

PETITION TO:

UNITED NATIONS

WORKING GROUP ON ARBITRARY DETENTION

Chair-Rapporteur: Mr. José Guevara Bermúdez (Mexico)
Vice-Chair on communications: Ms. Leigh Toomey (Australia)
Vice-Chair on follow-up: Ms. Elina Steinerte (Latvia)
Mr. Seong-Phil Hong (Republic of Korea)
Mr. Sètondji Adjovi (Benin)

**HUMAN RIGHTS COUNCIL
UNITED NATIONS GENERAL ASSEMBLY**

In the Matter of
Shakthika Sathkumara,
Citizen of Sri Lanka

v.

Government of Sri Lanka

Petition for Relief Pursuant to Human Rights Council Resolutions 1991/42, 1994/32, 1997/50, 2000/36,
2003/31, 2006/102, 6/4, and 24/7

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December 9, 2019

**QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY ARREST OR
DETENTION**

I. IDENTITY

1. *Family Name:* Sathkumara (full name: Delankage Sameera Shakthika Sathkumara)
2. *First Name:* Shakthika
3. *Sex:* Male
4. *Age at the Time of Detention:* 33 (Date of Birth: [REDACTED])
5. *Nationality:* Sri Lankan
6. (a) *Identity document (if any):* Unknown
(b) *Place of Issue:* N/A
(c) *On (date):* N/A
(d) *No.:* N/A
7. *Profession and/or activity (if believed to be relevant to the arrest/detention):* Shakthika Sathkumara is an award-winning Sri Lankan author. He has co-authored two books on Buddhism and has won awards for his poetry and short stories. Additionally, Mr. Sathkumara is a civil servant, working as an Economic Development Officer in the Polgahawela Divisional Secretariat.
8. *Address of usual residence:*
[REDACTED]

II. ARREST

1. *Date of arrest:* April 1, 2019
2. *Place of arrest (as detailed as possible):* Shakthika Sathkumara was arrested at the Polgahawela Police Station in Polgahawela, in the North Western Province of Sri Lanka.
3. *Forces who carried out the arrest or are believed to have carried it out:* Police officers of the Polgahawela Police Station.
4. *Did they show a warrant or other decision by a public authority?* No.
5. *Authority who issue the warrant or decision:* Chief Inspector of Police (Officer-In-Charge, Police Station, Polgahawela) R.D.M. Cyril informed Mr. Sathkumara that he was being arrested.
6. *Reasons for the arrest imputed by the authorities:* Mr. Sathkumara was accused of defaming Buddhism in a short story he had published to Facebook.
7. *Legal basis for the arrest including relevant legislation applied (if known):* Chief Inspector of Police R.D.M. Cyril informed Mr. Sathkumara that he was being arrested under section 291B of the Penal Code and section 2(1) and 3(1) of the International Covenant on Civil and Political Rights Act No. 56 of 2007 (the “ICCPR Act”), which is Sri Lanka’s law purportedly implementing the government’s obligations under the treaty from which the ICCPR Act derives its name.

III. DETENTION

1. *Date of detention*: Arrested on April 1, 2019.
2. *Duration of detention (if not known, probable duration)*: Mr. Sathkumara was held in custody at Kegalle Remand Prison from April 1, 2019 to August 8, 2019 (127 days). From August 8, 2019 up until the date of submission, Mr. Sathkumara has been released from the center on the condition that he meet burdensome bail and reporting requirements. The restrictions imposed by these conditions constitute an on-going deprivation of liberty by inhibiting Mr. Sathkumara's freedom of movement.¹
3. *Forces holding the detainee under custody*: While in Kegalle Remand Prison, Mr. Sathkumara was held by Kegalle Prison staff, which is managed by the Department of Prisons. After release from the Kegalle Remand Prison, police officers from the Polgahawela police station monitor compliance with the conditions of his bail release.
4. *Places of detention (indicate any transfer and present place of detention)*: Kegalle Remand Prison, a few kilometers from Kurunegala, Sri Lanka. Mr. Sathkumara was released from the center on the condition that he post cash bail and report to Polgahawela police station on every second and fourth Sunday of each month, requiring him to remain local.
5. *Authorities that ordered the detention*: The Polgahawela Magistrate Court ordered that Mr. Sathkumara be initially held in detention at the Kegalle Remand Prison. Mr. Sathkumara's release on the above mentioned bail conditions was ordered by the Kurunegala High Court.
6. *Reasons for the detention imputed by authorities*: The Polgahawela Magistrate Court ordered Mr. Sathkumara's detention to permit further investigation into allegations that Mr. Sathkumara defamed Buddhism in violation of section 291B of the Penal Code and section 2(1) and 3(1) of the ICCPR Act.
7. *Legal basis for the detention including relevant legislation applied (if known)*: Section 291B of the Penal Code and section 2(1) and 3(1) of the ICCPR Act.

IV. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER THE ARREST OR DETENTION TO BE ARBITRARY

A. Statement of Facts

Part 1 of this Statement of Facts details the current political climate in Sri Lanka in order to demonstrate the government's patterns of violating the substantive and procedural rights of its citizens. Part 2 of this Statement of Facts details the circumstances surrounding the arrest and detention of Mr. Shakhika Sathkumara.

1. The Social, Legal, & Human Rights Context in Sri Lanka

a. *The Use of Blasphemy Laws to Curtail Freedom of Expression*

¹ The Working Group on Arbitrary Detention has previously found that an act of detention continued after an individual had been released on bail when the bail conditions prohibited the individual from leaving the city in which he resided. *See, e.g., Paulo Jenaro Diez Gargari v. Mexico*, UN Working Group on Arbitrary Detention, Opinion No. 58/2016, paras. 11, 21 (Nov. 25, 2016), <https://www.unwgadatabase.org/un/Document.aspx?id=3283>.

Buddhism is the state religion of Sri Lanka and is given special protections in the Constitution.² Buddhist groups are extremely influential in Sri Lankan politics and have repeatedly been given the blessing of the government.³ Presidential candidates enter into alliances with parties such as the National Heritage Party, which is led by Buddhist monks.⁴ Buddhist organizations frequently make complaints to Sri Lankan police about any perceived insults to Buddhism, to which the government is very receptive.⁵ Perceived slights to Buddhism frequently result in arrest and detention for blasphemy, while Buddhist extremist attacks on other religions and ethnic minorities face impunity.⁶

The Sri Lankan government uses several laws to criminalize insult to religion, and the government's enforcement of these laws often disproportionately restricts the right to freedom of expression. Sri Lankan Penal Code Section 291 criminalizes "wounding the religious feelings of any person" or "outraging the religious feelings of any class of persons."⁷ Although this law is written without explicit reference to a particular religion, the government almost exclusively enforces it against those speaking about Buddhism.⁸

Another law that the government frequently uses to punish blasphemy is the International Covenant on Civil and Political Rights Act No. 56 of 2007 (hereinafter ICCPR Act). The ICCPR Act is intended to incorporate into domestic law the Sri Lankan government's treaty obligations under the International Covenant on Civil and Political Rights ("the Covenant").⁹ However, rather than protecting human rights, the Sri Lankan government has used the ICCPR Act primarily to intensify its defense of Buddhism and to limit those who are critical of the government. Mirroring the language of Article 20 of the Covenant,¹⁰ Section

² See Andreas Johansson, *Why the peaceful religion of Buddhism has grown violent in Sri Lanka (and Myanmar)*, SCROLL.IN (April 28, 2019), <https://scroll.in/article/877143/why-the-peaceful-religion-of-buddhism-has-grown-violent-in-sri-lanka-and-myanmar>. ("The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the state to protect and foster the Buddha Sasana.")

³ See R Hariharan, *Role of Buddhism in Sri Lankan politics*, COLOMBO TELEGRAPH (November 6, 2017), <https://www.colombotelegraph.com/index.php/role-of-buddhism-in-sri-lankan-politics/>; see also *Sri Lankan writer imprisoned at instigation of Buddhist extremists*, WORLD SOCIALIST WEBSITE (April 13, 2019), <https://www.wsws.org/en/articles/2019/04/13/writ-a13.html>.

