

SOUTHERN AFRICA LITIGATION CENTRE

SOUTH AFRICA'S OBLIGATION TO REFUSE TO RECEIVE AND RECOGNISE SRI LANKAN GENERAL AND SUSPECTED WAR CRIMINAL SHAVENDRA SILVA AS SRI LANKA'S DEPUTY AMBASSADOR TO SOUTH AFRICA

Submitted to the Office of the Presidency and the Department of International
Relations and Cooperation

Legal Briefing Paper

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OVERVIEW

The Southern Africa Litigation Centre (SALC) and the Foundation for Human Rights and Solidarity Groups, the Tamil Federation of Gauteng and the South African Tamil Federation, have learnt that Sri Lanka intends appointing Major General Shavendra Silva as its Deputy Ambassador to South Africa. Authoritative and extensive information, including a high-level UN Secretary-General's report, exists linking General Silva to the commission of war crimes and crimes against humanity during the Sri Lankan civil war. These allegations render General Silva ineligible for the nominated diplomatic post and compel South Africa to refuse to receive and recognise him as such.

The decision to receive and recognise foreign diplomats is, pursuant to section 84(2)(h) of the Constitution, vested in the President. This is an important exercise of public power; one with far reaching consequences that goes beyond South Africa's relationship with Sri Lanka. The President, in his exercise of this power, is obliged to discharge this responsibility within the legal parameters of the Constitution taking into account a number of considerations, including, but not limited to, prior conduct of the nominated diplomat concerned.

Sri Lanka, like South Africa, has a past characterised by the flagrant disregard of human rights. South Africa owes its emergence from apartheid in part to the support of the international community and its condemnation of a regime that was illegal under international law. Similarly, the international community and the United Nations have condemned the atrocities committed by Sri Lankan forces and have called on the Sri Lankan authorities to investigate and prosecute those responsible.

The promotion and protection of human rights feature prominently in South Africa's foreign policy and international relations. Respect for the rule of law and adherence to South Africa's international obligations are embodied in the values and norms enshrined in South Africa's Constitution. South Africa is under a legal and moral duty, in circumstances such as the present, to respond to violations of human rights committed beyond its borders in a principled, legally appropriate and constitutionally compliant manner, and must act accordingly at all levels of government.

SALC and its partners urge the President and the Department of International Relations and Cooperation (DIRCO) not to recognise General Silva. Recognition would cloak General Silva with undeserved diplomatic immunity. In bestowing such recognition South Africa would render itself complicit in his impunity, frustrating efforts at accountability and denying justice to the victims of the Sri Lankan conflict, in violation of South Africa's Constitution and its international and domestic obligations.

To assist the President in assessing General Silva's credentials and in reaching a considered determination, SALC and its partners have prepared a legal briefing paper outlining the relevant factual and legal considerations that must inform any decision made in terms of section 84(2)(h) of the Constitution in respect of reception and recognition of General Silva in South Africa.

We would welcome the opportunity to engage with the Presidency and/or DIRCO should there be any queries or concerns relating to the contents of this briefing paper.

INTRODUCTION

This briefing paper concerns the proper and lawful exercise of the power of the President of South Africa to receive and recognise foreign diplomats in terms of section 84(2)(h) of the South African Constitution. In particular, it addresses the response section 84(2)(h) compels of South Africa in respect of Sri Lanka's stated intention to assign Major General Shavendra Silva (General Silva) to the post of its deputy ambassador in South Africa.

The briefing paper has been prepared by the Southern Africa Litigation Centre (SALC) in consultation with the Foundation for Human Rights and a number of Solidarity Groups in South Africa, including the Tamil Federation of Gauteng and the South African Tamil Federation for the attention of the Office of the Presidency and the Department of International Relations and Cooperation (DIRCO) as the entities responsible for decisions made pursuant to section 84(2)(h).

We have prepared and now submit this briefing paper, having learnt that Sri Lanka intends to deploy General Silva as its deputy ambassador to South Africa. However such deployment does not vest exclusively as an exercise of Sri Lanka's sovereign power. South Africa's Constitution authorises the President to recognize and receive foreign diplomats. Exercise of this power requires the President to assess General Silva's suitability for the post and either grant or reject Sri Lanka's request to have him deployed to South Africa.

Informed assessment of General Silva's suitability compels the conclusion that he is ineligible to take up an ambassadorial position in South Africa on account of the credible allegations against him that he participated in the commission of war crimes and crimes against humanity in Sri Lanka in 2009.

South Africa's constitutional framework requires that all public power be exercised in accordance with the rule of law, that it be rational and that relevant considerations be taken into account and given appropriate weight to ensure informed and accountable decision making.

Rationality and the identification of those considerations that are relevant are to be determined on a case by case basis. Both enquiries however must be made in accordance with and within the

parameters of the Constitution. Should they be exercised outside these legally mandated confines the impugned conduct becomes susceptible to review and stands to be declared unconstitutional, unlawful and in breach of the principle of legality.

The allegations of crimes against humanity and war crimes against General Silva require that the President and DIRCO evaluate his eligibility with reference to two key considerations: the purpose and integrity of diplomatic status and its attendant privileges and South Africa's domestic and international obligations to ensure accountability for international crimes.

Were General Silva to be received and recognised as deputy ambassador to South Africa, he would be conferred with diplomatic immunity. The practice of diplomatic immunity is intended to safeguard sovereign equality between states and enable the peaceful conduct of foreign relations. It is not intended to shield individuals from accountability for egregious human rights violations. The extension of diplomatic immunity to General Silva would amount to an abuse of the internationally regulated system of diplomatic status.

