

Mandate of the Special Rapporteur on the independence of judges and lawyers.

REFERENCE: UA G/SO 214 (3-3-16)
LKA 7/2012

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers pursuant to Human Rights Council resolution 17/2.

In this connection, I would like to draw the attention of Your Excellency's Government to information I have received regarding **serious allegations of lack of fair trial and due process guarantees in the impeachment process of the Chief Justice of the Supreme Court, Ms. Shirani Bandaranayake, as well as attacks against and intimidation of lawyers, in particular Mr. Gunaratne Waninnayaka, the president of the Colombo Magistrate's Court Lawyers' Association, and Mr. Wijedasa Rajapakse, the President of the Bar Association of Sri Lanka.**

An urgent appeal expressing serious concern about reported attacks on, threats to and interference in the independence of the justice system in Sri Lanka, including specific attacks against judges, was transmitted to Your Excellency's Government on 2 November 2012. I regret that a reply in relation to this urgent appeal has not been received to date from Your Excellency's Government.

According to the new information received:

On 1st November 2012, a motion of impeachment against the Chief Justice of the Supreme Court signed by 117 Parliamentarians was handed over to the Speaker of Parliament. It is reported that almost immediately thereafter a document containing 14 charges against the Chief Justice was leaked to some media. Some media allegedly also published the Chief Justice's bank details in violation of the existing law in Sri Lanka.

On 14 November 2012, 11 Members of Parliament were appointed to the Parliamentary Select Committee to probe into the impeachment motion against the Chief Justice. Seven among the 11 Members reportedly belong to the Government's party. The remaining four Members reportedly belong to opposition parties. Opposition parties allegedly requested the Speaker to increase the number of Members of Parliament belonging to the opposition represented in the Parliamentary Select Committee to six. Their request was reportedly rejected by the Speaker.

On the same day, the impeachment was served on the Chief Justice, requiring her to respond to the charges within one week.

On 19 November 2012, it is reported that several public interest applications were filed before the Court of Appeal challenging, among other things, the validity of Standing Order 78 A. The Court of Appeal is said to have heard the said applications on 20 November and have referred the constitutional question to the Supreme Court of Justice. The determination of the interpretation of the Constitution by the Supreme Court is reported to be pending.

On 22 November 2012, the Supreme Court reportedly recommended to the Parliamentary Select Committee that it defer the inquiry to be held against the Chief Justice until the Court's determination on the question of law referred to it by the Court of Appeal.

On 23 November 2012, the Chief Justice was summoned to appear before the Parliamentary Select Committee. It is alleged that the Chairman of the Parliamentary Select Committee initially requested the Chief Justice to appear in person without her lawyers. When the Chief Justice refused, it is reported that she was allowed to enter with her main counsel. After discussions, her other lawyers were reportedly allowed to be present at the hearing. It is reported that the hearing was concluded after approximately two hours and that the procedure to be adopted for the inquiry was not discussed.

On 4 December 2012, at the second hearing before the Parliamentary Select Committee, the Chief Justice is reported to have requested a public trial, a request which was allegedly turned down. She further requested that the Bar Association of Sri Lanka and International Bar Association be granted observer status, but this request was allegedly also refused. The inquiry hearing was reportedly held in camera.

In addition, it is reported that the Chief Justice objected to the participation of two Members of Parliament in the 11-member Parliamentary Select Committee because she had passed orders against them and their family members in different cases. The Chief Justice reportedly also sought further time to prepare a comprehensive reply to the charges brought against her, as she had been compelled to submit a tentative reply within a period of one week. It is alleged that the Parliamentary Select Committee did not disclose nor adopt a procedure for the inquiry, but announced that no witnesses would be called.

On 6 December 2012, the Chairman of the Parliamentary Select Committee allegedly overruled the objection of bias raised against two members of the Committee, without consulting the other members. Members of the Parliamentary Select Committee belonging to opposition parties allegedly dissented. At this hearing, the head counsel of the Chief Justice reportedly raised the issue of the procedure of the inquiry again.

