SRI LANKA: Further information regarding the recent Supreme Court decision on the Singarasa case

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A Statement by the Asian Human Rights Commission

SRI LANKA: Further information regarding the recent Supreme Court decision on the Singarasa case

We refer to the recent Supreme Court decision on the Singarasa case (please see below for reference) and our subsequent statements on this matter.

As there has been considerable interest in this case and also some confusion we are reproducing below the written submission filed on behalf of the Petitioner which may clarify certain matters.

This application to the Supreme Court was not for the implementation of the UN Human Rights Committee's opinion on this case but for a revision and / or review of the earlier judgement of the Supreme Court on the basis of error in law.

In the matter of an application for revision and/or review of the judgment and order is SC (Spl) L.A. No. 182/99 dated 28.01.2000 and pursuant to the findings of the Human Rights Committee set up under the International Covenant on Civil and Political Rights in Communication No. 1033 of 2001 made under the Optional Protocol thereto

SC (Spl) L.A. No. 182/99
CA Appeal No. 208/95
H.C, Colombo Case No. 6825/94

Nallaratnam Singarasa vs. Attorney General

Written submissions on behalf of the Petitioner in SC (Spl) L.A. No. 182/99

1) It is important to understand why the UN Human Rights Committee (I4RC) found that in convicting Singarasa the state had violated the obligations it had undertaken when ratifying the International Covenant on Civil and Political Rights (ICCPR). Singarasa's convictions in the first instance carried a sentence of 50 years rigorous imprisonment later reduced to 35 years.

2) The Committee's views communicated to the state stated that Singarasa had been denied a fair trial as mandated by ICCPR Article 14(1). (Fair trial is also a fundamental right in our Constitution, Article 13 (3)). This fair trial guarantee has been judicially interpreted by our courts in Wijepala v. The Attorney General [2001] 1 Sri L.R. 46 to include "anything and everything necessary for a fair trial." (p. 49).

3) The HRC found that the sole basis of the conviction was an alleged confession typed in Sinhala when whatever statement the accused made orally would have been in Tamil. The HRC pointed out that the alleged confession "took place in the sole presence of the two investigating officers — the Assistant Superintendent of Police and the Police Constable, the latter typed the statement and provided interpretation between Tamil and Sinhalese." This alone was sufficient for the Committee to say that the element of a fair trial was denied. The Committee in its views did not specify why particular care in the interrogation and interpretation was necessary on the special facts of this case, namely that the accused was an illiterate youth who spoke only Tamil, or, important, that under our law there could be a conviction without other evidence. But although unspoken these factors could not have been far from their minds.

4) The Committee made no comment on the PTA law on confessions except that it was a violation to place on

the accused the burden of proving that a confession was not made voluntarily. The accused had complained of a severe assault after arrest. The Committee ruled that Article 14(3(g) of the ICCPR meant that it was for the prosecution to prove the confession was voluntary and that there could be no shifting of the burden, even by placing a low standard of proof, on the accused. PTA section 16 therefore was in violation of Article 14(3)(g) of the Covenant. There was also a finding that the shifting of the burden resulted in a violation of Article 14(2) of the Covenant, namely that an accused is presumed to be innocent.

5) The reference by the Committee to "a confession obtained in such circumstances" could only refer to a doubt as to the genuineness of the statement even before the question of whether it was voluntary could be considered. If a man says, as the accused did, that he had no idea what was recorded but he was forced to put his mark (thumb impression) to it, it is not just a case of a statement obtained by threat, promise or inducement; it is not his statement at all.

6) During the course of the hearing of this application some confusion arose regarding exhaustion of domestic remedies. The position on this is as follows. The Optional Protocol provides that individuals who claim their rights have been violated and who have exhausted all domestic remedies may submit written communications to the Committee - Article 2. The requirement of exhaustion of domestic remedies is a matter for the Human Rights Committee to determine when deciding to exercise its jurisdiction. This was in fact gone into in the present case, The State argued that domestic remedies had not been exhausted, and the HRC did not agree with this contention. Vide in general the part of the HRC's views headed **Consideration of Admissibility**, and in particular paras 6.4 and 6.5. The Committee having ruled on admissibility, which is a matter pertaining only to its own practice and rules of procedure, this issue is not now of any relevance to the Supreme Court when considering the Committee's views.