Moreover, by recognising and receiving General Silva, and in consequence recognising his diplomatic immunity, South Africa would render itself complicit in his impunity, frustrating efforts at accountability and denying justice to the victims of Sri Lanka's conflict. In so doing, South Africa would violate its own constitutional, domestic and international obligations.

This briefing paper answers the following questions:

- Is the power of the President to receive and recognise foreign diplomats subject to judicial scrutiny under the principles of legality and rationality?
- What factual and legal considerations is the President required to take into account in the exercise of his power to receive and recognise foreign diplomats?

It does so by examining the following:

- The Sri Lankan conflict and ensuing violations of international law;
- General Silva's role and involvement in the conflict;
- The President's power to receive and recognise foreign diplomats, as set out in section 84(2)(h) of the Constitution;

- The exercise of that power;
- South Africa's international obligations and their relevance to any determination made in terms of section 84(2)(h);
- Potential legal implications of receiving and recognising General Silva.

THE SRI LANKAN CONFLICT

Following Sri Lanka's independence from Britain, ethnic tensions between the majority Sinhalese and the Tamils, the largest of the minority groups, began. Many Tamils felt marginalised and discriminated against. In the 1970s Tamil rebel groups began mobilising in response to a government they deemed to be elitist and anti-Tamil. What started as a demand for greater equality within Sri Lanka evolved into one for separatism and the establishment of an independent Tamil state.

What followed was a bloody civil war that spanned almost thirty years. In May 2009 the Sri Lankan Army (SLA) declared that it had defeated the Liberation Tigers of Tamil Eelam (LTTE), an armed group that throughout the war remained intent on establishing a separate state in northern Sri Lanka.

The last five months of the civil war were, according to credible reports, particularly violent.¹ Although both the SLA and the LTTE committed atrocities throughout the conflict, the scale and nature of violations worsened from January 2009 as the SLA intensified its military operations in the northern Sri Lankan province of Vanni, the last remaining LTTE stronghold. Credible evidence indicates that during this time tens of thousands of Tamil civilians were killed, countless more wounded, and hundreds of thousands deprived of adequate food and medical

¹ UN Secretary-General (UNSG), *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (UN Report)*, 31 March 2011, available at <http://www.unhcr.org/refworld/docid/4db7b23e2.html> ; International Crisis Group *War Crimes in Sri Lanka (ICG Report)*, 2010 available at <http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka/191-war-crimes-in-sri-lanka.aspx>. See also the reporting by the European Centre for Constitutional and Human Rights available at <http://www.ecchr.de/index.php/sri-lanka.404/articles/the-jagath-dias-case.html>

care, resulting in yet more deaths. Conservative estimates put civilian deaths at around 40 000² and displacements at 290 000³.

Following the Sri Lankan government's self-proclaimed victory in May 2009, United Nations (UN) Secretary-General, Ban Ki-moon visited Sri Lanka and met with the Sri Lankan president. The two leaders issued a joint statement committing themselves to ensuring accountability for crimes committed during the conflict.

On 22 June 2010 Ban Ki-moon appointed a commission of enquiry comprised of a panel of experts to investigate crimes committed during the final stages of the civil war and to evaluate Sri Lanka's accountability mechanisms.

On 31 March 2011 the panel of experts released a report documenting its findings, titled *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka* (UN Report).⁴ The panel of experts focused on the period from September 2008 through May 2009, the most intense and violent phase of the war during which many serious violations of international law were committed.

The UN Report concluded that during this time the SLA and LTTE forces had both been guilty of violations of international humanitarian law and war crimes. The SLA, in particular, was implicated in the commission of extensive international law violations, including, but not limited to:

- Killing of civilians through widespread shelling;
- Shelling of hospitals and other humanitarian installations;
- Denying humanitarian assistance to civilians.

² UN Report at para 137.; ICG Report estimates the figures as follows: "At the start of the 2002 peace process, the consensus was that 65,000-70,000 had been killed in the preceding nineteen years of fighting. It is likely that about the same number were killed in the period between late 2005, when active insurgency and counter-insurgency recommenced, and the end of the war in May 2009." At p. 28

³ UN Report, above note 1 at para 2.

⁴ Above note 1.

The UN Report also confirms the majority of findings of a similar report prepared by prominent international NGO, the International Crisis Group (ICG) titled *War Crimes in Sri Lanka* (ICG Report) released a year earlier.⁵

GENERAL SILVA’S INVOLVEMENT IN THE SRI LANKAN CIVIL WAR

The UN Report documents the operations of Sri Lanka’s armed forces during the final stages of the civil war. Most of the fighting took place in the north of Sri Lanka in the province of Vanni, where six SLA military units were stationed.

General Silva is known to have commanded the 58th Division of the SLA during this period.⁶ The 58th Division is identified in the UN Report as one of the divisions responsible for offensives launched during the final phases of the war:

“Lieutenant General Fonseka himself commanded the war effort from the Joint Operations Headquarters in Colombo and handpicked seasoned commanders to lead the campaign ... six major battalions were active in the final stages of the war, including ... the 58th Division (Commanded by Brigadier Shavendra Silva)”.⁷

The UN Report details numerous atrocities committed by Sri Lankan armed forces in northern Sri Lanka – including by General Silva’s 58th Division.

The collective and individual operations of these units included, but were not limited to, a series of military actions that caused the death and displacement of tens of thousands civilians. Among these were the following incidents:

- The Sri Lankan government declared three No Fire Zones (NFZs). NFZs were small areas of land or coast. Civilians were encouraged to find safety and refuge in these zones, and many did. It is estimated that 330 000 civilians found themselves in NFZs during the final stages of

⁵ Above note 1.

