage**

21. Section 15 of the Marriage Registration Ordinance provides, “no marriage contracted after the coming into force of this section shall be valid unless both parties to the marriage have completed eighteen years of age.”<sup>21</sup> However, the title of the law explicitly excludes the marriages between Muslims from this provision. That is, the minimum age to marry does not apply to marriages in Sri Lanka’s Muslim community.
22. Muslim marriages are regulated in the Muslim Marriage and Divorce Act, which does not contain an absolute minimum age for marriage. Section 23 provides that “a marriage contracted by a Muslim girl who has not attained the age of twelve years shall not be registered under this Act unless the Quazi for the area in which the girl resides has [...] authorized the registration of the marriage.”<sup>22</sup> Not only does this law explicitly permit marriage of girls as young as 12, but also shows that even younger girls can be forced to marry if authorized by the Quazi, a Muslim magistrate.
23. The Sri Lankan government’s report to the Committee on the Rights of the Child submitted in June of this year reveals that it was not ready to amend the law considering “efforts to reach a consensus with the Sri Lankan Muslim community on reforming this law has not yielded positive results as yet.”<sup>23</sup>
24. It is estimated that about 12% of Sri Lankan women who are now between 20 and 24 years of age have been married before they were 18 years old. The percentage of women who were married before they turned 15 years is about 2%. Thus, child marriage affects a considerable number of women.<sup>24</sup>
25. This Committee has found child marriage amounts to torture or cruel, inhuman or degrading treatment.<sup>25</sup> Similarly, the most recent report of the Special Rapporteur on Torture plainly states that “child marriage constitutes torture or ill-treatment.”<sup>26</sup>
26. Thus, the exception for Muslim communities in Sri Lanka’s Marriage Registration Ordinance, which *de facto* results in marriage of girls under the age of 18, is impermissible under the Convention.

#### Recommendations

27. With respect to issues and legislation relating to child marriage, this Committee should recommend to the Sri Lankan government to:
  - a. Prohibit marriage of children under 18 years of age in all circumstances.

## V. The Organizations Submitting this Report

Created in 2005, the **Global Justice Center** (GJC) works to achieve sustainable justice, peace and security by building a global rule of law based on gender equality and universally enforced international human rights laws. Adhering to principles over politics, GJC fills a critical niche in the human rights field by serving as an unwavering voice calling for the enforcement of international legal obligations to uphold fundamental human rights. GJC works by combining advocacy with service, forging legal precedents in venues which have the greatest potential for global impact, such as the United Nations Security Council, while empowering strategic partners – including governments, women leaders, and civil society – with international law expertise and tools to embed human rights and gender equality. Based in New York City, GJC focuses on situations which present the greatest opportunity for systemic change, such as conflict and post-conflict situations and transitional democracies. Specifically, GJC’s legal projects challenge systemic discrimination in the enforcement of international law, while shaping international law to ensure gender equality. In doing so, GJC seeks to advance the integrity of our global legal system, forge new rights for women and girls, and have a direct positive impact on the rights and lives of persons who suffer from egregious human rights violations. GJC’s August 12<sup>th</sup> Campaign, created in 2010, challenges the denial of safe abortion services to women and girls raped in war and works to ensure that such services are provided in all humanitarian medical settings.

Created in 1986, the **World Organization against Torture** (OMCT) is today the main coalition of international non-governmental organizations (NGO) fighting against torture, summary executions, enforced disappearances and all other cruel, inhuman or degrading treatment. With 297 affiliated organizations in its SOS-Torture Network and many tens of thousands correspondents in every country, OMCT is the most important network of non-governmental organisations working for the protection and the promotion of human rights in the world. Based in Geneva, OMCT’s International Secretariat provides personalised medical, legal and/or social assistance to hundreds of torture victims and ensures the daily dissemination of urgent appeals across the world, in order to protect individuals and to fight against impunity. Specific programs allow it to provide support to specific categories of vulnerable people, such as women, children and human rights defenders. In the framework of its activities, OMCT also submits individual communications and alternative reports to the special mechanisms of the United Nations, and actively collaborates in the development of international norms for the protection of human rights. OMCT has previously drawn attention to the US’ problematic foreign aid restriction through a letter to President Obama.

