

[Working Paper Series: Horizontal Accountability in Asia]

## Horizontal Accountability in Sri Lanka: The Commission to Investigate Allegations of Bribery or Corruption

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### 1. Introduction

Democracy in Sri Lanka has a deep history, with regular elections being held since its independence in 1948 (Parliament of Sri Lanka 2020). In a robust democracy, suitable checks and balances within the branches of government ensure that the executive is held accountable (Landry Signé 2018; Schmitter and Karl 1991). Three sub-types of accountability advance good governance in a democracy; these are vertical, horizontal, and diagonal accountability. Vertical accountability is concerned with the ability of the citizens of a country to hold their government accountable, while diagonal accountability is concerned with oversight of the government by civil society organizations and the media. Horizontal accountability is the capacity of state institutions to hold the other branches of government accountable (Lührmann, Marquardt, and Mechkova, 2017).

Sri Lanka has gone through a political and economic crisis. The International Monetary Fund (IMF) mission team, discussing IMF support for Sri Lanka in 2022, highlighted reducing corruption vulnerabilities as a macro-critical challenge needing to be addressed (IMF 2022). The *Aragalaya* (Sinhalese word for ‘struggle’) in Sri Lanka, which began in March 2022, was a rallying call for systemic change in government and the resignation of former President Gotabaya Rajapakse. The protest movement demanded a more accountable government, specifically holding corrupt politicians accountable. In this regard, protestors have called for allegedly stolen public funds to be returned by public officials and for more public scrutiny of elected representatives (Economy Next 2022).

In the 2022 Corruption Perceptions Index, Sri Lanka scored 36/100 on a scale of 0 (highly corrupt) to 100 (very clean) (Transparency International 2022). The Commission to Investigate Allegations of Bribery or Corruption (CIABOC) is a constitutional and legal horizontal accountability mechanism that checks the executive. CIABOC was established with the enactment of the 17<sup>th</sup> Amendment to the Constitution by the Commission to Investigate Allegations of Bribery and Corruption Act, No. 19 of 1994. CIABOC has two overarching mandates: (i) to investigate allegations of bribery and corruption; and (ii) to direct the institution of prosecutions for offenses under the Bribery Act and the Declaration of Assets and Liabilities Law No. 1 of 1975.

This working paper seeks to assess whether CIABOC’s mandate and performance as an anti-corruption agency are consistent with international conventions and standards. This paper is presented in three sections. The first section identifies the gaps in the legal framework of CIABOC compared to the key conventions Sri Lanka has ratified, international standards, and the salient provisions therein. This section also analyzes critical drivers of the success of Hong Kong’s anti-corruption

agency and uses this as a benchmark for comparison with CIABOC. The second section discusses the legal and procedural limitations undermining CIABOC’s ability to fulfill its expected functions. The final section draws conclusions from the preceding analysis and provides recommendations to address these limitations.

## 2. Comparative Analysis

### 2.1. Legal Gap Analysis with International Instruments

Sri Lanka ratified the UN Convention Against Corruption (“the UNCAC”) on March 31, 2004. As part of a country’s obligations under the UNCAC, the Jakarta Principles for Anti-Corruption Agencies (“the Jakarta Principles”) were developed, providing a benchmark for the independence and effectiveness of anti-corruption agencies (ACAs). At the invitation of the Corruption Eradication Commission (KPK) of Indonesia, the United Nations Development Programme (UNDP), and the United Nations Office on Drugs and Crime (UNODC), experts around the world developed the 16 Jakarta Principles. The Jakarta Principles are synonymous with an accreditation system, unlike a Convention such as the UNCAC to which member states are bound. Therefore, this working paper will use the UNCAC and the Jakarta principles as benchmarks for its analysis. Table 1 below identifies the salient provisions of the Convention and the Jakarta Principles.