⁶ See the personal website of General Silva at <http://shavendrasilva.com/achievements.html>.

⁷ UN Report at para 62.

the conflict. Yet, in disregard of their status as “no fire” areas, the SLA launched a number of offensives on the NFZs in an attempt to root out LTTE forces. The following attacks on NFZs have been documented:

- On 24 January 2009 heavy shelling occurred in the first NFZ. A UN security officer called the Sri Lankan authorities to demand that shelling stop. This request was ignored. Most civilians sheltering in the NFZ were exposed to the shelling. The scene following this attack was described in the following terms: “mangled bodies and body parts were strewn all around them, including those of many women and children. Remains of babies had been blasted upwards into the trees.”⁸

- Another attack on the NFZ was described by the UN Report in the following terms: “The scene inside the NFZ along the road to PTK [Puthukkudiyiruppu, an area in which the 58th division was active] ... was one of great destruction, and even the vegetation was shredded. Dead or severely injured civilians lay along the roadsides, amidst shattered shelters, strewn belongings and dead animals. Hundreds of damaged vehicles also lay along the road; ambulances parked by Vallipunam hospital were seriously damaged.”⁹

- On 12 February 2009 a second NFZ was declared on a 12km stretch of coast and was estimated to be home to 300 000 civilians. Before and after the NFZ was declared the Sri Lankan armed forces shelled the area. The SLA used Multi Barrel Rocket Launchers (MBRLs) described in the UN Report as “unguided missile systems designed to shell large areas, but if used in densely populated areas, are indiscriminate in their effect and likely to cause large numbers of casualties.”¹⁰

⁸ UN Report at paras 84-85.

⁹ UN Report at para 89.

¹⁰ UN Report at para 100.

- The SLA shelled a number of hospitals and prevented medical supplies and assistance from reaching the injured. All hospital locations were clearly marked and their locations were known to the SLA.¹¹

- Other indiscriminate attacks by the SLA were also documented:
 - The SLA screened civilians seeking safety to determine whether they were LTTE fighters or not. Civilians were expected to strip naked. According to the UN Report “[t]he screening process resulted in cases of executions, disappearances and sexual violence.”¹²

 - The UN Report observes that “[a]uthenticated footage and numerous photographs indicate that certain LTTE cadre were executed after being taken into custody by the SLA.”¹³

 - The UN Report found that “[r]ape and sexual violence against Tamil women during the final stages of the armed conflict, and in its aftermath, are greatly under-reported ... Nonetheless, there are many indirect accounts reported by women of sexual violence and rape by members of Government forces and their Tamil-surrogate forces, during and in the aftermath of the final phases of the armed conflict.”¹⁴

 - The UN Report found that, “individual incidents of shelling and shooting took place on a daily basis, destroying the lives of many individuals or families. The SLA also shelled large gatherings of civilians capable of being identified [as non-combatants]. On 25 March 2009, an attack on Ambalavanpokkanai killed around 140 people, including many children. On 8 April 2009, a large group of women and children, who were queued up at a milk powder distribution line ... were shelled ... Some of

¹¹ UN Report at paras 87; 91; 94; 107; 106-107; 109-111.

¹² UN Report at para 148.

¹³ UN Report at para 148.

¹⁴ UN Report at para 152.

the dead mothers still clutched cards which entitled them to milk powder for their children"¹⁵

In particular, the **58th Division**, under the leadership of General Silva, is explicitly linked in the UN Report to several of the most notorious violations of humanitarian law and human rights committed during the conflict. Specifically:

- Despite their surrender, political leaders of the LTTE and their dependents were executed by the **58th Division**. As the UN Report documents, at “around 6.30 am on 18 May 2009, Nadesan and Pulidavan [LTTE leaders] left their hide-out to walk towards the area held by the **58th Division**, accompanied by a large group including their families.” They were carrying white flags indicating their surrender, and their surrender was communicated to the SLA. They were nonetheless killed. This area was held by the **58th Division** then under the command of General Silva.¹⁶
- The 55th and **58th Divisions** expressed intent to capture the area known as PTK (Puthukkudiyiruppu). During their onslaught, the region’s hospital, despite being marked with clearly visible emblems, was hit every day during the week of 29 January – 4 February 2009 resulting in numerous casualties.¹⁷
- On 19 April 2009, the “**58th Division** came onto the coastal strip for the first time, breaking through LTTE defences, dividing the NFZ into two, but inflicting heavy civilian casualties at the same time.”¹⁸

In its final assessment, the UN Report concluded that the operations of the SLA (including General Silva’s 58th Division forces) amounted to breaches of international humanitarian law and

¹⁵ UN Report at para 105.

¹⁶ UN Report at paras 170-171.

¹⁷ UN Report at paras 90-95.

¹⁸ UN Report at para 109.

Common Article 3, the violation of which constitutes war crimes as defined in the Geneva Conventions and the Rome Statute of the International Criminal Court. By way of summary the following crimes were identified:

- Serious violations of Common Article 3 of the Geneva Conventions:
 - murder of all kinds, mutilation, cruel treatment and torture, including:
 - rape;
 - outrages upon personal dignity, in particular humiliating and degrading treatment; and
 - failure to collect and care for the wounded and sick
- Intentional attacks on civilians;
- Indiscriminate or disproportionate attacks on civilians;
- Attacks on medical and humanitarian objects, including humanitarian convoys and Red Cross-designated facilities;
- Starvation of the population and denial of humanitarian relief; and
- Enforced disappearances¹⁹

The overwhelming evidence presented by the UN and other respected international human rights bodies that SLA forces committed war crimes and crimes against humanity during the period that General Silva controlled the 58th Division clearly demonstrates that there is reason to believe that he is responsible for the commission of these crimes, either in his personal capacity or on the basis of command responsibility.

