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Arrest of Gen. Fonseka: due process of law is being followed -Foreign Minister Bogollagama

Foreign Minister Rohitha Bogollagama addressing the Diplomatic Corps at the Ministry of Foreign Affairs on 11th February 2010 stated that the decision to arrest Gen. Sarath Fonseka on 8th February with a view to instituting legal action was taken only after careful consideration. He also stated that the Government had very strong reasons to apprehend Gen. Fonseka that had acted in a manner prejudicial to the responsibilities of the senior posts he held during his service as a military officer

The Foreign Minister emphasized that the authorities taking into account the circumstances had concluded that in this particular instance, the application of the Army Act No.17 of 1949 would be the most appropriate. He recalled that this Act was enacted about1½ years after Sri Lanka gained Independence at the point the country was establishing the Sri Lanka Army. He stated that it was therefore natural that the structure and concepts behind the Sri Lanka Army, including the provisions of the Act governing its setting up, should be modeled very much on the lines of British military law. He said it is pertinent to note that the Courts of the United Kingdom when interpreting British military law, have held that reasonable suspicion provides adequate grounds for an arrest.

The Foreign Minister pointed out that Section 57(1) of the Army Act has specific provisions for dealing with the trial of offenders even after they have ceased to be in service.

The Minister emphasized that the processes under the Army Act do not derogate in any way from the fundamental entitlements to a free and fair hearing, including with all the necessary access to and the assistance of Defence Counsel. He noted that in the case of Gen. Fonseka, the authorities had made it a point to ensure that he is treated with all the dignity and courtesy that is due while his family are afforded regular access. He reiterated that there were no constraints to Gen. Fonseka meetings with his Defence Counsel.

Foreign Minister Bogollagama stated that there are perhaps some who due to their being unaware of the true circumstances of the case, have chosen to perceive it as an example of political victimization. He pointed out that the facts do not warrant such an assumption. He noted that the Government could have if it so wished, opted to deny Gen. Fonseka the

opportunity of entering the political arena by deciding either to refuse to accept his request to retire or by keeping the decision pending. On the contrary, after Gen. Fonseka sent in his letter, the President accepted his retirement from military service despite being fully aware of the fact that the General was leaving the Armed Forces, in order to contest as President Rajapaksa's principal opponent in the forthcoming Presidential election.

Foreign Minister Bogollagama reiterated that the action taken in relation to Gen. Fonseka was a necessary step guided by the very valid consideration of maintaining the primacy of the rule of law.

Ministry of Foreign Affairs
Colombo

11th February 2010

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DIPLOMATIC BRIEFING

Excellencies,
Distinguished members of the Diplomatic Corps and of the UN and other International Organizations,
Ladies & Gentlemen,

I thank you for your presence at this diplomatic briefing. Sri Lanka as a democratic nation is committed to transparency and believes in the importance of always sharing with our friends and partners overseas, the facts and considerations behind any noteworthy development in our country.

It is in this context that I need to emphasize at the very outset that the decision taken to arrest Gen. Fonseka on 8th February and then hold him in detention with a view to conducting investigations followed by a legal process, was taken only after careful consideration. The Government had very strong reasons to apprehend that Gen. Fonseka had acted in a manner prejudicial to the responsibilities of the senior posts he held during his service as a military officer. The Armed Forces of all our countries have the sacred duty of protecting the security of the nation. It is therefore a universal practice that military officers are held to a perhaps necessarily higher standard of accountability than that which is applied to their peers in other walks of life.

It was in this context ladies and gentlemen, that the careful consideration of all the legal issues involved, led the authorities to conclude that in this particular instance, the application of the Army Act No.17 of 1949 would be the most appropriate. This Act was enacted about 1 ½ years after we gained Independence at the point we were establishing what was then known as the Ceylon Army, and later renamed the Sri Lanka Army. It was therefore natural that the structure and concepts behind our Army, including the provisions of the Act governing its setting up, should be modeled very much on the lines of British military law. It is moreover pertinent to note that the Courts of the United Kingdom when interpreting British military law, have held that reasonable suspicion provides adequate grounds for an arrest.

The Army Act provides that members of the Regular Force, the Regular Reserve, the Volunteer Force and the Volunteer Reserve would be subject to the provisions of Military Law. Moreover, Section 57(1) of the Act has a specific provision dealing with the trial of offenders, even after they have ceased to be in service. The relevant section reads as follows :

"*Where a person subject to Military Law commits any offence and thereafter ceases to be a person subject to Military Law, he may be taken into and kept in Military Custody and be tried and punished for that offence by a Court Martial. Provided that he shall not be so tried after the lapse of six months, from the date of the commission of such offence unless such offence is the offence of mutiny, desertion or fraudulent enlistment."*

Gen. Sarath Fonseka was a serving Military Officer until the 14th of November 2009, when he resigned from the post of Chief of Defence Staff. The provisions of Section 57(1) therefore were invoked to effect the arrest last Monday.