## VI. Endnotes

<sup>1</sup> SRI LANKAN PENAL CODE § 303.

<sup>2</sup> SRI LANKAN PENAL CODE § 303.

<sup>3</sup> Eighth Periodic report of the Government of Sri Lanka to the Committee on the Elimination of Discrimination against Women, U.N. Doc. CEDAW/C/LKA/8, p. 12, table 1, 29 May 2015.

<sup>3</sup> Eighth Periodic report of the Government of Sri Lanka to the Committee on the Elimination of Discrimination against Women, U.N. Doc. CEDAW/C/LKA/8, p. 12, table 1, 29 May 2015.

<sup>4</sup> R. Kumar, *Abortion in Sri Lanka: The Double Standard*, 103 AM. JOUR. PUBLIC HEALTH 400 (2013)

<sup>5</sup> C. Arambepola & L. Rajapaksa, *Decision making on unsafe abortion in Sri-Lanka: a case-control study*, 11 REPRODUCTIVE HEALTH 91 (2014).

<sup>6</sup> C. Arambepola & L. Rajapaksa, *Decision making on unsafe abortion in Sri-Lanka: a case-control study*, 11 REPRODUCTIVE HEALTH 91 (2014).

<sup>7</sup> C. Arambepola & L. Rajapaksa, *Decision making on unsafe abortion in Sri-Lanka: a case-control study*, 11 REPRODUCTIVE HEALTH 91 (2014).

<sup>8</sup> R. Kumar, *Abortion in Sri Lanka: The Double Standard*, 103 AM. JOUR. PUBLIC HEALTH 400 (2013).

<sup>9</sup> Concluding Observations of the Committee against Torture – Nicaragua, U.N. Doc. CAT/C/NIC/CO/1, ¶ 16, 10 June 2009; Amnesty International, *The Total Ban in Nicaragua: Women’s Lives and Health Endangered, Medical Professional Criminalized*, 2009, at 23.

<sup>10</sup> Concluding Observations of the Committee against Torture – Philippines, U.N. Doc. CAT/C/PHL/CO/3, ¶¶ 39-40, 2 June 2016; Concluding Observations of the Committee against Torture – Poland, U.N. Doc. CAT/C/POL/CO/5-6, ¶ 23, 23 December 2013; Concluding Observations of the Committee against Torture – Ireland, U.N. Doc. CAT/C/IRL/CO/1, ¶ 26, 17 June 2011; Concluding Observations of the Committee against Torture – Paraguay, U.N. Doc. CAT/C/PRY/CO/4-6, ¶ 22, 14 June 2011; Concluding Observations of the Committee against Torture – Nicaragua, U.N. Doc. CAT/C/NIC/CO/1, ¶ 16, 10 June 2009; Concluding Observations of the Committee against Torture – Peru, U.N. Doc. CAT/C/PER/CO/4, ¶ 23, 25 July 2006.

<sup>11</sup> For reference, see *Elements of Crimes of the International Criminal Court*, art. 7(1)(g)-1, 2011.

<sup>12</sup> The full rape provision reads: “A man is said to commit “rape” who has sexual intercourse with a woman under circumstances falling under any of the following descriptions: (a) without her consent even where such a woman is his wife and she is judicially separated from the man [this section is read to permit marital rape]; (b) with her consent, which she was in lawful or unlawful detention or when her consent was obtained, by use of force or intimidation, or by threat of detention or by putting her in fear of death or hurt; (c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by alcohol or drugs, administered to her by the man or by some other person; (d) with her consent when the man knows he is not her husband, and that her consent is given because she believes that he is another man to whom she is, or believed herself to be, lawfully married; (e) with or without her consent when she is under sixteen years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man; *Clarifications*: (i) penetration is sufficient to constitute the sexual intercourse necessary for the offense of rape; (ii) evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.” (SRI LANKAN PENAL CODE § 363.)

<sup>13</sup> See *Elements of Crimes of the International Criminal Court*, art. 7(1)(g)-1, 2011.

