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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session, 27–31 August 2012

No. 38/2012 (Sri Lanka)

Communication addressed to the Government on 5 April 2012

Concerning Gunasundaram Jayasundaram

The Government replied to the communication on 3 May 2012.

The State is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The case summarized below was reported to the Working Group on Arbitrary Detention as follows.

4. Gunasundaram Jayasundaram, 56 years of age, is an Irish citizen who was born in northern Sri Lanka. Mr. Jayasundaram left for London at the age of 17 to study engineering and took up permanent residence there. He was arrested on 4 September 2007 in Colombo, under suspicion of supporting the Liberation Tigers of Tamil Eelam (LTTE).

5. Mr. Jayasundaram is the subject of three urgent appeals: one by the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, dated 19 June 2008; one by the Working Group on Arbitrary Detention and the Special Rapporteur on the question of torture, dated 14 August 2009; and one by the Working Group on Arbitrary Detention, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on the question of torture, dated 30 August 2011. To date, there have been no responses from the Government to those urgent appeals.

6. Mr. Jayasundaram was arrested allegedly without a warrant on 4 September 2007, on orders of the military authorities under Emergency Regulation No. 19 (2). The accusations against him were based solely on statements of another person, whom Mr. Jayasundaram had reportedly never met. Mr. Jayasundaram was arrested and held in detention without prompt access to a lawyer. He was detained without charge and was not brought before an independent judicial authority.

7. On 12 September 2008, the Working Group on Arbitrary Detention adopted its opinion No. 30/2008¹ on the case of Mr. Jayasundaram, stating that “the deprivation of liberty of Mr. Gunasundaram Jayasundaram is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9, 14, and 26 of the International Covenant on Civil and Political Rights, and falls under categories II and III applicable to the consideration of cases submitted to the Working Group”.

8. Despite the adoption of the aforementioned opinion, Mr. Jayasundaram continues to be in detention. Recent additional information received from the source states that Mr. Jayasundaram is currently in need of serious medical assistance, as he suffers from blood pressure problems and a debilitating mosquito-borne viral disease which has caused pain in his joints. He is asthmatic and has had various respiratory problems, which have been worsened by regular bouts of the flu. He also suffers from insomnia; acute distress, anxiety and depression as a result of his detention, which included periods in solitary

¹ Available on the Working Group on Arbitrary Detention’s database: www.unwgadatabase.org/un/.

confinement. He does not wish to ask for medical assistance from the prison administration, as the last time he did he was sent to the prison hospital, where he said he seriously feared for his life as he was exposed to other seriously ill people, some with contagious diseases. He no longer takes his blood pressure medication as it causes frequent urination and he is reportedly not allowed out of his cell at night to use the toilet facilities.

9. Mr. Jayasundaram allegedly suffers from a hernia and his family fears for his deteriorating health. He urgently requires an operation within a proper medical facility. His serious state of health required him to undergo his first operation in July 2011 without close family members being present. He was reportedly handcuffed by the feet to the bed by four security guards as soon as he returned to the ward following his operation. Mr. Jayasundaram was ordered to lift his leg so that his ankle could be handcuffed, despite his pleas that he could not feel anything; the security guards reportedly pushed and pulled his anesthetized legs into place.

10. A doctor is reported to have ordered the security guards outside the room and explained to them that it would take four to six hours for Mr. Jayasundaram to regain any feeling. Additionally, he recently lost a tooth which had required root canal treatment; he has had a toothache for over a fortnight but is unable to see a dentist. Mr. Jayasundaram reportedly requires a second groin hernia operation but his health has been too unstable to risk another operation in the short term. The current medical service provided to Mr. Jayasundaram is reportedly inadequate and will not alleviate the various health problems he is experiencing. Mr. Jayasundaram is reported to be severely depressed and suicidal, believing that he will not survive the sufferings he has had to endure throughout his detention.

11. Additional information received indicates that the police have reportedly tried to have Mr. Jayasundaram transferred to Boosa prison, where he had been previously held in solitary confinement. Allegedly, this application has been unsuccessful.