⁴ See Hannah Ellis-Petersen, *Sri Lanka's presidential election: what you need to know*, THE GUARDIAN (Nov. 12, 2019), <https://www.theguardian.com/world/2019/nov/13/sri-lankas-presidential-election-what-you-need-to-know>; see also Emily Schmall, *Former Sri Lankan defense chief wins presidential vote*, AP (Nov. 17, 2019), <https://apnews.com/8838d7e7b80b4b1bbc859c11be708af0>.

⁵ See Rohini Mohan, *Sri Lanka's violent Buddhists*, NY TIMES (Jan. 3, 2015), <https://www.nytimes.com/2015/01/03/opinion/sri-lankas-violent-buddhists.html>; see also *Sri Lanka abusing UN law to make arrests: rights group*, THIS IS MONEY (June 17, 2019), <https://www.thisismoney.co.uk/wires/afp/article-7149519/Sri-Lanka-abusing-UN-law-make-arrests-rights-group.html>.

⁶ See *Asgiri Prelate calls for stoning of Muslims – but remains immune to ICCPR Act violations*, COLOMBO TELEGRAPH (June 18, 2019), <https://www.colombotelegraph.com/index.php/asgiri-prelate-calls-for-stoning-of-muslims-but-remains-immune-to-iccpr-act-violations/>.

⁷ *The Freedom of Thought Report*, HUMANISTS INTERNATIONAL, <https://fot.humanists.international/countries/asia-southern-asia/sri-lanka/>.

⁸ In 2012, three French tourists were sentenced under 291A to six months of hard labor for kissing a statue of Buddha. See Charles Haviland, *French tourists guilty in Sri Lanka over Buddha photos*, BBC NEWS (Aug. 21, 2019), <https://www.bbc.com/news/world-asia-19325357>. In 2014, a British nurse was arrested for a tattoo portraying the Buddha. See *Sri Lanka to deport Buddha tattoo British woman*, BBC NEWS (April 22, 2014), <https://www.bbc.com/news/world-asia-27107857>. In 2019, a radio script writer was arrested under section 291 on the basis that his radio drama insulted Buddhism. See *Misuse of ICCPR Act in Sri Lanka in suppressing freedom of expression rights*, SRI LANKA BRIEF (June 24, 2019), <https://srilankabrief.org/2019/06/misuse-of-iccpr-act-in-sri-lanka-in-suppressing-freedom-of-expression-rights/>.

⁹ See Ruwan Laknath Jayakody, *Buddha's bulldogs vs. the cloud dweller: the strange case of Shakthika Sathkumara's Ardha*, COLOMBO TELEGRAPH (April 20, 2019), <https://www.colombotelegraph.com/index.php/buddhas-bulldogs-vs-the-cloud-dweller-the-strange-case-of-shakthika-sathkumaras-ardha/>.

¹⁰ *International Covenant on Civil and Political Rights*, G.A. Res 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171, entered into force on Mar. 23, 1976 (hereinafter "ICCPR"), at art. 20(2).

3(1) of the ICCPR Act provides that “no person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹¹ While Article 20 of the ICCPR Act was not intended to limit legitimate forms of peaceful expression,¹² the Sri Lankan government’s application of the ICCPR Act, has thus far been applied exclusively in contravention of the right to freedom of expression enshrined in Article 19 of the Covenant. The Sri Lankan Government has used the ICCPR Act to imprison journalists, researchers, activists, and citizens that exercise their freedom of expression in ways that appear to challenge or offend the Buddhist majority.¹³

b. *Pre-Trial Detention & Prison Conditions*

The UN Human Rights Committee (“UNHRC”) in its most recent periodic report on Sri Lanka expressed serious concern at the government’s excessive use of pre-trial detention and the significant number of persons subjected to prolonged and arbitrary detention.¹⁴ More than half of the prison population in Sri Lanka is currently being held in pre-trial detention.¹⁵ Individuals can be held in pre-trial detention for years, with some being held for up to 10 years without a trial.¹⁶ Moreover, prison conditions in Sri Lanka are bleak and overcrowded.¹⁷ The UNHRC has specifically expressed the need for Sri Lanka to consider alternatives to pre-trial detention to alleviate the overcrowding and harsh prison conditions.¹⁸

c. *The Inadequate Protection for Constitutional Rights*

The Constitution of Sri Lanka provides fundamental rights which are guaranteed to the people.¹⁹ Under articles 17 and 126 of the Constitution, individuals who believe that they have been unjustly arrested

(“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”).

¹¹ Act 56/2007: International Covenant on Civil and Political Rights (ICCPR), Section 3(1) (2007) *available at* <https://www.parliament.lk/business-of-parliament/acts-bills?view=actsandbills>.

¹² *See* General Comment No. 11 UN Human Rights Committee, General Comment No. 11: Article 20 (Prohibition of propaganda for war and inciting national, racial or religious hatred), UN Doc. CCPR/C/GC/11, para. 2 (Jul. 29, 1983), *available at*

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11 (stating that “In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities.”).

¹³ Journalist Kusal Perera was arrested in June 2019 for publishing an article critical of the government’s role in an anti-Muslim attack that occurred in April. *See Misuse of ICCPR Act and Judicial System to Stifle Freedom of Expression in Sri Lanka*, CIVICUS (July 5, 2019), <https://monitor.civicus.org/newsfeed/2019/07/05/iccpr-act-and-judicial-system-being-misused-stifle-freedom-expression-sri-lanka/>. A researcher and activist campaigning against anti-Muslim violence was similarly arrested under the ICCPR Act in May 2019, after spending more than a month in Negombo remand prison. *Id.* Also in May 2019, a woman was arrested for wearing a caftan bearing a Buddhist symbol. The woman was held in detention while her dress was sent to the Department of Buddhist Affairs for investigation. *Id.* Meanwhile, in June 2019, one of the highest Buddhist authorities in Sri Lanka faced no legal consequences after he called for the stoning of all Muslims and asserted that the Muslims had “poisoned” the Sinhalese people of Sri Lanka. *See Asgiri Prelate Calls for Stoning of Muslims – But Remains Immune to ICCPR Act Violations*, COLOMBO TELEGRAPH (June 18, 2019), <https://www.colombotelegraph.com/index.php/asgiri-prelate-calls-for-stoning-of-muslims-but-remains-immune-to-iccpr-act-violations/>.

¹⁴ UN Human Rights Committee, *Concluding Observations on Sri Lanka* (Oct. 27, 2014), UN Doc. CCPR/C/LKA/CO/5, paras. 17, 18, <https://www.undocs.org/ccpr/c/lka/co/5>.

¹⁵ *See Working Group on Arbitrary Detention: preliminary findings from its visit to Sri Lanka*, OHCHR (Dec. 15, 2017) (hereinafter “UN Working Group on Arbitrary Detention Report”), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22541&LangID=E>.

¹⁶ *Id.*

¹⁷ UN Human Rights Committee, *supra* note 14, para. 18.

¹⁸ *Id.*

¹⁹ The Constitution of the Democratic Socialist Republic of Sri Lanka (as amended up to May 15th 2015), *available at* <https://www.parliament.lk/constitution/main>.

or detained are entitled to file complaints directly to the Supreme Court.²⁰ Unfortunately, there are numerous problems with the fundamental rights procedure which render it ineffective for many citizens of Sri Lanka.²¹ For litigants living outside of Colombo, the petition process poses problems of distance, cost, and difficulty in receiving representation.²² In a 2016 analysis of fundamental rights petitions, only 20 of 78 cases held that the rights of petitioners had been violated.²³ A full 49 petitions were dismissed without being heard.