GENERAL SILVA'S ACTIVITIES SUBSEQUENT TO THE CONFLICT

Since the end of the war, General Silva's human rights record and his suitability for official position have been queried.

He has been the subject of a private lawsuit brought in the United States by family members of two LTTE combatants that were killed by soldiers under General Silva's command. The first

¹⁹ UN Report at para 257.

plaintiff is the widow of Thurairajasingham Devi, and is currently living in South Africa with her three children. It is alleged that Devi was part of the group of LTTE combatants, referred to in the UN Report, that surrendered to the SLA in May 2009 and were subsequently killed by General Silva's military unit.²⁰

This case was dismissed on the grounds that at the time he was Sri Lanka's deputy ambassador to the UN and consequently enjoyed immunity from prosecution. The merits of the case were therefore not dealt with by the court.

General Silva was also appointed to the UN Special Advisory Group on Peacekeeping Operations, but was excluded from deliberations by the group's head, Canadian Louise Frechette, on the basis of the credible allegations of his involvement in international crimes. The UN Human Rights Commissioner, Navi Pillay, also expressed her concern to UN Secretary-General Ban Ki-moon over General Silva's appointment to this special advisory group, and in a letter stated "that there is, at the very least, the appearance of a case of international crimes to answer by Mr. Silva".²¹

THE RESPONSE OF THE INTERNATIONAL COMMUNITY

In March 2012 the UN Human Rights Council adopted a resolution citing dissatisfaction with Sri Lanka's internal accountability efforts and called on the Sri Lankan government to take more definitive action.²²

There have been other reported instances of individual states refusing to recognise Sri Lanka's officials. In 2005 and in 2008 Canada refused to accept the Sri Lankan nominated High

²⁰ See in this regard *Civil lawsuit filed against Major General Shavendra Silva* available at http://www.bbc.co.uk/sinhala/news/story/2011/09/110924_lawsuit.shtml

²¹ See *Sri Lanka Outrage at UN* available at: <http://www.google.com/hostednews/afp/article/ALeqM5iUD290Dsbh14E3nNBYaglYtxFllw?docId=CNG.163dc6a974e4d63bf289b4444420ae3d.5d1>

²² Resolution A/HRC/RES/19/2 *Promoting Reconciliation and Accountability in Sri Lanka*, 3 April 2012.

Commissioners on the basis that the individuals were guilty of human rights abuses.²³ In 2011 Sri Lanka recalled its diplomatic representative in Switzerland, Germany and the Vatican, General Jagath Dias – the former commander of the 57th Division of the SLA, and also identified in the UN Report. The European Centre for Constitutional and Human Rights (ECCHR) had published a report implicating General Dias in the commission of human rights violations at the end of the civil war, prompting the Swiss authorities to contact their counterparts in Sri Lanka. Dias was subsequently withdrawn from his position by Sri Lanka.²⁴

In the United Kingdom, rights groups submitted a dossier to the government calling for Sri Lankan General and diplomat, Prasanna De Silva to be declared *persona non grata* and for the initiation of a criminal investigation. The groups indicated that they would initiate review proceedings if the British government failed to take action. General De Silva left the United Kingdom shortly thereafter²⁵ General De Silva was the commander of the 55th Division in the SLA and has been named alongside General Silva and General Dias as responsible commanding officers by the UN Report.²⁶

The Australian authorities are currently under pressure to withdraw their recognition of the Sri Lankan High Commissioner, Admiral Thisara Samarasinghe as he had served as the head of the Sri Lanka Navy which shelled the safe zone containing women and children at the end of the war.²⁷

²³ See *Sri Lanka's Envoy Must be Recalled* available at <http://www.canberratimes.com.au/opinion/politics/sri-lankas-envoy-must-be-recalled-20120718-22a26.html>

²⁴ See *Sri Lanka Recalls Diplomat Over War Crimes* available at http://www.swissinfo.ch/eng/politics/Sri_Lanka_recalls_diplomat_accused_of_war_crimes.html?cid=31128290; the dossier submitted by the ECCHR documenting the crimes of General Dias is available at <http://www.ecchr.de/index.php/sri-lanka.404/articles/the-jagath-dias-case.html>.

²⁵ See <http://www.ecchr.de/index.php/sri-lanka.404/articles/the-prasanna-de-silva-case.html>. See also *Sri Lankan diplomat may avoid questioning on war crimes claims* available at <http://www.guardian.co.uk/politics/2012/apr/05/sri-lankan-diplomat-war-crimes-allegations>.

²⁶ UN Report at para 62

²⁷ See note 23 above.

SECTION 84(2)(H) OF THE CONSTITUTION: RECEIVING AND RECOGNISING FOREIGN DIPLOMATS

Section 84(2)(h) confers the responsibility of “receiving and recognising foreign diplomatic and consular representatives” on the president of South Africa. The nature of the power to “receive and recognise” foreign diplomatic representatives necessarily entails a corresponding power to refuse to recognise these officials. This power is not a purely symbolic or ceremonial power. To understand it as such would render this provision redundant, effectively preventing South Africa from having a say as to who may enter South Africa.