12. To date, Mr. Jayasundaram has been detained for almost five years without trial. Efforts to seek judicial remedies, including a habeas corpus application filed on his behalf and a fundamental rights application before the Supreme Court have been met with repeated delays. His case has been reportedly postponed again to September 2012. He remains in prolonged detention in Welikada remand prison in Colombo and has been deprived of regular contact with his wife and children, who reside in Europe.

Response from the Government

13. The Working Group transmitted the above allegations to the Government of Sri Lanka on 5 April 2012, requesting detailed information about the current situation of Mr. Jayasundaram.

14. An interim response was provided to the Working Group on 3 May 2012 which stated the following:

There is evidence of Mr. Gunasundaram's involvement in LTTE procurement activities which involve nine countries and Sri Lanka authorities are seeking the assistance of Singapore as he is a permanent resident of that country. Further, as per the communication, a Mutual Legal Assistance was requested from the Attorney General's Department of Singapore and response is awaited by them. Once the Mutual Legal Assistance agreement is authorized and investigations are concluded, criminal indictment with charges commensurate with the findings would be considered and filed in the High Court. In the meantime, Mr. Gunasundaram filed a habeas corpus appeal before the Court of Appeal in Sri Lanka and it was withdrawn by the Counsel appearing for the applicant. He also filed a Fundamental Rights application before the Supreme Court of Sri Lanka, challenging his arrest and

detention. The State has been given time till September 2012 to file an objection. Thereafter, the applicant will be given time to file a counter objection. Subsequently, a hearing will be fixed in the Supreme Court.

Further comments from the source

15. The Government's response was sent to the source for their comments, which are presented below.

16. The source states that these are unsubstantiated claims that have been made by the Government for almost five years, both to the United Nations and in the Sri Lankan courts. The source refers to opinion No. 30/2008 of the Working Group, which declares the detention of Mr. Jayasundaram as arbitrary.

17. The source further states that their request has always been that Mr. Jayasundaram be either charged or released. The Government of Sri Lanka in its response has failed to mention that despite the Supreme Court ordering in October and November 2011 that he be charged or discharged on 3 February 2012, Mr. Jayasundaram is still detained. The source claims that even the judge requested the State to either charge or discharge Mr. Jayasundaram rather than continue its persistent postponements, yet the case was again postponed to September 2012. The lawyer appearing on behalf of the State had even sought postponement to November 2012, but the judge refused this request.

18. The source further reports that the Supreme Court in Sri Lanka does not normally permit leave to proceed, but in this case the judicial panel was dissatisfied and frustrated with the State prosecution and leave to proceed was granted in March 2012. The State prosecution objected to the granting of leave to proceed and the judicial panel gave the State only two months to give a reason as to why leave to proceed should not be granted.

19. The source further declares that it is not comprehensible why Singapore would delay giving the information to the Government of Sri Lanka, which is the excuse used by the State for over three years. Mr. Jayasundaram had only one registered company and that was in Singapore; given the tight Singapore laws, Mr. Jayasundaram would undoubtedly have been caught had he been operating in an illegal manner as the State authorities in Sri Lanka "suspects". The source also questions why the Government of Sri Lanka fails to name the nine countries Mr. Jayasundaram was alleged to have been involved with.

20. The source adds that regardless of the seriousness of the allegations, Mr. Jayasundaram needs at the very least to be brought to trial. The poor excuse that Singapore is dragging its heels demonstrates that the State authorities in Sri Lanka have acted illegally and arbitrarily in detaining him, and now want to fabricate a reason for this excessively prolonged arbitrary detention by blaming Singapore. The Sri Lankan authorities have never provided a reason for his arrest in September 2007. This in itself is a serious violation of the legal code of Sri Lanka and departs from both domestic and international human rights standards regarding arrest and detention.

21. Regarding the habeas corpus, it was forcibly withdrawn by the counsel as over 12 court hearings over a period of two years failed to produce Mr. Jayasundaram in court or remedy his situation. A fundamental rights case was lodged instead of the habeas corpus after that period. By law the habeas corpus must be withdrawn in order to proceed with the Fundamental Rights application, which is more extensive in that it covers the right to a fair trial. Although the right to a fair trial is guaranteed as a fundamental human right within the Constitution of Sri Lanka, State authorities, particularly the police, have shown little respect for those constitutional provisions. The modus operandi of the Sri Lankan authorities is to continuously postpone hearings, as is clear in this case, in the hope that the case will be dropped or that the detainee will be forced to sign a fabricated confession in order to get reprieve.