Claims of violations of fundamental rights may also be made to the Human Rights Commission of Sri Lanka (“HRCSL”). This additional mechanism provides little protection, however, as decisions by the HRCSL are nonbinding and merely extend the statute of limitations for complaints to the Supreme Court.²⁴ Additionally, the HRCSL is understaffed and has difficulty receiving proper resources and funding.²⁵

2. The Case of Shakthika Sathkumara

a. *Mr. Sathkumara’s Background*

Shakthika Sathkumara is a prominent Sri Lankan author. He has written seven short-story collections, four poetry anthologies, a novel, and at least 17 nonfiction books on topics ranging from literary theory, theater, art and Buddhism.²⁶ He is also a regular contributor to the literary supplements of various Sinhala-language newspapers.²⁷

Mr. Sathkumara graduated from the University of Kelaniya with a Bachelor of Arts Degree specialized in Sinhala.²⁸ He additionally received a Diploma in Journalism from the University of Colombo, a Diploma in Writership and Communication from the University of Sri Jayawardhanapura, and a Diploma in Buddhism from the Buddhist and Pali University of Sri Lanka.²⁹

Mr. Sathkumara has been recognized repeatedly for excellence in writing, having won the “Best Short Story” prize at the National Youth Literary Festivals in both 2010 and 2014, an award bestowed by the National Youth Services Council.³⁰ Mr. Sathkumara has additionally won numerous prizes awarded by Sri Lanka’s Department of Cultural Affairs and the Cultural Affairs Division of the Chief Ministry of the North Western Province.³¹ In 2004, Mr. Sathkumara was awarded the Education Excellence Award of the North Western Province for a book related to Buddhism.³² He received the 50th Anniversary Golden Jubilee Award awarded by the Department of Cultural Affairs for a short story book in 2006.³³ He won the Best Compilation of Short Stories Award in 2010, 2012, 2015, and 2016, awarded by the Cultural Affairs

²⁰ See UN Working Group on Arbitrary Detention Report, *supra* note 15.

²¹ These problems include ambiguity with petition procedures, a one-month limitation for filing petitions, lack of standing for public interest petitions, and lack of access to the process itself. UN Working Group on Arbitrary Detention Report, *supra* note 15.

²² See *Sri Lanka’s judiciary: politicized courts, compromised rights*, International Crisis Group (June 30, 2009), <https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lanka-s-judiciary-politicised-courts-compromised-rights>.

²³ See Dinesha Samararatne, *Recent trends in Sri Lanka’s fundamental rights jurisdiction*, The Bar Association Law Journal (2016),

https://www.researchgate.net/publication/331770737_Recent_Trends_in_Sri_Lanka's_Fundamental_Rights_Jurisdiction.

²⁴ See International Crisis Group, *supra* note 22.

²⁵ See UN Working Group on Arbitrary Detention Report, *supra* note 15.

²⁶ Lucy Popescu, *Shakthika Sathkumara*, Literary Review (Aug. 2019), <https://literaryreview.co.uk/shakthika-sathkumara>.

²⁷ *Id.*

²⁸ Confidential Source A

²⁹ *Id.*

³⁰ See World Socialist Website, *supra* note 3.

³¹ Confidential Source A.

³² *Id.*

³³ *Id.*

Division of the Chief Ministry of the North Western Province.³⁴ The Cultural Affairs Division also awarded him the Best Compilation of Poetry Award in 2009, 2011, and 2012.³⁵

Since 2012, Mr. Sathkumara has also worked as a government employee, and since 2015, he has been an Economic Development Officer in the Polgahawela Divisional Secretariat.³⁶ Before working for the government, Mr. Sathkumara worked as a journalist for several national newspapers in Sri Lanka.³⁷ [REDACTED].³⁸ Before the events recounted below, Mr. Sathkumara had no criminal history or prior arrests.³⁹

b. *Arrest*

On February 15, 2019, Mr. Sathkumara published a short story to Facebook in a post that was publicly viewable.⁴⁰ The story, titled *Ardha*, is reproduced in English in the Appendix to this petition. *Ardha* tells the story of a young ex-monk who has recently disrobed (*i.e.* quit the monastic life) and who moves into the boarding house of another friend while he pursues a university degree. The story contains three parts. The first part concerns how the ex-monk meets his friend while he, along with a group of radical monks, was raiding an NGO that was believed to be providing support to “tigers” (referring to a Tamil rebel group in Sri Lanka); the second part concerns the ex-monk destroying a short story written by his friend after finding it offensive; and the third part concerns a dream that the ex-monk has in which he symbolically has a sexual encounter with the chief monk of his former monastery. *Ardha* contains themes of homosexuality and alludes to an instance of possible sexual abuse in a Buddhist temple.⁴¹ According to Mr. Sathkumara, the story belongs to the Postmodern literary tradition, which he states is “...often characterized by reliance on narrative techniques such as fragmentation, paradox, and the unreliable narrator; and is often unrealistic and downright plots.”⁴² Mr. Sathkumara also explained that the story is a “frame Short Story” which is a type of creative fiction where “the protagonist sees various imaginary stories within the Short Story.”⁴³

On February 25, 2019, an organization called the Buddhist Information Centre lodged a complaint with the Inspector General of Police in Colombo, Pujitha Jayasundara, regarding the short story Mr. Sathkumara published to Facebook on February 15.⁴⁴ The organization demanded that Mr. Sathkumara be arrested and that the publication of his short story be halted.⁴⁵ The organization’s executive director alleged that the work was defamatory to Buddhism and that Mr. Sathkumara was in violation of Section 291B of the Penal Code and Section 3(1) of Sri Lanka’s ICCPR Act.⁴⁶

On March 6, a group of Buddhist monks visited Mr. Sathkumara’s place of work, at the Polgahawela Divisional Secretariat.⁴⁷ That day, the Divisional Secretary of Polgahawela called Mr. Sathkumara to her office. Once Mr. Sathkumara arrived, he found around 20 Buddhist monks seated in the office.⁴⁸ The Division Secretary introduced the monks to Mr. Sathkumara as “Monks of Polgahawela and Pothuhera Shasanarakshaka Bala Mandala,” and the Division Secretary explained that the monks had delivered a petition against Mr. Sathkumara’s literary work, particularly against *Ardha* which the monks alleged defames

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Confidential Source F.

³⁸ Confidential Source A

³⁹ Confidential Source B

⁴⁰ Confidential Source B.

⁴¹ *See* Appendix; *see also* Jayakody, *supra* note 9.

⁴² Confidential Source A.

⁴³ *Id.*

⁴⁴ *See* World Socialist Website, *supra* note 3.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Confidential Source F.

⁴⁸ Confidential Source A.

Buddhism.⁴⁹ Mr. Sathkumara explained that the story was not intended to defame Buddhism or hurt the religious feelings of the community.⁵⁰ He explained that the story is part of a larger tradition of Sinhalese literature “expressing the author’s creative thoughts as to how they view the world at large.”⁵¹ The monks objected that Mr. Sathkumara, as a public servant, cannot defame Buddhism. Mr. Sathkumara responded that public servants also have freedom of expression, but was shouted down. The Divisional Secretary told the monks that she would inform the District Secretary of the situation. The Assistant District Secretary of Kurunegala subsequently informed Mr. Sathkumara that an inquiry would be held.⁵²

On April 1, 2019, Mr. Sathkumara arrived at the Polgahawela Police Station around 10:00 AM with his attorney, Mr. Rathnayake.⁵³ Mr. Sumana along with several other monks were seated near Chief Inspector Cyril’s office. The Chief Inspector called the monks into his office and spoke with them for half an hour before calling in Mr. Sathkumara and his attorney.⁵⁴ Mr. Sathkumara and his attorney subsequently had a discussion with the monks, at which time Mr. Rathnayake explained that Mr. Sathkumara is an award-winning author, that his work was not intended to harm anyone, and that the post had already been removed from Facebook.⁵⁵ The monks and Mr. Sathkumara’s attorney agreed to settle the matter with an apology from Mr. Sathkumara.⁵⁶

Mr. Sathkumara was then asked to make a statement.⁵⁷ However, while making his statement, the Chief Inspector interrupted and informed him that “it is a serious matter and he would not allow this to be settled.”⁵⁸ After Mr. Sathkumara finished recording his statement, the Chief Inspector informed him that he was under arrest for offenses under Section 291B of the Penal Code and Sections 2(1) and 3(1) of the ICCPR Act.⁵⁹

c. Pre-Trial Detention

The afternoon of April 1, following Mr. Sathkumara’s arrest, he was taken to the Polgahawela Magistrate Court, where he was heard under case number B7673/2019.⁶⁰ The Polgahawela Police provided the Magistrate with a copy of their police report and asked that the court order Mr. Sathkumara be held in detention until April 12 while police conduct further investigation.⁶¹ During the hearing, Mr. Sathkumara’s attorney, Mr. Rathnayake, challenged the police’s request, arguing that Mr. Sathkumara is an author of several books regarding Buddhism and that his story was not intended to insult Buddhism or any other religious feelings.⁶² Mr. Rathnayake further explained that Mr. Sathkumara had already apologized to the Buddhist monks.⁶³ In addition, Mr. Rathnayake moved for Mr. Sathkumara’s release on bail. The Magistrate ordered that Mr. Sathkumara be held in pre-trial detention until April 9, 2019 and denied the request for release on bail.⁶⁴

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Confidential Source F.