Section 84(2)(h) therefore imposes a positive duty on the president to consider the credentials of every foreigner that is nominated by their home country to a diplomatic or consular position in South Africa. The president, if of the opinion that a person is not eligible for the nominated post in question, has a discretion to decline the request of the sending state.

Decisions made in terms of section 84(2)(f) constitute an important exercise of public power. Diplomatic status is internationally recognised and imposes a number of legally binding obligations on South Africa that the country assumed through its ratification of the Vienna Convention on Diplomatic Immunity of 1961 (Vienna Convention).

Diplomatic Immunities and Privileges Act and the Vienna Convention

The Vienna Convention, pursuant to section 2(1)(a) of the Diplomatic Immunities and Privileges Act 37 of 2001 (Diplomatic Immunities Act), is part of South African law and has been incorporated in its entirety through Schedule I of the Diplomatic Immunities Act. Its provisions therefore carry the force of law in South Africa.

Every diplomat that receives presidential recognition is entitled to the protections provided for in the Vienna Convention and the Diplomatic Immunities Act and South Africa must ensure that diplomats are treated accordingly. The Vienna Convention declares inviolable the person of the

diplomat.²⁸ The diplomat enjoys immunity from the law enforcement activities of the receiving State's agents.²⁹ Moreover, the receiving State has a duty to protect the diplomat from attack.³⁰ Diplomats also enjoy immunity from the civil and criminal jurisdiction of the receiving State's courts.³¹ The rationale behind this protection is to enable diplomats to exercise their duties without being impeded by the authorities of the receiving State. But while diplomatic immunity is not designed to shield persons from the consequences of their illegal conduct, it cannot be denied that it can have this effect.

It is therefore in the interests of South Africa, and any state for that matter, to ensure that the persons it affords such extensive protections to, are deserving of this degree of virtually absolute internationally mandated protection. As such it is a prerequisite that holders of this office are of the highest calibre, integrity and moral standing, making them less likely to abuse privileges that render them immune from having to account for their actions.

Furthermore, it is also in South Africa's interests that it ensures that foreign diplomats are cognisant, appreciative and respectful of South Africa's constitutional and human rights framework. Just as the President, pursuant to section 84(2)(i) of the Constitution, seeks to ensure that it only deploys diplomatic staff to its international missions that are suitably qualified, fit and proper and will promote South Africa's interests and values abroad, South Africa is entitled to demand the same from other countries wishing to have representation in South Africa.

South Africa is also entitled, if not required, to ensure that the recognition of foreign diplomats does not place South Africa in breach of other obligations it has assumed either through ratification of relevant international instruments or by virtue of their status under international customary law.

²⁸ Vienna Convention, article 29.

²⁹ Vienna Convention, article 31.

³⁰ Vienna Convention, article 29.

³¹ Vienna Convention, article 31.

Persona Non Grata and Unacceptable Diplomats

The discretion inherent in the exercise of section 84(2)(h) is confirmed by Article 9 of the Vienna Convention. It recognises the power of a receiving state to refuse to accept a foreign diplomat or expel them. Article 9 provides:

- “1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.”
(Emphasis added)

International and South African law provides little guidance on how this discretion is to be exercised, and each case should be judged on its own merits.

States the world over have declared diplomats and consular staff “*persona non grata* or not acceptable” for a variety of reasons. In some instances the decision is purely political, in others it is due to the nature and gravity of the individual’s conduct, and other in instances it is used as form of protest against the actions of the country concerned.

It must be emphasised that declaring a nominated foreign diplomat “not acceptable” or “[e]xpelling a diplomat, even an ambassador, *is not the same thing as severing diplomatic relations*”³²

Some examples include:

- a. In 1995 Australia refused to accept Indonesia’s nomination of General Herman Mantiri on the ground that he had been involved in the commission of war crimes in East Timor.³³
- b. In May 2012 the Philippine government declared a Panamanian diplomat accused of raping a 19-year-old Filipino woman *persona non grata*³⁴
- c. In September 2012 Canada shut down the Iranian embassy and declared all diplomats *persona non grata* citing continued human rights violations³⁵
- d. Citing continued human rights violations in Syria, the United States, Switzerland, the Netherlands Bulgaria, Spain, Italy, Canada, Britain, Australia, France and Germany, Slovenia and Morocco declared Syrian envoys *persona non grata*.

THE SCOPE OF THIS ENQUIRY

The question at the heart of this enquiry is: when deciding whether a foreign diplomat is acceptable what factors should inform this decision; what limitations are imposed on the decision maker and is the decision maker subject to any legal constraints in reaching his or her decision. Simply put, is the exercise of this power required to be rational, reasonable and not arbitrary?

³² Joshua Keating, *Foreign Policy: How To Expel A Diplomat* available at <http://www.publicbroadcasting.net/wfsu/arts.artsmain?action=viewArticle&sid=1&pid=1338&id=1933733> (emphasis added)

³³ *Sri Lanka's envoy must be recalled* available at <http://www.canberratimes.com.au/opinion/politics/sri-lankas-envoy-must-be-recalled-20120718-22a26.html>

³⁴ *DFA declares Panama diplomat persona non grata* <http://www.gmanetwork.com/news/story/257947/news/nation/dfa-declares-panama-diplomat-persona-non-grata>

³⁵ *Canada closes embassy in Iran, to expel Iranian diplomats* <http://www.reuters.com/article/2012/09/07/us-canada-iran-idUSBRE8860QC20120907>