<sup>14</sup> Concluding Observations of the Committee against Torture – Sri Lanka, U.N. Doc. CAT/C/LKA/CO/3-4, ¶ 22, 8 December 2011.

<sup>15</sup> SRI LANKAN PENAL CODE § 363(e).

<sup>16</sup> Women’s Action Network, *Critical Issues and questions to be raised with the Sri Lankan government at CEDAW Constructive Dialogue (July 2016)*, Submission to the Pre-Session Working Group of the CEDAW Committee’s Evaluation of the Eighth Period Report of the Government of Sri Lanka, p. 3.

<sup>17</sup> Fifth Periodic report of the Government of Sri Lanka to the Committee against Torture, U.N. Doc. CAT/C/LKA/5, ¶ 105, 11 December 2015.

<sup>18</sup> Committee against Torture, General Comment No. 2 on the Implementation of article 2 by State parties, U.N. Doc. CAT/C/GC/2, ¶ 5, 24 January 2008; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 2.

<sup>19</sup> *New Anti-Rape Laws Proposed*, THE SUNDAY LEADER, 13 Apr. 2014, <http://www.thesundayleader.lk/2014/04/13/new-anti-rape-laws-proposed/>.

<sup>20</sup> Concluding Observations of the Committee against Torture – Bulgaria, U.N. Doc. CAT/C/BGR/CO/4-5, ¶ 25, 14 December 2011; Concluding Observations of the Committee against Torture – Mongolia, U.N. Doc. CAT/C/MNG/CO/1, ¶ 20, 20 January 2011; Concluding Observations of the Committee against Torture – Cambodia,



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U.N. Doc. CAT/C/KHM/CO/2, ¶ 21, 20 January 2011; Concluding Observations of the Committee against Torture – Ethiopia, U.N. Doc. CAT/C/ETH/CO/1, ¶ 32, 20 January 2011; Concluding Observations of the Committee against Torture – Syria, U.N. Doc. CAT/C/SYR/CO/1, ¶ 27, 25 May 2010; Concluding Observations of the Committee against Torture – Cameroon, U.N. Doc. CAT/C/CMR/CO/4, ¶ 30, 19 May 2010; Concluding Observations of the Committee against Torture – Zambia, U.N. Doc. CAT/C/ZMB/CO/2, ¶ 22, 26 May 2008; Concluding Observations of the Committee against Torture – China, U.N. Doc. CAT/C/CNA/CO/4, ¶ 27, 12 December 2008; Concluding Observations of the Committee against Torture – Latvia, U.N. Doc. CAT/C/LVA/CO/2, ¶ 20, 19 February 2008; Concluding Observations of the Committee against Torture – Benin, U.N. Doc. CAT/C/BEN/CO/2, ¶ 24, 19 February 2008; Concluding Observations of the Committee against Torture – South Korea, U.N. Doc. CAT/C/KOR/CO/2, ¶ 17, 25 July 2006.

<sup>21</sup> ORDINANCE TO CONSOLIDATE AND AMEND THE LAW RELATING TO MARRIAGES OTHER THAN THE MARRIAGES OF MUSLIMS AND TO PROVIDE FOR THE BETTER REGISTRATION THEREOF, § 15, 1 Jan. 1908 amended by act 2 and 18 of 1995.

<sup>22</sup> MUSLIM MARRIAGE AND DIVORCE ACT, § 23, 1 August 1954.

<sup>23</sup> Fifth and Sixth Combined Periodic Report of the Government of Sri Lanka to the Committee on the Rights of the Child, ¶ 148, 8 June 2016.

<sup>24</sup> UNICEF, *The State of the World's Children 2016*, p. 152.

<sup>25</sup> Concluding Observations of the Committee against Torture – Sierra Leone, U.N. Doc. CAT/C/SLE/CO/1, ¶ 16, 20 June 2014; Concluding Observations of the Committee against Torture – Yemen, U.N. Doc. CAT/C/YEM/CO/2/Rev.1, ¶ 31, 25 May 2010.

<sup>26</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on Gender Perspectives and Torture and other Cruel, Inhuman and degrading treatment, UN Doc. A/HRC/31/57, 5 January 2016, para. 63.