⁶¹ *Id.*

⁶² Confidential Source A.

⁶³ *Id.*

⁶⁴ *Id.*

Mr. Sathkumara was subsequently taken to Kegalle Remand Prison, where he was held in pre-trial detention in an overcrowded cell.⁶⁵ The prison is severely overcrowded, with approximately 800 prisoners forced to share limited facilities designed to hold only 200 individuals.⁶⁶

After the Magistrate Court's decision, Mr. Sathkumara's lawyers filed a case at the Kurunegala High Court requesting bail.⁶⁷ However, this case would not be heard until July 9 and decided until August 5, 2019.⁶⁸

d. *Pre-Trial Proceedings*

On April 9, 2019, Mr. Sathkumara appeared for his first pre-trial hearing before the Polgahawela Magistrate Court.⁶⁹ At this hearing, an attorney representing the association of monks who filed the petition argued that Mr. Sathkumara had, through his story, insulted Buddhism, the Buddhist Sasana,⁷⁰ and the Buddhist clergy.⁷¹ The monks who submit the Facebook post containing Mr. Sathkumara's story also complained that the post contained a semi-nude image of a woman, and alleged that this was intended to offend Buddhists.⁷² Mr. Sathkumara was again ordered to be held in remand until April 23.⁷³

On April 23, 2019, Mr. Sathkumara appeared for his second pre-trial hearing where he filed a petition arguing that he was wrongfully arrested, as arrests under Sections 291A or 291B require the prior approval of the Attorney General.⁷⁴ The Magistrate again ordered Mr. Sathkumara be held in remand, until his next hearing on May 7.⁷⁵ The presiding judge denied bail specifically on the ground that, under the ICCPR Act, a magistrate court does not have the authority to grant bail for a person who is accused or suspected of committing a crime under the Act; only the High Court (the intermediate court of appeal in Sri Lanka) has the authority to grant bail for individuals detained on accusation or suspicion of violating the Act.⁷⁶

On April 30, 2019, Mr. Sathkumara's lawyers filed a petition directly with the Supreme Court of Colombo, alleging violations of his rights guaranteed by the Sri Lankan Constitution.⁷⁷ This petition was set to be argued September 30, 2019, but has been inexplicably rescheduled to be heard on July 28, 2020.⁷⁸

Over the next three months, Mr. Sathkumara's detention was repeatedly extended by the Magistrate Court, while the police made little progress on developing the case for trial. On May 7, 2019, Mr. Sathkumara appeared before Magistrate Court and was yet again ordered in remand until May 21.⁷⁹ On May 21, 2019, attorney S. Kotagoda Hetti appeared on behalf of Mr. Sathkumara and argued that the police were unreasonably delaying the case, as they claimed they required further investigation into the uploading of the short story.⁸⁰ Once again, Mr. Sathkumara was ordered to be held in remand, until June 4.⁸¹ On June 4, 2019,

⁶⁵ *Id.*

⁶⁶ Confidential Source B.

⁶⁷ Confidential Source F.

⁶⁸ *Id.*

⁶⁹ See World Socialist Website, *supra* note 3.

⁷⁰ "Buddhist Sasana" is a term referring to the teaching and practice of Buddhism.

⁷¹ See Jayakody, *supra* note 9.

⁷² See Jayakody, *supra* note 9.

⁷³ *Id.*

⁷⁴ Confidential Source E.

⁷⁵ See *Sathkumara denied bail*, The Sunday Morning (May 6, 2019), <http://www.themorning.lk/sathkumara-denied-bail/>.

⁷⁶ See ICCPR Act, para. 3(4) (An offence under this section shall be cognizable and non-bailable, and no person suspected or accused of such an offence shall be enlarged on bail, except by the High Court in exceptional circumstances.)

⁷⁷ Confidential Source F.

⁷⁸ *Id.*

⁷⁹ Confidential Source E.

⁸⁰ *Id.*

Mr. Sathkumara was ordered to be held until June 18. On June 18, 2019, attorney Sanjaya Wilson Jayasekera asked to make submissions, and the Magistrate responded he could do so at the next hearing on June 25.⁸²

On June 25, 2019, the Polgahawela Police reported that their investigation was concluded and that the matter could finally be referred to the Attorney General for his decision as to whether charges should be filed.⁸³ Mr. Sathkumara's attorney Mr. Jayasekera moved again that he be released on bail, as he had at that point been in custody for 85 days.⁸⁴ The bail application was denied, another hearing was set for July 4, and Mr. Sathkumara's remand custody was again extended. On July 4, 2019, Mr. Sathkumara's detention was again extended until July 18.⁸⁵

On July 9, 2019, the Kurunegala High Court heard Mr. Sathkumara's request for bail, however the judgement was postponed until August 5.⁸⁶

On August 1, 2019, the Polgahawela Magistrate again ordered an extension to Mr. Sathkumara's detention.⁸⁷

Finally, on August 5, 2019, the High Court granted Mr. Sathkumara's release on bail in the amount of two sureties worth Rs. 200,000 each, as well as on the condition that he report to the Polgahawela police station every other week.⁸⁸ Mr. Sathkumara was not immediately released following the High Court's ruling.⁸⁹ On August 8, 2019, after 127 in days in detention, Mr. Sathkumara was released from Kegalle Remand Prison.⁹⁰

e. *Current Status*

As of the filing of this petition, Mr. Sathkumara has still not been formally indicted and no charges have been pressed against him. The Attorney General is scheduled to appear in the Magistrate Court with a decision whether indictments will be filed on December 10, 2019.⁹¹ There has been no court hearings at the Magistrate Court since the last extension of detention on August 1, 2019.⁹²

While currently released on bail, Mr. Sathkumara still faces the threat of arrest and further detention for charges which have yet to be formally issued against him. Additionally, Mr. Sathkumara is required to meet unduly harsh bail conditions, including providing two sureties worth Rs. 200,000 each, as well as reporting to the Polgahawela police station every other week.⁹³

Mr. Sathkumara has sought to continue his work as a government employee following his arrest. Though he received a letter of reinstatement from the government in late October, 2019, he has been refused a position by the Irrigation Department of Colombo, where he was reassigned.⁹⁴ Mr. Sathkumara hopes to find a position in the Kurunegala district where he formerly worked, but has thus far been denied.⁹⁵

⁸¹ *Id.*

⁸² *Id.*

⁸³ See Vimukthi Vidarshana, *Sri Lankan writer still detained on bogus blasphemy allegations*, World Socialist Web Site (July 12, 2019), <https://www.wsws.org/en/articles/2019/07/12/sath-j12.html>.

⁸⁴ *Id.*

⁸⁵ Confidential Source F.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Confidential Source C.

⁸⁹ *Id.*

⁹⁰ See *Sri Lanka: drop investigation into award-winning writer Shakthika Sathkumara*, English Pen (Sep. 6, 2019), <https://www.englishpen.org/campaigns/sri-lanka-drop-investigation-into-award-winning-writer-shakthika-sathkumara/>.