SECTION 84 OF THE CONSTITUTION: THE RATIONAL AND LAWFUL EXERCISE OF PRESIDENTIAL POWERS

The power to receive and recognise foreign diplomats is located in section 84(2) of the Constitution and is one of a number of presidential powers that, because of their nature as “prerogative powers”, have been the focus of litigation to determine their ambit and the constraints limiting their exercise.³⁶

It is acknowledged that the exercise of presidential power constitutes executive action and must be distinguished from administrative action, the exercise of which is subject to the Promotion of Administrative Justice Act (PAJA). All “administrative action” is judicially reviewable on the grounds contained in PAJA. However, PAJA explicitly excludes a number of section 84(2) responsibilities – including the power to receive and recognise foreign diplomatic representatives provided for in section 84(2)(h). Yet, as the Constitutional Court has made abundantly clear, the exercise of these presidential powers is not exempt from judicial scrutiny

In the case of *SARFU*, the Court held:

“It does not follow, of course, that because the President’s conduct in exercising the power conferred upon him by section 84(2)(f) does not constitute administrative action, *there are no constraints upon it*.”³⁷ (Emphasis added)

³⁶ See for example *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at para 116 where the Court confirmed that presidential powers are reviewable; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) (*Hugo*) in respect of presidential pardons; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (*SARFU*), power of the president to appoint commissions of enquiry under section 84(2)(f) of the Constitution; *Minister for Justice and Constitutional Development v Chonco* 2010 4 SA 82 (CC), presidential pardons under section 84(2)(j) of the Constitution; *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) (*Albutt*) presidential pardons. See also the following in which powers conferred on the President (outside of section 84 of the Constitution) were also assessed within the Constitutional framework: *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) in respect of the power of president to appoint the head of the intelligence services under section 209(2) of Constitution; *Democratic Alliance v President of the Republic of South Africa (Democratic Alliance)* Unreported decision of the Constitutional Court, 5 October 2012 in respect of the power of the president to appoint a National Director of Public Prosecutions in terms of section 179(1)(a) of the Constitution.

³⁷ *SARFU* above note 36 at para 148.

This notion of unfettered power has been found to be inconsistent with South Africa's constitutional democracy. In the context of executive powers, the Constitutional Court held in *Pharmaceutical Manufacturers* that:

“It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not it falls short of the standards demanded by our Constitution for such action. The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry”³⁸

This broad formulation makes it clear that no exercise of public power by the executive or other is beyond rationality review by the courts. The constitutional principle of legality, derived from the broader value of the rule of law, has been held to require that public powers are not misconstrued and are exercised rationally and in good faith, and this includes the exercise of presidential power.³⁹

In this regard, the Constitutional Court's jurisprudence is authoritative and extensive, as evidenced in the following dictum:

“It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law.”⁴⁰

³⁸ *Pharmaceutical Manufacturers Association & another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers*) at para 85

³⁹ See in this regard Cora Hoexter, *Administrative Law in South Africa*, Juta, 2007, 117, where she confirms that the principle of legality applies to more than just administrative action as that the principle “governs the use of all public power rather than the narrower realm of administrative action”.

⁴⁰ *Albutt* at para 49. The judgment provides a summary of the jurisprudence of the Constitutional Court: *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 49; *Pharmaceutical Manufacturers* at para 20; *SARFU* at para 38 and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (*Fedsure*) at para 32.

FACTORS THAT MUST INFORM THE EXERCISE OF THE PRESIDENT'S POWER TO RECOGNISE FOREIGN DIPLOMATS

It is beyond doubt that the President's power in exercising his responsibilities under section 84(2)(h) is not unlimited – it must be exercised in good faith, rationally and in compliance with South African law. Any action that goes against the values espoused in the Constitution as well as any legislative provisions would therefore be invalid.

But if the President's power to recognise and receive foreign diplomats is not unconstrained, there remains the question as to what considerations must guide the President in the exercise of his discretion. It is those considerations that this briefing paper next examines.

Constitutional Considerations

Section 195 of the Constitution provides *inter alia* that the public administration must be governed by a high standard of professional ethics and accountability. Mokgoro J in *Van der Merwe*,⁴¹ had this to say about the importance of section 195:

“In this constitutional era, where the Constitution envisages a public administration which is efficient, equitable, ethical, caring, accountable and respectful of fundamental rights, the execution of public power is subject to constitutional values. Section 195 reinforces these constitutional ideals.”⁴²

At the heart of the Constitution are the foundational values of dignity, equality and freedom. The State and its agents have an important role to play in upholding these values. In this regard the Constitutional Court in *Mohamed v President of the Republic of South Africa* noted:

“South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that

⁴¹ *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC).

⁴² *Van der Merwe* at 27C-28A. Cf, *Chirwa v Transnet* 2008 (4) SA 367 (CC) at paras 74 to 76.

the state lead by example ... The legitimacy of the constitutional order is undermined rather than reinforced when the state acts unlawfully.”⁴³

The duty on the state, and on the President – as its most powerful agent – is to promote and fulfil the foundational constitutional rights and values. However, this is not limited only to the rights included in the South African Constitution; there is an obligation on the state to act in accordance with international law to ensure that rights at the international level are also promoted and protected. O’Regan J in her minority judgment in *Kaunda v President of the Republic of South Africa*⁴⁴ was of the view that:

“The importance of that foundational value is to be understood in the context of a growing international consensus that the promotion and protection of human rights is part of the responsibility of both the global community and individual states, and that there is a need to take steps to ensure that those fundamental human rights recognised in international law are not infringed or impaired.”⁴⁵

The North Gauteng High Court, in the context of South Africa’s obligations under the Rome Statute of the International Court found that:

“[T]he general South African public deserves to be served by a public administration that abides by its national and international obligations”⁴⁶

South Africa’s international legal obligations – the rights it has undertaken internationally to uphold and promote – cannot be separated from the constitutional duties resting upon the state, but are intrinsic to the fulfilment thereof. These obligations must inform decision making at all levels when relevant. Failure to do so renders the decision vulnerable to constitutional challenge.

