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Written statement* submitted by African Green Foundation International, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[02 June 2019]

* Issued as received, in the language(s) of submission only.

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UNHRC Resolutions 30/1 & 40/1: a threat to fundamental rights

UNHRC Resolution 40/1 has of questions. By co-sponsoring the resolutions, 30/1 in 2015 and 40/1 in 2019, Sri Lanka has become a party to the resolution notwithstanding the fact that some provisions require revisions to the Constitution and introduction of new legislation.

The most significant issue brought to the attention of the Human Rights Council relates to "a Sri Lankan judicial mechanism…including foreign judges" as stated in paragraph 6 of UNHRC Resolution 30/1. The other relates to devolution and for "the government to ensure that all Provincial Councils are able to operate effectively, in accordance with the thirteenth amendment to the Constitution of Sri Lanka". The both issues involve constitutional and legislative changes of an order that reached an all-time high, post-October 2018, for the government to repeatedly co-sponsor the resolution reflects a level of deceit that shames Sri Lanka because there is no guarantee of overcoming the needed constitutional impediments without which they are hollow commitments.

Paragraph 6 of UNHRC Resolution 30/1

In the course of his statement in March 2019 Sri Lanka's Foreign Minister stated:

"In referring to para 68 (C) of the OHCHR Report (A/HRC/40/23), which pertains to the Recommendations to GOSL, 'to adopt legislation establishing a hybrid court to investigate allegation of violating and abuses of international law and violations of international humanitarian law', I wish to make it clear that our position on this matter is as follows':

"The Government of Sri Lanka at the highest political levels, has both publicly and in discussions with the present and former High Commissioner for Human Rights and other interlocutors, explained the constitutional and legal challenges that preclude it from including non-citizens in its judicial processes. It has been explained that if non-citizen judges are to be appointed in such a process, it will not be possible without an amendment to the Constitution by 2/3 of members of the Parliament voting in favour and also the approval of the people at a referendum".

Unlike most conflicts in other parts of the world the conflict in Sri Lanka reached the threshold of an armed conflict where the applicable law is International Humanitarian Law; a fact that has been acknowledged by the UN appointed Panel of Experts (PoE) and by the Office of the Human Rights Commission (OHCHR) in their respective reports.

The UN appointed PoE in their report stated: "There is no doubt that an internal armed conflict was being waged in Sri Lanka with the requisite intensity during the period that the Panel examined. As a result, international humanitarian law is the law against which to measure the conduct of both government and the LTTE".

Paragraph 182 of The OHCHR report states: "Article 3 common to the four Geneva Conventions relating to conflict not of an international character is applicable to the situation in Sri Lanka".

Paragraph 183 goes on to state: "In addition, the Government and armed groups that are parties to the conflict are bound alike by relevant rules of customary international law applicable to non-international armed conflict".

Consequently, the standards, benchmarks and parameters that should guide a judicial inquiry should be Additional Protocol II of 1977 and Rules of Customary International Law applicable to non-international armed conflict embodied in ICRC document Volume 87, Number 857 of March 2005. Therefore, any violations prohibited by provisions in Additional Protocol II of 1977 should be addressed under provisions of Article 6, "Penal prosecutions", in the Protocol and NOT by a judicial process that does not have specific guidelines for an inquiry as evident from Paragraph 6 of the UNHRC Resolution 30/1 of 2015. It is the absence of specific standards benchmarks and parameters to guide a judicial

inquiry this makes it an impending threat to Fundamental Rights of those associated with the armed conflict.

"Article 6. Penal Prosecutions

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

The Foreign Minister referred to the challenges that exist as long as Paragraph 6 exists in its current form. However, even if possibilities exist to overcome challenges relating to foreign judges in a purely Sri Lankan judicial mechanism, what is of paramount importance is the context or terms of reference (remit) for the conduct of the judicial inquiry. If such a judicial mechanism fails to abide by provisions of Customary International Law as incorporated in Additional Protocol II of 1977 and in particular Article 6 in Additional Protocol II of 1977 cited above, the Fundamental Rights of those who would be tried would be violated.

Therefore, as long as Paragraph 6 stands as stated in UNHRC Resolution 30/1 without a clear reference to standards, benchmarks and parameters that should guide a judicial inquiry, there is an imminent danger of violating the Fundamental Rights of anyone charged with allegations of violations of Humanitarian Law.

Paragraph 16 of UNHRC Resolution 30/1

A similar paradox exists in relation to paragraph 16.

The Human Rights Council cannot be unaware that it is next to impossible to make any headway to reach consensus on the issue of devolution. All it means is that as far as devolution is concerned, the status quo would remain not only because of the public's disenchantment with Provincial Councils as an institution, but also the fact that though most of them are currently not operational, there is little or no impact on the delivery of goods and services to the People.

Paragraph 4 of UNHRC 30/1

Paragraph 4 inter alia states: "also welcomes in this regard the proposal by the Government to establish a;

- Commission for truth, justice, reconciliation and non-recurrence,
- Office of missing persons, and
- Office for reparations.

The question that arises is on what grounds does Sri Lanka become solely responsible for setting up offices for missing persons and reparations since the conflict in Sri Lanka was an armed conflict wherein all parties "are bound alike by relevant rules of customary international law applicable to non-international armed conflict" (para. 183).

CONCLUSION

Sri Lanka recently witnessed their Ambassador in Geneva co-sponsoring UNHRC Resolution 40/1 that called for the full implementation of UNHRC Resolution 30/1, while the Foreign Minister brought to the attention of the Council some of the challenges associated with its implementation. For instance, if it is not possible to set up a Sri Lankan

judicial mechanism including Commonwealth and other foreign judges due to constitutional constraints, what would Sri Lanka's standing be among the community of nations? Similarly, what explanation would Sri Lanka have if it cannot implement constitutional amendments to "ensure that Provincial Councils are able to operate effectively in accordance with the thirteenth amendment"?

What Sri Lanka has failed to accomplish in Geneva since 2015 when it first co-sponsored resolution 30/1 is to establish the context, meaning the standards, benchmarks and parameters that should guide all issues relating to the non-international armed conflict. And as a non-international armed conflict the appropriate standards, benchmarks and parameters should be those in Additional Protocol II of 1977 and Rules of Customary International Law applicable to non-international armed conflict embodied in ICRC document Volume 87, Number 857 of March 2005. While such an approach may appear legalistic, it is unavoidable because issues of accountability, missing persons, and reparations are based on Law.

The issue of accountability is expected to address alleged violations of human rights and humanitarian law. The government of Sri Lanka has not come to an understanding with the OHCHR as to the standards, benchmarks and parameters that should guide such an inquiry. Furthermore, domestic laws relating to humanitarian violations during an armed conflict do not exist. Conducting a judicial inquiry in such a vacuum means that there is a strong possibility that the Fundamental Rights of anyone who could be tried would be violated. Therefore, it is imperative that the government and the OHCHR come to an understanding that any judicial inquiry conducted is based on the standards, benchmarks and parameters in Additional Protocol II and the ICRC Rules of Customary International Law. Until then, the government of Sri Lanka should be restrained from conducting any form of judicial inquiry relating to accountability. – Reference: - Mahes Ladduhetti – The Island

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Global Srilankan Forum Executive Committee, an NGO without consultative status, also shares the views expressed in this statement.