7) In view of the unfortunate doubts suggested by Deputy Solicitor General Kodagoda on the quality of the members comprising the Human Rights Committee we are submitting a summary of the qualifications and background of those who participated in the Singarasa case Annex "A". (data from the UN website http://www.ohchr.org/englishlbodies/hrc/members.htrn). 'Without doubt the views expressed by them in the Singarasa case are entitled to great respect.

8) Having disapproved of his conviction the Human Rights Committee is asking the state inter alia to release Singarasa who has now been in continuous custody for over 12 years, or to order a retrial. The alternative of retrial can only be on the basis that PTA Section 16 is amended so as to be in keeping with the ICCPR as recommended by the Committee. This is unlikely to take place in the near future and release would be the just solution along with compensation. It would also be the legitimate expectation of any citizen who has been enabled by the state to petition a grievance to the HRC, that the state would follow the recommendations of the Committee after due inquiry where the state is given ample opportunity to present its case. The doctrine of legitimate expectation as a substantive right giving rise to a remedy has been recognized by our courts in *Dayarathna and Others v. Minister of Health and Indigenous Medicine and Others [1999] 1 Sri L.R. 393; Sirimal and Others v. Board of Directors of the Co-operative Wholesale Establishment and Others [2003] 2 Sri L.R. 23; Dr. MN. Sri Skandarajah v. VC Abeygunawardena, Secretary, Ministry of Health & Indigenous Medicine and Others, S.C.(FR) Application No. 490/2000*, S.C. Minutes 25.10.2004.

In the case Minister for Immigration v. Teoh [1995] 3 LRC 1 (Law Reports of the Commonwealth) the High Court of Australia recognised that the doctrine of legitimate expectation can be relied upon to ask for a right provided by an international covenant which Australia had ratified — in this instance the Convention on the Rights of the Child, This report is reproduced as Annex "B".

9) What should the state's reaction be to the Committee's views? It is a request to the state to do something, not to do nothing. The state in its response has not refused but has stated that it is unable to give effect to the Committee's recommendations because a judicial order has interposed. In its response the state has also incorrectly claimed that the petitioner, who has only ever been charged in connection with attacks on army camps, had been convicted of "murder of innocent civilians including Buddhist monks".

10) The JCCPR is a treaty and it is a basic tenet of the law of treaties, now reaffirmed in the Vienna Convention on the Law of Treaties, that a state party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (Article 27). It is for this reason that the Human Rights Committee has said that "the executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provision of the Covenant was carried out by another branch of government as a means of seeking to release the State Party from responsibility for the action and consequent incompatibility." This is from para 4 of General Comment 3 1 of the Human Rights

Committee.

11) The ICCPR and the Protocol, both ratified by Sri Lanka, must be read together. The Protocol sets out the procedure for the HRC to entertain an individual grievance, while Article 2 of the ICCPR indicates the appropriate remedy that the state is obliged to take if it is found that there is merit in the complaint. Article 2 is clear that the state in ratifying the Covenant has undertaken to give an "effective remedy" and this is explained further by requiring the state to ensure that the aggrieved party's right to the remedy is determined by "competent judicial, administrative or legislative authorities and to develop the possibility of judicial remedy." It is respectfully submitted that it is not the legislature alone that can provide the remedy. The judiciary can act in the interests of the citizen by developing judicial remedy.

12) It is in that expectation that the application has been made to Your Lordships' Court. General Comments to the ICCPR are made by the HRC under Article 40(4) of the Covenant and are recognised as part of the jurisprudence of the Human Rights Committee. General Comment 31 of the HRC at para 4 says clearly "The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive legislative and judicial), and other public or governmental authorities, at whatever level — national, regional or local -- are in a position to engage the responsibility of the State Party." The appeal to the Supreme Court for a remedy is for this reason, bearing in mind that the court is the only Court having a human rights jurisdiction and is regularly engaged in promoting and protecting human rights.