22. The source calls upon the Government of Sri Lanka to honour the recommendations of the Working Group on Arbitrary Detention, which are to remedy the situation of Mr. Jayasundaram and to bring it into conformity with its international human rights obligations under the International Covenant and Civil and Political Rights. The source also brings to the attention of the Working Group the report of the Commission of Inquiry on Lessons Learnt and Reconciliation,² in particular to the recommendation in paragraphs 9.54, 9.55, 9.56 and 9.57 and paragraph 9.70. The source argues that none of the obligations Sri Lanka has accepted under applicable international human rights instruments, and in accordance with the requirements of its national laws, have been adhered to in respect of Mr. Jayasundaram despite representations made on his behalf during the time the public was encouraged to communicate with the Commission of Inquiry.

Discussion

23. Mr. Jayasundaram was the subject of opinion No. 30/2008 of the Working Group and three urgent appeals. To date, there have been no responses from the Government to those urgent appeals.

24. Since the adoption of opinion No. 30/2008, new information has been provided by the source highlighting the deteriorating physical and psychological health of Mr. Jayasundaram and the lack of procedural safeguards accorded to him since his detention in 2007. He has had to undergo surgery while in detention and requires a further hernia operation, which cannot be undertaken due to his poor health condition. The detention of Mr. Jayasundaram has a direct bearing on his deteriorating health condition, which is one of the main factors instigating the present submission. The combination of civilian and emergency regulations in Sri Lanka has resulted in a worsening environment for the protection of human rights, a situation that has been noted by national, regional and international organizations, including the United Nations. The case in hand is one of many that reveal a lack of respect for human rights that has arisen in reaction to the conflict and post-conflict situation.

25. Sri Lanka has been under emergency laws for a very long time; the foundation of the laws is the Public Security Ordinance of 1947, dating back to British colonial rule. Since then, these laws have enabled declarations of emergency and emergency regulations in the country. The second law in this regard is the Prevention of Terrorism (Temporary Provisions) Act of 1979. Human rights advocates and the international community have repeatedly called for the repeal or amendment of these laws as they have resulted in the dissipation of the core of human rights protecting persons deprived of their liberty, including rules governing detention, due process and the right to a fair trial. Since 2005, the Public Security Ordinance has been used to enact a total of 20 regulations by the Government of Sri Lanka, which has undermined the human rights regime in general and with particular effects on the rights relating to arrest, detention and fair trial.

26. A number of emergency laws in Sri Lanka allow military personnel to perform the functions usually carried out by normal law enforcement officials. Regulations 19 and 20 of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005 give the armed forces powers of: search and seizure; arrest and detention without warrant; police powers in dealing with prisoners; the powers of a police officer under any emergency regulation; and the power to question a person in detention.

27. Section 19 of the Emergency Regulations 2006, under which Mr. Jayasundaram was arrested and continues to be detained, provides specific immunity for actions taken under

² Available from <http://slembassyusa.org/downloads/LLRC-REPORT.pdf>.

the Regulations. It provides that “no action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties”.

28. Similar immunity provisions are contained in Regulation 73 of the 2005 Emergency Regulations, the Public Security Ordinance (sects. 9 and 23) and the Prevention of Terrorism (Temporary Provisions) Act (sect. 26). These provisions seek to severely limit the accountability of civilian and military authorities exercising emergency powers, provided that the action of the official took place in the course of discharging official duties. Further, the overly vague definitions of offences; sweeping powers of the military; arbitrary grounds for arrest and detention; erosion of fair trial and due process rights; and curtailing of fundamental freedoms endanger the life, liberty and security of the people. The Working Group is concerned that the immunity provisions may have far-reaching implications on those who are deprived of their liberty in that the violations of their human rights can be carried out with impunity by State authorities. Laws that give immunity to public functionaries and which are inimical to the human rights protection of those who are deprived of their liberty should therefore be amended.