**Table 1.** Legal Gap Analysis with International Instruments

International convention	Salient provisions
UN Convention Against Corruption	<p><b>Article 6 – Preventive anti-corruption body or bodies</b></p> <p>1. Each State Party shall... ensure the existence of a body... that prevents corruption by such means as:</p> <p>(a) implementing the policies referred to in Article 5 and, where appropriate, overseeing and coordinating the implementation of these policies; (b) increasing and disseminating knowledge about the prevention of corruption.</p> <p>2. Each body should be independent and carry out its function effectively and free from undue influence.</p> <p><b>Article 8 – Codes of conduct for public officials</b></p> <p>4. Establish measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.</p>
Jakarta Statement on Principles for Anti-Corruption Agencies	<p><b>Principle 1</b></p> <p>ACAs shall have a clear mandate to tackle corruption through prevention, education, awareness-raising, investigation and prosecution, either through one agency or multiple coordinated agencies.</p>

International convention	Salient provisions
	<p><b>Principle 2</b> ACAs shall not operate in isolation and shall foster good working relations with State agencies, civil society, the private sector and other stakeholders, including international cooperation.</p> <p><b>Principle 3</b> ACAs shall, be established by a proper and stable legal framework, such as the Constitution or a special law to ensure continuity.</p> <p><b>Principle 4</b> ACA heads shall be appointed through a process that ensures their apolitical stance, impartiality, neutrality, integrity and competence.</p> <p><b>Principle 5</b> In the event of suspension, dismissal, resignation, retirement or end of tenure, all powers of the ACA head shall be delegated by law to an appropriate official in the ACA within a reasonable period of time until the appointment of the new ACA head.</p> <p><b>Principle 6</b> ACA heads shall have security of tenure and shall be removed only through a legally established procedure equivalent to the procedure for the removal of a key independent authority specially protected by law (such as the Chief Justice).</p> <p><b>Principle 7</b> ACAs shall adopt codes of conduct requiring the highest standards of ethical conduct from their staff and a strong compliance regime.</p> <p><b>Principle 8</b> ACA heads and employees shall have immunity from civil and criminal proceedings for acts committed within the performance of their mandate. ACA heads and employees shall be protected from malicious civil and criminal proceedings.</p> <p><b>Principle 9</b> ACA employees shall be remunerated at a level that would allow for the employment of a sufficient number of qualified staff.</p> <p><b>Principle 10</b> ACAs shall have the power to recruit and dismiss their own staff according to clear and transparent internal procedures.</p>

International convention	Salient provisions
	<p><b>Principle 11</b> ACAs shall have sufficient financial resources to carry out their tasks, taking into account the country’s budgetary resources, population size and land area. ACAs shall be entitled to timely, planned, reliable and adequate resources for the gradual capacity development and improvement of the ACA’s operations and fulfilment of the mandate.</p> <p><b>Principle 12</b> ACAs shall receive a budgetary allocation over which ACAs have full management and control without prejudice to the appropriate accounting standards and auditing requirements.</p> <p><b>Principle 13</b> ACAs shall develop and establish clear rules and standard operating procedures, including monitoring and disciplinary mechanisms, to minimize any misconduct and abuse of power by ACAs.</p> <p><b>Principle 14</b> ACAs shall strictly adhere to the rule of law and be accountable to mechanisms established to prevent any abuse of power.</p> <p><b>Principle 15</b> ACAs shall formally report at least annually on their activities to the public.</p> <p><b>Principle 16</b> ACAs shall communicate and engage with the public regularly in order to ensure public confidence in their independence, fairness and effectiveness.</p>

When considering how effective CIABOC has been as an anti-corruption agency against these international standards, there are two critical shortcomings in CIABOC’s legal framework. The first of these shortcomings is that the opaque process of appointing commissioners is in contravention of Principle 4 of the Jakarta Principles, which requires that the appointment of commissioners occurs through a process that ensures their apolitical stance and impartiality.

In line with Principle 15 of the Jakarta Principles, CIABOC has consistently published progress and annual reports on its website from 2018 onwards. However, CIABOC has not successfully ensured public confidence in its independence, fairness, and effectiveness in line with Principle 16. There is low public confidence in CIABOC’s effectiveness, evidenced by a survey conducted by Verité Research in 2019 which found that the most common reason for not reporting

corruption was because respondents thought no action would be taken (Verité Research 2019). Therefore, the second shortcoming concerns low prosecution and conviction rates, which have resulted in low public confidence in CIABOC.

## **2.2. Comparative Analysis with Hong Kong's Independent Commission Against Corruption (ICAC)**

Hong Kong's ICAC is widely known for its three-pronged approach to battling corruption – deterrence, prevention, and education (Hsieh 2017, p. 5). In Asia, Hong Kong represents one of the most successful models for controlling corruption (Quah 2021). The ICAC's 2022 annual survey found that 90.1% of the 1,761 respondents were of the opinion that the ICAC deserved their support (ICAC 2022). In the 2022 Corruption Perceptions Index, Hong Kong scored 76/100 on a scale of 0 (highly corrupt) to 100 (very clean) (Transparency International 2022).