13) We are not asking the Court to substitute for the decision of a local court the views of the Human Rights Committee, but in the exercise of its inherent jurisdiction to review the conviction of Singarasa in the light of the observations of a body of experts. The Court's respect for standards and principles set in international instruments is demonstrated in many judgments. These include: *Mediwake and Others v. Dayananda Dissanãyake, Commissioner of Elections and Others [2001] 1 Sri L.R. 177; Centre for Policy Alternatives ('Guarantee,) Limited and Another v, Dayananda Dissanayake, Commissioner of Elections and Others [2003] 1 Sri L.R. 277; Farwin v. Weyasiri, Commissioner of Examinations and Others [2004] 1 Sri L.R. 99; Nadeeka Hewage and Others v. University Grants Commission of Sri Lanka and Others, SC Application No. 627/2002 (FR), SC Minutes 8.8.2003; Warnakulasooriya Merina Ratnaseeli Fernando v. D.M Jayaratne and Others SC (FR) Application No. 528/2000, SC Minutes 27,9.2001; A.H. Wickramatunga and Others v. HR. de Silva, Chief Valuer, Department of Valuation and Others* SC Application, No. 551/98 (FR), SC Minutes 31.8.2001. More recently, the Solicitor-General addressing the UN Committee on the Torture Convention (CAT) on November 11 2005 (as reported by the Asian Human Rights Commission 6 December 2005) affirmed the position that "the Courts of our country are bound to give expression to international covenants where Sri Lanka is a party, when called upon to interpret any statute." He added that" Sri Lanka has always been mindful of its obligations and respected secured and advanced human rights to its society." The Foreign Minister articulated the same views recently in Parliament. He said:

"My Ministry attaches great importance and priority to the promotion and protection of human rights in all our international endeavours. I am pleased to inform this House that Sri Lanka has continued to play a very positive and proactive role in promoting human rights. We will continue to follow this practice through co-operation at various international human rights fora."

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14) By this application the Supreme Court is given the opportunity, while noting the views of the Human Rights Committee on the conviction of Singarasa, to reexamine, in the interests of justice, the conviction under our law, including the PTA. There are two reasons for making this respectful request —

i. Even if the burden of proving that the confession was not voluntary shifted to the accused, the presumption of innocence was not shaken. This presumption was a cardinal principle of our criminal law well before it was elevated to the level of a constitutional right. When the facts relating to the recording of the confession, the evidence given by the accused at the voire dire inquiry and the trial, the paucity of the prosecution evidence, are all taken together, the reasonable conclusion is that the accused had discharged that burden. He did not have to prove beyond reasonable doubt or even by a balance of probability that section 24 of the Evidence Ordinance applied. The prosecution had failed to establish his guilt beyond reasonable doubt because an accused is entitled to rely on the presumption of innocence. The trial judge was impressed only by the manner in which the police officers gave evidence and dismissed out of hand the evidence given by the accused and his lowly background.

ii. Assuming that the 'confession' was voluntary and is admissible in evidence, still its

> value has to be tested, especially when it is retracted on oath by the accused, and there is no other prosecution evidence. The tests are truth and reliability. Voluntariness of a confession does not ensure a conviction because a court must be satisfied that it is also true and reliable. There was no evidence to support the truth of the facts related in the confession, namely that attacks on the army camps specified had in fact taken place. But both the trial judge and the Court of Appeal accepted the truth of these facts, giving only the reason that no man would admit to facts against his interest unless they were true. The other recognised test of reliability of the confession was *not considered at all.*

15) This is in marked contrast to a later Supreme Court decision where the relevant facts are similar. Shortly after *Singarasa* the court of Appeal in *Theivendian* affirmed the conviction of an LTTE suspect citing the authority of *Singarasa* on the law. This was a case where the only evidence was that of an alleged confession, and there was no independent evidence that the attacks on army persons on which the charges were based had in fact taken place. On appeal the Supreme Court set aside the conviction. The judgment of the Court of Appeal in Singarasa, which is specially referred to in the judgment of Ameer Ismail J, must be considered as having been disapproved. It is submitted that the 1000 PTA indictments admitted by the Attorney General in his response to the HRC's views as having been withdrawn and the 338 persons who were in detention having been discharged, were all due to the realisation that after ***Theivendran*** there was no possibility of obtaining a conviction,

16) In any event the conviction on charge 1 is on an entirely different footing, and cannot stand as it clearly contravenes the provisions of our law. This was a charge not under the PTA, but under the emergency regulations, which cannot override the provisions of the constitution. The conviction may therefore be considered as made per incuriam. This first charge, which dealt with conspiracy to overthrow the lawfully constituted government of Sri Lanka, was a charge under emergency regulations, i.e. regulation 23(a) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989.

17) Here again the only evidence against the Petitioner was an alleged confession, which had been taken under the provisions of regulation 50 of the emergency regulations. Regulation 60 of the emergency regulations placed the burden of proving that the confession was not voluntary on the Petitioner, in violation of his constitutional rights to the presumption of innocence and fair trial guaranteed by Articles 13(5) and 13(3) of the constitution, respectively. The relevant portions of the emergency regulations are annexed marked "C".

18) Article 155(2) of the constitution prohibits emergency regulations from overriding the provisions of the constitution and therefore emergency regulation 60 could not have placed the burden on the Petitioner to prove that the confession was not voluntary.

19) If Your Lordships' Court were to quash the conviction and sentence on the first charge, an appropriate alteration may be made of the sentences on the other charges which, once the element of conspiracy to overthrow the government is removed, only amount to simple mischief, An alteration for the sentences to run concurrently instead of consecutively would serve the end result of the release of Singarasa, now aged 32, who has spent over twelve years of his life in custody.

20) In the world order of today we cannot talk of state sovereignty as we did before. The changes that were brought about after World War II require rethinking not only of the relationship of state and state but also of state and state including its inhabitants. Experts have in recent years considered what happens to the notion of sovereignty when a state of its own volition subscribes to overarching principles outside national laws, primarily intended for the benefit of the people and the country. They have highlighted that doctrines of international law on dualist or monist theories cannot claim to be unaffected. The law of treaties now reaffirmed in the Vienna Convention says that when a state ratifies a covenant or treaty there is a contract, and *pacta sunt servanda*. We can say therefore that the concept of sovereignty is qualified, because we regularly go before international tribunals to plead compliance. Or we can say that by ratification the State has recognized that the only true sovereignty is sovereignty of the people. The court has a unique opportunity to enunciate such principles in this case, relying on the recognition of the sovereignty of the people as the lodestar of our Constitution, as reflected in the Preamble and in the substantive provisions.

21) There are examples of the attitude of our courts to obligations undertaken by the state in international agreements. An illustration is how the court reacted when the UN Stockholm Declaration and the UN Rio de Janeiro Declaration were cited to support an argument,

"[they] are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior Courts of record and by the Supreme Court in particular, in their decisions."

SC Application No. 884/99 (F.R.) *Tikiri Banda Bulankulama v Secretary, Ministry of Industrial Development* S.C. Minutes 2 June 2000 (Eppawela case) per Amerasinghe J at page 22.

22) The Supreme Court in the referring to the provisions of Article 9 of the International Covenant on Civil and Political Rights and to its Optional Protocol to which Sri Lanka is a party stated

"A person deprived of personal liberty has a right of access to the judiciary, and that right is now internationally entrenched, to the extent that a detainee who is denied that right may even complain to the Human Rights Committee.

Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations". That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognises."

Weerawansa v. The Attorney-General and Others [2000] 1 Sri L.R. 387, page 409.

Sgd
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