



**ARTICLE 15 COMMUNICATION SUBMITTED  
TO THE PROSECUTOR OF THE  
INTERNATIONAL CRIMINAL COURT ON THE  
DEPORTATION, DEPRIVATION OF THE  
RIGHT TO RETURN AND PERSECUTION OF  
TAMIL CIVILIANS BY THE SRI LANKAN  
AUTHORITIES**

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## EXECUTIVE SUMMARY

This Communication outlines the information that explains the basis for why the Prosecutor of the International Criminal Court ('ICC') should investigate, and in due course arrest and try the following individuals who belong(ed) to the Government of Sri Lanka ('GoSL'):

1. Gotabaya Rajapaksa, current President and former Secretary of Defence of Sri Lanka;
2. Kamal Gunaratne, current Secretary of Defence of Sri Lanka and former Army Commander in the Sri Lankan Army ('SLA');
3. Jagath Jayasuriya, former Army Commander and Chief of Defence Staff of the SLA;
4. Successive Inspector-Generals of the Sri Lankan Police ('SLP') since 2002;
5. Sisira Mendis, former Deputy Inspector General of the Criminal Investigation Division ('CID') and Terrorism Investigation Division ('TID') within the SLP; and
6. Successive commandants of the Special Task Force ('STF') of the SLP since 2002.

The information contained in the Communication provides more than a reasonable basis for concluding that these individuals are responsible for crimes against humanity of deportation (through underlying acts of abductions, unlawful detention and torture), deprivation of the right to return, and persecution committed against numerous Tamil victims in Sri Lanka and the United Kingdom ('UK'). The information shows that these individuals held positions of command and/or authority over the Sri Lankan security forces, including SLP (including the CID, TID and STF) and the SLA, that are directly involved in the perpetration of crimes against humanity, including the notorious "white van abductions", against Tamil victims. Through their acts and omissions, these suspects are directly responsible for the commission of these mass atrocities. Nevertheless, none of these individuals has ever been made subject to a criminal investigation or prosecution in Sri Lanka, notwithstanding the gravity of these offences. As such, these potential ICC cases would be admissible before the ICC.

This Communication is provided to the Prosecutor of the ICC under Article 15 of the Rome Statute by Global Rights Compliance LLP ('GRC') on behalf of 200 Sri Lankan Tamil victims (Victims). GRC will also provide the Communication to the national police authorities of the UK for the initiation of an investigation and issuance of arrest warrants under the principle of universal jurisdiction against the Sri Lankan authorities, including President Gotabaya Rajapaksa and some of the other individuals named above, who are expected to be visiting Glasgow between 31 October – 12 November 2021 to participate in the United Nations Climate Change Conference 2021 (COP26).

The Communication provides an overview of the cogent information regarding the widespread and systematic commission of the crimes against humanity of deportation, deprivation of the right to return as an inhumane act and persecution (under Article 7 of the Rome Statute) in Sri Lanka and the UK against the Tamil nationals who were perceived as supporters or members of the Liberation Tigers of Tamil Eelam ('LTTE') by the Government of Sri Lanka ('GoSL'), at least since 2002.

Thousands of actual or perceived Tamil supporters or members of LTTE have been systematically subjected to abduction, unlawful detention and/or torture by GoSL officials with command and authority over the Sri Lankan security forces in the course of, as well as after the end of, the armed conflict between the LTTE and GoSL in 2009. Although this filing is on behalf of 200 Victims, the experiences of the Victims outlined therein concern thousands of more victims. Thus, these victims represent only a fraction of the heinous crimes committed and that continue to be committed against Tamil men, women and children in Sri Lanka and the UK.

The underlying purpose of the GoSL authorities in committing these crimes is to annihilate, by any means necessary, the Tamil separatism in Sri Lanka embodied within the LTTE and its supporters. However, the GoSL makes no distinction between those with these political beliefs and the thousands of Sri Lankan men, women and children who wish for nothing but peace, security and a place to call home.

As such, the officials of GoSL committed these criminal acts on ethnic and political grounds, meaning that they were in fact committed as underlying acts of discrimination and persecution. The severity of the persecution they have faced left the Victims with no option but to flee Sri Lanka and seek refuge in the UK. Subsequently, the Victims were and continue to be deprived of their right to return to their homes as a result of the threats, torture and persecutory policies of the GoSL security forces led by Gotabaya Rajapaksa and Kamal Gunaratne. These men and the GoSL as a whole have initiated policies that continue to this day to prevent the Victims from returning home. They face the risk of torture, injury and death if they returned to Sri Lanka, whether they are LTTE supporters or not. The Victims continue to suffer from the harassment of and threats to their loved ones who remain in Sri Lanka, as well as the ongoing surveillance, harassment and persecution directed towards themselves in the UK. These as well as the indignities and difficulties inherent in being refugees in the UK, including the agonies of having to start their lives again in a foreign country where they are deprived of their homes, culture and families, have caused and continue to cause the Victims severe mental suffering and harm.

The entirety of the conduct and this continued brutality amounts to three distinct crimes against humanity (deportation, deprivation of the right to return, and persecution) that have been and continue to be committed against the Victims in the UK. As the UK is a state party to the Rome Statute, this gives the ICC jurisdiction over them, and also provides the UK with another basis – besides the pursuant to universal jurisdiction principles – to arrest them upon their arrival in the UK.

As this Communication shows, this is for two reasons: first, deportation is a continuing crime, meaning that it continues to take place on the territory of the UK as long as the victims are prevented from returning their homes in Sri Lanka due to the acts of these men and the continuing persecutory acts of the GoSL authorities. Second, as confirmed by the recent jurisprudence of the ICC, the crime of the denial of the right to return home takes place where the victims are present as refugees, which is now the UK. The Victims have been abducted, detained, tortured, persecuted (in Sri Lanka and the UK) and thus deprived of their right to return home due to their ethnic and political identities.

Based on the foregoing, the Victims contend that the initiation of an investigation by the Prosecutor of the ICC is imperative to deter the continuing commission of these crimes and ensure that the unalienable rights of the Victims to return home, know the truth, to see their torturers face justice, and request reparations for their losses are realised.

## STATEMENT FROM THE VICTIMS

We are the victims of the Government of Sri Lanka's ('GoSL') decades long genocidal campaign against the Tamils nation in Sri Lanka. Since the independence of Sri Lanka from the British colonisers, Tamils have been systematically discriminated against by the Sinhalese political establishment, whose primary goal has always been to transform Sri Lanka into a pure Sinhala Buddhist country. Historically, our ancestors have lived under periodic state-sponsored massacres and discriminatory legislation that stripped us of our civil, political, economic, social and cultural rights. We are merely the latest generation of Tamils who have been and continue to be subjected to these horrific crimes by the GoSL.

All we wanted was to live freely in our homelands, in the country where we were born. GoSL made this impossible for us. This is why we had to organise under the Liberation Tigers of Tamil Eelam (LTTE) in 1983 to defend ourselves as well as to establish our own sovereign State, Tamil Eelam, where we can live freely and without being discriminated against. To this end, some of us became active members of LTTE while others were mere supporters. The GoSL responded with a vicious campaign of violence, murdering, abducting, unlawfully detaining and torturing LTTE members and Tamil civilians alike. Some of us were among those who were subjected to these crimes during the war.

After the end of the war in May 2009, the GoSL's campaign of violence against Tamils escalated. Some of us were hoping that with the conclusion of the war, Sri Lanka could normalise. We were wrong. GoSL continued to persecute the now undefended Tamils. Up until this very day, GoSL security forces, including the Sri Lankan Police (Criminal Investigation Division, Terrorism Investigation Division and Special Task Force in particular) and the Sri Lankan Army continue to send their notorious "white vans" to abduct, unlawfully detain and torture Tamils. All of us have been through this experience. We have been subjected to excruciating pain and suffering at the hands of the GoSL officials belonging to these units.

Upon escaping detention, we had no choice but to flee our homelands and seek refuge in the United Kingdom. The GoSL authorities, however, were not done with us just yet. They continued to surveil our activities in the United Kingdom. They sent police officers to our homes in Sri Lanka to harass and threaten our families. Some of us have lost family members as a result. Recognising our suffering and the high risk of persecution we would be exposed to if we were to be returned to Sri Lanka, the United Kingdom authorities have granted most of us asylum. Others are still anxiously waiting for the determination of the United Kingdom authorities in this regard.

The criminal acts of the GoSL authorities have destroyed our lives. We all suffer from various mental illnesses (including post-traumatic stress disorder and depression) caused by our suffering at the hands of the GoSL authorities, the threats and harassment that our families are subjected to, and being parted from our homelands and loved ones. The uncertainty that we had to go through during our respective asylum application processes in the United Kingdom, with the possibility of being handed over to our torturers in Sri Lanka, also took its toll on our mental health. We live as shells of our former selves, unable to cope with the mental suffering that the GoSL has inflicted and continue to inflict on us every day. We would like to return to our homes and families in safety and with dignity, but we cannot due to the ongoing crimes of the GoSL against us as well as our communities back in Sri Lanka.

We respectfully ask the Prosecutor of the International Criminal Court to take our plight into serious consideration and open an investigation into the crimes of the GoSL. We have been denied recognition as victims, reparations, and redress at every turn by the GoSL authorities so far. This is our one and only chance for justice for the crimes that were and continue to be committed against us.

## INTRODUCTION:

1. This communication ('Communication') is addressed to the Prosecutor ('Prosecutor') of the International Criminal Court ('ICC' or 'the Court') pursuant to Article 15 of the Rome Statute ('Statute') by Global Rights Compliance LLP ('GRC') on behalf of 200 Tamil Sri Lankan victims who currently reside in the United Kingdom ('UK') as refugees ('Victims').<sup>1</sup>
2. The Communication provides an overview of the available information regarding the commission of three distinct crimes against humanity against the Victims in the territories of Sri Lanka and the United Kingdom: (i) deportation (Article 7(1)(d)), (ii) deprivation of the right to return as an inhumane act (Article 7(1)(k)) and (iii) persecution (Article 7(1)(h)). These crimes were committed in the context of a widespread and systematic attack carried out by the Government of Sri Lanka ('GoSL') against the Tamil nationals in Sri Lanka who were actual or perceived supporters or members of the Liberation Tigers of Tamil Eelam ('LTTE').
3. As the information outlined in this Communication demonstrates, thousands of actual or perceived Tamil supporters or members of LTTE, including the Victims, have been systematically subjected to abduction, unlawful detention and/or torture by the GoSL officials in the course of, as well as after the end of the armed conflict between the LTTE and GoSL in 2009. As such, the Victims represent a fraction of a larger group of individuals who have been subjected to these crimes by the GoSL authorities.
4. The underlying purpose of the GoSL authorities in committing these crimes is to annihilate, by any means necessary, the Tamil separatism in Sri Lanka embodied within the LTTE and its supporters. As such, the officials of the GoSL committed these criminal acts discriminatorily on ethnic and political grounds, meaning that they were in fact committed as underlying acts of persecution. The severity of the persecution they have faced left the Victims with no genuine option but to flee Sri Lanka and seek refuge in the United Kingdom. In this sense, the deportation of the Victims was a foreseeable and natural consequence of the criminal acts perpetrated by the GoSL authorities. Subsequently, the Victims were deprived of their right to return to their homelands in Sri Lanka as a result of the ongoing conduct of the officials of the GoSL authorities, including (i) the maintenance of the coercive circumstances in Sri Lanka against suspected LTTE supporters or members, (ii) the surveillance and harassment of the Victims in the UK, and (iii) the harassment of and threats to the family and community members of the Victims in Sri Lanka. Such conduct also formed a part of the continuing persecutory campaign of the GoSL against the Victims, which was precipitated by their abduction, unlawful detention, torture and deportation from Sri Lanka.
5. These crimes (i.e. deportation, deprivation of the right to return, and persecution) are committed partly within the territory of the UK. Accordingly, the Court could exercise territorial jurisdiction over them in line with its recent jurisprudence on the principle of objective territoriality.<sup>2</sup> This is for three reasons: first, the authors contend that deportation (as a

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<sup>1</sup> GRC is an international legal partnership specialising in on-the-ground international humanitarian law and human rights issues in conflict-affected and high-risk areas around the world and working to identify, prevent and mitigate adverse IHL and human rights impacts. See Global Rights Compliance, [About Us](#).

<sup>2</sup> ICC, Decision on the "[Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute](#)", ICC-RoC46(3)-01/18, 6 September 2018, (Myanmar/Bangladesh Article 19(3) Decision, para. 72; ICC, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar](#), 14 November 2019, (Myanmar/Bangladesh Authorisation Decision) para. 61.

continuing crime) continues to take place on the territory of the UK.<sup>3</sup> This is due to the fact that the GoSL authorities through their continuing acts and omissions actively prevent the Victims from returning to Sri Lanka which effectively maintains and perpetuates their deportation. Second, in line with the jurisprudence of the Court, the deprivation of the right to return takes place in the territory where the Victims are present as refugees, i.e. the UK.<sup>4</sup> Lastly, the Victims have been and continue to be deprived of their right to return on ethnic and political grounds. Such deprivation, which continues to take place in the UK, forms a part of the overall persecutory campaign carried out against the Victims by the GoSL authorities since their initial abduction, unlawful detention, torture and deportation. This provides the Court with the necessary territorial link to exercise jurisdiction over the persecution of the Victims as well as the totality of its underlying acts (i.e. abduction, unlawful detention, torture, deportation and deprivation of the right to return).

6. Accordingly, the authors contend that the available information establishes a reasonable basis to proceed with an investigation under Article 53 of the Statute in relation to the commission of these crimes. Specifically, it is submitted that:

- I. The information outlined in the Communication provides a reasonable basis to believe that three distinct crimes within the jurisdiction of the Court, namely deportation (Article 7(1)(d)), deprivation of the right to return (Article 7(1)(k)), and persecution (Article 7(1)(h)), has been and/or continue to be committed within the territories of Sri Lanka and United Kingdom;
- II. The potential cases against the perpetrators of these crimes would be admissible under Article 17 of the Statute.

7. The accounts cited in the Communication predominantly belong to 28 Victims whose accounts are particularly striking. The dates of abduction, detention and deportation of the remaining Victims, whose similar accounts are equally relevant and probative, are provided in the attached Annex I. The names, victim statements (VS), medicolegal reports (MLR) and refugee status determination decisions (RSDD) of all 200 are currently withheld from disclosure to the Prosecutor by GRC due to the security concerns of the Victims. GRC can, however, disclose this information following a request from the Prosecutor through secure channels. The authors also attach two expert reports provided to the UK courts by Dr Suthaharan Nadarajah (Annex II) and Dr Chris Smith (Annex III) in 2020 in the context of refugee status determination litigation for Tamil nationals.

**I. THERE IS A REASONABLE BASIS TO BELIEVE THAT THE CRIMES AGAINST HUMANITY OF DEPORTATION, DEPRIVATION OF THE RIGHT TO RETURN AND PERSECUTION ARE COMMITTED IN SRI LANKA AND THE UNITED KINGDOM**

8. This section of the Communication will demonstrate:

- A. Contextual background information on the persecution of Sri Lankan Tamils since the independence of the country in 1948;
- B. The commission of the crimes against humanity of deportation, deprivation of the right to return and persecution by the GoSL officials against Tamil nationals from Sri Lanka; and

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<sup>3</sup> See below paras 104-116.

<sup>4</sup> See below paras. 117-118.