There are several elements of success notable from the ICAC. First, in setting up the ICAC, there was a clear call for the Commission to be separate from the police, who were notoriously corrupt, and from any other government department. Second, the ICAC's high conviction rate and investigation of high-profile cases demonstrated that the ICAC is effective in its anti-corruption work (Wong 2019). These elements have enabled the ICAC to succeed in holding the executive accountable.

### *2.2.1. CIABOC*

The first limb of CIABOC's mandate is that CIABOC can launch an investigation once an allegation of bribery or corruption is communicated to the Commission if it believes that the complaint is genuine and that the complaint discloses material upon which an investigation should be conducted (CIABOC Act, Section 4). The second limb of the CIABOC's mandate is that once an offense is disclosed to the Commission, it can direct proceedings against such affiliated people (CIABOC Act, Section 3).

The powers of the Commission include, among others, the following: (a) to procure and receive all such evidence, written or oral, and to examine all such persons as the Commission may think necessary or desirable; (b) to require any person to attend before the Commission for the purposes of being examined by the Commission and to answer, orally on oath or affirmation, any question put to him by the Commission relevant, in the opinion of the Commission, to the matters under investigation; and (c) to summon any person to produce any document or other thing in his possession or control.

Compared to Hong Kong's ICAC, two shortcomings can be observed: 1) CIABOC is connected with the police and the Attorney General's Department, which affects its independence because the police are perceived by the public as corrupt, and the Attorney General acts as the chief legal advisor to the state and therefore cannot be expected to also prosecute the state for corruption/bribery without a conflict of interest arising and 2) CIABOC's low conviction rate and its failure to investigate complaints have prevented it from demonstrating that it acts effectively to curb corruption.

## **3. Limitations of CIABOC as a Horizontal Accountability Mechanism**

The comparative analyses above reveal several limitations that undermine CIABOC's ability to succeed as an effective horizontal accountability mechanism. These limitations are categorized under three distinct challenges: i) gaps in the legal framework, ii) the appearance of bias, and iii) low public confidence.

### 3.1. Gaps in the Legal Framework

#### 3.1.1. *Lack of Transparency in the Process of Appointing Commissioners*

On the recommendation of the Constitutional Council, the President appoints the members of the Commission. Under the 21<sup>st</sup> Amendment to the Constitution, issues of independence arise in the composition of the Constitutional Council itself. The Bar Association of Sri Lanka has stated that under the 21<sup>st</sup> Amendment, there is a danger that a majority of the members of the Constitutional Council may be controlled by the government of the day, which impacts the overall independence of the Constitutional Council in appointing members to CIABOC (The Island 2022).

The Anti-Corruption Agency Assessment Report for Sri Lanka, conducted by Transparency International Sri Lanka in 2016, reported that CIABOC's ability to emerge as an independent body was high. However, the report highlighted that CIABOC's independence was impaired by the fact that the Constitutional Council's procedure in recommending the appointment of Commissioners, was not clearly provided for under the 19<sup>th</sup> Amendment. The lack of a transparent procedure for appointment, gave the Council the freedom to take any steps it deems fit to make recommendations, which made the appointment process less transparent (Transparency International 2017a). This shortcoming is still present in the Constitutional Council under the 21<sup>st</sup> Amendment, which does not specify how the Constitutional Council selects candidates to be recommended to the President.

The lack of transparency in the process for the appointment of commissioners in Sri Lanka means that the scope for executive influence is higher and is contrary to Principle 4 of the Jakarta Principles, which requires heads of ACAs to be appointed by a process that ensures their impartiality (Gloppen 2014). Therefore, CIABOC is unable to emerge as an independent horizontal accountability mechanism that acts as an effective check on the government due to the gap in the law on the process for the appointment of commissioners.

#### 3.1.2. *Lack of Impartial Process for the Appointment and Removal of the Director General*

The process for the appointment of the Director General to CIABOC also contributes to the appearance of bias. Principle 4 of the Jakarta Principles requires heads of ACAs to be appointed through a process that ensures their impartiality. Principle 6 of the Jakarta Principles requires heads of ACAs to be given security of tenure and a legally established procedure for removal. In Sri Lanka, the President may appoint a Director General in consultation with the members of the Commission. The power to appoint the Chief Financial and Administrative Officer for CIABOC is vested solely to the President, contrary to Principle 4 since an appointment exclusively by the President is not a process that ensures impartiality. The removal of the Director General is also vested in the President. The disciplinary procedure applicable to the Director General is unclear as disciplinary matters are generally handled by the appointing authority, in this case, the President. The appointment, removal, and disciplinary procedure being controlled solely by the President has restricted the ability of successive commissions to be free from undue influence (UNODC 2018).