⁹¹ Confidential Source F.

⁹² *Id.*

⁹³ Confidential Source C.

⁹⁴ *Id.*

⁹⁵ *Id.*

B. Legal Analysis

The arrest and detention of Mr. Sathkumara is arbitrary under Categories I, II and III of the Working Group's Revised Methods of Work.⁹⁶ The detention is arbitrary under Category I because Mr. Sathkumara was detained without sufficient legal justification. The detention is arbitrary under Category II because Mr. Sathkumara's detention resulted from and amounted to reprisal for the legitimate exercise of his rights to freedom of thought, conscience and religion, as well as his right to freedom of expression. The detention is arbitrary under Category III because the Sri Lankan government's arrest, detention and prosecution of Mr. Sathkumara failed to meet minimum standards of due process.

1. Arbitrary Deprivation of Liberty under Category I

A detention is arbitrary under Category I when there is no legal basis or justification for it.⁹⁷ The Working Group has found a lack of legal basis for the purposes of Category I when the Government uses vague and/or overbroad laws to prosecute an individual.⁹⁸ In the present case, Mr. Sathkumara's detention is arbitrary under Category I because the Government arrested and detained Mr. Sathkumara under the ICCPR Act of 2007 and Section 291B of the Sri Lankan Penal Code, both of which are vague and overbroad.

a. *The ICCPR Act of 2007 Is Vague and Overbroad as Applied*

Article 15(1) of the Covenant⁹⁹ and Article 11(2) of the UDHR¹⁰⁰ both guarantee individuals the right to know the content of the law and what conduct violates it. In its General Comment No. 35, the UNHRC states that “[a]ny substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.”¹⁰¹ Likewise, the UNHRC has determined that a law “must be formulated with sufficient precision to enable an

⁹⁶ An arbitrary deprivation of liberty is defined as any “depriv[ation] of liberty exception on such grounds and in accordance with such procedures as are established by law.” ICCPR, *supra* note 10. An arbitrary deprivation of liberty is expressly prohibited under international law. *Id.*; *See also Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (hereinafter “UDHR”), at art. 9, (1948) (“No one shall be subjected to arbitrary arrest, detention or exile.”); *Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment*, G.A. Res. 47/173, 43 UN GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (hereinafter “Body of Principles”), at principle 2 (“Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law. . .”).

⁹⁷ Report of the Working Group on Arbitrary Detention, 16th session, (hereinafter “Revised Work Methods”) A/HRC/16/47, Annex 8(b) (Jan. 19, 2011), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/102/76/PDF/G1110276.pdf?OpenElement>.

⁹⁸ *61 Individuals v. United Arab Emirates*, UN Working Group on Arbitrary Detention, Opinion No. 60/2013, para. 22 (Nov. 22, 2013), <http://hrlibrary.umn.edu/wgad/60-2013.html>; *Judicaël et al. v. Republic of Congo*, UN Working Group on Arbitrary Detention, Opinion No. 44/2014, paras. 26-37 (Feb. 4, 2015), <http://hrlibrary.umn.edu/wgad/44-2014.pdf>.

⁹⁹ ICCPR, *supra* note 10, art. 9(1) (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”).

¹⁰⁰ UDHR, *supra* note 96, art. 11(2) (“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”).

¹⁰¹ UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and Security of Persons), UN Doc. CCPR/C/GC/35, para. 22 (Dec. 16, 2014), [available at https://undocs.org/ccpr/c/gc/35](https://undocs.org/ccpr/c/gc/35); UN Human Rights Committee, *Concluding Observations on Mauritius*, UN Doc. CCPR/CO/83/MUS, para. 12 (Apr. 27, 2005), [available at https://undocs.org/CCPR/CO/83/MUS](https://undocs.org/CCPR/CO/83/MUS); UN Human Rights Committee, *Concluding Observations on Russia*, UN Doc. CCPR/C/RUS/CO/6 (Nov. 24, 2009), para. 24, [available at https://undocs.org/CCPR/C/RUS/CO/6](https://undocs.org/CCPR/C/RUS/CO/6).

individual to regulate his or her conduct accordingly. . .”¹⁰² The exact wording of Article 15(1) is also enshrined in the Sri Lankan Constitution under Article 13(6).¹⁰³

Mr. Sathkumara’s arrest is part of a pattern of abusive applications of the ICCPR Act that serve to suppress a large swath of legitimate forms of individual expression. Subsequent to Mr. Sathkumara’s arrest, the police Special Task Force (STF) attempted to arrest a respected journalist, Kusal Perera, under the guise of the ICCPR Act for a column published on May 17, 2019 reporting Buddhist extremist violence against Sri Lanka’s Muslim minority following the Easter Sunday terror attacks.¹⁰⁴ Additionally, a Muslim woman wearing a T-shirt with a print of a ship’s steering wheel which police mistook for the Dharma Chakra, a Buddhist symbol, was also arrested under the ICCPR Act. The woman was held in detention for three weeks before a senior police officer intervened to press for her release.¹⁰⁵ Additionally, the government has used the ICCPR Act to open an investigation into Malaka Devapriya, a prominent Sri Lankan filmmaker and playwright, after a Buddhist monk complained that a recent radio drama produced by Mr. Devapriya “distorted Buddhist terminology.”¹⁰⁶

The above cases demonstrate a pattern of abuse that illustrate that the application of the ICCPR Act overly broad and vague. As applied, almost any form of expression challenging Buddhist political power, actions by Buddhists or expressing personal beliefs outside the norms of Buddhist orthodoxy could be considered a violation of the ICCPR Act’s Section 3(1) prohibition on propagating religious hatred. As a result, neither the text of the ICCPR Act nor its application provides sufficient precision for an individual to be able to know what expressive conduct will fall afoul of the Act.

Given this arbitrary application of the ICCPR Act, Mr. Sathkumara could not have reasonably known that his work would incur criminal sanction under the Act. Mr. Sathkumara’s story does not in any way advocate violence or war. Nor does it incite to discrimination or hostility. Rather, the fictional story contains religious motifs and themes of homosexuality and sexual abuse in Buddhist temples. The content of the fictional story, which the Buddhist Information Center’s executive director considered “defamatory,” serves primarily to reflect on the nature of Buddhist philosophy juxtaposed against a troubling reality faced by the story’s narrator. The text of the story is not intended to incite “discrimination, hostility or violence.” There has been no evidence presented that the story had the effect of incitement, nor has Mr. Sathkumara ever been accused of any form of violence or incitement to violence. Accordingly, there was no grounds for Mr. Sathkumara or any other impartial observer to reasonably suspect that Mr. Sathkumara’s activity would be criminalized under the ICCPR Act. His activity is punished only because of the Sri Lankan government’s practice of applying the law when speech is perceived as challenging Buddhist hegemony. Such application cannot be considered precise, as required by Article 15(1) of the Covenant and Article 11(2) of the UDHR.

As such, Mr. Sathkumara’s arrest and detention is arbitrary under Category I because the first legal basis for his detention, the ICCPR Act, is both vague and overbroad in violation of his rights under the Covenant and UDHR.

b. *Section 291B of the Sri Lankan Penal Code is Vague and Overbroad Facially and as Applied*

Section 291B of the Sri Lankan Penal Code, the other legal basis for Mr. Sathkumara’s arrest, is also deficiently overbroad and vague. Section 291B prohibits “deliberate and malicious acts intended to outrage

¹⁰² UN Human Rights Committee, General Comment No. 34: Article 19 (Freedom of Expression), UN Doc. CCPR/C/GC/34, para. 25 (Sep. 12, 2011), *available at* <https://undocs.org/CCPR/C/GC/34>.

¹⁰³ Sri Lanka Constitution, *supra* note 19, at art. 13(6)

¹⁰⁴ *See Sri Lanka abusing UN law to make arrests: Rights group*, The Times of India (June 17, 2019), <https://timesofindia.indiatimes.com/world/south-asia/sri-lanka-abusing-un-law-to-make-arrests-rights-group/articleshow/69825080.cms>.