C. That the commission of these crimes fall within the jurisdiction of the Court.

#### A. Contextual background information

9. The origins of the armed conflict in Sri Lanka date back to the country's independence in 1948 and the increasingly majoritarian and ethnic-based policies of the GoSL in favour of the Sinhalese majority ever since.<sup>5</sup> From then onwards, Sinhala-Buddhist nationalist principles and values have become the dominant ideology among the Sinhalese majority in politics and policy decisions.<sup>6</sup> Over the years, this nationalism transformed into Sinhala-Buddhist chauvinism with ethnic discrimination against the Tamil minority at its core.<sup>7</sup>
10. In line with the dominant ideology of the State, successive Sri Lankan governments since 1948 have enacted a series of patently discriminatory policies. The 1948 Ceylon Citizenship Act, for instance, denied tens of thousands of Tamils their right to citizenship in the newly independent State by only allowing those individuals whose fathers were born in Ceylon or were at least third-generation immigrants,<sup>8</sup> an impossible feat for most of the more than 900,000 Tamils on the island who migrated to the island from India under the British colonial rule to work as labourers.<sup>9</sup> This has effectively deprived them of their political rights such as their right to vote.<sup>10</sup> By the year of 2000, there were still 300,000 Tamils who were stateless and living in Sri Lanka. This situation was resolved only in 2003 with a new act authorising the granting of citizenship to all persons of Indian origin.<sup>11</sup>
11. The Sinhalese chauvinism also manifested itself with the Official Language Act No. 33 of 1956 (commonly referred to as the Sinhala Only Act), replacing English with Sinhala as the sole official language of the island.<sup>12</sup> This created further alienated Tamils and excluded them from public life. As a result of these measures, they have been put at a serious disadvantage in gaining employment in the public sector as well as accessing public services (including the courts) where use of the Sinhala language was rigorously implemented.<sup>13</sup> These policies were complemented by a series of other discriminatory policies of the GoSL which prevented Tamil nationals of Sri Lanka from entering into the military<sup>14</sup> and the universities.<sup>15</sup> The Sinhalese governments also engaged in gerrymandering the electoral map to ensure permanent Sinhala

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<sup>5</sup> Report of the OHCHR Investigation on Sri Lanka (OISL), 16 September 2015, (A/HRC/30/CRP.2\_E) para. 47.

<sup>6</sup> Annex II, Expert Opinion of Dr Suthaharan Nadarajah, 22 June 2020, (Expert Opinion of Dr Nadarajah), para. 12.

<sup>7</sup> Expert Opinion of Dr Nadarajah, para. 212; E. V. Daniel and Y. Thanagaraj, 'Forms, Formations and Transformations in the Tamil Refugee' in: E. V. Daniel and J. C. Knudsen eds., *Mistrusting Refugees*, Univ. of California Press, 1995, p. 232.

<sup>8</sup> See [Ceylon Citizenship Act, No 18](#), 15 November 1948.

<sup>9</sup> Minority Rights Group International, [Sri Lanka: Tamils](#), March 2018, (Minority Rights Group); Nirupama Subramanian, The Indian Express, [Exclusion and Ethnic Strife: Story of Sri Lanka's Citizenship Law](#), 16 January 2020; Nubin, Walter, *Sri Lanka: Current Issues and Historical Background*. Nova Publishers, 2002, (Walter), p. 61.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> [Official Language Act No. 33 of 1956](#), Section 2.

<sup>13</sup> Walter, p. 63; M. Deegalle, *Buddhism, Conflict and Violence in Modern Sri Lanka*, Routledge, 2006, p. 183.

<sup>14</sup> In 1962, a policy of recruiting military personnel only from the Sinhalese Buddhist community was instituted in Sri Lanka. This is deemed as the beginning of an ethnically pure army in Sri Lanka. Further, the Sri Lankan army routine practices (such as ceremonies, regiment names, symbols etc.) have been moulded in line with the Sinhala-Buddhist ideology. B. Blodgett, *Sri Lanka's Military: The Search for a Mission: 1949-2004*, Aventine Press, 2004, p. 54; Expert Opinion of Dr Nadarajah, para. 217.

<sup>15</sup> The 1971 policy of "standardization", which aimed to provide more educational opportunities for disadvantaged Sinhalese students, required Tamil students to achieve higher exam scores than their Sinhalese counterparts to be admitted to Sri Lankan universities. This policy effectively discriminated against Tamil students, causing further ethnic frictions. Harvard International Review, [The Sri Lankan Civil War and its History. Revisited in 2020](#), 31 August 2020; Permanent People's Tribunal, Peoples' Tribunal on Sri Lanka: 7-10 December 2013, [Judgment](#), 2014, (Peoples' Tribunal on Sri Lanka) p. 16.

dominance of government by promoting State-sponsored colonisations schemes that put many Sinhalese settlers into Tamil dominated areas in the East of the country.<sup>16</sup>

12. In effect, these policies marginalised and alienated the Tamil minority of the country, causing outbreaks of decades-long communal violence from 1956 onwards. The most significant of these were the State-sponsored: (i) the 1958 anti-Tamil pogrom, where an estimated 300 to 1,500 Tamils were murdered and many more were injured and Tamil homes and businesses were looted and destroyed;<sup>17</sup> (ii) the post-election violence of 1977 where more than 300 Tamils were killed and 25,000 to 50,000 displaced,<sup>18</sup> and (iii) the 1981 burning of the Jaffna library which contained over 95,000 Tamil historical texts and manuscripts by an organised Sinhalese mob.<sup>19</sup>
13. In 1972, despite the strong protests of Tamils and their political leaders, the GoSL passed a new Sinhala-Buddhist constitution, which changed the country's name from Ceylon to Sri Lanka (a Sinhala name) and gave Buddhism primacy in state affairs.<sup>20</sup> In response, Tamils' aspirations for federal autonomy in their homeland in the island's North East transformed into demands for full independence and statehood.<sup>21</sup> In 1976, the major Tamil political parties united as the Tamil United Liberation Front ('TULF') and called for non-violent struggle for an independent state of Tamil Eelam.<sup>22</sup> In the same period, some Tamil youth, calling for armed struggle for independence, formed the Tamil New Tigers, renamed the Liberation Tigers of Tamil Eelam ('LTTE') in 1975. When the TULF called on Tamils to use the 1977 general elections as a de facto referendum on independence and statehood, and swept the seats in the North East, the GoSL responded by deploying the armed forces to the Tamil majority-areas, and passing the Prevention of Terrorism Act ('PTA') in 1979.<sup>23</sup> The GoSL also amended the constitution, changing the Westminster-style Parliamentary system to a bicameral system in which parliament was now subordinate to a powerful executive President elected by an island-wide majority, thus ensuring the permanency of Sinhala majoritarianism.<sup>24</sup>
14. Until 1983, armed militancy was low-grade and marginal to Tamil politics, which was dominated by the TULF.<sup>25</sup> In this sense, 1983 was a turning point in the conflict. The LTTE carried out an attack in the city of Jaffna in July 1983 where 13 GoSL soldiers were killed. Thereafter, the infamous anti-Tamil pogrom, also known as the 'Black July', erupted across Sri Lanka. The Sinhalese mobs were transported to Tamil areas in GoSL buses and used official voter registration lists to identify and target Tamils.<sup>26</sup> Approximately 3,000 Tamils were killed, countless Tamil properties and businesses were destroyed, and many Tamils fled Sinhalese-

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<sup>16</sup> Expert Opinion of Dr Nadarajah, para. 212; Minority Rights Group.

<sup>17</sup> Tamil Guardian, [Remembering the 1958 Pogrom](#), 22 May 2020.

<sup>18</sup> A. Bandarage, *The Separatist Conflict in Sri Lanka: Terrorism, Ethnicity, Political Economy*, 2008, p. 76.

<sup>19</sup> Al Jazeera, [The Fear Inside Ss: Confronting Sri Lanka's past](#), 4 February 2018; T. Manoranjan and M. Sivaselvachandran, [Sri Lanka's State Responsibility for Historical and Recent Tamil Genocides](#), in *Opinio Juris*, 24 July 2020; People's Tribunal on Sri Lanka, p. 16.

<sup>20</sup> Madura Rasaratnam. *Tamils and the Nation: India and Sri Lanka Compared*, Oxford University Press, 2016; Neil DeVotta. *Blowback: linguistic nationalism, institutional decay, and ethnic conflict in Sri Lanka*, Stanford University Press, 2004.

<sup>21</sup> *Ibid*; Sankaran Krishna, *Postcolonial insecurities: India, Sri Lanka, and the question of nationhood*, University of Minnesota Press, 1999.

<sup>22</sup> *Ibid*; Sankaran Krishna, *Postcolonial insecurities: India, Sri Lanka, and the question of nationhood*, University of Minnesota Press, 1999.

<sup>23</sup> *Ibid*; [Nagaiah Manoharan](#). *Counterterrorism Legislation in Sri Lanka: Evaluating Efficacy*. Policy Studies 28. East-West Center. Washington, DC. 2007. Available at <https://www.files.ethz.ch/isn/35329/PS028.pdf>.

<sup>24</sup> *Ibid*; Sankaran Krishna, *Postcolonial insecurities: India, Sri Lanka, and the question of nationhood*, University of Minnesota Press, 1999.

<sup>25</sup> *Ibid*; Sumantra Bose. *States, nations, sovereignty: Sri Lanka, India, and the Tamil Eelam Movement*, Sage Publications, 1994.

<sup>26</sup> [Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka](#), 31 March 2011, (PoE Report), para. 30.



majority areas or left the country. Following this attack, a full-fledged armed conflict erupted between the LTTE and GoSL.<sup>27</sup> Subsequently, from 1983 to May 1995, over 90 massacres were committed by the GoSL armed forces where more than 4,000 Tamils were killed.<sup>28</sup>

15. Despite the ceasefire signed between LTTE and GoSL in February 2002 and the subsequent peace and normalisation efforts,<sup>29</sup> the hostilities picked up again with the election of Mahinda Rajapaksa as the president in November 2005.<sup>30</sup> Rajapaksa ran an ultra-Sinhalese nationalist platform which was critical of the peace process and aimed at achieving a final military solution to the civil war.<sup>31</sup> In response, the LTTE initiated a renewed campaign of violence in December 2005.<sup>32</sup> Targeted killings between the LTTE, rival paramilitary groups and the Sri Lankan military intelligence operatives reached new levels during this period, including against prominent Tamil parliamentarians and journalists, and attacks against civilian busses and trains.<sup>33</sup> A new wave of “white van abductions”<sup>34</sup> and enforced disappearances carried out by the GoSL had also engulfed the country in 2006 and 2007.<sup>35</sup> In its 2006 report, the Working Group on Enforced and Involuntary Disappearances (‘WGEID’) indicated that it was “gravely concerned at the increase in reported cases of recent enforced disappearances occurring primarily in the north-east of the country in the context of renewed fighting in the region.”<sup>36</sup> The reported cases of enforced disappearances steadily increased between 2007 and 2009 which WGEID found as a “widespread pattern of disappearances in the country.”<sup>37</sup>
16. Military clashes began particularly in the East around Jaffna and Mannar to the North between the Sri Lankan Army (‘SLA’) and the LTTE.<sup>38</sup> As the hostilities intensified, the LTTE withdrew from the ongoing peace talks on 20 April 2006.<sup>39</sup> The LTTE carried out assassination attempts against the GoSL Army Commander General Fonseka and the Defence Secretary Gotabaya Rajapaksa in Colombo in April and December 2006 respectively. In retaliation, the Sri Lankan Air Force bombed areas controlled by the LTTE in the East.<sup>40</sup> In response to the LTTE’s renewed offensive in July 2006, the GoSL launched a military campaign into the East of country and captured a number of areas that were controlled by the LTTE.<sup>41</sup> By the end of 2006, the hostilities resulted in the displacement of at least 520,000 people.<sup>42</sup> Alongside this operation, the GoSL reimposed severe restrictions on humanitarian agencies that were bringing aid into LTTE controlled areas from the beginning of 2007 onwards.<sup>43</sup>
17. In January 2008, the GoSL announced its withdrawal from the ceasefire agreement which signalled its intention to defeat the LTTE militarily.<sup>44</sup> In April 2008, GoSL started advancing

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<sup>27</sup> A/HRC/30/CRP.2\_E, para. 48; PoE Report, para. 30.

<sup>28</sup> People’s Tribunal on Sri Lanka, p. 17.

<sup>29</sup> A/HRC/30/CRP.2\_E, paras. 54-57

<sup>30</sup> A/HRC/30/CRP.2\_E, para. 62.

<sup>31</sup> PoE Report, para. 42.

<sup>32</sup> A/HRC/30/CRP.2\_E, para. 62.

<sup>33</sup> A/HRC/30/CRP.2\_E, para. 63.

<sup>34</sup> See below para. 33.

<sup>35</sup> A/HRC/30/CRP.2\_E, para. 63; Human Rights Watch, [Recurring Nightmare: State Responsibility for “Disappearances” and Abductions in Sri Lanka](#), March 2008, p. 41.

<sup>36</sup> UN Human Rights Council, [Report of the Working Group on Enforced or Involuntary Disappearance](#), 25 January 2007, (A/HRC/4/41), para. 396.

<sup>37</sup> Human Rights Council, [Report of the Working Group on Enforced or Involuntary Disappearances](#), 10 January 2008, (A/HRC/7/2) para. 344.

<sup>38</sup> A/HRC/30/CRP.2\_E, para. 63.

<sup>39</sup> A/HRC/30/CRP.2\_E, para. 64.

<sup>40</sup> A/HRC/30/CRP.2\_E, para. 64-65.

<sup>41</sup> A/HRC/30/CRP.2\_E, para. 67-68.

<sup>42</sup> A/HRC/30/CRP.2\_E, para. 76.

<sup>43</sup> A/HRC/30/CRP.2\_E, para. 69.

<sup>44</sup> A/HRC/30/CRP.2\_E, para. 77.

further into LTTE controlled areas in the North, threatening the LTTE's *de facto* capital Kilinochchi and forcing the LTTE to retreat.<sup>45</sup> On 3 September 2008, GoSL ordered all UN agencies and NGOs to leave the LTTE controlled areas.<sup>46</sup> The departure of most international observers left the civilian population vulnerable to violations by the GoSL.<sup>47</sup> Taking advantage of this situation, GoSL ramped up its violent campaign against the Tamils. In an extremely shocking pattern, GoSL launched at least 30 attacks on medical facilities in the combat area after December 2008.<sup>48</sup>

18. By January 2009, the GoSL captured Kilinochchi with relative ease and low military casualties, indicating that the LTTE was in a state of military collapse.<sup>49</sup> Indeed, the LTTE was severely diminished as a fighting force, lacked heavy weapons, ammunition and had to rely on new and ill-trained recruits to fill its ranks.<sup>50</sup> The much superior GoSL forces were able to advance further into the last remaining LTTE controlled areas.<sup>51</sup> During this period, numerous international observers urged the GoSL to halt its offensive and called for a humanitarian pause to the hostilities.<sup>52</sup>
19. Between January and May 2009, many alleged gross human rights violations and serious violations of IHL (including attacks on civilians, restrictions on humanitarian assistance, forced recruitment of adults and children by the LTTE and coercive measures to stop civilians leaving the conflict areas) occurred.<sup>53</sup> From as early as 6 February 2009, for instance, the SLA continuously shelled the paradoxically named "No- Fire Zones" that the GoSL had created as a means of detaining 300,000 Tamil civilians under the pretence of a safety zone.<sup>54</sup> The UN High Commissioner for Human Rights issued a statement on 13 March 2009, suggesting war crimes and crimes against humanity may have been committed in the course of the conflict by both sides.<sup>55</sup> Between September 2008 to May 2009, the violence reached its climax with the "Mullivaikkal extermination" where, according to some estimates, more than 70,000 Tamils were killed and 146,679 left unaccounted.<sup>56</sup> Without making a definitive finding, the UN indicated that the number of killed civilians at the latest stages of the conflict to likely be somewhere between 40,000 to 75,000.<sup>57</sup>
20. On 26 April, LTTE unilaterally declared a ceasefire, which was rejected by the GoSL who instead sought LTTE's surrender.<sup>58</sup> The senior LTTE cadres began to communicate their intent to surrender from 14 May onwards.<sup>59</sup> On 16 May, the GoSL finally established control over all LTTE controlled areas, bringing the conflict to an end.<sup>60</sup> Thousands of former LTTE combatants or people suspected of links to the LTTE (including children) were held in detention and rehabilitation centres and were only gradually released. Some, however, reportedly remained in detention for years after the end of the conflict.<sup>61</sup> Many others disappeared, never

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<sup>45</sup> A/HRC/30/CRP.2\_E, para. 80.

<sup>46</sup> A/HRC/30/CRP.2\_E, para. 81.

<sup>47</sup> A/HRC/30/CRP.2\_E, para. 82.

<sup>48</sup> HRW, "[Sri Lanka: Repeated Shelling of Hospitals Evidence of War Crimes](#)." Human Rights Watch, 08 May 2009.

<sup>49</sup> A/HRC/30/CRP.2\_E, para. 83.

<sup>50</sup> A/HRC/30/CRP.2\_E, para. 86.

<sup>51</sup> A/HRC/30/CRP.2\_E, para. 87.

<sup>52</sup> A/HRC/30/CRP.2\_E, para. 90.

<sup>53</sup> A/HRC/30/CRP.2\_E, para. 87.

<sup>54</sup> PoE Report, para. 100.

<sup>55</sup> A/HRC/30/CRP.2\_E, para. 90.

<sup>56</sup> People's Tribunal on Sri Lanka, p. 17; Tamil Guardian, [12 Years Today: A Massacre at Mullivaikkal](#), 18 May 2021.

<sup>57</sup> PoE Report, paras. 132-137.

<sup>58</sup> A/HRC/30/CRP.2\_E, para. 91.

<sup>59</sup> A/HRC/30/CRP.2\_E, para. 94.

<sup>60</sup> A/HRC/30/CRP.2\_E, para. 94.

<sup>61</sup> A/HRC/30/CRP.2\_E, para. 95.

to be seen again.<sup>62</sup> Photographic and video evidence depicts the summary executions of detained persons, including surrendered LTTE members, leaders and political cadres.<sup>63</sup>

21. Some of the Victims themselves have witnessed the heinous war crimes committed by the GoSL towards the last stages of the armed conflict, including the use of cluster ammunition, chemical weapons, the bombing of hospitals and civilian targets.<sup>64</sup> One Victim explained: “I witnessed a lot of war crimes committed by the SLA such as deliberately bombing the hospitals and other civilian targets. I also saw them using prohibited chemical weapons and cluster bombs which killed innocent people in thousands. People were asked to go into areas marked as “No Fire Zone” and then bombed. I also saw the army firing on civilians who surrender with white flags.”<sup>65</sup> Another one who was acting as a medic during the time stated “I also witnessed the SLA using cluster bombs, which explode in the air and killed hundreds of people and cattle in each blast. They also used chemical weapons, which melted people to death... It was obvious that these civilian casualties were deliberately caused by the SLA in order to wipe out Tamils.”<sup>66</sup>

#### **B. The Sri Lankan authorities committed the crimes against humanity of persecution, deportation, and deprivation of right of return against the Victims**

22. The Victims have been subjected to three specific crimes against humanity within the jurisdiction of the Court: (i) deportation (Article 7(1)(d)), (ii) deprivation of the right to return (Article 7(1)(k)), and (iii) persecution (Article 7(1)(h)). This section of the Communication will outline the available evidence (i.e. open-source material in the form of international organisation/NGO reports, expert commentary, media articles and victim statements) that establishes the commission of these crimes in Sri Lanka and the UK by the GoSL authorities.

##### **i. Deportation**

###### *Law*

23. Article 7(1)(d) of the Rome Statute criminalises deportation as a crime against humanity. In addition to the contextual elements of crimes against humanity, there are three elements that must be satisfied to establish this crime:
1. The perpetrator deported without grounds permitted under international law, one or more persons to another State by expulsion or other coercive acts;
  2. Such persons were lawfully present in the area from which they were so deported;
  3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.<sup>67</sup>
24. Establishing the crime of deportation requires a demonstration that the victims were forcibly removed from one country to another.<sup>68</sup> Accordingly, the deportation must be forced or

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<sup>62</sup> Human Rights Watch, [Open Wounds and Mounting Dangers: Blocking Accountability for Grave Abuses in Sri Lanka](#), February 2021, p. 33.

<sup>63</sup> *Ibid.* pp. 34-35; A/HRC/30/CRP.2\_E, para. 285, 322.

<sup>64</sup> Statement of Victim 2, para. 9; Statement of Victim 7, para. 12; Outline of Victim 11’s Account, p. 1; Outline of Victim 15’s Account, p. 1; Statement of Victim 16, para. 10-12; Statement of Victim 18, paras. 16-18, 22-23; Statement of Victim 19, para. 16-17; Statement of Victim 22, para. 10; Statement of Victim 24, para. 10.

<sup>65</sup> Statement of Victim 4, para. 6.

<sup>66</sup> Statement of Victim 6, paras. 13-14.

<sup>67</sup> [ICC Elements of Crimes](#), Article 7(1)(d).

<sup>68</sup> Myanmar/Bangladesh Authorisation Decision, paras. 52, 98; ICTY, *Prosecutor v. Stakić*, IT-97-24-A, [Appeal Judgment](#), 22 March 2006, (Stakić Appeal Judgment) paras. 278, 288-302, 317.

coerced,<sup>69</sup> as opposed to being motivated by the victim's own genuine wish to leave.<sup>70</sup> The term 'force' or 'coercion' is not limited to the application of physical force on the victim.<sup>71</sup> Threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, abuse of power, or taking advantage of a coercive environment may also constitute underlying acts of deportation.<sup>72</sup> Measures that may create a coercive environment may include house searches, conducting arrests and interrogations during which the victims are tortured and beaten, individual killings and massacres.<sup>73</sup>

25. The main question that must be considered in determining whether the victim was forced to leave is whether he/she had a genuine choice to remain.<sup>74</sup> It is not possible to infer genuine choice solely from the fact that consent was expressed, since the prevailing circumstances may deprive the victim's consent of any value.<sup>75</sup> Accordingly, the context and atmosphere, as well as all other relevant circumstances, including the victim's vulnerability at the time of the deportation must be taken into consideration in deciding whether he/she had a genuine choice.<sup>76</sup> If, for instance, the victims flee to escape deliberate violence or persecution, they would not be exercising a genuine choice.<sup>77</sup>
26. The lawful presence of a deportee in the State from which he/she was deported is to be assessed on the basis of international law, and should not be equated with the requirement of lawful residence.<sup>78</sup>
27. There are certain strictly defined lawful grounds for deportation. At times of war, these include (i) evacuations motivated by protecting the civilian population from the dangers of military operations; and (ii) situations where imperative military reasons so demand, i.e. when the presence of civilians hamper military operations.<sup>79</sup> During times of peace, deportation may be lawful if it is necessary to protect national security, public order, safety, health and morals or the human rights of others. Such restrictions, however, cannot be arbitrary in nature and must be in accordance with the law and necessary in a democratic society.<sup>80</sup> The fact that the

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<sup>69</sup> ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, [Trial Judgement](#), 15 March 2002, (Krnojelac Trial Judgment), para 475; ICTY, *Prosecutor v. Krstić*, IT-98-33-T, [Trial Judgement](#), 2 August 2001, (Krstić Trial Judgment), para 528; ICC, Situation in the Republic of Kenya, ICC-01/09-19, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya](#), 31 March 2010, para 162

<sup>70</sup> ICTY, *Prosecutor v. Simić et al*, No. IT-95-9-T, [Trial Judgement](#), 17 October 2003, para 125; ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, [Trial Judgement](#), 31 March 2003, (Naletilić and Martinović Trial Judgment) para 519.

<sup>71</sup> ICC Elements of Crimes, Article 7(1)(d), fn. 12; Stakić Appeal Judgment, para. 281; Krstić Trial Judgment, para. 529; Krnojelac Trial Judgment, para. 475; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, [Trial Judgement: Vol. I](#), 29 May 2013, para. 50.

<sup>72</sup> ICC Elements of Crimes, Article 7(1)(d), Element 1, fn. 12; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18, [Trial Judgement](#), Case, 24 March 2016, (Karadžić Trial Judgment) para. 489; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, [Trial Judgement](#), 12 December 2012 (Tolimir Trial Judgment), para 795.

<sup>73</sup> *Prosecutor v. Krajišnik*, IT-00-39-T, [Trial Judgement](#), 27 September 2006, para 729.

<sup>74</sup> ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, [Trial Judgment](#), 8 July 2019, (Ntaganda Trial Judgment) para. 1056; Stakić Appeal Judgment, para. 279; ICTY, *Prosecutor v. Krnojelac*, IT-97-25-A, [Appeal Judgment](#), 17 September 2003, (Krnojelac Appeal Judgment) para. 229; See also ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(1\) and \(b\) of the Rome Statute](#), 23 January 2012, para. 244 where the Court found that the destruction of homes, the brutality of killings and injuries that occurred, the rape of certain individuals, and public announcements to the effect that certain groups needed to leave, all amounted to coercion.

<sup>75</sup> Krnojelac Appeal Judgment, para. 229.

<sup>76</sup> Ntaganda Trial Judgment, para. 1056; Karadžić Trial Judgment, para. 489; *Prosecutor v. Tolimir*, Trial Judgment, para 795.

<sup>77</sup> Krstić Trial Judgment, para 530.

<sup>78</sup> Myanmar/Bangladesh Authorisation Decision, para. 99

<sup>79</sup> Karadzic Trial Judgment, para. 492.

<sup>80</sup> G. Werle & J. Jessberger, *Principles of International Criminal Law*, 2014, p. 359. See also [ICCPR](#), Article 12(3); [ICCPR](#), Article 12(3); Protocol No. 4 to the [ECHR](#), Article 3.

displacement was discriminatory in nature or was carried out in a violent and arbitrary manner would provide strong evidence in establishing the unlawfulness of the resulting deportation.<sup>81</sup>

*Facts:*

28. The Victims are all Tamil nationals who were natural-born citizens of Sri Lanka.<sup>82</sup> They have been deported by the GoSL authorities from Sri Lanka where they were lawfully present. The perpetrators achieved this by creating a coercive environment in Sri Lanka for the perceived or actual members and supporters of the LTTE through certain underlying criminal acts including abduction, unlawful detention (constituting crimes against humanity of imprisonment and enforced disappearance) and torture. All of the incidents described below where these crimes were committed by the GoSL officials took place between 2002 and 2021.
29. Some of the Victims were detained, abducted and tortured in the context of the surging white van abductions after the resumption of hostilities between the LTTE and GoSL in 2006.<sup>83</sup> Victim 21 and Victim 28, for instance, were arrested in May 2007 and July 2008 respectively.<sup>84</sup> They were interrogated about their pro-Tamil activities and association with the LTTE by the GoSL authorities under severe torture.<sup>85</sup> The *modus operandi* of the abduction and the torture methods matched perfectly with the remainder of the Victims.<sup>86</sup>
30. After the cessation of the hostilities between the GoSL and LTTE in May 2009, approximately 300,000 (mostly Tamil) civilians crossed from LTTE controlled territories into Government-controlled territories.<sup>87</sup> These civilians were sent to a makeshift IDP camp established in the Manik Farm near Vavuniya and subjected to screening by the GoSL authorities to identify suspected LTTE cadres.<sup>88</sup> The Sri Lankan authorities made repeated calls for the LTTE cadres to come forward and surrender as LTTE members rather than civilians.<sup>89</sup> It was generally known at the time that, under the 2005 Emergency Regulations, those Victims who were identified as LTTE members by the GoSL authorities would be detained, interrogated and severely tortured and/or sent to “rehabilitation” centres.<sup>90</sup>
31. Some of the Victims experienced the horrors of rehabilitation centres first-hand.<sup>91</sup> For most Victims, being sent to rehabilitation centres meant further detention under horrendous conditions for up to two years without charge or trial, interrogation, torture, sexual violence as

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<sup>81</sup> Krajišnik Appeal Judgment, para. 308; ICTY, *Prosecutor v. Dorđević*, IT-05-87/1-A, [Appeal Judgment](#), 27 January 2014, para. 734.

<sup>82</sup> Medicolegal Report of Victim 1, para. 3; Statement of Victim 2, para. 1; Outline of Victim 3’s Account, p. 1; Statement of Victim 4, para. 1; Statement of Victim 5, para. 1; Statement of Victim 6, para. 1; Statement of Victim 7, para. 1; Medicolegal Report of Victim 8, para. H1; Outline of Victim 9’s Account, p.1; Outline of Victim 10’s Account, p.1; Medicolegal Report of Victim 11, para. 4; Medicolegal Report of Victim 12, p. 3 and Psychiatric Report of Victim 12, para 5(a); Medicolegal Report of Victim 13, para. 3.1; Medicolegal Report of Victim 14, para. 3.1; Outline of Victim 15’s Account, p. 1; Statement of Victim 16, para. 1; Medicolegal Report of Victim 17, para. 1; Statement of Victim 18, para. 1; Statement of Victim 19, para. 1; Statement of Victim 20, p. 1; Outline of Victim 21’s Account, p. 1; Statement of Victim 22, para. 1; Statement of Victim 23, para. 1; Statement of Victim 24, para. 1; Medicolegal Report of Victim 25, para. 3; Statement of Victim 26, para. 1; Medicolegal Report of Victim 27, para. 4; Statement of Victim 28, para. 2.

<sup>83</sup> See above para. 15.

<sup>84</sup> First Victim Statement of Victim 21, para. 5-6; Statement of Victim 28, para. 10.

<sup>85</sup> Additional Witness Statement of Victim 21, para. 5-6; Statement of Victim 28, para. 10-11.

<sup>86</sup> See below para. 36.

<sup>87</sup> A/HRC/30/CRP.2\_E, para. 1023-1024.

<sup>88</sup> A/HRC/30/CRP.2\_E, para. 96.

<sup>89</sup> A/HRC/30/CRP.2\_E, para. 363.

<sup>90</sup> Sri Lanka, Regulation 22 of the EMPP Regulations 2005, as amended by Emergency Regulation 1462/8, 2006; See A/HRC/30/CRP.2\_E, para. 361.

<sup>91</sup> Statement of Victim 7, para. 9, 13; Medicolegal Report of Victim 7, para. 6-7; Medicolegal Report of Victim 12, p. 4 and Psychiatric Report of Victim 12, para 5(d).



well as forced labour.<sup>92</sup> Victim 4, for instance, describes that he was beaten with pipes, wires and other objects and deprived of medical treatment. He remembers being “made to work like slaves” to clear 15 – 20 acres of jungle in the vicinity of the rehabilitation camp to make it ready for farming for more than a year.<sup>93</sup> Some of those who were sent to rehabilitation disappeared, never to be seen again.<sup>94</sup>

32. To avoid this fate, the majority of the surviving LTTE political cadres and fighters elected to hide their identities, leaving their uniforms, weapons and other military equipment behind and joining the civilian crowd to surrender as civilians.<sup>95</sup> A number of the Victims were among them.<sup>96</sup> The surrendered civilians were taken to IDP camps in horrendous conditions without proper sanitation, clean water or food.<sup>97</sup> Authorities continued to try and identify those who tried to disguise as non-LTTE members in the IDP camps which created considerable fear and anxiety among the civilian population.<sup>98</sup>
33. Even years after the end of the hostilities, GoSL continued to search for former members of LTTE as well as anyone who had any affiliation with the LTTE. Those individuals who were identified as such were often subjected to infamous “white van abductions.”<sup>99</sup> As evidenced by their statements, the vast majority of the Victims suffered this fate. They were unlawfully arrested through physical force by the GoSL security forces in plain clothes, bundled into an unmarked white van, blindfolded, gagged and/or tied up as they were taken to an unknown detention centre.<sup>100</sup> The investigations by the UN revealed that most victims of abductions were taken to various places for detention by the GoSL forces, including, *inter alia*, Terrorism Investigation Division (‘TID’) facilities in Colombo (i.e. the 6<sup>th</sup> floor), the Criminal Investigation Division (‘CID’) headquarters in Colombo (i.e. the fourth floor) and Joseph Camp (i.e. the Security Forces Headquarters for the Vanni in Vavuniya).<sup>101</sup>

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<sup>92</sup> Statement of Victim 3, paras. 7-13; Statement of Victim 4, para. 7-10; Medicolegal Report of Victim 13, para. 3.5-3.6; Medicolegal Report of Victim 15, para. 3.5-3.6 and Outline of Victim 15’s Account, p.1; Statement of Victim 24, para. 12-14; See also A/HRC/30/CRP.2\_E, paras. 338, 361, 367, 372, 379, 545, 547, 1129; UN Committee Against Torture, [Concluding Observations on the Fifth Periodic Report of Sri Lanka](#), (CAT/C/LKA/CO/5), 27 January 2017; UN Working Group on Arbitrary Detention, [Preliminary Findings from Visit to Sri Lanka \(4 to 15 December 2017\)](#), 15 December 2017, (UNWGAD 2017 Report).

<sup>93</sup> Statement of Victim 4, para. 10

<sup>94</sup> Statement of Victim 22, para. 11, 35.

<sup>95</sup> A/HRC/30/CRP.2\_E, para. 1024;

<sup>96</sup> Medicolegal Report of Victim 2, para. 8; Statement of Victim 3, para. 1-2; Medicolegal Report of Victim 5, para. 12; Statement of Victim 5, para. 8; Statement of Victim 6, para. 16; Statement of Victim 7, para. 12; Medicolegal Report of Victim 11, para. 12; Medicolegal Report of Victim 14, para. 3.5; Medicolegal Report of Victim 15, para. 3.3; Statement of Victim 18, para. 26; Statement of Victim 19, para. 19-20; Medicolegal Report of Victim 20, para. H5; Statement of Victim 22, para. 11; Statement of Victim 24, para. 11; Medicolegal Report of Victim 25, para. 14.

<sup>97</sup> Statement of Victim 5, para. 9; Statement of Victim 6, para. 18; Medicolegal Report of Victim 9, para. 3.2; Statement of Victim 16, para. 13; Statement of Victim 19, para. 22; Medicolegal Report of Victim 10, para. 8-9, 11; Statement of Victim 18, para. 26; Statement of Victim 22, para. 12.

<sup>98</sup> Statement of Victim 6, para. 18-19; Statement of Victim 18, para. 30; Medicolegal Report of Victim 11, para. 13, 16; Statement of Victim 16, para. 12; Statement of Victim 18, para. 30, 31; Statement of Victim 19, para. 22; Medicolegal Report of Victim 20, para. H6; Statement of Victim 23, para. 29; Statement of Victim 24, para. 15.

<sup>99</sup> A/HRC/30/CRP.2\_E, para. 346-351.

<sup>100</sup> Statement of Victim 1, para. 10; Statement of Victim 2, para. 17; Statement of Victim 3, paras. 17, 21; Statement of Victim 4, para. 15; Statement of Victim 5, para. 11; Statement of Victim 6, para. 24; Medicolegal Report of Victim 8, para. H7; Medicolegal Report of Victim 9, para. 3.6; Medicolegal Report of Victim 10, paras. 20-23; Medicolegal Report of Victim 11, para. 17, 20; Medicolegal Report of Victim 13, para. 3.9; Medicolegal Report of Victim 14, para. 3.10; Medicolegal Report of Victim 15, para. 3.5-3.7; Statement of Victim 16, para. 20; Medicolegal Report of Victim 17, para. 9-10, 16; Statement of Victim 18, para. 33; Statement of Victim 19, para. 28; Medicolegal Report of Victim 20, para. H9-H10; Statement of Victim 22, para. 13; Statement of Victim 23, para. 31; Medicolegal Report of Victim 25, para. 20; Statement of Victim 26, para. 14; Statement of Victim 28, para. 10-12;

<sup>101</sup> A/HRC/30/CRP.2\_E, paras. 368-376.

34. Once they arrived at the detention centre, the Victims were kept in a small, dark and unsanitary room to wait for their interrogations.<sup>102</sup> There is no indication that the authorities produced a warrant at the time of the arrest/abduction, informed the victims about the reasons for their arrest, or brought them before a judge, charged them, or gave them access to legal counsel.<sup>103</sup> Their families have not been officially notified of their arrest or their whereabouts during their detention. This, in effect, removed the victims completely outside of the protection of the law.
35. Regardless of when and how they were arrested and detained, the Victims were invariably questioned and accused by CID, TID or SLA officials during their interrogations about their (i) past or present support and/or membership to the LTTE (including any affiliation of their family members or acquaintances with the LTTE), (ii) purported attempts to reform the LTTE, (iii) continuing international work for the LTTE in foreign States, (iv) attempts to discredit and harm the reputation of the GoSL, and/or, (v) pro-Tamil and separatist activism (e.g. participation in political events and demonstrations against the GoSL).<sup>104</sup>
36. Without exception, all of the Victims were subjected to various forms of severe torture during their interrogation. The torture methods used by the GoSL authorities included solitary confinement, deprivation of food and water, slapping, punching, kicking with heavy boots, falaka (i.e., beating of the bottom of the feet with a wooden stick), beating with a wooden baton, heavy metal wire and a sand-filled plastic pipe, waterboarding through submersion into a bucket of water, placing a plastic bag filled with petroleum or chilli powder over the head of the victim, burning with cigarettes or a heated metal rod and, in some cases, sexual assault, including forced nudity and rape.<sup>105</sup> The duration of their detention varied from days to years. Those who were detained for prolonged periods were interrogated and tortured on multiple occasions during their detention.<sup>106</sup> Some of the Victims, (especially those who had been identified as LTTE members at the end of the armed conflict) were arrested and subjected to torture by the Sri Lankan authorities multiple times in different occasions.<sup>107</sup> The Victims have all gone

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<sup>102</sup> Medicolegal Report of Victim 1, para. 11, 16; Statement of Victim 2, para. 18; Medicolegal Report of Victim 5, paras. 16-17; Statement of Victim 26, para. 14; Medicolegal Report of Victim 10, para. Paras. 24-25; Medicolegal Report of Victim 17, para. 13-14; Medicolegal Report of Victim 20, para. H11; Medicolegal Report of Victim 27, para. 14;

<sup>103</sup> Statement of Victim 12, para. 6; See A/HRC/30/CRP.2\_E, para. 344.

<sup>104</sup> Medicolegal Report of Victim 1, paras 12-15, 30; Statement of Victim 2, para. 18; Statement of Victim 3, para. 21-23; Statement of Victim 4, para. 15; Statement of Victim 5, paras. 11; Statement of Victim 6, para. 25-26; Medicolegal Report of Victim 7, para. 8; Medicolegal Report of Victim 8, para. H9, H16; Medicolegal Report of Victim 9, para. 3.6; Medicolegal Report of Victim 10, paras. 32-37; Medicolegal Report of Victim 11, para. 19, 30; Statement of Victim 12, para. 15; Outline of Victim 13's Account, p. 1; Outline of Victim 14's Account, p. 2; Outline of Victim 15's Account, p. 2; Statement of Victim 16, para. 21; Medicolegal Report of Victim 17, paras. 11, 16-18, 22; Statement of Victim 18, para. 34; Statement of Victim 19, para. 30; Medicolegal Report of Victim 20, para. H12, H25; Outline of Victim 21's Account, p. 1; Statement of Victim 22, para. 14; Statement of Victim 23, para. 32; Statement of Victim 24, para.16; Medicolegal Report of Victim 25, para. 21; Statement of Victim 26, paras. 15, 54; Medicolegal Report of Victim 27, para. 18; Statement of Victim 28, para. 10.

<sup>105</sup> Medicolegal Report of Victim 1, paras. 15, 17, 19, 21, 25-26, 31-32, 63; Statement of Victim 2, para. 19; Statement of Victim 3, paras. 21-23; Statement of Victim 4, para. 15; Statement of Victim 5, para. 20; Statement of Victim 5, paras. 11; Statement of Victim 6, para. 26; Medicolegal Report of Victim 7, para. 7-14; Medicolegal Report of Victim 8, para. H8-H16; Medicolegal Report of Victim 9, para. 3.6; Medicolegal Report of Victim 10, paras. 27-31, 40-51; Medicolegal Report of Victim 11, paras. 20, 31-32; Medicolegal Report of Victim 12, p.4 and Psychiatric Report of Victim 12, para. 5; Medicolegal Report of Victim 13, para. 3.10; Medicolegal Report of Victim 15, para. 3.7; Statement of Victim 16, para. 22-24; Medicolegal Report of Victim 14, para. 3.10; Medicolegal Report of Victim 15, para. 3.5-3.7 and Outline of Victim 15's Account, p.1; Medicolegal Report of Victim 17, paras. 17-26; Statement of Victim 18, para. 35-36; Statement of Victim 19, para. 30; Medicolegal Report of Victim 20, para. H12-23; Outline of Victim 21's Account, p. 1; Statement of Victim 22, para. 14-15; Statement of Victim 23, para. 33-34; Statement of Victim 24, paras. 13-14, 16; Medicolegal Report of Victim 25, para. 21-22; Statement of Victim 26, para. 15; Medicolegal Report of Victim 27, paras. 15-30; Statement of Victim 28, para. 10-11.

<sup>106</sup> Medicolegal Report of Victim 1, paras. 23-24, 36; Witness Statement Victim 4, para. 15; Medicolegal Report of Victim 8, para. H11, H20; Medicolegal Report of Victim 22, para. 13; Statement of Victim 26, para. 15; Medicolegal Report of Victim 20, para. H26.

<sup>107</sup> Medicolegal Report of Victim 9, para. 3.5; Statement of Victim 24, para. 12, 16; Statement of Victim 3, para. 7-8; Medicolegal Report of Victim 9, para. 3.5-3.6; Medicolegal Report of Victim 11, para. 18, 30; Medicolegal Report of Victim

through physical and psychological examination by medical professionals for the purposes of their asylum applications in the UK and their accounts of torture were found credible and consistent with the medical evidence.<sup>108</sup>

37. Through such unbearable torture, the Victims were forced to make false confessions, accept the allegations in relation to their association with the LTTE and anti-government activities and sign a document in the Sinhalese language, which they were not able to understand.<sup>109</sup> As confirmed by the UN Working Group on Arbitrary Detention in 2017, this was routine practice in Sri Lanka: “[t]here were numerous instances reported of confessions written in Sinhala signed by suspects who do not understand that language.”<sup>110</sup>
38. Following their confessions, the vast majority of the Victims were released from detention following the payment of a bribe by a relative or an acquaintance to the Sri Lankan officials.<sup>111</sup> In this sense, their release was unofficial in nature, meaning that they were considered as fugitives and remained wanted by the GoSL authorities after their release.
39. Due to the abduction, unlawful detention and torture they have been subjected to at the hands of the GoSL authorities and to avoid being arrested again and put through the same, if not worse, treatment, the Victims decided to flee Sri Lanka. Indeed, some Victims were specifically told by their captors to leave and not to return to Sri Lanka upon their release.<sup>112</sup> In order to avoid detection by the authorities, they were smuggled out of the country by intermediaries, ultimately making their way to the UK to claim asylum.<sup>113</sup>

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13, para. 3.4, 3.10; Medicolegal Report of Victim 14, para. 3.6-3.10; Medicolegal Report of Victim 15, para. 3.5-3.6; Outline of Victim 21’s Account, p. 1; Statement of Victim 24, paras. 14, 16.

<sup>108</sup> Medicolegal Report of Victim 1, paras. 64-66; Medicolegal Report of Victim 2, paras. 7.14, 9.1-9.3; Medicolegal Report of Victim 3, para. 68; Medicolegal Report of Victim 5, para. 79; Medicolegal Report of Victim 6, para. 64-66; Medicolegal Report of Victim 7, para. 56; Medicolegal Report of Victim 8, para. O4, O13; Medicolegal Report of Victim 9, paras. 6.1-6.3; Medicolegal Report of Victim 10, para. 118; Medicolegal Report of Victim 11, para. 80-87; Medicolegal Report of Victim 12, p. 5 and Psychiatric Report of Victim 12, para 5(f); Medicolegal Report of Victim 13, para. 6.2-6.3; Medicolegal Report of Victim 14, para. 6; Medicolegal Report of Victim 15, paras. 5.1, 6.2; Medicolegal Report of Victim 17, para. 65; Medicolegal Report of Victim 18, para. 49-50; Medicolegal Report of Victim 19, para. 14-16; Medicolegal Report of Victim 20, para. O13; Medicolegal Report of Victim 21, para. O5; Medicolegal Report of Victim 22, para. 65O; Medicolegal Report of Victim 23, para. 53; Psychiatric Report of Victim 24, para. 16.10-16.11 and Medicolegal Report of Victim 24, para. 6; Medicolegal Report of Victim 25, para. 86; Medicolegal Report of Victim 26, para. O11; Medicolegal Report of Victim 27, para. 123-125; Medicolegal Report of Victim 28, para. O24.

<sup>109</sup> Medicolegal Report of Victim 1, paras. 20, 27-28; Statement of Victim 2, para. 19; Statement of Victim 4, para. 15; Statement of Victim 5, paras. 11; Statement of Victim 6, para. 26; Medicolegal Report of Victim 8, para. H16; Outline of Victim 9’s Account, p.3; Outline of Victim 10’s Account, p.2; Outline of Victim 14’s Account, p. 2-3; Outline of Victim 15’s Account, p.1; Statement of Victim 16, para. 23; Medicolegal Report of Victim 17, para. 25; Statement of Victim 18, para. 37; Statement of Victim 19, para. 30; Medicolegal Report of Victim 20, para. H24; Statement of Victim 23, para. 33; Statement of Victim 24, paras. 13, 16; Medicolegal Report of Victim 25, para. 26; Statement of Victim 26, para. 15; Medicolegal Report of Victim 27, para. 31.

<sup>110</sup> UNWGAD December 2017 Report, pp. 11-12.

<sup>111</sup> Statement of Victim 2, para. 21; Statement of Victim 3, para. 24; Statement of Victim 4, para. 16; Statement of Victim 5, paras. 12; Statement of Victim 6, para. 27; Medicolegal Report of Victim 8, para. H17; Medicolegal Report of Victim 9, para. 3.7; Medicolegal Report of Victim 10, paras. 53-54; Medicolegal Report of Victim 11, paras. 22, 33; Medicolegal Report of Victim 12, p. 4 and Psychiatric Report of Victim 12, para 5(f); Medicolegal Report of Victim 13, para. 3.11; Medicolegal Report of Victim 14, para. 3.11; Medicolegal Report of Victim 15, para. 3.8 and Outline of Victim 15’s Account, p. 2; Statement of Victim 16, Medicolegal Report of Victim 17, para. 27-28; para. 26; Statement of Victim 18, para. 38; Statement of Victim 19, para. 31; Medicolegal Report of Victim 20, para. H27-H28; Statement of Victim 22, para. 16; Statement of Victim 23, para. 35; Statement of Victim 24, paras. 14, 17; Medicolegal Report of Victim 25, para. 29; Statement of Victim 26, para. 16; Medicolegal Report of Victim 27, para. 34-35; Statement of Victim 28, para. 12.

<sup>112</sup> Statement of Victim 3, para. 25; Medicolegal Report of Victim 23, para. 23

<sup>113</sup> Medicolegal Report of Victim 1, para. 37; Statement of Victim 2, para. 26-33; Statement of Victim 4, para. 17; Statement of Victim 5, para. 13; Statement of Victim 6, para. 30; Statement of Victim 7, para. 13; Medicolegal Report of Victim 8, para. H19; Medicolegal Report of Victim 9, para. 3.7; Medicolegal Report of Victim 10, para. 56-60; Medicolegal Report of Victim 11, para. 34; Medicolegal Report of Victim 12, p. 4 and Psychiatric Report of Victim 12, para 5(f); Medicolegal Report of Victim 13, para. 3.11; Medicolegal Report of Victim 14, para. 3.11; Outline of Victim 15’s Account, p. 2; Statement of Victim 16, para. 34; Medicolegal Report of Victim 17, para. 31; Statement of Victim 18, para. 41-42; Statement of Victim 19, para.



40. As such, the Victims were deported from Sri Lanka by the GoSL authorities through underlying criminal acts of abduction, unlawful detention (constituting enforced disappearance and imprisonment respectively), torture and the subsequent threat of further force or coercion. The Victims had no genuine choice but to leave Sri Lanka as a result of the conduct of the GoSL authorities and the coercive environment that such conduct brought about.

## ii. Deprivation of the Right to Return as an Inhumane Act

### Law

41. Article 7(1)(k) criminalises other inhumane acts of similar character to the crimes against humanity listed under the Statute. The elements of this crime are the following:

1. The perpetrator inflicted great suffering, or serious injury to body or mental or physical health, by means of an inhumane act, and
2. Such act was of a character similar to any other act referred to in Article 7(1) of the Statute.<sup>114</sup>

42. The degree of severity of bodily and mental harm for the purposes of Element 1 is assessed on a case-by-case basis with due regard given for the circumstances of the victims.<sup>115</sup> Acts that inflict mental trauma, diminish the victim's psychological well-being, constitute a serious attack on the victim's dignity, or deprive the victim of a fundamental right may cause serious injury to mental health.<sup>116</sup> In the context of other crimes (such as genocide, persecution and wilfully causing great suffering or serious injury to body or health), "serious mental harm" was defined as harm that does not necessarily cause permanent or irremediable harm, but goes beyond temporary unhappiness, embarrassment or humiliation.<sup>117</sup> It must result in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.<sup>118</sup> Element 2, on the other hand, requires the inhumane act that caused the harm to the victim to be of similar nature and gravity to other crimes against humanity listed under the Statute.<sup>119</sup>

43. Importantly, the Court has already recognised that depriving individuals of their right to return their homelands may be characterised as an inhumane act under Article 7(1)(k). The Court noted that "preventing a person from returning to his or her own country may cause great suffering or serious injury to mental health since it deepens the anguish of persons uprooted from their own homes and forced to leave their country, and renders the victims' future even more uncertain and compels them to continue living in deplorable conditions."<sup>120</sup> The Court

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35; Medicolegal Report of Victim 20, para. H290; Outline of Victim 21's Account, p. 1; Statement of Victim 22, para. 21, 26-28; Statement of Victim 23, para. 37; Witness Statement of Victim 24, para. 18-19; Medicolegal Report of Victim 25, para. 30; Statement of Victim 26, para. 17; Medicolegal Report of Victim 27, paras. 40-44; Statement of Victim 28, para. 13, 18.

<sup>114</sup> ICC Elements of Crimes, Article 7(1)(k).

<sup>115</sup> ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, [Decision on the Confirmation of Charges](#), 30 September 2008, (Katanga Confirmation of Charges Decision) para. 454; ICTY, *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, [Appeal Judgment](#), 17 December 2004, para. 117.

<sup>116</sup> See *mutatis mutandis* ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15, [Trial Judgment](#), 4 February 2021, (Ongwen Trial Judgment) para. 2748.

<sup>117</sup> Krstić Trial Judgment, para 513; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, [Trial Judgment](#), 2 September 1998, para. 502.

<sup>118</sup> Krstić Trial Judgment, para 513.

<sup>119</sup> ICC Elements of Crimes, Article 7(1)(k), fn. 30; Ongwen Trial Judgment, para. 2749.

<sup>120</sup> Myanmar/Bangladesh Article 19(3) Decision, para. 77.

further found that since the right to return is a fundamental human right, any conduct depriving victims of it would be similar in character to persecution.<sup>121</sup>

44. As evidenced by its request for authorisation to initiate an investigation into the Myanmar/Bangladesh situation, the OTP appears to have adopted the Court's findings on the qualification of deprivation of the right to return as a distinct crime under Article 7(1)(k).<sup>122</sup> The authors largely concur with the three-pronged test that the OTP suggested in assessing whether the requisite degree of harm to the victim in situations of deprivation of the right to return is met, i.e.: (1) the victims were forcibly displaced and are *bona fide* refugees; (2) the victim is sufficiently connected to the state of origin (having regard to the victim's nationality, prior residence, community and family links, the relatively brief time elapsed since their displacement, and their subjective desire to return to that State); and (3) the displacement has resulted in great suffering or serious injury (having regard to factors such as: residence in temporary and inadequate accommodation; disruption of family ties; unemployment; extreme poverty; hunger and malnutrition; ill health; loss of legal status and associated rights; and secondary victimisation through other criminal activity, including trafficking in persons and sexual or gender-based crimes).<sup>123</sup>
45. However, the authors disagree with the OTP on their suggestion that the "relatively brief time elapsed since displacement" is a necessary feature of a sufficient connection between the displaced individual and the State in question. Such temporal restriction appears arbitrary and may unjustifiably exclude displaced persons who have managed to survive prolonged periods of exile, running contrary to the unfettered right of return under international human rights law.<sup>124</sup> Accordingly, the authors contend that too much emphasis should not be placed on the number of years that have passed since the initial deportation of the victims in its consideration of whether they have sufficient connection with their home State. Indeed, the perpetrator's acts may continue and, therefore, the Victim's suffering may get worse over time.

#### *Facts*

46. Following their deportation from Sri Lanka, the Victims were actively prevented by the GoSL authorities to return to their homes in Sri Lanka. The GoSL authorities achieved this through their continued witch hunt against anyone perceived as being associated with the LTTE or a proponent of Tamil separatism. More and more continued to be abducted, detained and tortured due to their past association with the LTTE and pro-Tamil activism perceived by the Sri Lankan authorities as separatism. By doing so, the GoSL authorities have maintained the coercive circumstances that forced the Victims to flee Sri Lanka in the first place. Furthermore, the GoSL authorities continued to surveil, harass and threaten the Victims after their deportation as well as their families who remained in Sri Lanka.

#### *The Victims are unable to return to Sri Lanka due to the continuing threat of persecution*

47. Under successive governments in Sri Lanka under Mahinda Rajapaksa (2005-2015), Maithripala Sirinena (2015-2019) and Gotabaya Rajapaksa (2019-present), an expansive program of surveillance and harassment of former LTTE members have been maintained on

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<sup>121</sup> *Ibid*; Under IHRL, States are not allowed to arbitrarily deprive their nationals of their right to enter their own country. Article 12, ICCPR.

<sup>122</sup> ICC, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, [Request for Authorisation of an Investigation Pursuant to Article 15](#), 4 July 2019, (OTP Request) paras. 123-150.

<sup>123</sup> *Ibid*. para 132.

<sup>124</sup> Michael G Kearney, The Denial of the Right of Return as a Rome Statute Crime, *Journal of International Criminal Justice* 18, 2020, pp. 997-998.

the suspicion that they may attempt to revive LTTE.<sup>125</sup> The specific surveillance methods employed by the GoSL authorities include social media monitoring, attempts to break into encrypted platforms (such as WhatsApp, Facebook and Viber) as well as using sophisticated facial recognition software to identify Tamil activists and individuals suspected of supporting the LTTE.<sup>126</sup> They have also employed an extensive network of ex-LTTE informants (some of whom themselves were subjected to brutal torture, threats to hurt their family members in order to force them to cooperate) who were returned to their communities in Sri Lanka or sent overseas to spy on their fellow Tamils.<sup>127</sup>

48. The GoSL's surveillance campaign against the Tamils takes place in the context of its policy of "Sinhalisation" of the Tamil areas in northern and eastern Sri Lanka. As found by the UK courts, after the end of the war, "[m]any Tamils have lost their businesses and farms to occupying Sinhalese soldiers and others find that their homes, farms and businesses are in high-security zones (HSZs)... and inaccessible. The former Tamil areas in the Northern and Eastern Provinces are in effect occupied territory, with one soldier for every five members of the population... [T]he army has run the shops, businesses, hotels and tourism in the area. Permanent barracks have been constructed and substantial payments made available for soldiers settling in the Northern Province who have at least three children"<sup>128</sup> As further found by the UK courts in 2021, "[t]here is nothing to suggest that the phenomenon of what was described in GJ as the "Sinhalisation" of Tamil areas has been reversed and...there continues to be a degree of "colonisation" by Buddhists. The evidence as a whole clearly shows that there is a very large military presence in the north and that the army still occupies a good deal of land previously owned by the Tamil population before the end of the civil war."<sup>129</sup>
49. The prevalence of the GoSL's surveillance of the Tamils in Sri Lanka was confirmed by the UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment following his visit in April-May 2016: "[o]wing to the heavy militarization that still exists in the North and East of the country, surveillance continues to be used as a tool of control and intimidation. In addition to rehabilitated persons, many former detainees under the [PTA] and their families, anyone deemed to have had any link to LTTE during the conflict and political and human rights activists remain subject to extensive surveillance and intimidation by the military, intelligence and police forces."<sup>130</sup> This finding was echoed by Amnesty International in 2018: "[l]aw enforcement officials continued to subject members of the Tamil minority, particularly former members of the LTTE, to ethnic profiling, surveillance and harassment. Tamil human rights defenders and activist community members, including relatives of the disappeared, continued to report surveillance and harassment by law enforcement officials."<sup>131</sup>
50. For instance, "some of the relatives of the victims of disappearance during and after the civil war who took part in organized protests in 2019 were asked to report to police stations for further questioning. Such visits which began before the presidential election [in November

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<sup>125</sup> Expert Opinion of Dr Nadarajah, para. 20.

<sup>126</sup> Expert Opinion of Dr Nadarajah, para. 125; *Sunday Observer*, [China to Share Social Media Surveillance Technology with Sri Lanka](#), 26 May 2019; *Modern Diplomacy*, ['Beijing's Export of Surveillance Technology](#), 7 January 2020; GroundViews, Sanjana Hattotuwa, [Hacking the Hackers: Surveillance in Sri Lanka Revealed](#), 15 July 2015; See also, *Freedom House*, [Freedom on the Net](#), 2021.

<sup>127</sup> International Truth and Justice Project Sri Lanka, [A Still Unfinished War: Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015](#), July 2015, (ITJP 2015 Report), pp. 103-108.

<sup>128</sup> UK Upper Tribunal (Immigration and Asylum Chamber), [GJ and Others \(post-civil war: returnees\) Sri Lanka CG \[2013\] UKUT 00319 \(IAC\)](#), paras. 327-238.

<sup>129</sup> KK and RS Decision, para. 325.

<sup>130</sup> Human Rights Council, [Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on his Mission to Sri Lanka](#), 22 December 2016, (A/HRC/34/54/Add.2), para. 42.

<sup>131</sup> Amnesty International, [Amnesty International Report 2017/18](#), 2018, p. 343.

2019] and have since continued, have been documented in different parts of the country, generating considerable fear and anxiety.”<sup>132</sup> OHCHR has noted “reports of harassment or surveillance of human rights defenders and victims of human rights violations increased during 2019...” and called upon GoSL to “immediately end the intimidating visits by State agents and all forms of surveillance and harassment of and reprisals against human rights defenders, social actors and victims of human rights violations and their families...”<sup>133</sup> ITJP, on the other hand, found that “[f]amilies of Sri Lankan torture survivors who have fled abroad are routinely harassed by the security forces. Surveillance and intimidation has (sic) continued unabated after the January 2015 elections.”<sup>134</sup> Further, some of the family members in Sri Lanka “suffered violence ranging from beatings to torture, gang rape, disappearance and even death.”<sup>135</sup>

51. These findings corroborate the Victims’ accounts. The Sri Lankan authorities threatened and harassed the family members of the Victims in Sri Lanka in order to find out about their whereabouts following their escape from detention, causing the Victims as well as the families to fear for their security and safety due to possible reprisals.<sup>136</sup> In one case, the authorities threatened to wipe out the victim’s entire family if they did not reveal her location.<sup>137</sup>
52. Some of the Victims have been politically active for the liberation of the Tamils both in Sri Lanka or other countries where they have fled due to the ongoing harassment of the Sri Lankan authorities against them or their families.<sup>138</sup> Those who carried out pro-Tamil activities in Sri Lanka through contributing to the work of Tamil political parties and movements as well as participating in demonstrations (including for the release of the lands occupied by the army and the families of the disappeared) also found themselves on the crosshairs of the GoSL authorities.<sup>139</sup>
53. The GoSL surveillance and harassment of Tamils extends also to foreign countries. SLA Commander Lt. Gen. Mahesh Senanayake has stated that they considered some LTTE members to have “escaped to India and other countries, [such] as Germany, France, Canada and the UK. We are seriously monitoring the activities of ex-LTTE cadres within the country and other countries also.”<sup>140</sup> UK courts have similarly found that the “GoSL continues to operate an extensive intelligence-gathering regime in the United Kingdom which utilises information acquired through the infiltration of diaspora organisations, the photographing and videoing of demonstrations, and the monitoring of the Internet and unencrypted social media.”<sup>141</sup>

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<sup>132</sup> Human Rights Council, [Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka](#), 18 February 2020, (A/HRC/43/19), para. 32.

<sup>133</sup> *Ibid.*

<sup>134</sup> ITJP 2015 Report, p. 84.

<sup>135</sup> *Ibid.*

<sup>136</sup> Statement of Victim 2, para. 39, 51; Statement of Victim 3, para. 15, 29; Statement of Victim 4, para. 24-26; Medicolegal Report of Victim 5, para. 31; Statement of Victim 6, para. 47-48; Statement of Victim 7, para. 43; Outline of Victim 11’s Account, p.2; Statement of Victim, para. 35; Statement of Victim 18, para. 45-46; Statement of Victim 19, para. 41; Additional Statement of Victim 21, para. 13-14 and Further Additional Statement of Victim 21, para. 3; Statement of Victim 22, para. 31-32; Statement of Victim 23, para. 42, 45; Statement of Victim 24, paras. 41-42; Medicolegal Report of Victim 25, para. 35; Statement of Victim 26, para. 31-32; Medicolegal report of Victim 27, para. 46; Statement of Victim 28, para. 15, 17.

<sup>137</sup> Statement of Victim 18, para. 46.

<sup>138</sup> Statement of Victim 2, para. 5-9; Statement of Victim 16, para. 14-15; Medicolegal Report of Victim 17, para. 4;

<sup>139</sup> Statement of Victim 4, para. 12-14; Statement of Victim 6, para. 23, 56; Outline of Victim 8’s Account, p. 2; Medicolegal Report of Victim 10, paras. 15-19; Medicolegal Report of Victim 13, para. 3.8 and Outline of Victim 13’s Account, p. 2; Outline of Victim 14’s Account, p. 2-3; Outline of Victim 15’s Account, p. 2; Statement of Victim 18, para. 31; Statement of Victim 19, para. 27-28; Outline of Victim 21’s Account, p. 1; Medicolegal Report of Victim 27, para. 8-9.

<sup>140</sup> Daily FT, [India to Provide Counter-Terrorism, Warfare Assistance, says Sri Lankan Army Chief](#) 13 May 2019.

<sup>141</sup> UK Upper Tribunal (Immigration and Asylum Chamber), [KK and RS \(sur place activities: risk\) Sri Lanka](#) [2021] UKUT 130 (IAC), Country Guidance, KK and RS Decision, para. 8.

54. Some of the Victims who have carried out pro-Tamil political activities in the UK were detected by the GoSL authorities through such surveillance.<sup>142</sup> The families of these Victims were threatened with “severe consequences” if the victim did not halt their pro-Tamil activities in the UK and return to Sri Lanka to hand themselves over to the authorities.<sup>143</sup> In some cases, the Sri Lankan authorities even used physical force against the family members of the Victims.<sup>144</sup> In one of the cases, the Victim’s wife was repeatedly sexually harassed and threatened with murder if she did not tell the victim to halt his political activities in the UK against the GoSL.<sup>145</sup> They have also threatened to arrest her and her child if the Victim failed to return to Sri Lanka to face the charges against him.<sup>146</sup> Such harassment was to such an extent and severity that she attempted suicide.<sup>147</sup> In another case, the sister of one of the victims was taken to the police station for questioning, hospitalised several and died under suspicious circumstances several hours later.<sup>148</sup>
55. These Victims were subjected to these persecutory acts despite merely carrying out peaceful political activities in the UK, such as participation in cultural events, demonstrations against the Sri Lankan government, contributing to the public activities of the Tamil diaspora organisations and providing evidence to the UN or other bodies involved in the documentation of the war crimes committed by the Sri Lankan government during the civil war.<sup>149</sup> Sri Lankan authorities characterise and sanction even such peaceful activities of Tamil diaspora members as “LTTE activities.”<sup>150</sup> Similarly, many activities that are an integral part of civil participation in democratic political life in the UK and other western countries, such as lobbying governments, signature campaigns, conferences, briefing journalists and appearing on media are perceived and punished as anti-Sri Lankan activities by the GoSL authorities.<sup>151</sup>
56. Some of the Victims contributed to the political activities and/or became members of certain Tamil diaspora organisations active in the UK in order to voice their political beliefs and seek redress for the crimes committed against them.<sup>152</sup> These include the Tamil Coordinating Committee (‘TCC’), British Tamil Forum (‘BTF’) and Tamil Youth Organisation (‘TYO’), Global Tamil Forum (‘GTF’) and Transitional Government of Tamil Eelam (‘TGTE’), which

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<sup>142</sup> Statement of Victim 2, paras. 48-50; Statement of Victim 3, para. 21; Statement of Victim 4, para. 26; Statement of Victim 7, para. 42-43; Medicolegal Report of Victim 11, para. 30; Statement of Victim 16, para. 21; Medicolegal Report of Victim 17, para. 17; Medicolegal Report of Victim 23, para. 23; Statement of Victim 24, para. 42; Medicolegal Report of Victim 25, para. 18; Medicolegal Report of Victim 25, para. 35.

<sup>143</sup> Statement of Victim 6, para. 32-44, 47-48; Statement of Victim 7, para. 43; Statement of Victim 24, para. 42.

<sup>144</sup> Statement of Victim 3, para. 29; Statement of Victim 23, para. 46.

<sup>145</sup> Statement of Victim 4, para. 25-26; Statement of Victim 23, para. 46; Statement of Victim 28, para. 15.

<sup>146</sup> Statement of Victim 4, para. 25.

<sup>147</sup> Statement of Victim 4, para. 25-26.

<sup>148</sup> Statement of Victim 22, para. 31.

<sup>149</sup> Statement of Victim 2, para. 39-47; Statement of Victim 3, para. 21; Statement of Victim 4, para. 18-23; Statement of Victim 5, paras. 32-39; Statement of Victim 6, para. 32-44, 47-48; Statement of Victim 7, para. 15-42; Outline of Victim 9’s Account, p.2; Medicolegal Report of Victim 10, paras. 67-69; Outline of Victim 11’s Account, p.2; Outline of Victim 13’s Account, p. 2; Outline of Victim 15’s Account, p. 2; Statement of Victim 19, para. 40; Second Additional Statement of Victim 21, para. 4-6 and Further Additional Statement of Victim 21, paras. 6-9; Statement of Victim 22, para. 34; Statement of Victim 23, para. 40-41; Statement of Victim 24, paras. 21-31; Statement of Victim 26, paras. 19-29; Statement of Victim 28, para. 20-30.

<sup>150</sup> Hindustan Times/AFP, [Tamil Separatists are Regrouping Abroad, says Sri Lanka President](#), 21 May 2018.

<sup>151</sup> Expert Opinion of Dr Nadarajah, para. 90-91.

<sup>152</sup> Statement of Victim 2, para. 39-47; Statement of Victim 3, para. 21; Statement of Victim 4, para. 18-23; Statement of Victim 5, paras. 32-39; Statement of Victim 6, para. 32-44, 47-48; Statement of Victim 7, para. 15-42; Outline of Victim 9’s Account, p.2; Medicolegal Report of Victim 10, paras. 67-69; Outline of Victim 11’s Account, p. 2; Outline of Victim 13’s Account, p. 2; Outline of Victim 15’s Account, p. 2; Statement of Victim 19, para. 40; Second Additional Statement of Victim 21, para. 4-6 and Further Additional Statement of Victim 21, paras. 6-9; Statement of Victim 22, para. 34; Statement of Victim 23, para. 40-41; Statement of Victim 24, paras. 21-31; Statement of Victim 26, paras. 19-29; Statement of Victim 28, para. 20-30.



are currently proscribed by the GoSL.<sup>153</sup> The GoSL deems these organisations as fronts for LTTE working towards reviving the armed struggle and a separate Tamil State.<sup>154</sup> Thus, the Sri Lankan intelligence agencies have increasingly and aggressively sought to identify and collect information on and to disrupt and deter actual or suspected cooperation and connection with these Tamil organisations and networks in the diaspora and those within Sri Lanka.<sup>155</sup> To this day, Sri Lankan security forces still use the draconian Prevention of Terrorism Act ('PTA') and other terrorism legislation against those who are or are suspected to be members or supporters of these organisations.<sup>156</sup> Anyone who has links to these groups risks surveillance, harassment, arrest and torture by the Sri Lankan authorities.<sup>157</sup>

57. There have also been instances of direct and blatant harassment of Tamil nationals by GoSL authorities within the territory of the UK. In two separate incidents, Sri Lankan High Commission ('SLHC') staff members in the UK have issued grave threats to peaceful demonstrators, among whom were some of the Victims. On 4 February, during a demonstration of the TGTE outside the SLHC, Brigadier Priyanka Fernando (the Defence Attaché to the SLHC) filmed the demonstrators and issued a death threat by making a throat-slitting gesture towards them.<sup>158</sup> On 4 February 2019, a woman working at the SLHC began filming the demonstrators and yelling abuses, threatening the demonstrators that they would get arrested when they returned to Sri Lanka. She later posted their photos on social media, branding them as LTTE members, tigers and terrorists in order to incite racial hatred against them.<sup>159</sup>
58. The harassment of the GoSL authorities towards Tamil diaspora members is not limited to the UK. They have also been known to threaten Tamil diaspora activists who have been operating in other countries. For instance, during the UN Human Rights Council (HRC) session in Geneva in March 2021, the UN High Commissioner for Human Rights spokesperson Rupert Colville has stated: "[d]uring this [HRC] session, there has been an unprecedented and totally unacceptable level of threats, harassment and intimidation directed at Sri Lankan activists who had travelled to Geneva to engage in the debate, including by members of the 71-member official Sri Lankan government delegation."<sup>160</sup> A similar statement was also made by UN High Commissioner for HR Zeid Ra'ad Al Hussein during the March 2017 session.<sup>161</sup>
59. These acts, which evidence the continuing adverse interest of the GoSL in them, led the Victims to believe that they would be tortured again and ultimately killed if they were to return to Sri Lanka.<sup>162</sup> The vast majority of them were all duly granted asylum in the UK due to the obvious

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<sup>153</sup> See Expert Opinion of Dr Nadarajah, paras. 56-57, 69-71, 75, 80; Tamil Guardian, [Sri Lanka Proscribes Hundreds alongside Tamil Diaspora Organisations](#), 27 March 2021.

<sup>154</sup> KK and RS Decision, paras. 5-7; *The Hindu*, [Sri Lanka Bans 15 Tamil Diaspora Organisations](#), 2 April 2014.

<sup>155</sup> Expert Opinion of Dr Nadarajah, para. 130.

<sup>156</sup> Expert Opinion of Dr Nadarajah, para. 70; See below paras 91-93.

<sup>157</sup> Expert Opinion of Dr Nadarajah, para. 59-62.

<sup>158</sup> Statement of Victim 2, para. 49; Statement of Victim 7, para. 43.

<sup>159</sup> Statement of Victim 2, para. 50.

<sup>160</sup> United Nations, [Senior UN Official Warns against Harassing Sri Lankan Human Rights Defenders](#), 23 March 2012.

<sup>161</sup> Human Rights Council, [Oral Presentation of the High Commissioner's Report on Sri Lanka: Statement by Zeid Ra'ad Al Hussein United Nations High Commissioner for Human Rights](#), 22 March 2017.

<sup>162</sup> Statement of Victim 2, para. 52; Statement of Victim 3, para. 52; Medicolegal Report of Victim 4, para. 53; Statement of Victim 5, para. 15; Statement of Victim 6, para. 44, 59; Statement of Victim 7, para. 46; Medicolegal Report of Victim 8, para. H19; Outline of Victim 9's Account, p. 3; Medicolegal Report of Victim 10, para. 74; Medicolegal Report of Victim 11, para. 43; Psychiatric Report of Victim 12, para 14; Statement of Victim 16, para. 40; Statement of Victim 18, para. 48; Statement of Victim 19, para. 43; Statement of Victim 20, p. 2; Additional Statement of Victim 21, para. 16; Statement of Victim 22, para. 57; Statement of Victim 23, para. 49; Statement of Victim 24, para. 47; Medicolegal Report of Victim 25, para. 93; Statement of Victim 26, para. 45; Statement of Victim 28, paras. 18, 47.

grounds that existed for them to fear persecution at the hands of the GoSL authorities. Others are waiting for the decision of the UK authorities on their applications.<sup>163</sup>

60. The Victims' fears in this regard are confirmed by the general practice of the GoSL in recent years. As found by the UNWGAD, "Tamils who were arrested and detained in 2015, 2016 and 2017 when returning to Sri Lanka after seeking asylum in another country or working abroad in some cases... were beaten and kept under surveillance once released and charged with offences relating to illegal departure from Sri Lanka."<sup>164</sup> Similar findings were made by Human Rights Watch. According to documentation between 2005-2015, HRW found that "[s]ince the end of the armed conflict... Tamils, living abroad, returned to Sri Lanka only to be arrested immediately or soon after arrival and they too have been subjected to torture, including rape, while in custody..."<sup>165</sup> "[PTA] has been used since the end of the war, including under the present government, to detain and torture people suspected of links to the LTTE, including forcibly returned asylum seekers. Many instances of torture, sexual violence and other ill-treatment occurred in the [CID] and [TID] offices in Colombo and elsewhere, while others occurred in unofficial places of detention."<sup>166</sup> This finding was echoed by the International Crisis Group in May 2016: "there continue to be credible reports of torture and sexual abuse by counterterrorist police and military intelligence units against Tamils returning to the country who are suspected of past LTTE involvement."<sup>167</sup>
61. Recognising the threat that the Tamil nationals who have escaped Sri Lanka due to torture still face, the UN has called upon its member states to "[e]nsure respect for the principle of non-refoulement in the case of Tamils who have suffered torture and other human rights violations until guarantees of nonrecurrence are in place to ensure that they will not be subject to further violations."<sup>168</sup>
62. These concerns remain valid today as well. Following the April 2019 attacks by ISIS, President Sirinisa "declared a state of emergency that was extended three times until 22 August 2019. Emergency powers were granted to the armed forces to search and arrest, which curtailed freedom of movement and of peaceful assembly, and some fair trial guarantees."<sup>169</sup> With the election of President Gotabaya in November 2019, Sri Lanka become a more precarious place for the Tamils. Military officers against whom serious allegations of gross violations of IHL and human rights law during the war were appointed to senior command positions, both before and after the presidential elections.<sup>170</sup> Further, under the new government, "there has been a disturbing trend towards the militarization of civilian government functions. Control of several key civilian departments has been recently put under the oversight of the Ministry of Defence, including the police, the immigration department, telecommunications registration, the national

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<sup>163</sup> See Annex I.

<sup>164</sup> UNWGAD December 2017 Report pp. 10-11;

<sup>165</sup> Human Rights Watch, [We Will Teach You a Lesson: Sexual Violence against Tamils by Sri Lankan Security Forces](#), 2013, (HRW 2013 Report) p. 35; See also International Crisis Group, [Sri Lanka: Jumpstarting the Reform Process' Asia Report N° 278](#), 18 May 2016, (ICG Report) p. 17

<sup>166</sup> Human Rights Watch, '[Sri Lanka: Events of 2015](#)', January 2016.

<sup>167</sup> ICG Report, p. 17; See also ITJP 2015 Report.

<sup>168</sup> *United Nations*. 10 February 2017. '[Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka](#)' A/HRC/34/20, p. 17

<sup>169</sup> A/HRC/43/19, para. 28.

<sup>170</sup> A/HRC/43/19, para. 34.

media centre and the secretariat for [NGOs].”<sup>171</sup> This is confirmed by the fact that some of the Victims were abducted, tortured and as late as 2019 and 2020.<sup>172</sup>

*The circumstances of the Victims satisfy the three-prong test of severe harm suggested by the Prosecutor*

63. The authors contend that the circumstances of the Victims satisfy the three-prong test suggested by the Prosecutor to assess whether severe harm resulting from the deprivation of their right to return could be demonstrated.
64. First, the Victims are all *bona fide* refugees in the UK. They were all deported from Sri Lanka due to the abduction, unlawful detention and torture they have suffered at the hands of the Sri Lankan authorities.<sup>173</sup> Since their escape to the UK, they have applied for asylum and the majority of them were duly granted refugee status therein by the UK authorities due to the continuing threat of persecution they face in case they were returned to Sri Lanka.<sup>174</sup> The asylum applications of some of the Victims are currently pending before the UK authorities.
65. Second, the Victims are sufficiently connected to Sri Lanka. They are all natural-born Sri Lankan Tamil nationals who lived most of their lives in Sri Lanka with their families. They were forcibly separated from their homes, communities and families as a result of the criminal conduct of the Sri Lankan authorities. Further, the majority of the Victims have been deported and subsequently deprived of their right of return since around 2009 and later. Their links to Sri Lanka remain strong and current. Indeed, the vast majority of the Victims have their families, friends and communities still living in Sri Lanka.
66. Lastly, the displacement of the Victims has inflicted upon them great mental suffering and injury. They have been deprived of their homes, culture, families and society, and forced to reside in the UK in impossibly difficult and impoverished conditions due to their status as refugees or asylum seekers, and their inability to gain employment due to their psychological problems, including post-traumatic stress disorder and depression.<sup>175</sup> The mental harm they suffered due to their abduction and torture in Sri Lanka has been exacerbated by their inability to return to their homes, families and communities, as well as the continuing threats against their family members.<sup>176</sup> Out of fear for their safety, the Victims have been unable to freely contact their family members in Sri Lanka,<sup>177</sup> causing significant disruption of their family ties. The Victims invariably would like to return to their homes if they could do so in safety and with dignity.

### **iii. Persecution**

#### *Law*

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<sup>171</sup> A/HRC/43/19, para. 33.

<sup>172</sup> See Statement of Victim 1, para. 10; Outline of Victim 11’s Account, p. 1; Outline of Victim 15’s Account, p. 1; Statement of Victim 25, para. 20; Outline of Victim 27’s Account, p. 1.

<sup>173</sup> See above paras 28-40.

<sup>174</sup> See Annex.

<sup>175</sup> See below para. 165.

<sup>176</sup> Statement of Victim 4, para. 25, 45; Outline of Victim 9’s Account, p. 3; Medicolegal Report of Victim 10, para. 58; Addendum Medicolegal Report of Victim 21, paras. 25; Medicolegal Report of Victim 23, para. 24; Statement of Victim 24, para. 20; Medicolegal Report of Victim 25, para. 67; Statement of Victim 28, para. 15-16, 31.

<sup>177</sup> Statement of victim 2, para. 51; Statement of Victim 4, para. 26; Statement of Victim 6, para. 48; Statement of Victims, para. 43; Medicolegal Report of Victim 11, para. 24; Statement of Victim 18, para. 46; Statement of Victim 19, para. 41; Medicolegal Report of Victim 20, para. H30; Additional Statement of Victim 21, para. 14; Statement of Victim 22, para. 32; Statement of Victim 26, para. 32.



67. Article 7(1)(h) of the Rome Statute prohibits “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law.”<sup>178</sup> In addition to the contextual elements of war crimes, the specific elements of this crime are the following:
1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights,
  2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such,
  3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, and
  4. The conduct was committed in connection with any act referred to in article 7(1) of the Statute or any crime within the jurisdiction of the Court.<sup>179</sup>
68. Any act or omission that severely deprives one or more persons of their fundamental human rights that are established under international law may constitute persecution.<sup>180</sup> Whether the acts of the perpetrators will result in severe deprivation is considered on a case-by-case basis, taking into account the context in which they are committed as well as their cumulative effect in order to ascertain whether, taken alone or in conjunction with other acts, they resulted in the gross or blatant denial of fundamental rights.<sup>181</sup> To establish this, courts will examine whether or not rights have been clearly violated, how many individuals were targeted and to what extent individuals were deprived of their rights.<sup>182</sup>
69. Any act that can be considered a crime against humanity in itself will be considered a severe deprivation of fundamental rights.<sup>183</sup> Indeed, established crimes such as deportation,<sup>184</sup> torture,<sup>185</sup> cruel and inhumane treatment,<sup>186</sup> outrages upon personal dignity,<sup>187</sup> harassment, humiliation and psychological abuse<sup>188</sup> have already been recognised in the jurisprudence as underlying acts of persecution. Additionally, as previously acknowledged by the OTP, severe deprivation of the right to return may be an underlying act of persecution since it is a fundamental human right under international law.<sup>189</sup> Furthermore, the Court held previously

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<sup>178</sup> [Rome Statute](#), Article 7(1)(h).

<sup>179</sup> ICC Elements of Crimes, Article 7(1)(h).

<sup>180</sup> These rights can be derived from customary international law and international instruments such as, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the European Convention on Human Rights; See Ntaganda Trial Judgment, para. 991; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-309, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda](#), 14 June 2014, para. 58.

<sup>181</sup> Ntaganda Trial Judgment, para. 991; ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, [Appeal Judgment](#), 28 February 2005, (Kvočka Appeal Judgment) paras 319-321.

<sup>182</sup> ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-T, [Trial Judgment](#), 14 January 2000, (Kupreškić Trial Judgment) para. 621.

<sup>183</sup> Ntaganda Trial Judgment, para. 994

<sup>184</sup> ICTY, *Prosecutor v. Stakić*, IT-97-24-T, [Trial Judgment](#), 31 July 2003, paras. 105-109; ICTY, *Prosecutor v. Blaškić*, IT-95-14-T, [Trial Judgment](#), 3 March 2000, (Blaškić Trial Judgment) para. 224; Krnojelac Appeal Judgment, paras. 221–222; Krstić Trial Judgment, para. 537.

<sup>185</sup> Blaškić Trial Judgment, para. 226; Kupreškić Trial Judgment, paras. 600-605; Naletilić & Martinović Trial Judgment, para. 682.

<sup>186</sup> ICTY, *Prosecutor v. Simić et al.*, IT-95-9-A, [Appeal Judgment](#), 28 November 2006, paras. 119–138; ICTY, *Prosecutor v. Blagojević & Jokić* [Trial Judgment](#), 17 January 2005, para. 620.

<sup>187</sup> ICC, Situation in Darfur, ICC-02/055-01/12, [Warrant of Arrest for Abdel Raheem Muhammad Hussein](#), 1 March 2012, p. 6.

<sup>188</sup> Kvočka Appeal Judgment, paras. 325, 335; ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, [Appeal Judgment](#), 29 July 2004, para. 155; Stakić [Appeal Judgment](#), paras. 105-109.

<sup>189</sup> OTP Request, paras. 172.

that deprivation of the right to return would be “of a character similar to the crime of humanity of persecution.”<sup>190</sup>

70. The reason why the perpetrator targeted the victims must be due to their group or collective identity. As such, the group or collectivity and their individual members need to be ‘identifiable’ by any of the characteristics mentioned in Article 7(2)(g) based either on objective criteria or on the subjective notions or beliefs of the perpetrator regarding the victim’s membership in the relevant group or collectivity.<sup>191</sup> An ethnic group is defined as a group whose members share a common language and culture.<sup>192</sup> A political ground, on the other hand, is expected to share membership to a political party, ideological political beliefs or an actual or perceived opposition to a particular political regime.<sup>193</sup>
71. Lastly, the underlying persecutory act must have been committed in connection to another crime against humanity or any other crime under the Statute. This would be the case, for instance, if the underlying persecutory acts themselves constitute crimes under the Statute.<sup>194</sup> If, however, there is an act which in and of itself is not a crime within the Rome Statute but is carried out in connection with such crimes, the Court may still give consideration to this conduct, as a whole, amounting to persecutory conduct.<sup>195</sup>

*Facts:*

72. The authors contend that the criminal conduct of the GoSL described in detail above (i.e. abduction, unlawful detention, torture, deportation and deprivation of right of return) also constitutes persecution since they have been inflicted upon the Victims discriminatorily on ethnic and political grounds. The Victims have been subjected to these crimes due to their perceived or actual affiliation with the LTTE and/or their pro-Tamil or separatist political activities. Their Tamil ethnicity remains one of the main reasons as to why they were perceived by the GoSL authorities as such.

*The hostility of the GoSL towards Tamil nationals who are affiliated with the LTTE or espouse separatist ideas*

73. In Sri Lanka, actual or suspected former members and supporters of the LTTE, advocates of Tamil self-determination and critics of Sri Lankan security forces’ human rights abuses and war crimes are subjected to intense hostility by the country’s political/military leaders and security forces. The GoSL authorities draw a direct link between the activism of the Tamil diaspora and the revival of the LTTE’s armed struggle in Sri Lanka.<sup>196</sup> This is the cornerstone of their perception of the Tamil diaspora as a serious threat to the country’s national security.<sup>197</sup> In this sense, GoSL equates and treats interchangeably Tamil diaspora groups advocating for self-determination, accountability for war crimes/human rights abuses, demilitarisation of the Tamil-majority areas and support for Tamil separatism with the armed struggle of LTTE and

<sup>190</sup> [Rohingya Article 19\(3\) Decision](#), para. 77

<sup>191</sup> Myanmar/Bangladesh Authorisation Decision, para. 102; Ntaganda Trial Judgment, paras 1010-1011.

<sup>192</sup> ICTR, *Prosecutor v. Clément Kayishema et. al*, ICTR-95-1-T, [Trial Judgment](#), 21 May 1999, para. 98; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, [Trial Judgment](#), para. 513.

<sup>193</sup> ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, [Decision on the Confirmation of Charges](#), para. 331; ICC, *Prosecutor v. Ruto et al*, ICC-01/09-01/11, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, paras. 273, 347; ICC, Situation in the Libyan Arab Jamahiriya, ICC-01/11, [Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah al-Senussi](#), 16 May 2011, paras. 12, 30.

<sup>194</sup> Ntaganda Trial Judgment, para. 1024.

<sup>195</sup> ICTR, *Prosecutor v. Nahimana et al*, ICTR-99-52-A, [Appeal Judgment](#), 28 November 2017, paras. 985, 988; Kvočka Appeal Judgment, para. 321; Kupreškić et al. Trial Judgment, paras. 615(e), 622.

<sup>196</sup> Expert Opinion of Dr Nadarajah, para. 20.

<sup>197</sup> *Ibid.*

“terrorism”.<sup>198</sup> This attitude defines the GoSL’s understanding of national security.<sup>199</sup> Indeed, the Sri Lankan Constitution explicitly outlaws supporting, espousing, promoting, encouraging, financing or advocating for a separate State within the territory of Sri Lanka.<sup>200</sup>

74. As aptly put by the UK courts “[t]he [GoSL] is an authoritarian regime whose core focus is to prevent any potential resurgence of a separatist movement within Sri Lanka which has its ultimate goal the establishment of Tamil Eelam. GoSL draws no material distinction between, on the one hand, the avowedly violent means of the LTTE in furtherance of Tamil Eelam, and non-violent political advocacy for that result on the other. It is the underlying aim that is crucial to GoSL’s perception. To this extent, GoSL’s interpretation of separatism is not limited to the pursuance thereof by violent means alone; it encompasses the political sphere as well. Whilst there is limited space for pro-Tamil political organisations to operate within Sri Lanka, there is no tolerance of the expression of avowedly separatist or perceived separatist beliefs.”<sup>201</sup>
75. The discriminatory intent of the GoSL officials towards Tamils who are perceived to be associated with the LTTE or espousing separatist ideas is also evidenced by the repeated and consistent statements made by the successive Presidents of Sri Lanka as well as other Sri Lankan political and military leaders.
76. In 2012, the then Secretary of Defence and the current President Gotabaya listed as the primary threats to Sri Lanka’s national security, among others, (i) the reorganization of the LTTE in the international arena, (ii) the efforts by some to take Sri Lanka’s internal issues in front of international bodies, and (iii) the creation of instability in Sri Lanka through indirect means as.<sup>202</sup> He went on to claim that the Tamil diaspora organisations are in fact LTTE fronts aiming to revive LTTE’s armed struggle in Sri Lanka as well as weakening Sri Lanka by intensifying the international pressure on Sri Lanka for accountability for war crimes and human rights abuses, demilitarisation of the Tamil-majority areas and post-war reconciliation.<sup>203</sup> Gotabaya specifically referred to organisations such as the TGTE, BTF, GTF, Tamil Eelam People’s Assembly and Tamil National Council and claimed that the members of these organisations are trained LTTE cadres and operatives engaged in propaganda activities.<sup>204</sup> He stated that these organisations work to “create an enabling environment for a separate state internationally, while also encouraging the resumption of an armed struggle within Sri Lanka [which] is a grave threat to our national security.”<sup>205</sup> Gotabaya further asserted there to be “LTTE cadres who escaped detection and detention during the war and are still at large in our society... Even among the cadres who were rehabilitated and reintegrated into society, there could still be some individuals who have not entirely given up their belief in militancy. Although the power of the Government to impede the activities of the LTTE-linked organisations abroad is limited, it has a much greater level of control within Sri Lanka.”<sup>206</sup>
77. Major General Tuan Suresh Sallay of the Head of Sri Lanka’s State Intelligence Service (“SIS”), on the other hand, has stated in 2011 that “the [Tamil] Diaspora... and the LTTE international network remain largely intact posing potential threat not only to Sri Lanka and the regions but

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<sup>198</sup> Expert Opinion of Dr Nadarajah, para. 30.

<sup>199</sup> Expert Opinion of Dr Nadarajah, para. 12.

<sup>200</sup> [Constitution of Sri Lanka](#), Article 157(A)

<sup>201</sup> KK and RS Decision, paras. 1-3

<sup>202</sup> Expert Opinion of Dr Nadarajah, para. 31, referring to Gotabaya Rajapaksa, [Future Challenges of National Security in Sri Lanka](#), 12 January 2012 which is no longer available online.

<sup>203</sup> *Ibid.* para. 32.

<sup>204</sup> *Ibid.* para. 34.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

also to the peace and stability of the world at large... [T]oday, the same [LTTE] front organisations, with the pro-LTTE elements and...radicalized segment of the Diaspora population, who are largely responsible for destabilising [Sri Lanka] and sustain[ing] the LTTE terror campaign for over 30 years still engage in carrying out the same activities as they did in the past.”<sup>207</sup>

78. In June 2016, former President Sirisena stated that he was focused upon “eradicating the LTTE ideology completely both locally and internationally.”<sup>208</sup> Later in October 2016, he defined the threat as “the ideology of LTTE terrorism... in certain parts of the world. It is clearly manifest [sic] in the protests staged against Sri Lanka in certain world capitals by the LTTE sympathizers...” He added, “we must not forget for a moment that there are certain groups and organizations that are ideologically in favour of separatism. These have not been destroyed and are waiting for an opportunity to create trouble in Sri Lanka. We must defeat them.”<sup>209</sup> Referring to the fact that there were protests against him in London in April 2018, President Sirisena stated that “[w]e have defeated terrorism of the LTTE but have not been able to defeat their ideology. They are very active abroad.”<sup>210</sup> As indicated by Sirisena’s Deputy Law and Order Minister Nalin Bandara Jamayaha in July 2018, defusing the pro-LTTE mindset among the Tamils in Northern Sri Lanka is a priority for the Sri Lankan government: “[t]here is only a pro-LTTE mindset among the Tamil people in the area and that will be got rid of sooner or later. It will not be easy but we will do it. We will not allow the LTTE [to] come back again.”<sup>211</sup>
79. This attitude escalated following the election of President Gotabaya in November 2019. Gotabaya himself, for instance, underlined in November 2020, that he had been elected by the Sinhala majority due to “legitimate fears that the Sinhala race, our religion, national resources and heritage would be threatened with destruction in the face of various local and foreign forces and ideologies that support separatism, extremism and terrorism.”<sup>212</sup> Gotabaya’s newly appointed Defence Secretary Major General Kamal Gunaratne stated in January 2020 that “[the] Tamil diaspora is trying their best to revive the LTTE, to achieve what the LTTE could not achieve through the arms struggle by lobbying against the government with the support of the international community.”<sup>213</sup> The same week, Gunaratne also denounced the “concerted efforts of Tamil diaspora groups... to revive the LTTE by means of promoting separatist ideologies among the rehabilitated and reintegrated [LTTE] ex-combatants in [Sri Lanka].”<sup>214</sup> OHCHR has voiced its concern about the “use of ethno-nationalistic and majoritarian rhetoric and symbols by the President and other senior Government figures, which define public policies that appear to be exclusively reflect the perceived interests of the Sinhala Buddhist majority, and with minimal consideration for minority communities.”<sup>215</sup>
80. The overt hostility of the GoSL authorities towards Tamil separatism causes them to regard Tamils who had any affiliation with the LTTE and/or espouse separatist ideas as enemies. As indicated above, anyone deemed as affiliated with the LTTE is at risk of torture and detention

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<sup>207</sup> *Business Today* ‘[Evolution of The LTTE And International Networking](#), 2 June 2011.