## 3.2. Appearance of Bias and Lack of Sufficient Resources

### 3.2.1. Investigation and Prosecution of Cases by the Police and Attorney General

Because CIABOC's investigators are seconded from the police department and its administrative staff are sourced from the Public Services Commission, the appearance of bias increases as it effectively "brings government regulation through the back door" (Transparency International 2017a). A survey conducted by Verité Research in 2019 revealed that 40% of participants incorrectly believed that CIABOC was a department under the Sri Lankan police and that 47% of the sample did not know whether CIABOC was a department under the police or not (Verité Research 2019). In the same survey, when asked to list out three of the most corrupt sectors in the country, respondents listed the police as the most corrupt sector. This perception of the police cannot contribute positively to CIABOC's reputation since the cultural proclivity of distrust towards the police may extend to CIABOC due to its connection with the police. Therefore, CIABOC being inextricably linked with the police affects CIABOC's ability to appear as an independent horizontal accountability mechanism. Further, the involvement of the police in CIABOC's investigations creates a conflict of interest in cases where police officers are being investigated for corruption or bribery. This is contrary to Article 6 and Article 36 of the UNCAC, which requires anti-corruption agencies to be granted independence to carry out their functions effectively and without undue influence.

While CIABOC has an independent legal division to advise on prosecuting cases and to institute prosecutions, CIABOC depends on the Attorney General's Department to handle prosecutions and hires staff from the Department as consultants (Transparency International Sri Lanka 2017a). The Attorney General's Department, in effect, plays a dual role as the chief legal advisor to the State while also prosecuting the State in bribery and corruption cases. The role of the Attorney General as the chief legal advisor to the State indicates that the Attorney General represents the State and therefore acts in the best interests of the State (OHCHR 2017). This impedes the Attorney General's Department's ability to emerge as an independent prosecutor in cases against the State (Centre for Policy Alternatives 2020). Therefore, CIABOC's dependence on the Department is contrary to Article 6 of the UNCAC, as it prevents CIABOC from maintaining its independence when it prosecutes cases.

## 3.3. Low Public Confidence

The Global Corruption Barometer 2019 for Sri Lanka by Transparency International revealed that 46% of citizens were of the opinion that CIABOC was 'doing very badly or fairly badly' in relation to fighting corruption in the country (Transparency International Sri Lanka 2019). Also noted was that one of the key restraints to tackling corruption in the public sector was the low degree of certainty that action would be taken on reports of corruption, indicating that the public need to be convinced of effective action being taken (Transparency International Sri Lanka 2019). The survey conducted by Verité Research in 2019 revealed similar findings. Although 80% of respondents confirmed their awareness that the public could make complaints of bribery and corruption to CIABOC, the most cited reason for not reporting corruption was that respondents felt that nothing would be done about it (Verité Research 2019). public perception of CIABOC's inaction reveals that Principle 16 of the Jakarta Principles has not been successfully implemented since the public does not believe CIABOC to be an effective anti-corruption agency.

### 3.3.1 Low Prosecution and Conviction Rates

In the survey conducted by Verité Research, 62% of participants were of the opinion that the most effective way of combatting corruption was prosecution (Verité Research 2019). Table 2 below contains a breakdown of proposals for action forwarded to CIABOC’s Legal Division after the investigation of complaints. The information displayed in Table 2 reveals that only 2.5% of the complaints investigated in 2022 and 4.1% of the complaints investigated in 2021 were prosecuted. While low prosecution rates may be emblematic of systemic issues in the justice system, such as delays in prosecution, diminished rates of prosecution of corruption/bribery are concerning.

**Table 2.** Breakdown of proposals forwarded to the Legal Division after investigation in 2021 and 2022

Decision	No. of Files	
	2021	2022
No. of files proposed for filing cases	103	86
No. of files proposed to be closed	1,370	858
For comparison/ legal advice/ amalgamated/ confidential	929	12
Ordered to record statements	62	2,465
<b>Total</b>	<b>2,464</b>	<b>3,421</b>

**Source:** CIABOC 2021a; CIABOC 2022b

Regarding conviction rates, 94 cases were concluded in court from January to November 2022. Among those prosecutions, offenders were convicted in 20 cases, resulting in a case-based conviction rate of 21.2% in 2022. In 2021, 69 cases were concluded in court, and offenders were convicted in 11 cases. Accordingly, the case-based conviction rate for 2021 was 15.9%.

