ICPPG STATEMENT ON THE DRAFT CONSENSUS RESOLUTION ON SRI LANKA BEFORE THE HUMAN RIGHTS COUNCIL.

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THE INTERNATIONAL CENTRE FOR THE PREVENTION AND PROSECUTION OF GENOCIDE: STATEMENT ON THE DRAFT CONSENSUS RESOLUTION ON SRI LANKA BEFORE THE HUMAN RIGHTS COUNCIL.

The draft Resolution on Sri Lanka presented on the basis of a consensus to the Human Rights Council will come as a disappointment, particularly when considered in the light of the excellence and industry shown in the Report of the Office of the High Commissioner on Human Rights on Sri Lanka. The Report details the atrocities committed by the Sri Lankan armed forces and the LTTE during the period leading to the final war in 2009. It deals with the oppression of Tamils continued after the war by the Sri Lankan armed forces and government agencies. The lukewarm response contained in the Draft Resolution to the Report of the High Commissioner for Human Rights stands in contrast to strength of the proof for human rights violations contained in the Report. The mechanism it creates to address the system is ineffective. As the Tamil saying goes, it amounts to stringing a fine garland of exotic flowers and giving it over to a pack of monkeys to desecrate.

The preamble to the resolution is totally lacking in making reference to the context in which the situation resulted. The Report has described as a “systemic course” of discriminatory violence that has been practiced by the Sri Lankan Government against the minority Tamil people during the relevant period. The Report referred to “patterns of conduct …over time.. that required considerable resources, coordination, planning and organization and were usually executed by a number of perpetrators within a hierarchical command structure” (Report, para. 6). There can be no clearer indication of genocide. In the view of the Centre for the Prevention and Prosecution of Genocide, the code words that the Report uses referring to systemic violence in several places in the Report is an acceptance of the fact that intentional genocide had been practiced by successive Governments of Sri Lanka against the Tamil people since independence from British colonialism in 1948.

The High Commissioner, in a press interview, indicated, that he did not rule out genocide on the facts disclosed in the Report. The Centre will develop the theme that the Report of the OHCHR indicates that genocide of Tamils was committed in Sri Lanka. This statement confines itself to the Draft Resolution.

The Centre accumulated evidence of individual atrocities committed during the relevant period as well as ongoing atrocities that continue to occur .This evidence was presented to the Office of the UNHCHR Investigation on Sri Lanka (OISL). As such, the Centre has a special interest in the outcome of the Report of the UNHCHR.

In the light of the harrowing circumstances that are described in the Report, the Draft Resolution comes as diluted response. It does not accord with the aims behind the development of international

criminal law through deterrence of future similar behavior both in the country of its occurrence and in other countries. The Centre, as its title indicates, campaigns for the prevention of genocide through the punishment of its perpetrators wherever such conduct takes place. The Centre expresses its profound disappointment in the manner in which the Draft Resolution seeks to dispose of the Report of the High Commissioner on Sri Lanka. The solutions of the Draft Resolution will enable a Government, which the Report has branded as practicing constant dissimulation, to engage in a series of eyewashes. The international community cannot control such conduct through the means devised in the Draft Resolution.

The Preamble of the Draft Resolution is timid by avoiding any reference to the fact that its is ethnic and religious chauvinism practiced over the years through the successive Governments of Sri Lanka that had led to violence in the country. A climate of ethnic chauvinism is the root cause that has to be eliminated if peace and reconciliation are to be achieved in Sri Lanka. The need to eliminate "the divisive approach" taken in Sri Lanka, which the US Secretary of State refers to in co-sponsoring the Draft Resolution (Secretary Kerry, Press Statement, 24 September 2015 http://www.state.gov/secretary/remarks/2015/09/247268.htm), is hardly reflected in the Draft Resolution. Consensus is secured for the Draft Resolution through the sacrifice of accuracy and of essential facts unpalatable to the Government of Sri Lanka (GOSL). The root causes of the violence in Sri Lanka, as the OHCHR Report stated are "discrimination, economic marginalization and a pernicious ethnicised form of politics" practiced by the GOSL ever since independence in Sri Lanka.(Para.3 of the Report). The Resolution does not identify this root cause. It, therefore, contains no prescriptions to remove them.

Rather, there is praise for the fact that Sri Lanka has turned a new leaf. The conclusion is not borne out by facts. The same ethnic chauvinists continue to populate the front benches of the Government of Sri Lanka. It is an appeasement of a wolf that now seeks to wear sheep's clothing. Principles have been sacrificed so that momentary geopolitical advantages could be obtained. The international community would be better served if the United States had marched to the drums of its historical idealism, which gave rise to the movement of human rights in the world.

The clear emphasis in the Draft Resolution is on domestic mechanisms of accountability. Such mechanisms are not advocated in international criminal law where there is clear evidence that domestic mechanisms would prove ineffective or illusory. The Centre rehearsed these reasons in its Statement on the Report. It had pointed out that Sri Lanka has had successive bouts of violence against minorities since its independence without any major trial taking place in respect of the killings, some of them committed within prisons and army camps. Such trials have not been held in respect of 70,000 Sinhalese youths killed by the army during an uprising. The judiciary in Sri Lanka is suspect. Its legal system is insufficient to accommodate concepts of modern international criminal law. Despite these evident deficiencies, the Draft Resolution seeks to emphasise a domestic mechanism.

The operative section of the Draft Resolution is couched in recommendatory language, suggesting few obligations. The compliance mechanism it sets up to ensure the recommendations are weak.

The accountability mechanism is referred to in para.6 of the operative section. It takes note (Para. 6): "with appreciation of the Government of Sri Lanka's proposal to establish a Judicial Mechanism with a Special Counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law, as applicable; and affirms that a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for integrity and impartiality; and further affirms in this regard the importance of participation in a Sri Lankan judicial mechanism, including the Special Counsel's office, of Commonwealth and other foreign judges, defence lawyers, and authorized prosecutors and investigators".

The constitutional validity of a “Judicial Mechanism” so set up is suspect under Sri Lankan Constitutional Law. The status of the “Judicial Mechanism” within the hierarchy of courts is not specified. How its members are to be appointed is also left open. They must be independent, an increasingly rare commodity in the Sri Lankan judiciary. A study by Sinhalese lawyers has recorded the inveterate anti-Tamil bias of the Sri Lankan judiciary. In the context of the militarization of Sri Lanka, the pressure that could be exerted on local judges will be great. There is no procedure for the inclusion of Commonwealth and foreign judges, as found in some constitutions. Foreign defence lawyers may not have status to appear before the courts. The office of the Special Counsel and its powers are not spelt out. The Sri Lankan Attorney General should not be the Special Counsel. The office of the Attorney General has been befuddled in political controversy in recent time. The investigative staff necessary to prepare charges is simply absent in Sri Lanka.

Greater effectiveness could have been secured by requiring that the Special Counsel should be foreign. The office should be modeled on that of the Prosecutor in the International Criminal Court. It should be given similar powers. The preparation of a report by the Special Counsel as the basis for the charge sheet should be the public basis on which the trial is commenced. The foreign judges could have been given a veto or constitute the majority on the tribunal. These are precautions one finds in other hybrid tribunals. They are missed out in the Draft Resolution making it a possible locus of a charade.

The next provision dealing with the mechanism (para.7) is to encourage the GOSL to enact legislation “by allowing, in a manner consistent with its international obligations, the trial and punishment of those most responsible for the full range of crimes under the general principles of law recognized by the community of nations relevant to violations and abuses of human rights and violations of international humanitarian law, including during the period covered by the LLRC”.

This is an enactment of another farce. The international obligations relating to international criminal law of Sri Lanka are meager. The notion that there are a “full range of crimes under general principles of law recognized by the community of nations” is a mirage. Every international lawyer knows that general principles of law are a weak source of international law. The use of general principles of law to construct international crimes has never been attempted before. International crimes are stated in conventions and in customary international law. The phrase is used in the Draft Resolution only because it is in Article 13 (6) of the Sri Lankan Constitution. The culling of international crimes from general principles is a difficult task. Even if this exercise can be performed, other principles necessary for trial and punishment like the adjectival law on command responsibility, joint criminal enterprise and the defences to liability have to be supplied. The extent of punishment for the crimes cannot be drawn from general principles of law. The Constitution contains the principle, nullum crimen sine lege, forbidding retrospective punishment. There are many difficulties in the way of the success of this provision.

There are no doubt worthwhile features in the Resolution like the recommendation of the withdrawal of the army from occupied lands. They were occupied ostensibly for national security purposes. Now, hotels are run in these lands. Any land that could have a tourist hotel cannot be required for national security purposes. Yet, the army runs tourist resorts in these lands to this day. Such withdrawal and return of lands are an obligation under international law. They should be accomplished without the need for a recommendation by the Human Rights Council. Compensation must be paid to the owners of the land for the duration of its occupation by the armed forces for no public interest purpose justified the seizure of these lands. They were seized, at least in the eyes of the people, to ensure the settlement of the armed forces in the region.

If there be a welcome feature in the draft, which simulates progress without achieving much, it is that the continued role of the Office of the United Nations High Commissioner for Human Rights is

provided, though in weak terms. He is to report on the progress achieved in the implementation of the Resolution at the next meeting of the Human Rights Council, ensuring that his competence to oversee the process continues to be retained. The High Commissioner for Human Rights comes out in this episode with flying colours.

The Centre believes that an opportunity for achieving worthwhile objectives in Sri Lanka has been frittered away for political expediency. Sri Lanka sorely needed a sweep of its Augean stables through effective accountability mechanisms that would have ended its political and economic life being stunted through useless and violent quarrels relating to ethnicity and religion. Its corrupt judiciary would have been removed; its ethnic chauvinist politicians deterred; the mentality of racial and religious superiority ended; the false pretensions of past mythical glory terminated; Triumphalism that attended victory in battle terminated.

More importantly from the point of the Centre, the great commitment with which the Report of the UNHCHR approached the task of detailing the atrocities has been dented by the meek response in the Draft Resolution. The progress towards ensuring the safety of the human being from the distressing power of a state uninhibited by human concerns in serving the interests of ethnic and religious chauvinism on a universal basis has suffered a set-back.

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