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CONFIDENTIAL

COMMITTEE ON THE HUMAN RIGHTS OF PARLIAMENTARIANS

CASE No. SRI/68 - SARATH FONSEKA - SRI LANKA

*Confidential decision adopted by the Committee at its 132nd session
(Geneva, 17 - 20 January 2011)*

The Committee,

Referring to the case of Mr. Sarath Fonseka, a member of the main opposition party in the Sri Lankan Parliament, and to the decision it adopted at its 131st session (October 2010),

Taking into account the information and report provided during the hearing it held on 17 January 2011 with Mr. Samarasinghe, who, as the current Minister of Plantation Industries, continues to be officially mandated to follow the cases it is examining in Sri Lanka; taking into account also the information regularly provided by the sources,

Considering the following elements currently on file as provided by the authorities, through Mr. Samarasinghe, and by the sources:

I. Regarding Mr. Fonseka's army and political career:

- Mr. Fonseka was appointed Commander of the Sri Lanka Army in November 2005 and led it to victory against the LTTE in May 2009; in July 2009, he was appointed Chief of Defence Staff, reportedly a largely ceremonial post, by President Mahinda Rajapakse and Defence Secretary Gotabhaya Rakapakse, apparently, according to the sources, because he had fallen out with them over the war strategy; according to the authorities, the Chief of Defence Staff Act, enacted in July 2009, gave the post of "Chief of Defence Staff" statutory recognition and the mandate to coordinate the activities of the Armed Forces and the Ministry of Defence; under the Act, only a serving commander of the Army can be appointed to this post; once appointed, he has to relinquish his position as commander; Mr. Fonseka was thus not removed from the post of Army Commander, but rather relinquished it in compliance with the Act;
- In November 2009, Mr. Fonseka retired from the Army to contest the January 2010 presidential elections as the common consensus candidate of the joint opposition;
- On election day, 26 January 2010, the hotel where Mr. Fonseka stayed with supporters to await the election results was surrounded by security forces; while the sources see in this a clear indication of a premeditated government plan to subvert the democratic process, the authorities affirm that the security forces were present because the hotel is located in a high security zone near Army Headquarters and the presidential and prime ministerial residences, which had to be adequately secured, all the more so as this was the first major election to be held since the end of the civil

war;

- On 8 February 2010, Mr. Fonseka was arrested by the military, hours after he told journalists in Colombo that he was prepared to give evidence in international courts on any war crime charges brought in relation to the war against the LTTE; according to Mr. Samarasinghe, he was arrested because he had discussed his entry into politics with two members of parliament while in uniform;
- While in custody, Mr. Fonseka contested the April 2010 legislative elections as the leader of the newly formed Democratic National Alliance and was elected to Parliament for Colombo District; the authorities emphasize that he was not deprived of his democratic right to contest the elections, and, once elected, was permitted not only to attend the sittings of Parliament and of various parliamentary committees but also to preside over the meetings of his party held in the parliament complex;

II. Regarding the first court-martial:

- Mr. Fonseka was brought before a court-martial under the Military Act and, on 13 August 2010, found guilty on three counts and dishonourably discharged; the discharge was ratified by President Rajapakse within 24 hours;
- One count concerns the violation of Army Act Section 124, which punishes the use of traitorous or disloyal words regarding the President, and is based on remarks that Mr. Fonseka allegedly made over the telephone to Mr. Johnston Fernando, then a parliamentarian belonging to the opposition United National Party, who subsequently joined the Government as a minister; it was reported in the media that Mr. Fernando had quoted Mr. Fonseka as saying, *"I will return to Sri Lanka after giving all evidence that the US government needs about the war and discredit the military victory. I will come prepared to contest the presidential election. Be ready to welcome me at the airport as a hero."*; defence counsel argued that Mr. Fernando was not a credible witness as he had been investigated in relation to an alleged suicide attempt on the President's life; the investigation had been brought to an abrupt halt when Mr. Fernando joined the Government; moreover, defence counsel was reportedly not allowed to question Mr. Fernando's credibility; the other two counts concern violations of Section 102(1) of the Army Act and Army Order 13/79, punishing neglect of military orders and prohibiting the exercise of political rights by army members; under these counts, Mr. Fonseka was accused of having engaged in politics while on active duty, more precisely of having, between 1 October and 14 November 2009, the day of his official retirement, allegedly solicited support from Mr. Fernando to have his name put forward to the Working Committee of the United National Party as the presidential candidate and having discussed his future political career with Mr. Lakshman Seneviratne, then a member of parliament;
- The sources affirm that the court-martial took place from 9 to 13 August 2010 in the absence of the defence team, which had informed the court that it could not be available and proposed alternative dates; the authorities, however, state that despite the requirement under Regulation 22 of the Army Discipline Regulations of 1950 that a court-martial continue from day to day and sit for a reasonable period on every day when it is assembled, the schedule was always set so as to accommodate Mr. Fonseka's senior defence counsel and that, at one point in time, the latter informed the court-martial that he was prepared to work during the court recess in August, after which the case was scheduled accordingly;