¹⁰⁵ *Id.*

¹⁰⁶ The Leader, *Award Winning Sri Lankan Playwright Penalised under UN Law* (Oct 19, 2019), <https://english.theleader.lk/news/584-award-winning-sri-lankan-playwright-penalised-under-un-law>.

religious feelings of any class, by insulting its religion or religious beliefs.”¹⁰⁷ The standards of “outrage religious feelings” and “insulting” are inherently subjective, thus failing to provide clear guidance to any individual as to what speech amounts to a violation. The lack of textual clarity as to the reach of this provision lends to its application in a manner that infringes upon freedoms of religion and expression under international and Sri Lankan domestic law. While Buddhism is the state religion under Article 9 of the Sri Lankan Constitution,¹⁰⁸ there is no law prohibiting blasphemy in Sri Lanka, and freedom of expression and religion are guaranteed by the Constitution.¹⁰⁹

Nonetheless, Buddhist monks wield significant political power and perceived insults to Buddhism or the Buddhist establishment often result in arrests following a complaint from the monks. As detailed above, Section 291 has repeatedly been abused to stifle legitimate forms of expression. Given the political sway of Buddhist clergy and the special constitutional status afforded to Buddhism as the state religion, Section 291B effectively provides Buddhist clerics a legal mechanism to stifle unorthodox religious views and expressions.

Here, the police used Section 291B at the behest of the monks to arrest Mr. Sathkumara for the legitimate exercise of his freedom of expression. As Mr. Sathkumara stated at the time of his arrest, the intent of his story was not to advocate against the Buddhist religion, and, in fact, he considered his story to be part of a tradition of critical Sinhalese literature on Buddhist philosophy. As further evidence of his benign intent, Mr. Sathkumara removed the story at the heart of the present case from Facebook—the only location where it was published—and was prepared to issue a formal apology as agreed upon in the initial settlement with the monks prior to his arrest.

Accordingly, Mr. Sathkumara’s arrest and detention pending trial is arbitrary under Category I because the legal basis that provided for his detention, Section 291B in addition to Section 3(1) of the ICCPR Act, is both vague and overbroad in violation of Mr. Sathkumara’s rights under the Covenant and UDHR.

2. Arbitrary Deprivation of Liberty under Category II

A detention is arbitrary under Category II of the Working Group’s Revised Methods of Work when it results from the exercise of fundamental rights or freedoms protected under international law, including the rights to freedom of expression and freedom of thought, conscience and religion.¹¹⁰ The Government arbitrarily arrested and detained Mr. Sathkumara on the basis of his exercise of both these rights.

a. *Sri Lanka violated Mr. Sathkumara’s Right to Freedom of Expression*

Article 19(2) of the Covenant provides, “Everyone shall have the right of freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹¹¹ The same right is protected under Article 19 of the UDHR. Freedom of expression is also guaranteed in the Sri Lankan Constitution under Article 14(1)(a).¹¹² The right to freedom of expression as provided in Article 19(2) of the Covenant is not limited by form or subject matter. As General Comment No. 34 explains, the right protected by Article 19(2) “includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others... It includes... cultural and artistic expression, teaching,

¹⁰⁷ See The Times of India, *supra* note 104.

¹⁰⁸ Sri Lanka Constitution, *supra* note 19, art. 9.

¹⁰⁹ *Id.*, at art. 14(1)(a).

¹¹⁰ Revised Methods of Work, *supra* note 97, Category III, at para. 8b.

¹¹¹ ICCPR, *supra* note 10, at art. 19(2).

¹¹² Sri Lanka Constitution, *supra* note 19, at art. 14(1).

and religious discourse.”¹¹³ Moreover, all forms of expression are covered, including electronic and internet based modes of expression.¹¹⁴

In the present case, Mr. Sathkumara was explicitly arrested and detained because of his expression as manifested in his short story *Ardha*. The Sri Lankan police cited criminal statutes that place limitations on free expression as the basis for his arrest. While the right to freedom of expression is not absolute, the state can only place restrictions on the freedom under limited conditions. Article 19(3) of the Covenant provides that freedom of expression may only be restricted when provided by law and necessary for the respect of the rights or reputations of others, protection of national security or public order, health or morals.¹¹⁵ The UNHCR has held that such government limitations in accordance with Article 19(3) must “meet a strict test of justification.”¹¹⁶

Here, the exceptions to the right to freedom of expression do not apply. While the restrictions on expression were written into law, the laws as drafted were overbroad and vague broad as described in Part IV.B.1.a., *supra*, and accordingly do not satisfy the provided for by law condition in Article 19(3) of the Covenant.

Regardless, the short story at issue did not infringe upon or in any way threaten “the rights or reputations of others, protection of national security or public order, health or morals.” In the context of what counts as legitimate grounds for restricting expression, the UNHRC has been clear that “[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.”¹¹⁷ As described above, the government applies both the ICCPR Act and Section 291B of the Penal Code to criminalize actions that are merely perceived to be offensive or insulting to Buddhists. As a result, the government’s application of these laws does not rise to the level of to a legitimate prohibition of hate speech under Article 20 of the Covenant. Any interpretation of Article 20 of the Covenant that inhibits free expression violates Article 5 of the Covenant which prohibits state interpretations of the Covenant which aim to destroy “any of the rights and freedoms recognized [in the Covenant] or [provide for] their limitation to a greater extent than is provided for in the [Covenant].”¹¹⁸ Thus, using these laws to harass, detain, and potentially punish Mr. Sathkumara cannot qualify as a legitimate exception to the right to freedom of expression.

Moreover, if a legitimate justification had existed, the Sri Lankan government had a duty to specify the manner of the threat posed by Mr. Sathkumara’s story. Under the UNHRC’s jurisprudence, “the State party must demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes”¹¹⁹ Sri Lanka has offered no explanation beyond the Buddhist clerics’ indignation at the content of the story as to why Mr. Sathkumara’s right to free expression should be curtailed. Indignation and offense are not enumerated as legitimate justifications restricting expression under Article 19(3). Therefore, no exceptions apply to the government’s restrictions on Mr. Sathkumara’s right to freedom of expression, and the government’s detention and continued prosecution of Mr. Sathkumara amount to a violation of Article 19 of the Covenant.

¹¹³ UN Human Rights Committee, General Comment No. 34, Article 19 (Freedom of Opinion and Expression). para. 11 (July 29, 2011) [hereinafter General Comment No. 34].

¹¹⁴ *Id.*, at para. 12.

¹¹⁵ ICCPR, *supra* note 10, at art. 19(3).

¹¹⁶ Communication No. 628/1995, *Park v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/628/1995, ¶ 10.3 (1998), <http://hrlibrary.umn.edu/undocs/session64/view628.htm>.

¹¹⁷ General Comment No. 34, *supra* note 102, para. 48.

¹¹⁸ ICCPR, *supra* note 10, art. 5 (“1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”).

¹¹⁹ Communication No. 926/2000, *Shin v. Republic of Korea*, U.N. Doc. CCPR/C/80/D/926/2000, ¶ 7.3 (2004), <http://ccprcentre.org/wp-content/uploads/2013/02/926-2000-Shin-v.-Republic-of-Korea-.2004.pdf>.

b. *Sri Lanka Violated Mr. Sathkumara's Right to Freedom of Thought, Conscience and Religion.*

The right to freedom of thought, conscience and religion is an essential tenet of international law as expressed in Article 18 of the Covenant¹²⁰ and of Sri Lankan domestic law under Article 10 of the Constitution. The rights contained in Article 18 of the Covenant include the “freedom to have or to adopt a religion or belief of [one’s] choice, and freedom, either individually or in community with others and in public or private, to manifest [one’s] religion or belief in worship, observance, practice and teaching.”¹²¹ In its General Comment No. 22 to the Covenant, the UNHRC explains that Article 18 “encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief...”¹²² Moreover, the UNHRC states that the “freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.”