⁴³ *Mohamed & Another v President of the Republic of South Africa & Others* 2001 (3) SA 893 (CC) at para 69.

⁴⁴ *Kaunda & others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) (Kaunda)

⁴⁵ Kaunda at para 221

⁴⁶ *Southern Africa Litigation Centre & Another v National Director of Public Prosecutions & Others*, unreported decision of the North Gauteng High Court, 8 May 2012, Case Number 77150/09.

International Law Considerations

The substantial allegations of war crimes and crimes against humanity made against General Silva trigger various international criminal law obligations that South Africa has assumed, either through ratification and domestication of relevant international law treaties or because of their status as international customary law. It is these obligations that must be considered and adhered to when making decisions in terms of section 84(2)(h).

In respect of international customary law, section 232 of the Constitution deems it to be part of South Africa law. The prohibition against war crimes, crimes against humanity and genocide are norms of customary international law and South Africa is therefore obliged to ensure that it enforces this prohibition domestically.

Moreover, the existence of numerous international conventions dealing with international crimes, the establishment and resultant jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTY), and the establishment of the first permanent International Criminal Court (ICC) attest to the premium that the international community has placed on the punishment of international crimes.

The Constitutional Court in *S v Basson* explained that this international imperative can impact on South Africa's domestic obligations:

[I]nternational law obliges the state to punish crimes against humanity and war crimes. It is... clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes. We do not have all the details before us but it does appear that the crimes for which the accused was charged may well fall within the terms of this international law obligation. In the circumstances, it may constitute an added obligation upon the state.”⁴⁷

In a subsequent judgement in *Basson* the Constitutional Court held that:

⁴⁷ *S v Basson 2005 (1) SA 171 (CC) at para 37* (Basson 1).

“Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges”⁴⁸

There can be little doubt therefore that the President has the duty to ensure that international law, as part of the law of South Africa, is faithfully executed.

Domestic Law Considerations

South Africa’s commitment to ensuring accountability for international crimes is also recognised domestically.

As mentioned above, there is a global imperative that impunity for perpetrators of crimes that are of concern to the international community as a whole – crimes against humanity, war crimes and genocide – must end, and South Africa has endorsed this.

The international community demonstrated its commitment to this principle through its enactment of the Rome Statute and the establishment of the International Criminal Court (ICC). At the core of the Rome Statute is the principle of complementarity: a recognition that domestic state parties have an essential responsibility to ensure accountability for these crimes through their individual legal systems.

In order to give effect to its obligations under the Rome Statute South Africa has enacted implementing legislation, the Implementation of the Rome Statute of the International Criminal Court Act (ICC Act), thus ensuring that South African authorities are vested with sufficient powers to prosecute and punish those responsible for crimes of genocide, crimes against humanity and war crimes.

South Africa’s enactment, in July 2012, of the Implementation of the Geneva Conventions Act which domesticates the Geneva Conventions and their Additional Protocols is also relevant. The

⁴⁸ *S v Basson* 2007 (3) SA 582 (CC), para 183 (Basson 2).

objects of this Act are to ensure that the country complies with the Conventions and to prevent and punish breaches of them.⁴⁹ Accordingly, breaches of the Geneva Conventions are recognised as crimes under South African law and the authorities are given both the power and duty to prosecute such crimes. The enactment of this legislation is further evidence of South Africa's commendable commitment to international criminal justice and to the global project of ending impunity for criminals of the worst kind.

Purpose of Diplomatic Immunity

The purpose of diplomatic immunity is to ensure that diplomatic missions run effectively and efficiently without any interruption. This is recognised in DIRCO's document entitled "Policy on the Management of Diplomatic Immunities and Privileges in the Republic of South Africa":

“As is recognised internationally, diplomatic immunity and inviolability is based on the principle that duly accredited members of diplomatic and international communities must be able to pursue their official duties free from harassment and possible intimidation and without impediment to the performance of those duties. Immunity and inviolability therefore, is not a licence for misconduct of any kind but is, in fact, intended to benefit the functioning of the diplomatic mission or an international organisation, and not for the personal benefit of individual members.”⁵⁰

It is clear that the purpose of diplomatic immunity is not to shield the diplomat from being held responsible and accountable for crimes he or she may have committed, or may commit whilst acting as a diplomatic representative.

The consequence of receiving and recognising foreign diplomatic representatives, under section 84(2)(h) is that those persons would be conferred with diplomatic immunity when they arrived in South Africa. This must be weighed against the Republic's strong commitment to and acceptance of the obligation of ending impunity for international crimes – as detailed above.

⁴⁹ Implementation of the Geneva Conventions Act, 8 of 2012, section 2.

⁵⁰ Policy on the Management of Diplomatic Immunities and Privileges in the Republic of South Africa, Department of International Relations and Cooperation. http://www.dfa.gov.za/protocol/policy_dip_immun_privilege_2011a.pdf (last accessed 5 December 2012).