III. Regarding the second court-martial:

- On 17 September 2010, a second court-martial found Mr. Fonseka guilty under Section 109 of the Army Act of having violated procurement guidelines; the court recommended a sentence of 30 months, which was subsequently approved by President Rajapakse;
- the court-martial found that Mr. Fonseka had failed to disclose a possible conflict of interest in awarding, apparently in 2007, four tenders to Hicorp Pvt. Ltd. Sri Lanka, a company in which the Government claimed his son-in-law had vested interests; the sources state that there is no evidence to suggest that Mr. Fonseka had an arbitrary hand in the selection process and stresses in this respect the following: the defence lawyers refused to make final submissions in this case, accusing the court of serious irregularities, including preventing them from bringing in witnesses such as a member of the Tender Board who was willing to come forward and testify that nothing illegal had happened in the award of tenders; the prosecuting lawyer from the Attorney General's Department and the Judge Advocate both accepted that Mr. Fonseka had not influenced any tenders; likewise the Registrar of Companies had testified that Mr. Fonseka's son-in-law was neither a director nor a shareholder of Hicorp Pvt. Ltd. Sri Lanka; the Brigadier handling army tenders testified that although four tenders had been given to Hicorp Pvt. Ltd., six more by the same company had been rejected by the Tender Board, all when Mr. Fonseka was its chairman; the authorities, however, affirm that the procurement guidelines required Mr. Fonseka to dissociate himself from the tender process given that there was a possible conflict of interest; Mr. Wellington De Hoedt, an employee (director) of the company which had tendered the impugned bids, testified that the company was de facto run by Mr. Fonseka's son-in-law, that cheques were sent to a bogus company in the United States of America of which Mr. Fonseka's son-in-law was the principle director and that the son-in-law was also the operator of the account which the Army had been deceived into crediting; at the request of Mr. Fonseka's defence counsel, the member of the Tender Board in question was summoned; however, he had left the country and all efforts to locate him have been to no avail; as a result, the court-martial had no other option than to proceed with the case; moreover, the authorities affirm that the defence lawyers made submissions in writing and that the Judge Advocate and the Attorney General did not take any position on whether or not Mr. Fonseka had influenced the tender procedure as this was outside the realm of the charges before the court-martial;
- Mr. Samarasinghe stated that while it was true that Mr. Fonseka had not obtained any financial benefits, this was irrelevant in this case;
- Mr. Fonseka has challenged the findings of both courts-martial by invoking the writ jurisdiction of the Court of Appeal, which has issued notices on the respondent parties; the Supreme Court has granted leave to proceed with a Fundamental Rights Petition challenging his arrest;

IV. The competence of the courts-martial in this case

- With regard to the competence of the courts-martial in this case, their composition and proceedings, the authorities point to Section 57 of the Army Act, which stipulates that a person subject to military law who commits an offence and thereafter ceases to be a person subject to military law may be taken into custody and tried and punished for that offence by a court-martial; the charges brought against Mr. Fonseka fall within the ambit of that provision; moreover, Mr. Fonseka never challenged the composition of the two courts-martial, something which the sources deny, affirming that Mr. Fonseka challenged the composition of the courts-martial before the proceedings started and also in the Writ Applications;