29. It is important to note that the Emergency Regulations are still in operation despite the fact that on 9 June 2010, the Government of Sri Lanka informed the Human Rights Committee that: “the recent amendments to the Emergency Regulations that have come into effect from 2 May 2010 are in keeping with the consistent commitment of Sri Lanka towards the promotion of human rights and the maintenance of strong judicial safeguards. It is in this context that the Government of Sri Lanka at the outset wishes to enumerate the terminations of derogations of the following ICCPR articles [: 9 (2), 12, 14 (3), 17 (1), 19 (2), 21 and 22 (1)]”.³

30. In a 2011 report, Amnesty International notes: “Detainees are often held arbitrarily for prolonged periods (sometimes years) without charge. Many are arrested and detained on suspicion of links to the LTTE pending investigation and interrogation by Sri Lanka’s intelligence and security forces ... People alleged to be involved with the LTTE are rarely brought to trial. Most of these detainees are eventually released for lack of evidence”.⁴

31. The Working Group is also mindful of the serious consequences for those who are “suspected of links to the LTTE” simply because they are of Tamil origin. The manner in which Mr. Jayasundaram’s case has been handled, namely the unsubstantiated reasons for his arrest; his prolonged detention without charge or trial; and the non-observance of his fundamental human rights, such as the right to a fair trial, lends weight to the concerns that the reason for his arrest and detention is linked to his ethnicity as a Tamil.

32. Mr. Jayasundaram was arrested without an arrest warrant on orders of the military authorities under Emergency Regulation No. 19 (2), which resulted in his prolonged detention. In its 2008 opinion, the Working Group arrived at the conclusion that the accusations against Mr. Jayasundaram were based solely on the statements of another person, with whom he had never met. Moreover, the Working Group found the Government’s argument that Mr. Jayasundaram was providing monetary and material support to the LTTE unsubstantiated. Four years on, the Government of Sri Lanka in its “interim response” of 3 May 2012 regarding the current matter has not progressed beyond its initial position. It is fairly incomprehensible that in five years the Government has been unable to frame charges and/or initiate legal proceedings against what they term is a suspect

³ See the United Nations Treaty Collection website at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

⁴ Amnesty International, “Sri Lanka: Briefing to Committee against Torture”, October 2011, p. 4.

in their struggle against terrorism. The excessively prolonged period in which Mr. Jayasundaram has been held in detention coupled with his deteriorating health condition has therefore rendered it necessary for the Working Group to consider the case at hand.

33. The Working Group reminds the Government of Sri Lanka of its duty to comply with international human rights obligations not to detain arbitrarily, to release persons who are arbitrarily detained and to provide them with compensation. The duty to comply with international human rights rests not only on the Government but on all officials, including judges, police, security officers and prison officers with relevant responsibilities. No person can contribute to human rights violations. The Working Group also underlines the liability that can follow from arbitrary detention when it constitutes a crime against humanity under customary international law.

Disposition

34. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The Working Group considers that the deprivation of liberty of Gunasundaram Jayasundaram continues to be arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9, 14 and 26 of the International Covenant on Civil and Political Rights, falling within categories II, III and V of the arbitrary detention categories referred to by the Working Group when considering the cases submitted to it.

35. Consequent upon the opinion rendered, the Working Group requests the Government of Sri Lanka to remedy the situation of Mr. Jayasundaram and to bring it into conformity with its international human rights obligations under the International Covenant on Civil and Political Rights. The appropriate remedy for the present case would be the immediate release of Mr. Jayasundaram and his enforceable right to compensation under article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

36. In view of the critical health condition of Mr. Jayasundaram, the Working Group requests the Government to extend to him access to all appropriate medical facilities.

37. Finally, the Working Group reminds the Government that, according to the recommendations of the Human Rights Council, national laws and measures aimed at combating terrorism shall comply with all obligations under international law, in particular international human rights law.⁵

[Adopted on 31 August 2012]

⁵ Human Rights Council resolution 7/7.