THE MANNER IN WHICH THE PRESIDENT SHOULD EXERCISE HIS 84(2)(H) POWER IN RESPECT OF GENERAL SILVA

By way of summary the following factors must be taken into consideration by the president in his assessment of General Silva's eligibility to be recognised as a diplomat in South Africa:

- a. Credible evidence of the commission of international crimes committed by the Sri Lankan Army;
- b. General Silva's high ranking position in the Sri Lankan army during the commission of international crimes in Sri Lanka;
- c. Calls from international bodies to secure the accountability of those responsible for the crimes committed in Sri Lanka;
- d. The global pledge to address impunity and secure accountability
- e. South Africa's Constitutional obligations;
- f. South Africa's customary international law obligations;
- g. South Africa's domestic law obligations:
 - i. The ICC Act
 - ii. The Geneva Conventions Act
- h. The purpose of diplomatic immunity
- i. The consequences of providing diplomatic immunity to an individual accused of war crimes through South Africa's recognition of him as a diplomat

In *Albutt* the Constitutional Court stated the following in respect of the exercise of executive powers:

“The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be

achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.”⁵¹

SALC and its partners are of the opinion that should the President recognise Silva as a diplomat the decision is susceptible to rationality challenge on two grounds. First, if the President failed to take the above considerations into account he would have ignored relevant considerations and would have failed the three stage test formulated by the Constitutional Court in *Democratic Alliance*:

There is therefore a three stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.”⁵²

To grant General Silva diplomatic status without taking into account the allegations of war crimes and South Africa’s obligations to combat impunity for international crimes would colour the entire process with irrationality.

Second, if the President did consider all relevant considerations and nonetheless recognised Silva, that recognition would amount to a conferral of immunity against prosecution for grave international crimes, contrary to South Africa’s international, domestic and constitutional obligations. This would be patently irrational.

⁵¹ *Albutt* at para 51.

⁵² *Democratic Alliance* at para 39.

LEGAL IMPLICATIONS OF RECOGNISING GENERAL SILVA

The guarantee of the rule of law in section 1(c) of the Constitution is justiciable. The Constitutional Court has relied on section 1(c) to develop a range of constitutional principles flowing from the rule of law. These include the following:

- a. A legality principle that all legislative and executive organs of State can exercise only those powers conferred lawfully on them;⁵³
- b. A principle that executive action cannot be arbitrary;⁵⁴
- c. A principle that executive action must be rational;⁵⁵
- d. A principle that the Government is accountable for its conduct.⁵⁶

The effect of this principle is that conduct which falls foul of the principle of legality is liable to be set aside. This stance is related to the Constitution's commitment to an ethos of accountability.

We are of the opinion that if the president were to recognise General Silva as a diplomat the decision would be irrational, arbitrary and inconsistent with the rule of law. This decision will therefore be susceptible to judicial review under the principle of legality.

Furthermore DIRCO has indicated that South Africa's domestication of the ICC Act may trump immunities afforded to diplomats in terms of South Africa law:

⁵³ *Fedsure* at paras 56-59; *SARFU* at para 148.

⁵⁴ *Pharmaceutical Manufacturers* at paras 83-85.

⁵⁵ *New National Party v Government of the Republic of South Africa 1999 (3) SA 191 (CC)* ('*New National Party*') at para 24; *Pharmaceutical* at para 85.

⁵⁶ In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC)* ('*Rail Commuters*'), the Constitutional Court (per O'Regan J, for a unanimous bench) stressed that the value of government accountability (which is codified throughout the Constitution – see in particular sections 1, 41(1) and 195 of the Constitution) is also asserted within the scheme of the Bill of Rights. Section 36 of the Constitution – the limitation clause – in its terms demands government to account for its actions where it infringes the rights in the Bill of Rights. In the words of O'Regan J:

“The process of justifying limitations ... serves the value of accountability in a direct way by requiring those who defend limitations to explain why they are defensible. The value of accountability, therefore, is one which is relevant to a consideration of the ‘spirit, purport and object of the Bill of Rights’” (para 75).

“Furthermore, Section 4(1) of the South African implementation of the Rome Statute of the International Criminal Court Act also ousts the applicability of other domestic laws in respect of an accused, with the result that the immunity from prosecution that President El Bashir would normally have enjoyed in terms of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001), is not be applicable.”

The inviolability of immunity afforded consular staff and diplomats is a contentious area of international law and has generated much scholarly debate – in particular, whether war criminals are entitled to diplomatic immunity. However, given that the debate is fluid and constantly evolving and, in addition, that the position adopted in SA’s ICC Act is clear and unambiguous – that diplomatic immunity will be no bar to international criminal law proceedings – there is virtual certainty that concerned rights groups will request the National Prosecuting Authority and South Africa Police Service to investigate General Silva in terms of the ICC Act which requires the investigation and prosecution of perpetrators, irrespective of their nationality and location of the alleged crimes, if the accused is in South Africa.⁵⁷

CONCLUSION

In light of the above SALC and its partners recommend that the President decline to receive and recognise General Silva as Sri Lanka’s deputy ambassador to South Africa. If the president has already communicated its willingness to receive and recognise General Silva in this capacity, we strongly recommend revoking this decision on account of the fact that decision is illegal, irrational and arbitrary.

We submit that refusing to recognise General Silva is in not only constitutionally required, but is also in the best interests of South Africa. We encourage the South African authorities to proceed with this matter in an open and transparent manner. It requests the Presidency to inform it of the decision reached in respect of General Silva.

⁵⁷ Requests of this nature have been made in respect of Zimbabwean officials accused of crimes against humanity in Zimbabwe, former Madagascan president Marc Ravalomanana and certain Israeli officials.

We would welcome the opportunity to engage with the Presidency and/or DIRCO should there be any queries or concerns relating to the contents of this briefing paper.