Sri Lanka has violated Mr. Sathkumara’s right to freedom of thought, conscience, and religion in this case. Mr. Sathkumara’s arrest and detention stem from the short story he wrote and posted to his Facebook account. Mr. Sathkumara’s story dealt primarily with religious themes and Buddhist philosophy, provoking the ire of Buddhist monks which in turn led to charges of incitement on the basis of religion. That Mr. Sathkumara’s writing and posting of his original short story constitutes the basis of his arrest and detention clearly amounts to a limitation on his right to freedom of religion.

The right to freedom of religion may only be limited by the State when such restrictions are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others.”¹²³ For the reasons stated above with respect to the right to freedom of expression, these exceptions do not apply to the present circumstances. Nor does the elevation of Buddhism to a “foremost place” under Article 9 of the Sri Lankan Constitution validate state action that would limit Article 18 rights. As General Comment No. 22 states, “The fact that a religion is recognized as a State religion or that it is established as official or traditional... shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including article [] 18...”¹²⁴ As no exception applies to the government’s restriction of Mr. Sathkumara’s right to freedom of religion, the government’s detention and continued prosecution of Mr. Sathkumara amounts to a violation of Article 18 of the Covenant.

3. Arbitrary Deprivation of Liberty under Category III

According to Category III of the Working Group’s Revised Methods of Work, a deprivation of liberty is arbitrary “[w]hen the total or partial non-observance of international norms relating to the right to a fair trial, spelled out in the UDHR and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.”¹²⁵ Due Process is at the core of the right to a fair trial. The minimum international standards of due process are established in the UDHR, the Body of Principles for the Protection of All persons under any Form of Detention or Imprisonment (the “Body of Principles”), and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the “Mandela Rules”).¹²⁶

a. *Sri Lanka Violated Mr. Sathkumara's Right Not to Be Subjected to Arbitrary Arrest*

¹²⁰ UDHR, *supra* note 96, at art. 18.

¹²¹ *Id.*

¹²² UN Human Rights Committee, General Comment No. 22, Article 18 (Freedom of Thought, Conscience or Religion) ¶ 9 (July 30, 1993).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Revised Methods of Work, *supra* note 97, Category III, para. c.

¹²⁶ *Id.*, at Category III, paras. 7(a)-(b).

Article 9(1) of the Covenant, which confirms the right to liberty and freedom from arbitrary detention, states, “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹²⁷ This right is reiterated by principles 2 and 36(2) of the Body of Principles¹²⁸ and Article 9 of the UDHR.¹²⁹ Article 13(1) of the Sri Lankan Constitution similarly prohibits arrest except in accordance with legal procedure.¹³⁰

While the police presented the legal justification for Mr. Sathkumara’s arrest at the police station at the time of his arrest, the basis for the charges was not accompanied by any evidence. Mr. Sathkumara and the complainant monks had already agreed to settle the issue amongst themselves when the Chief Inspector interrupted and informed Mr. Sathkumara that “it is a serious matter and he would not allow this to be settled.” The Chief Inspector stated that Mr. Sathkumara was under arrest pursuant to Section 291B and the ICCPR Act, but did not explain on what grounds Mr. Sathkumara’s violations were alleged. Moreover, under Sri Lankan criminal procedures, arrests made pursuant to Section 291 require the approval of the Attorney General. No such approval was sought for the arrest of Mr. Sathkumara. In light of the Chief Inspector’s irregular manner of arrest, Mr. Sathkumara’s arrest was arbitrary in violation of Article 9(1) of the Covenant, Article 9 of the UDHR, and principles 2 and 36(2) of the Body of Principles.

b. *Sri Lanka Violated Mr. Sathkumara’s Right to Be Tried Without Undue Delay*

Article 14(3)(c) of the Covenant guarantees that each individual subject to arrest shall “be tried without undue delay.”¹³¹ The UNHRC has explained that, “[a]n important aspect of the fairness of a hearing is its expeditiousness,”¹³² and “in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.”¹³³ The right to be tried without undue delay is reiterated by Principle 38 of the Body of Principles.¹³⁴

Here, Mr. Sathkumara was held without bail for 127 days, and to date formal charges have yet to be filed. While Mr. Sathkumara was able to appear before a court during the period of his detention, courts repeatedly delayed substantive decisions on his case while extending the period of his detention. Moreover, the hearing on Mr. Sathkumara’s petition with the Supreme Court of Sri Lanka filed on April 30, 2019 has been rescheduled for July 28, 2020, now over a year after the petition was submitted. Due to the substantial delays in Mr. Sathkumara’s trial and due to the failure of the government to provide legitimate grounds for the length of proceedings, the government has violated Mr. Sathkumara’s right to be tried without undue delay in violation of Article 14(3)(c) of the Covenant.

c. *Sri Lanka Violated Mr. Sathkumara’s Right to Release Pending Trial*

Article 9(3) of the Covenant provides the right to an individual’s release pending trial.¹³⁵ Pretrial detention under this provision should be the exception not the norm, and must be justified based on the circumstances. The UNHRC has found that “[d]etention pending trial must be based on an individualized determination that [such detention] is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime . . . Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual

¹²⁷ ICCPR, *supra* note 10, at art. 9(1).

¹²⁸ UDHR, *supra* note 96, at art. 9.

¹²⁹ Body of Principles, *supra* note 96, at principles 2 and 36(2).

¹³⁰ *Supra* note 108, at art. 13(1).

¹³¹ ICCPR, *supra* note 10, at art. 14(3)(c).

¹³² UN Human Rights Committee, General Comment No. 32, Article 14 (Right to equality before courts and tribunals and to a fair trial para. 27 (Aug. 23, 2007).

¹³³ *Id.*, at para. 35.

¹³⁴ Body of Principles, *supra* note 96, at principle 38.

¹³⁵ ICCPR, *supra* note 10, at art. 9(3).

circumstances.”¹³⁶ Principles 38 and 39 of the Body of Principles further confirm that, except in special cases, a criminal detainee is entitled to release pending trial.¹³⁷

Here, Mr. Sathkumara was held without formal charges or a right to bail. The ICCPR Act, which provided the grounds for Mr. Sathkumara’s detention, mandates that anyone accused of violating the act shall, by default, be denied bail. In Paragraph 3(4), the act states that “An offence under this section shall be cognizable and non-bailable, and no person suspected or accused of such an offence shall be enlarged on bail, except by the High Court in exceptional circumstances.”¹³⁸ Paragraph 3(4) on its face violates the Covenant’s requirement in Article 9(3) that pre-trial custodial detention is not the general rule. During the April 23, 2019 hearing before the Magistrate Court, the judge explicitly stated that the reason he could not grant bail was due to the charges alleged under the ICCPR Act. Accordingly, the grounds for Mr. Sathkumara’s detention are a violation of article 9(3).

Moreover, because the denial of bail was based upon Paragraph 3(4) of the ICCPR Act rather than an individualized determination regarding Mr. Sathkumara’s case, the Magistrate Court failed to take the totality of the circumstances into account as required under the Covenant. The courts offered no determination as to whether Mr. Sathkumara represented a flight risk or risked repeating his supposed offense. Even if the short story at controversy did constitute some form of public threat or offense, which it did not, the offending short story had been removed from Facebook prior to arrest. As such, there were no circumstances present that could reasonably justify the excessive period of detention without trial or even formal charges.

Accordingly, the government violated Mr. Sathkumara’s rights under Article 9(3) of the Covenant, as well as principles 38 and 39 of the Body of Principles.

4. Conclusion

For the above reasons, Mr. Sathkumara’s arrest and detention violated Sri Lankan and international law. Mr. Sathkumara’s expression through his short story is protected under the applicable provisions of the Covenant, as well as other sources of international and Sri Lankan law. By arresting Mr. Sathkumara in a manner incongruous with Sri Lankan law and subjecting Mr. Sathkumara to a lengthy pre-trial detention, the conditions of which also violated international law, the Sri Lankan government has arbitrarily detained Mr. Sathkumara.

V. INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES, TAKEN ESPECIALLY WITH THE LEGAL AND ADMINISTRATIVE AUTHORITIES, PARTICULARLY FOR THE PURPOSE OF ESTABLISHING THE DETENTION AND, AS APPROPRIATE, THEIR RESULTS OR THEIR REASONS WHY SUCH STEPS OR REMEDIES WERE INEFFECTIVE OR WHY THERE WERE NOT TAKEN.

On April 21, 2019, [REDACTED], Mr. Sathkumara’s wife, filed a complaint with the HRCSL on Mr. Sathkumara’s behalf. The complaint is registered under the file number HRC/1140/2019. So far, no action has been taken by the Commission on Mr. Sathkumara’s case. On April 30, 2019, Mr. Sathkumara’s attorneys filed a petition asserting Mr. Sathkumara’s fundamental rights to the Supreme Court of Colombo. The Supreme Court initially scheduled to hear arguments on the petition is September 2019; however, the Court rescheduled the hearing to July 28, 2020.

¹³⁶ General Comment No. 35, *supra* note 101, at para. 38.

¹³⁷ Body of Principles, *supra* note 96, at principles 38 and 39.

¹³⁸ ICCPR Act, para. 3(4).

VI. FULL NAME AND ADDRESS OF THE PERSON(S) SUBMITTING THE INFORMATION (TELEPHONE AND FAX NUMBER, IF POSSIBLE).

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Date: December 9, 2019

Appendix

Below is an English translation of the short story Ardha, written by Mr. Shakthika Sathkumara, and published on his Facebook account on February 15, 2019.¹³⁹

Ardha¹⁴⁰

Halwelle Kassapa thero became Kasaan Palihawadana, not because of a particular fondness for lay life, he simply had no love of monastic life. After giving up monkhood, Kasan did not want to stay at university's monastic accommodation any longer. There were many who began as monks but later became 'ex-monks' living in the monastery.

Kasaan was reading his old study notes when Dhammissara thero came in.

"Redeemed, redeemed, Kasaa, you 're redeemed... going to stay in the hostel, right? Now you don't have to wait till evening to do groceries."

Dhammissara thero plopped into a chair. Medhananda thero who was lying in bed, reading the book 'Budunge Rasthiyaduwa',¹⁴¹ stood up with the book in his right hand.

"Our Sadaham Sena¹⁴² is going to file a court case against this book, this is entirely a work of fundamentalist propaganda" said Medhananda thero, acknowledging the book.

"Kasa's going to move out to a boarding place. Looks like this guy not only gave up monkhood, but want to give up us as well," said Sumedha thero as he came in. Kasan stopped his work for a moment.

"It's not like that. I will come visit you reverends very often." Kasan's voice sounded heavy with emotion.

¹³⁹ This translation of *Ardha* was provided by Journalists for Democracy in Sri Lanka and is available at the following link: <http://www.jdslanka.org/index.php/analysis-reviews/poetry-a-prose/903-shakthika-sathkumara-shortstory-ardha>.

¹⁴⁰ The word 'Ardha' is Sanskrit for the word 'half'.

¹⁴¹ The title of the book translates to "Buddha's Vagabondage," which is the name of a novel written by a Sri Lankan author Srinath Chaturanga, in 2018. The author was accused of being anti-Buddhist, and there were multiple attempts to ban this book.

¹⁴² 'Sadaham Sena', (Army of Dhamma) is a fictional organization of hardline monks.

“Come on, don’t take it too hard. Just complete your degree wherever you are”.

1

I just added that opening to my story because I didn’t want to use the word ‘Heeraluwa’¹⁴³ to introduce myself. But now, everyone knows that I used to be a monk. I don’t know why I became a monk or why I gave it up. After the head monk’s demise, I had no reason to stay.

And just like that, I did not give much thought to the decision to move into Lloyd Ayya’s boarding place; I just wanted to get rid of the air I was experiencing. I met Lloyd Ayya¹⁴⁴ as an enemy and he still remains an enemy to ‘Sadaham Sena’. He works for an NGO. We joined the ‘Sadaham Sena’, once when they barged into his work place.

“Is it true that you guys are building houses for Tiger families¹⁴⁵ with foreign money?” Everyone was aghast by Gnanasara therō’s tone of voice. Media personnel armed with cameras were milling around in a show of support to us.

“Pardon me, reverend... We are building houses for people displaced because of the war.” A young man said as he confronted us.

“Who are you?”

“I’m Lloyd.... the project...”

“Looks like you are in a deep thought.... am I late?” Lloyd Ayya halted his motorcycle right in front of me. I grabbed my bag and sat on the back seat.

“Kasan looks much nicer in denim instead of that clergy-robe.” said Lloyd Ayya turning the bike to Vewelduwa¹⁴⁶. Even as I was caught between two worlds, his words brought a hint of a smile to my lips.

“I’m going to have a full string hopper kottu dinner, what would you have, Kasan.....?” Lloyd Ayya stopped the bike at Green Garden Hotel.

“A small one is enough for me,” I said in a low tone.

2

When I was a monk, I thought the society had regressed. But now I know it hasn’t. I thought everyone would marginalise me; instead I was welcomed. The university and my boarding place both became more pleasant.

“Kasan, I started writing a short story, have a look...” Lloyd Ayya dropped a bunch of hand written papers onto the table. I started reading the untitled story.

“Yaśodharā¹⁴⁷ was sobbing. Though she could have stopped what Channa¹⁴⁸ was doing, she let him continue. ‘That’s because I yearned for it’, she thought to herself. ‘Did Siddhartha know that Rahula¹⁴⁹ wasn’t his son? Was that the reason for his leaving? Did he know that I wasn’t satisfied? Wasn’t it true he was unable to please a woman?’ Rather than finding answers, Yaśodharā let out a long sigh, in an unsuccessful attempt to find some solace.”

“Oh my goodness, burn this, Ayya”

¹⁴³ A derogatory term used to stigmatize those who disrobed.

¹⁴⁴ The word ‘Ayya’ means “older brother” in Sinhala.

¹⁴⁵ The families of the members of the Liberation Tigers of Tamil Eelam (LTTE), commonly known as ‘Tamil Tigers.’

¹⁴⁶ A small village in the suburbs of Colombo.

¹⁴⁷ The wife of Prince Siddhartha.

¹⁴⁸ The head charioteer of Prince Siddhartha.

¹⁴⁹ The son of Prince Siddhartha.

I read a chapter and tried to make him realise.

“Wouldn’t this be accepted as an art? Would I go to hell? Anyway, this concept is from the Mahayana Buddhist tradition.”

There was a sardonic smile on Lloyd Aiya’s lips as he lit a cigarette. A ring of smoke that escaped rose up in a new found freedom.

“But this is a country of Theravada Buddhism.” The words slipped out of my mouth.

“Oh yes! In name only’.

3

I was dragged and then pushed into a dark room by two people. As I collapsed, the door slammed shut. I tried to peer through the faint light. I was able to make out the head priest lying in a corner. He was in some form of great discomfort. I moved toward him. He wasn’t asleep. His eyes were brimming with tears. Seeing me, he just stood up. I was terrified by seeing the blood that surged between his legs.

“What’s happening reverend?”, I screamed. But I was voiceless. He turned towards me and parted his robes: Oh god, his penis was cut – a gush of blood.

“Who did this crime...”

“Kasan, why are you screaming in the middle of night...” I opened my eyes to Lloyd Ayya’s voice. The room light was on.

“Nothing, I just had a dream”, I moved the mosquito net aside and sat.

“You are sweating crazily” he threw me a water bottle from the table. I held it with both my hands and drank thirstily. Lloyd Ayya was looking at me, smiling. He opened the door.

“Are you still living in hell?”

I did not reply.

I walked to the bathroom. Relieved somewhat after a rinse, I crawled back under the mosquito net. Singing softly, Lloyd Ayya shut the door, and then turned the light off. Not long after I could hear him right next to my ear. His scent really was the same sweaty scent that the head monk had.

I shut my eyes. Gently.