Documents amounting to approximately 1000 pages were reportedly handed over to the Chief Justice that day, requiring her to respond by the afternoon of 7 December (the next day). It is reported that no list of documents nor witnesses was provided. Moreover, the Chief Justice was reportedly told that

there would be no oral evidence and that therefore no cross-examination would be permitted. When issues related to the principles of fair trial and due process guarantees were raised, it is alleged that some members of the Parliamentary Select Committee responded that the Parliamentary Select Committee is not a court and that therefore it is not bound by such rules.

It is further reported that two members of the Committee particularly ridiculed the Chief Justice, using derogatory remarks and calling her “a mad woman”. Her counsel was reportedly also subjected to hostility. Members of the Committee belonging to opposition parties allegedly requested the Chair to control the proceedings and ensure that the Chief Justice and her counsel were treated with dignity, but the Chair reportedly did not make any attempt to prevent further humiliation. As a result, it is reported that the Chief Justice and her counsel walked out of the hearing.

On 7 December 2012, the four members of the Parliamentary Select Committee belonging to opposition parties reportedly walked out of the proceedings because of the biased and arbitrary nature of the proceedings. After they walked out, and in the absence of the Chief Justice and her counsel, the Parliamentary Select Committee allegedly proceeded to call 16 witnesses, none of whom were subject to any cross-examination. The proceedings of the Parliamentary Select Committee reportedly lasted until midnight.

The final report of the remaining seven members of the Parliamentary Select Committee was reportedly submitted to the Speaker of Parliament on 8 December, the last day of session of the Parliament in 2012. It is alleged that a draft of this report was not circulated to the other four members of the Parliamentary Select Committee before it was finalized. The Government reportedly announced that the impeachment debate would take place in January 2013 during a period of 10 days.

On 13 December 2012, it is reported that the President publicly indicated that he would appoint an independent panel to review the report of the Parliamentary Select Committee. He allegedly later clarified that he would consider this option after the impeachment is adopted by the Parliament.

It is further reported that at a meeting on 15 December 2012, the Bar Association of Sri Lanka unanimously passed three resolutions. These three resolutions reportedly stated: (i) that the Bar Association would not welcome the next Chief Justice if the current Chief Justice was to be impeached in an arbitrary manner; (ii) that the Parliament should first pass a law on the impeachment procedure before continuing with the impeachment of the Chief Justice; and (iii) that the Government should reconsider the impeachment.

On 17 December 2012, a group of four armed men reportedly attacked Mr. Gunaratne Waninnayaka, the president of the Colombo Magistrate's Court Lawyers' Association, a key figure of the Lawyers Collective, a non-governmental organization of lawyers, and the leader of the so-called Free March Movement, a constituent group of the Lawyers Collective. Mr. Gunaratne Waninnayaka was allegedly ambushed outside his house by four

unidentified men armed with automatic weapons when returning home with his wife. It is reported that he and his wife managed to escape the attack unharmed. The four attackers allegedly fled the scene in a white van parked nearby. It is reported that a police investigation is underway but has not progressed. It is alleged that the armed group was part of an organized attack aiming at intimidating or even kidnapping or assassinating Mr. Gunaratne Waninnayaka.

On 20 December 2012 shortly after midnight, the house of the President of the Bar Association of Sri Lanka, Mr. Wijedasa Rajapakse, was reportedly attacked by gun fire fired by unknown persons. It is reported that police investigations are underway. It is further reported that the Bar Association of Sri Lanka and Mr. W Rajapakse have recently come under media attack for voicing their support for the independence of the judiciary.

The Chief Justice filed a writ application before the Court of Appeal, seeking to quash the findings of the seven members of the Parliamentary Select Committee. On 21 December 2012, the Court of Appeal reportedly ruled to stop parliament voting on the Chief Justice impeachment while it decides whether her appeal against the charges by the Parliamentary Select Committee is justified.