Contained in Table 3 below is a breakdown of cases concluded in the Magistrates and High Courts. The information in Table 3 reveals that in 2022, 48% of the cases prosecuted were withdrawn, which suggests that of the 2.5% of complaints that were proposed for prosecution, almost half of the cases were withdrawn. In 2021, 60% of cases prosecuted were withdrawn, so of the 4.1% of complaints that were proposed for prosecution, a majority were withdrawn.

**Table 3.** Breakdown of cases concluded in court from 2019-2022

	2019		2020		2021		2022	
	Magist rates Court	High Court						
Convictions	05	40	04	21	02	09	03	17
Acquittals	13	32	05	22	01	15	04	25
Other/Withdrawn	01	03	00	03	23	19	25	21
<b>Total</b>	<b>19</b>	<b>75</b>	<b>09</b>	<b>46</b>	<b>26</b>	<b>43</b>	<b>32</b>	<b>63*</b>

\* In a case involving two accused parties, one accused pleaded guilty and the case against the other accused is pending which is why there's a total of 95 cases.

**Source:** CIABOC 2020; CIABOC 2021b; CIABOC 2022a; CIABOC 2022b

These figures indicate that there may be some truth in the public's perception that CIABOC would not take sufficient action if complaints were made.

#### 4. Conclusion and Recommendations

For CIABOC to improve performance as a horizontal accountability mechanism, there needs to be an improvement on several grounds, which can be categorized as follows:

##### 4.1. Amendments to the Legal Framework within which CIABOC Operates:

i) It is important that the procedure by which the Constitutional Council selects candidates to recommend as Commissioners is clearly set out. In the Maldives, commissioners are appointed following a weighted assessment against set criteria (Transparency International, 2017b). If Sri Lanka were to adopt a similar process, it is likely that technocrats with a background in anti-corruption, instead of political appointees, would be appointed. The presentation of the process must be clear to ensure transparency, but it can involve calling for nominations from the public and an interview process. A transparent process will likely create public trust in the appointment process, resulting in public support for CIABOC and confidence in its leadership (Schütte, 2015). Published eligibility criteria would assist in this regard. If the criteria for selection are publicly available, the process would be subject to public scrutiny, thus allowing these criteria to be reviewed and amended as needed.

ii) The Commissioners appointed to CIABOC should not only be independent, but they should appear independent as well. They must exhibit an apolitical stance. In the selection process, the allocation of resources is needed to evaluate the character and affiliations of candidates before they are appointed. Including candidates who are not civil servants or members of the police force may also impact "the actual and perceived impartiality, competence and responsiveness" of CIABOC's leadership (Schütte 2015).

iii) Section 10 of the CIABOC Act should be amended, so that the Director General is appointed by and placed under the purview of an independent committee in terms of disciplinary

matters. The procedure for selection and appointment must be clearly set out. The Director General must also be given security of tenure, and only Parliament should be able to remove the Director General on the grounds of misconduct or incapacity. Granting security of tenure and establishing a procedure for removal is in line with Principle 6 of the Jakarta Principles and will strengthen the Director General's independence.

#### **4.2. Limit the Appearance of Bias and Allocate Sufficient Resources to CIABOC**

CIABOC would require a substantial investigations unit with trained investigators to reduce dependence on the police. In its previous study, Verité Research recommended that CIABOC takes steps to differentiate its investigative officers from the police, for example, by providing CIABOC's investigative officers with a different colored uniform (Verité Research 2019). In terms of prosecution, either a change to the function of the Attorney General is required – separate prosecutorial and advisory bodies – or CIABOC's legal division should be trained to undertake complex prosecutions independently of the Attorney General's department.

#### **4.3. Improve Public Confidence**

i) Internal and external review bodies should be established to ensure the routine and thorough investigation of complaints by the Investigations Division. These review bodies will play a significant role in ensuring that cases are not withdrawn unnecessarily.

ii) Table 3 revealed that a large proportion of CIABOC's cases fall into the "other/withdrawn" category. CIABOC should be required to specify what "other" encompasses and disclose reasons for the withdrawal of cases. A reform of the rules of proactive disclosure that apply to CIABOC under the Right to Information Act No. 12 of 2016 or a reform of the CIABOC Act can impose this requirement. ■

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