Let me now enumerate to you the legal provisions that will govern the process that is now underway. At the time of the arrest, the alleged offences were read to the defendant. As the investigation proceeds, a Summary of Evidence will be recorded, on the basis of all witnesses having to make their Statements of Evidence under oath. After the recording of evidence of each witness, the Statement would be read over to him and his signature would be obtained.

The defendant has the right to be present when the Summary of Evidence is recorded on a basic Charge Sheet. He also has the entitlement of cross-examining all of the witnesses. As a further safeguard, the defendant is cautioned that he has the right to make a Statement or to remain silent. He is also entitled to call witnesses to give evidence on his behalf.

At the end of the Summary, the officer recording the Summary of Evidence is obliged to state that he has adhered to all of the provisions laid down in the Disciplinary Regulations of 1950. The Summary of Evidence then constitutes the basis of determining whether a prima-facie case prevails for the continuation of the process or not. If there is a prima-facie case, the final Charge Sheet would be framed according to the evidence that has been established. A copy of the Convening Order, a copy of the Charge Sheet, a copy of the Summary of Evidence and a list of witnesses would be issued to the defendant, prior to commencement of the Court Martial.

It is important to note that the defendant has the right to retain any number of lawyers of his absolute choice to defend himself during the Court Martial proceedings. The Court Martial itself is governed by the Disciplinary Regulations of 1950 and the Court Martial Regulations of 1950, promulgated under Section 155 of the Army Act.

The outcome of a Court Martial can be subjected if the defence so wishes, to judicial review by the Superior Courts of the land. This entitlement stems from Section 79(1) of the Army Act, which provides that *"such of the provisions of Article 140 of the Constitution as relates to the grant and issue of writs of mandamus, certiorari and prohibition shall be deemed to apply in respect of any Court Martial or of any Military Authority exercising judicial functions."*

You would therefore observe ladies and gentlemen, that the processes under the Army Act do not derogate in any way from the fundamental entitlements to a free and fair hearing, including with all the necessary access to and the assistance of Defence Counsel. In the case of Gen. Fonseka, let me add that given the high office he has held, the authorities have made it a point to ensure that he is treated with all the dignity and courtesy that is due. His family are afforded regular access and there are no constraints to his meetings with his Defence Counsel.

I mentioned at the very outset of my remarks ladies and gentlemen, that the action concerning Gen. Sarath Fonseka was embarked upon only after careful consideration. There are some who perhaps due to their being unaware of the true circumstances of the case, have chosen to perceive it as an example of political victimization. The facts do not warrant such an assumption. Firstly, the Government could have if it so wished, opted to deny Gen. Fonseka the opportunity of entering the political arena by deciding either to refuse to accept his request to retire or by keeping the decision pending. That did not happen and in fact, quite soon after his sending in his letter, the President accepted his retirement from military service despite being fully aware that the General was leaving the Armed Forces, in order to contest as President Rajapaksa's principal opponent in the forthcoming Presidential election. Secondly, the authorities had even at that time very strong reasons to apprehend that the General had acted contrary to the provisions of the law, including the Army Act. However, the legal processes could not be applied since the election preparations were at an advanced stage and President Rajapaksa did not want to leave room for any public perception to arise that he was acting in a manner intended to frustrate the political aspirations of any other potential candidate. Yesterday at the Cabinet meeting, the President in fact said that if he had prevented by any means Gen. Fonseka entering the political arena, the President's own stature would have become lowered because of the public perception that may have been created.

Let me therefore conclude ladies and gentlemen, by reiterating to you two fundamentals. One is that the action taken in relation to Gen. Fonseka is a necessary step guided by the very valid criterion of maintaining the primacy of the rule of law. In our country, everyone is equal before the law and correspondingly no one can claim to be above the law. The other is that the process involving Gen. Fonseka will be conducted in a manner and on the basis of legal provisions that afford him and any other defendant under military law, the absolute and fundamental entitlement to a free and fair hearing in terms of the procedures established by law. Even as this process is underway, the Government will do everything necessary to ensure the personal dignity of the General.

Ladies and gentlemen, I thank you for your attention.