I would like to express serious concern regarding the impeachment proceedings against the Chief Justice of the Supreme Court, including the grave allegations of lack of fair trial and due process guarantees. I would also like to express serious concern about the physical and mental integrity of lawyers Mr. Gunaratne Waninnayaka and Mr. Wijedasa Rajapakse, as well as that of other lawyers and members of the judiciary in Sri Lanka. In addition, I am concerned that the facts reported in this case and in the previous urgent appeal dated 2 November 2012 might form part of a pattern of attacks on, threats to and interference in the independence of the justice system in the country.

While I do not wish to prejudge the accuracy of these allegations, I would like to draw Your Excellency's attention to the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. In particular, principle 1 states: "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."

Regarding the impeachment procedure against the Chief Justice, I would like to refer Your Excellency's Government to principles related to disciplinary proceedings against judges contained in the Basic Principles on the Independence of the Judiciary, and in particular the following principles:

- Principle 17, which states: "A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing.

The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.”

- Principle 18, which states: “Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”

- Principle 19, which states: “All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.”

- Principle 20, which states: “Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.”

Furthermore, the Human Rights Committee explained in its General Comment No. 32 (CCPR/C/GC/32) that: “Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.”

I would also like to refer Your Excellency's Government to article 14(1) of the International Covenant on Civil and Political Rights, which states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

Regarding the attacks and intimidation against lawyers, I would like to refer Your Excellency's Government to the Basic Principles on the Role of Lawyers, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Havana, Cuba, from 27 August to 7 September 1990, and in particular principle 16, which states: “Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”; principle 17, which states: “Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.”; and principle 18, which states: “Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.”

In this context, I would also like to refer Your Excellency's Government to principle 23 of the Basic Principles on the Role of Lawyers, which states: “Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In

exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.”

In view of the urgency of the matter, I would appreciate a response on the initial steps taken by Your Excellency’s Government to ensure that the impeachment procedure against the Chief Justice respects all guarantees of fair trial and due process and to protect the physical and mental integrity of Mr. Gunaratne Waninnayaka and Mr. Wijedasa Rajapakse, as well as that of other lawyers and members of the judiciary who have reported interference, threats and/or attacks, including any investigation that might have been undertaken.

Moreover, it is my responsibility under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention. Since I am expected to report on these cases to the Human Rights Council, I would be grateful for your cooperation and your observations on the following matters:

1. Are the facts alleged in the above summary of the case accurate?
2. Please indicate where the procedures of impeachment of the Chief Justice of the Supreme Court stand and how such procedures respect the international principles and standards on the independence of the judiciary, in particular article 14 of the International Covenant on Civil and Political Rights and the Basic Principles on the Independence of the Judiciary.
3. Has a complaint been lodged by or on behalf of Mr. Gunaratne Waninnayaka and Mr. Wijedasa Rajapakse?
4. Please provide the details, and where available the results, of any investigation, and judicial or other inquiries carried out in relation to the cases mentioned in the above summary. If no inquiries have taken place, or if they have been inconclusive, please explain why.
5. Please indicate which measures are being taken by the authorities to ensure the safety of Mr. Gunaratne Waninnayaka and Mr. Wijedasa Rajapakse, as well as that of other lawyers and members of the judiciary who have reported interference, threats and/or attacks.
6. Please provide detailed information on the measures taken to ensure the independence of the justice system, prevent interference, threats and attacks against judges, lawyers and other members of the judiciary, and punish the perpetrators of such interference, threats and attacks.

I undertake to ensure that Your Excellency’s Government’s response to each of these questions is accurately reflected in the report I will submit to the Human Rights Council for its consideration.

While waiting for your response, I urge Your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of the above mentioned persons are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person

responsible of the alleged violations should be ensured. I also request that Your Excellency's Government adopt effective measures to prevent the recurrence of these acts.

Please accept, Excellency, the assurances of my highest consideration.

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers