UNHRC RESOLUTIONS WITHOUT A RESOLUTION

by Neville L.

September is the month when the UN Human Rights Council presents its latest Resolution on Sri Lanka. It is reported that the latest version has graduated from violations of human rights and international humanitarian law to include violations of "economic crimes". Whatever the scope of the Resolution, the dogged fact remains that every sovereign country is compelled to function within the provisions of its own Constitution, because it is the fundamental law as recognized by the Vienna Convention; a fact unequivocally stated by the President and Foreign Minister of this Government, and repeated earlier by previous governments. This fundamental fact was the rationale for rejecting the former co-sponsored Resolution UNHRC 30/1. Therefore, if the UNHRC is serious about its Resolutions, it has to start with Sri Lanka's Constitution. Incorporating provisions in Resolutions beyond the provisions of the Constitution become a meaningless and distracting exercise for all concerned, without Resolution.

Chapter III of the Constitution of Sri Lanka is titled "Fundamental Rights". Under Fundamental Rights, there are NO provisions that address "violations of human rights and violations of international humanitarian law", nor is there any provision for

“economic crimes”. The only provision that is of relevance is under Article 13, and in particular 13 (6) on Fundamental Rights.

This Article 13 (1) states: “No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed”.

If a person is “guilty of an offence”, the punishment for such an offence should be as contained in Sri Lanka’s Penal Code. Therefore, any person “guilty of an offence” should conform to the definition stated in the Penal Code of Sri Lanka. However, the Constitution under the second paragraph of Article 13 (6) states: “Nothing in this article shall prejudice the trial and punishment of any person for an acct or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”. This means that even if a person is NOT guilty of an offence under the Penal Code, he/she could be guilty of a criminal act under provisions “of law recognized by the community of nations”. The issue then resolves itself into identifying the relevant instruments that contain the “general principles of law” to establish guilt for acts that are recognized by the community of nations. Therefore, under provisions of the Constitution a person could be found guilty of an offence either under provisions of the Penal Code or under provisions contained in instruments of law recognized by the community of nations.

INSTRUMENTS REGOGNIZED by the COMMUNITY of NATIONS

The context for determining whether an offence was committed or not should be based on the acknowledged fact that conflict was an Armed Conflict and therefore the applicable law is International Humanitarian Law; a fact acknowledged by the representatives of the LTTE to the European Court. Furthermore, since the conflict was a Non-International Armed Conflict the applicable legal framework is the Additional Protocol II of 1977. This Protocol is an extension of Common Article 3 of the Geneva Conventions. Although Sri Lanka has not formally ratified Protocol II, it is today accepted as an instrument of international customary law accepted by the community of nations. Therefore, any questions of guilt for offences committed during the Armed Conflict should either be based on provisions of the Penal Code or procedures laid out in Article 6. “Penal prosecution” of Additional Protocol II. Part II of the Additional Protocol Paragraphs 2 (a) to (h) and 3 (a) to (c) specify what constitutes violations that ‘shall remain prohibited at any time and in any place whatsoever”.

NATIONAL LAWS COMPLEMENTTARY to INTERNATIONAL LAWS

Domestic Laws should take primacy over provisions of international law as recognized by the Rome Statute in its Preamble that states: "Emphasizing that the International Criminal Court established under the Statute shall be complementary to national criminal jurisprudence". Endorsing the principle of complementarity, Justice A.R.B. Amerasinghe states: "The ultimate goal of international norm-setting is their full and effective implementation through domestic procedures without the need for recourse to international mechanisms. In fact, access to international mechanisms is usually limited and may be resorted to only if domestic mechanisms are not available or inadequate…. The effective protection of human rights depends in the first instance upon national courts, legislatures, and public officers, and only in the last resort upon the international machinery and fora" (Amerasinghe, "Our Fundamental Rights of Personal Security and Physical Liberty" p. 2) Therefore, it is only in instances where acts committed that cannot be categorized as violations under the Penal Code, that provisions contained in Additional Protocol II under Article 6: "Penal prosecution" should be followed.

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". In particular: (a) "The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence"; (b) "No one shall be convicted of an offence except on the basis of individual penal responsibility"; (c) "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby" (d) "Anyone charged with an offence is presumed innocent until proved guilty according to law"; (e) Anyone charged with an offence shall have the right to be tried in his presence"; (f) "No one shall be compelled to testify against himself or to confess guilt".

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”.

5. “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained” Article 25 (2) of the Rome Statute states: “A person who commits within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with the Statute”

The material presented relating to Penal prosecutions contained in the Additional Protocol II and the Rome Statue clearly establish that the procedures that should be followed to establish guilt SHOULD be based on “individual penal responsibility”.

Furthermore, since guilt is based on “individual penal responsibility” Command Responsibility is not recognized either by Protocol II or the Rome Statute. Under the circumstances blacklisting entire fighting divisions reflects ignorance of International Humanitarian Law applicable to Non-International Armed Conflict. However, since the Protocol II does not specify what the punishment should be for the offences committed, punishment for such should be guided by provisions in Sri Lanka’s Penal Code. This is in keeping with the recognized principle of complementarity that recognizes the primacy of national laws that complement international laws.

DOMESTIC MECHANISM

During the course of the Foreign Minister Ali Sabry’s address, at the 51st Secession of the UN Human Rights Council, he stated: “We endeavor to establish a credible truth-seeking mechanism within the framework of the Constitution. The contours of a model that would suit the particular conditions of Sri Lanka are under discussion”. When the Minister of Justice, Prison Affairs and Constitutional Reforms, Dr. Wijeyedasa Rajapakse, was asked by the Sunday Observer “about the possibility of the international mechanism coming with hybrid Courts to address war crimes in Sri Lanka, he is reported to have stated: “It is likely. That is why we are going to propose the setting up of a domestic truth-seeking mechanism with special courts that can respond to rights violation cases involving the LTTE and the military. We are currently discussing the situation with countries such as the US, China, UK, and the European Union to promote the domestic mechanism.” (Sunday Observer, September 18, 2022).

Establishing the "Truth" by means of a truth-seeking domestic mechanism depends on the degree of certainty of evidence presented. Such degrees of certainty are needed whether "truth" is established by existing provisions or by fresh domestic mechanisms. However, the intention to set up "special courts" that could respond to violations by the LTTE or the military would then have to function alongside existing High Courts that are in place under the 13th Amendment to the Constitution that are mandated to address violations specified in the Penal Code. Whether such an arrangement is constitutionally acceptable or not is a matter that needs to be explored. It is apparent from these comments that the reason to endeavor the setting up a "domestic truth-seeking mechanism with special courts" is to satisfy US, China, UK and the European Union with whom Sri Lanka is having discussions, that Sri Lanka is serious about addressing possible human rights law and humanitarian law violations that could have occurred during the Armed Conflict. During these discussions it would make a significant difference to these discussions if Sri Lanka makes them aware of the outstanding determinations made by the Supreme Court of Sri Lanka relating to Human Rights violations. The fact that the UNHRC and the Core Group backed by local entities seem to be ignorant of such determinations by the Supreme Court of Sri Lanka, and the fact that the scope of national laws complemented by international laws do already exist and have the capacity to address alleged violations, is because Sri Lanka has made no attempt to present them. This may also be the possible reason for demanding hybrid courts to address violations, if any, that may have occurred during the armed conflict.

EXISTING DOMESTIC MECHANISMS to ADDRESS VIOLATIONS

Article 154P (1) of the 13th Amendment to the Constitution states: "There shall be a High Court for each Province …Each such High Court shall be designated as the High Court of the relevant Province".

Article 154P (6) of the 13th Amendment states: "Subject to the provisions of the Constitution and any law, any person aggrieved by a final order, judgment or sentence of any such Court in the exercise of its jurisdiction under paragraph (3) (b) or (3) (c) or (4) may appeal therefrom to the Court of Appeal in accordance with Article 138" In addition to such avenues to pursue the interests of aggrieved parties relating to investigations such persons could lodge a complaint with Sri Lanka's Human Rights Council under provisions of Part II "POWERS OF INVESTIGATION" of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996, PART II POWERS OF INVESTIGATION OF THE COMMISSION Paragraph 14 of the above Act states: "The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, investigate an allegation at the infringement or imminent

infringement of a fundamental right of such person or group of persons caused". It is therefore crystal clear that provisions currently exist between provisions in the 13th Amendment to the Constitution and the remit of the Sri Lanka's Human Rights Commission for an aggrieved party to seek redress in relation to serious violations. One such landmark judgment given by the Court of Appeal relating to Disappearances is given below, in order to demonstrate that the existing jurisprudence is sufficient to address issues relating to serious violations.

DISAPPEARANCES

K. LEEDA VIOLET AND OTHERS V T.P. VIDANAPATHIRANA AND OTHERS H.C.A.164/89, H.C.A.171/89 AND H.C.A.166/89 DECIDED ON 2 DECEMBER 1994.S.N.SILVA.J. PRESIDENT OF THE COURT OF APPEAL

"In HCA 164/89 the Petitioner Leeda Violet, being the mother of the corpus, Y. Wimalpala, father of the corpus and T. Lilinona gave in support of the petition. According to their evidence the corpus, being the eldest son of the Petitioner and her husband Wimalpala, was 26 years of age at the time of his arrest…. At about 4.30 p.m. a party of police officers came in several vehicles. Thereafter he (the officer in-charge) arrested the persons who were near the shop selling fishing gear. Some persons who were on the beach were also arrested… Those arrested were asked to kneel on the road. Thereafter the 1st Respondent asked those persons to get into the vehicles and took them to the Dikwella Police Station. It is stated that about 30 persons were arrested. The Petitioners in HCA 164/89 and HCA 171/89 followed the police vehicles and went up to the Police Station". The final paragraph of the judgment states: "The Petitioners filed these applications in April 1989. There were initial hearings before this Court and protracted inquiries before the Magistrate Court. Thereafter the cases were adjourned for further hearing before this Court. It is obvious that the Petitioners have incurred heavy expenditure in these proceedings. They have boldly pursued these applications, which is commendable conduct considering that the 1st Respondent continues to hold office…. Several applications with regard to other disappearances reported from the same place have been dismissed for non-prosecution. In these circumstances as a measure of exemplary costs, I direct that the Respondent to pay each petitioner in the above application a sum of Rs. 100,000/= as exemplary costs…. Also direct the Registrar of this Court to forward copies of the proceedings recorded in the Magistrate's Court to the Inspector General of Police who is hereby directed to consider the evidence recorded as information of the commission of cognizable offences. He will take necessary steps to conduct proper investigations and to take steps according to the law…" (A.R.B Amerasinghe, Ibid p. 336-340)

TORTURE

On the topic of Torture, Cruel, Inhuman, Degrading Treatment or Punishment, Justice Amerasinghe in the book cited above states: "The Supreme Court of Sri Lanka has over and over again emphasized that even persons whose records are not particularly meritorious should enjoy the Constitutional Guarantee of personal liberty and security and that even 'notorious' or hard core criminals should not be subject to torture, inhuman or degrading treatment or punishment" (Ibid, p. 29).

THE QUESTION of PROOF

"In Malinda Channa Pieris and others v A.G. and others, it was pointed out that, having regard to the gravity of the matter in issue, a high degree of certainty is required before the balance of probability might be said to tilt in favoure of a petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment or punishment; and unless has adduced sufficient evidence to satisfy the Court…" (Ibid, p.43) Internationally too, the allegation must be proved before the relevant Article is held to have been violated. Thus for instance in Fillastre v Bolivia, the UN Committee on Human Rights held that there was no violation of Article 10 of the ICCPR because the allegations that the conditions of detention were inhuman and degrading had not been substantiated or corroborated" (Ibid, p. 44).