- Moreover, Mr. Fonseka challenged the constitutionality of the courts-martial before the Supreme Court;

V. Cases before the High Court

- In addition to the two court-martials, three more cases have been brought against Mr. Fonseka before the High Court, of which, according to Mr. Samarasinghe, at present only one, namely exciting or attempting to excite disaffection (Section 120 of the Penal Code read with Regulation 45 of the Emergency Regulations introduced under the Public Security Ordinance), is proceeding; this case is said to be based on a newspaper article which reportedly misquoted Mr. Fonseka as saying that the Defence Secretary had ordered surrendering LTTE cadres to be shot; Mr. Samarasinghe pointed out in this respect that Mr. Fonseka has never denied the statement attributed to him but has merely claimed it was distorted by the media;
- The second case is related to the Hicorp case already dealt with by a court-martial; Mr. Fonseka is one of three accused, and the charge brought against him is conspiracy to obtain delivery of money through fraudulent representations by submitting forged documents; the report submitted by Mr. Samarasinghe states that "given the attitude General Fonseka displayed towards administrative duties, it is not possible for him to have inadvertently overlooked the name of his son-in-law's company in the procurement applications before him"; Mr. Samarasinghe stated that the case before the High Court was not the same as the one tried by court-martial as it involves not only Mr. Fonseka but also others and goes beyond the court-martial; there was therefore no duplication;
- The third case concerns charges regarding a conspiracy to suborn Sri Lankan Army soldiers from their allegiance and duty; it is based on an allegation that Mr. Fonseka kept army deserters with him; according to the sources, the alleged deserters were in fact 10 members of a Military Police motorcycle security unit who were assigned to Mr. Fonseka as his personal security detail by the army; the security detail was withdrawn when Mr. Fonseka decided to contest the presidential election, but the 10 men were reinstated following an order from the Elections Commission; the Army ignored the Commission's order, however, and classified the men as "absentees", arresting them as "deserters" when they reported for duty after the election; the soldiers were reinstated; Mr. Samarasinghe stated in this respect that Mr. Fonseka is accused of having prevented the soldiers in question from reporting for duty at Army Headquarters;

VI. Regarding Mr. Fonseka's conditions of detention:

- Mr. Fonseka was transferred on 1 October 2010 to Welikada prison in Colombo to serve the 30-month prison term; the sources express fear for his security and health, affirming that he is not being provided with the necessary specialized medical care; according to them, he is kept isolated in a small room in the prison premises, with the entire area barb-wired and cut off from the outside world; the sources affirm, with regard to family visits, that as of mid-January 2011 his wife has been allowed only one visit a month and a maximum of three members of his family (including his wife) are allowed to visit;
- According to the note of the Commissioner General of Prisons forwarded by Mr. Samarasinghe, Mr. Fonseka commenced his prison sentence on 17 September 2010; unlike the other convicted prisoners, he is provided with the following facilities in a separate enclosure: floor area of 150 sq.ft with a complete ceiling; attached washroom, colour TV, a treadmill for exercise, an open area (garden) of approx. 300 sq.ft; Mr. Fonseka is regularly examined by the senior medical officer from Welikada Prison Hospital and, on his recommendation, by a consultant; meals are provided as

advised by the medical officer; Mr. Fonseka is provided with security round the dock by prison officers inside the prison; Mr. Samarasinghe reported, moreover, that Mr. Fonseka has received family visits in accordance with normal prison regulations and that in the period from 1 October 2010 to 6 January 2011 he received 43 visits from members of parliament,

Noting that, according to the authorities, owing to his conviction to 30 months in prison, by virtue of Articles 89(d) and 91 of the Constitution, Mr. Fonseka will be debarred from sitting and voting in Parliament for a period of seven years, and *considering* in this respect that, according to Mr. Samarasinghe, any irregularities will be ruled on by the civil superior courts and that, moreover, Mr. Fonseka's electorate will be represented because the candidate from his party who polled the next highest number of votes at the elections is eligible for nomination as a member of parliament; *noting* also that, according to the sources, it is wrong to say that conviction by a court-martial will result in Mr. Fonseka losing his parliamentary seat, referring in this respect to the petitions which are pending in the Court of Appeal and the Supreme Court submitting that the court-martial is not a court,

Bearing in mind that the Attorney General's Department has been placed under the direct authority of the President; that, however, according to the authorities, the Attorney General's Department retains full operational independence despite being administratively listed under the President's Office whereas it was formerly listed under the Ministry of Justice,

Recalling that, during a BBC HARDtalk interview of the Defence Secretary in June 2010, the interviewer pointed to claims by Mr. Fonseka that there were witnesses who had seen that the last remnants of the LTTE were shot while trying to surrender and that the Defence Secretary had told local commanders to take no prisoners, that the interviewer had also referred to Mr. Fonseka's preparedness to testify before international war crimes investigators in this respect, and that the Defence Secretary had stated in response that such testimony would be treason and that Mr. Fonseka was a liar and would be hung if he so testified,

Recalling finally that Sri Lanka is a party to the International Covenant on Civil and Political Rights and is therefore bound to respect the fundamental rights guaranteed therein, among them the right to liberty and security and to fair trial, as enshrined in Articles 9 and 14, respectively,

1. *Thanks* the authorities for their continued cooperation and, more particularly, Mr. Samarasinghe for the information he provided and his observations;
2. *Considers*, however, that the information made available to it is not such as to dispel its deep concerns regarding the legal cases brought against Mr. Fonseka, in particular their timing, substance and developments;
3. *Refers* in this regard to the following: both courts-martial took place in a charged political context in which former General Fonseka had run against the incumbent President of the Republic, challenged the election results in court, strongly criticized the Government, including its alleged handling of the final phase of the conflict with the LTTE, and immediately afterwards was charged with several offences and imprisoned;
4. *Reaffirms* that in such a situation particular care must be taken to ensure strict respect for fair trial guarantees, and that the Government must avoid any behaviour

which may influence the ongoing judicial proceedings and thus jeopardize the essential principle of the presumption of innocence; *can only once again reiterate* in this respect its dismay at the public statement made by the Defence Secretary in a widely broadcast television interview, which is unacceptable under any circumstances and denotes an intention, if not determination, to eliminate Mr. Fonseka from the political process;

5. *Notes* that Mr. Fonseka has made use of his right to seek redress against the court-martial verdicts handed down on him and that the relevant proceedings are pending and *is confident* that the court will examine questions such as the following: i) how the first court-martial examined the challenges raised by defence counsel regarding the credibility of the Government Minister whose statements form the basis for its ruling; ii) on what grounds Mr. Fonseka's remarks were considered traitorous or disloyal towards the President and the grounds for the accusations of engaging in politics when the only issue discussed related to his future entry into politics; iii) why the second court-martial was initiated almost four years after the alleged facts took place; iv) how the prosecution showed that Mr. Fonseka was aware that his son-in-law had vested interests in Hicorp and how Mr. Fonseka's behaviour amounted to a fraudulent act, as defined under the Army Act; v) how the courts-martial considered the challenges by defence counsel with respect to the integrity of its members; vi) how it was possible for Mr. Fonseka to retire from the Army, if such retirement is reportedly only granted if the individual has a clean criminal record, which suggests a prior investigation;
6. *Decides* to send an observer to the judicial proceedings and requests the Secretary General to take the necessary measures to this end; *reiterates its wish* in the meantime to receive a copy of the two court-martial verdicts handed down on Mr. Fonseka as well as a copy of the indictments in the three other cases pending before the High Court;
7. *Remains concerned* at Mr. Fonseka's conditions of detention, given the contradictory information provided in this respect, and *requests* the Secretary General to seek authorization from the authorities for the trial observer to pay a visit to Mr. Fonseka;
8. *Requests* the Secretary General to inform the authorities and the sources accordingly;
9. *Decides* to continue examining this case at its next session, to be held during the 124th IPU Assembly (April 2011).