MEANING of ARREST

Article 13 (1) of the Constitution states: "No person shall be arrested except according to procedures established by law. Any person arrested shall be informed of the reason for his arrest". Article 13 (2) states: "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedures established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedures established by law". "So long as the grounds for arrest are made known, the Constitutional requirement that reason for arrest should be given will be satisfied. The police do not have to quote chapter and verse from statutes and legal literature to justify the arrest. There is no obligation on the police to quote the law applicable", said Samarakoon C.J. "On the other hand… He must be given the grounds – the material facts and particulars – for his arrest, for it is then that the man will have information that will enable him to take meaningful steps towards regaining his liberty" (Ibid, p. 115).

CONCLUSION

The Foreign Minister Ali Sabry during the course of his address, at the 51st Secession of the UN Human Rights Council, stated: "We endeavor to establish a credible truth-seeking mechanism within the framework of the Constitution. The contours of a model

that would suit the particular conditions of Sri Lanka are under discussion". Whether the intended mechanism is compatible with existing systems under the 13th Amendment is an issue that needs resolution. Establishing the "truth", whatever the mechanism, depends on the evidence presented because only evidence that has a "high degree of credibility" is what is accepted as evidence both nationally and internationally. For instance, in Fillastre v Bolivia, the UN Committee on Human Rights held that there was no violation of Article 10 of the ICCPR because the allegations that the conditions of detention were inhuman and degrading had not been substantiated or corroborated" (A.R. B. Amerasinghe, "Our Fundamental Rights of Personal Security and Physical Liberty" p. 44). Such evidence could be presented to any of the High Courts established under the 13th Amendment or the new Domestic Mechanism contemplated. For instance, the landmark judgment presented above, with the decision by the then President of the Court of Appeal, S.N. Silva J. reflects the scope of existing national mechanisms to address serious violations, regardless of whether or not they come within the rubric of human rights or humanitarian law.

Furthermore, an aggrieved party who is not satisfied with the diligence of the investigations could appeal to Sri Lanka's Human Rights Commission to undertake under provisions of Part II "POWERS OF INVESTIGATION" of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996, PART II POWERS OF INVESTIGATION OF THE COMMISSION Therefore, aggrieved parties should be encouraged and urged to exploit the full potential of existing domestic mechanisms to redress their grievances. If the evidence reaches the standard of "high degree of credibility", the next step is for Domestic mechanisms provided in the Constitution to apply, and the procedures for prosecution and punishment in keeping with provisions of Sri Lanka's Penal Code, to proceed. However, if the evidence relates to violations outside its scope, they could still apply to acts that are "recognized by the community of nations" as per the second paragraph of Article 13 (6) of the Constitution. The evidence, however must relate to "individual penal responsibility", as called for by the Additional Protocol II applicable to the

Non-International Armed Conflict and by the Rome Statute. Therefore, the call to blacklist entire fighting divisions reflects a total ignorance of such internationally recognized provisions. Furthermore, Additional Protocol Ii does not recognize Command Responsibility. As for the punishment, what is provided nationally is Sri Lanka's Penal Code. Therefore, even if an individual is guilty for a violation and is recognized as such by the community of nations, the punishment has to be in keeping with provisions in Sri Lanka's Penal Code.

Few are aware of these facts, and least of all the UNHRC. Instead of pleading our case in Geneva, this body of evidence should be brought to the attention of the UNHRC, Diplomatic Representatives in Sri Lanka and to those who are committed to Human Rights issues. In addition, the Government should document regularly the current status of every complaint filed with the High Courts or any of the Superior Courts relating to human rights and humanitarian law violations to demonstrate the manner in which the domestic system is working. The fact that achievements gained through Domestic Mechanisms have not received the publicity it deserves has resulted in acquiring the image that impunity reigns in Sri Lanka.