<sup>208</sup> Tamil Guardian, [Sri Lankan President ‘More Committed to National Security than Ever Before](#), 19 January 2016; The Hindu, [Sri Lanka President Vows to Eradicate LTTE Ideology](#), 8 June 2016.

<sup>209</sup> The New Indian Express, [Sirisena Quotes Modi to Justify Tirade against NGOs](#), 28 October 2016.

<sup>210</sup> Hindustan Times/AFP, [Tamil Separatists are Regrouping Abroad, says Sri Lanka President](#), 21 May 2018.

<sup>211</sup> Tamil Guardian, [Sri Lankan Minister to Visit North-East to ‘Defuse Pro-LTTE Mindset](#), 10 July 2018.

<sup>212</sup> Human Rights Council, Promotion Reconciliation Accountability and Human Rights in Sri Lanka, 27 January 2021, (A/HRC/46/20) para. 30.

<sup>213</sup> Sri Lanka Ministry of Defence, [National Security was Neglected due to Negligence and Ignorance - Defence Secretary](#), 13 January 2020.

<sup>214</sup> Sri Lanka Ministry of Defence, [Proper Plans Afoot to De-radicalize Misguided Youth - Secretary Defence](#), 16 January 2020.

<sup>215</sup> A/HRC/46/20, para. 29.

in Sri Lanka. As indicated by the UN Special Rapporteur on Terrorism, in Sri Lanka “[e]ntire communities have been stigmatised and targeted for harassment and arbitrary arrest and detention, and any person suspected of association, however indirect, with the LTTE remains at immediate risk of detention and torture.”<sup>216</sup> Such targeting is not limited to Sri Lanka, however. Internationally, “Tamils who participate, or are suspected to have participated, in... Tamil diaspora political activities that are perceived by the Sri Lankan authorities as working to advance the cause of Tamil separatism, and, therefore, as supporting or facilitating the LTTE’s terrorism against the country, are at a real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise.”<sup>217</sup>

*Victims have been persecuted due to their ethnic and political identities*

81. The Victims are all Tamil nationals who are, correctly or not, associated with, or supportive of, the LTTE or Tamil independence movement. Some were active members of the LTTE who either voluntarily joined<sup>218</sup> or were conscripted<sup>219</sup> to the LTTE towards the final stages of the armed conflict. Others were civilians who either had relatives in the LTTE, or supported and assisted the LTTE in various ways (such as providing food and other essential items) out of a political belief that Tamils need a separate homeland.<sup>220</sup>
  
82. The fact that their ethnic and political identities were the primary reason for the abduction, arrest, torture and deportation of the Victims can be inferred from a number of factors. First, the questions that the Victims were asked during their interrogation by the GoSL authorities indicate that they were subjected to these crimes due to their actual or perceived affiliation with the LTTE. Indeed, all of the Victims were questioned about their or their acquaintances’ involvement with the LTTE and/or their pro-Tamil political activities.<sup>221</sup> Some were subjected to verbal ethnic abuses during their torture.<sup>222</sup> Second, the GoSL authorities actively surveilled the Victims’ pro-Tamil activities in the UK and questioned their families in Sri Lanka about them.<sup>223</sup> Third, the GoSL authorities threatened the families of some of the Victims with harm in case the Victim in question did not cease his/her pro-Tamil activities in the UK.<sup>224</sup> Lastly, some of the Victims and their families experienced ethnic discrimination and displacement in the past due to their Tamil identities and support for the LTTE.<sup>225</sup> For instance, some Victims

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<sup>216</sup> OHCHR, [Human Rights and Counter-Terrorism: UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism Concludes Visit to Sri Lanka: Preliminary Findings of the Visit to Sri Lanka](#), (Preliminary Report of UN Special Rapporteur on Terrorism) 14 July 2017.

<sup>217</sup> Expert Opinion of Dr Nadarajah, para. 38.

<sup>218</sup> Medicolegal Report of Victim 1, para. 5; Statement of Victim 3, para. 1; Statement of Victim 4, para. 4; Medicolegal Report of Victim 8, para. H3; Medicolegal Report of Victim 13, para. 3.2; Medicolegal Report of Victim 15, para. 3.2-3.3; Medicolegal Report of Victim 20, para. H3; Statement of Victim 22, para. 5; Statement of Victim 23, para. 16-17; Statement of Victim 25, para. 8-10; Statement of Victim 26, para. 5-7; Statement of Victim 28, para. 5;

<sup>219</sup> Statement of Victim 5, para. 7; Statement of Victim 6, para. 7-8; Statement of Victim 7, paras. 11; Medicolegal Report of Victim 11, para. 10; Medicolegal Report of Victim 12, p. 3 and Psychiatric Report of Victim 12, para 5(c); Medicolegal Report of Victim 14, para. 3.2; Statement of Victim 18, para. 18-20; Statement of Victim 19, para. 12; Statement of Victim 24, para. 7

<sup>220</sup> Statement of Victim 2, para. 4, para. 39; Medicolegal Report of Victim 10, para. 1; Medicolegal Report of Victim 11, para. 6-7; Outline of Victim 14’s Account; Statement of Victim 16, para. 3, 9; Statement of Victim 18, para. 8, 15; Statement of Victim 19, para. 6; Statement of Victim 20, p. 1; Outline of Victim 21, p. 1; Statement of Victim 23, para. 4; Statement of Victim 25, para. 8; Medicolegal Report of Victim 27, paras. 5-7.

<sup>221</sup> See above para. 35.

<sup>222</sup> Statement of Victim 1, para. 15; See also ITJP, [Sri Lanka: Torture & Sexual Violence by Security Forces 2020-21](#), September 2021, p. 43-44.

<sup>223</sup> See above paras 46-61.

<sup>224</sup> See above para. 54.

<sup>225</sup> Statement of Victim 7, paras. 1-7; Outline of Victim 14’s Account, p.1; Statement of Victim 18, para. 4; Statement of Victim 19, para. 4; Statement of Victim 22, para. 1; Statement of Victim 23, para. 4-5, 14; Statement of Victim 24, para. 3; Statement of Victim 25, para. 6; Statement of Victim 26, para. 2-4; Outline of Victim 27’s Account, p. 1; Statement of Victim 28, para. 2;



had relatives or acquaintances who have been abducted, detained and/or tortured at the hands of the Sri Lankan authorities due to their affiliation with the LTTE.<sup>226</sup>

83. The motivation behind the persecution of the Victims was succinctly explained by International Truth and Justice Project ('ITJP'), an NGO that works for justice in Sri Lanka: "[a]bduction, torture and sexual violence, as well as reprisals and persecution are all part of the machinery of control, used to dehumanise and humiliate Tamils. The aim is to spread terror among the population through violence, fear, and humiliation so that its members will never dare raise their heads to demand their rights for the future or justice for the past... These attacks speak of a government-supported effort to annihilate by any means the LTTE and subjugate the Tamil population that once supported them."<sup>227</sup> This has been deemed as "the continuation of the conflict against the ethnic Tamil Community with the purpose of sowing terror and destabilising community members who remain in the country."<sup>228</sup> Indeed, "[i]t is difficult to avoid drawing a clear inference that the witnesses were targeted because they are Tamil and suspected of supporting or having a connection with the LTTE..."<sup>229</sup>

#### *Connection with other crimes under the Statute*

84. The persecution of the Victims by the Sri Lankan authorities was carried through acts that themselves constitute crimes against humanity under Article 7 of the Statute, including enforced disappearance (i.e. abduction), imprisonment, torture, deportation, and deprivation of right of return. As illustrated above, all of these crimes were committed by the GoSL authorities with the requisite discriminatory intent and due to the ethnic/political identities of the Victims, meaning that they constitute underlying acts of persecution committed against the Victims.

#### **iv. Contextual Elements of Crimes Against Humanity**

##### *Law*

85. For conduct constituting deportation, persecution or other inhumane acts to be considered as a crime against humanity under Article 7 of the Statute, it must be committed as part of a widespread or systematic attack directed against a civilian population pursuant to or in furtherance of a State or organisational policy to commit such attack.<sup>230</sup>
86. The "widespread" nature of an attack is assessed based on the number of its victims or its geographical scope.<sup>231</sup> There is no set number of victims to make an attack widespread; instead, the widespread nature of an attack is assessed on a case-by-case basis.<sup>232</sup> Factors such as (i) the number of criminal acts committed during the attack, (ii) the logistics and resources involved, (iii) the number of victims, (iv) the temporal and geographical scope of the attack, and (v) the cumulative effect of the criminal acts are taken into consideration in assessing whether an attack is widespread.<sup>233</sup>

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<sup>226</sup> Statement of Victim 2, para. 15-16; Statement of Victim 6, para. 12, 19; Statement of Victim 7, para. 9; Medicolegal Report of Victim 8, para. H5; Medicolegal Report of Victim 9, para. 3.1-3.3; Medicolegal Report of Victim 10, para. 1, 5; Outline of Victim 14's Account, p. 1; Statement of Victim 16, para. 9; Statement of Victim 18, para. 28; Statement of Victim 19, para. 28-30, 32, 37, 42; Medicolegal Report of Victim 20, para. H8; Outline of Victim 21's Account, p. 1-2; Statement of Victim 28, para. 17;

<sup>227</sup> ITJP 2015 Report, p. 122.

<sup>228</sup> ITJP, [An Unfinished War: Torture and Sexual Violence in Sri Lanka, 2009-2014](#), March 2014, (ITJP 2014 Report) p. 62.

<sup>229</sup> ITJP 2014 Report, p. 62.

<sup>230</sup> Rome Statute, Article 7(1)-(2).

<sup>231</sup> Katanga Confirmation of Charges Decision, para. 395.

<sup>232</sup> Stakić Trial Judgment, para. 640; ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, [Trial Judgment](#), 1 September 2004, para. 391.

<sup>233</sup> ICTY, *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, [Trial Judgment](#), 20 July 2009, para. 890.

87. To be considered “systematic”, on the other hand, the violent acts that make up the attack must be organised in nature, referring often to the existence of patterns of crimes and the improbability of their random or accidental occurrence.<sup>234</sup> This element is somewhat similar to the existence of a State policy to commit an attack, which may be inferred from, *inter alia*, (i) a recurrent pattern of violence, (ii) the use of public or private resources to further the policy, (iii) the involvement of State forces in the commission of crimes, (iv) statements, instructions or documentation attributable to the organisation condoning or encouraging the commission of crimes, and (v) an underlying motivation.<sup>235</sup> In principle, a State committing a systematic attack against a civilian population will satisfy the policy requirement.<sup>236</sup>

#### Facts

88. The experiences of the Victims detailed above form only a small fraction of the larger victimisation occurring in Sri Lanka. Indeed, the GoSL has been and is currently waging a war against Tamil nationals perceived to be LTTE supporters. Such individuals are routinely abducted, unlawfully detained, and tortured by the GoSL authorities. This constitutes a widespread and systematic attack against a civilian population.

89. Throughout the armed conflict as well as after the end of the hostilities in May 2009, numerous Tamils individuals have been abducted, detained and accused of being LTTE members or supporters, or were questioned about others who had such involvement such as links through spouses and relatives.<sup>237</sup> A pattern of increased arrests and enforced disappearances primarily in the North-East of Sri Lanka could be observed in 2006 due to the renewed fighting in the region with the breakdown of the ceasefire between the LTTE and the GoSL.<sup>238</sup> In fact, in 2006, the UN Working Group on Enforced Disappearances transmitted more cases of disappearances as urgent appeals to the GoSL than to any other country in the world, despite its relatively small population.<sup>239</sup> Between 2006 and 2009, there have been more than a 1000 reported cases of enforced disappearances after being detained by GoSL security forces.<sup>240</sup> Sri-Lanka currently has the world’s second highest number of cases registered with the UNWGEID. It is estimated that 60,000 to 100,000 people have disappeared, i.e. abducted, tortured and killed by the GoSL security forces.<sup>241</sup> The OHCHR Investigation on Sri Lanka (‘OISL’) has found that the majority of victims of enforced disappearances during the period of its mandate (i.e. 2001 and 2011) have been individuals perceived to have links with the LTTE.<sup>242</sup>

90. As evidenced by the accounts of the Victims as well as many others, despite the end of the armed conflict, the white van abductions of the GoSL continued against Tamils perceived as having links to the LTTE.<sup>243</sup> The abductions followed the notorious “white van” arrests perpetrated by the GoSL security forces throughout Sri Lanka, in particular in Colombo, Jaffna,

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<sup>234</sup> Ongwen Trial Judgment, para. 2682.

<sup>235</sup> Ongwen Trial Judgment, para. 2679; Ntaganda Trial Judgment, para. 674; ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, [Judgment pursuant to Article 74 of the Statute](#), 7 March 2014, (Katanga Trial Judgment) paras 1108-1110.

<sup>236</sup> Ongwen Trial Judgment, para. 2679; Katanga Trial Judgment, paras 1111-1113.

<sup>237</sup> Human Rights Council, [Report of the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism](#), 14 December 2018, (A/HRC/40/52/Add.3), para. 8.

<sup>238</sup> A/HRC/30/CRP.2\_E, para. 403-404; A/HRC/4/41, para. 396; Statement of Victim 28, para. 8

<sup>239</sup> A/HRC/30/CRP.2\_E, para. 387; Human Rights Watch, [Recurring Nightmare: State Responsibility for “Disappearances” and Abductions in Sri Lanka](#), March 2008.

<sup>240</sup> A/HRC/30/CRP.2\_E, para. 402-406.

<sup>241</sup> Human Rights Watch, [Families of Sri Lanka’s Forcibly Disappeared Denied Justice: Campaign of Intimidation, Blocking Legal Remedies](#), 25 August 2021; Amnesty International, [Sri Lanka: Fulfil the demands of the families of the disappeared](#), 14 February 2020.

<sup>242</sup> A/HRC/30/CRP.2\_E, para. 407.

<sup>243</sup> See above paras. 33-39; ITJP 2015 Report, p. 28; Human Rights Watch, [Locked up Without Evidence: Abuses under Sri Lanka’s Prevention of Terrorism Act](#), 29 January 2018 (HRW 2018 Report); A/HRC/34/54/Add.2, para. 21.

Barricaloa, Trincomalee and particularly after 2009, in areas around Vavuniya.<sup>244</sup> Different branches of the Sri Lankan security forces, including SLA, TID, CID and STF, work in coordination in perpetrating these unlawful and arbitrary arrests by sharing intelligence and information and joint planning.<sup>245</sup>

91. Generally speaking, such arrests are made under Sri Lanka's Prevention of Terrorism Act 1982 ('PTA'), the primary legislation applicable to national security and terrorism-related offences,<sup>246</sup> which has been used to detain an unknown number of individuals without access to legal recourse since its enactment.<sup>247</sup> The PTA allows the Sri Lankan security forces to arrest individuals suspected of "acting in any manner prejudicial to the national security or the maintenance of public order" or having "any transaction" with a person or group engaged in terrorist activities and be detained up to 18 months without charge or being brought before a court.<sup>248</sup> Furthermore, the PTA allows for confessions extracted under torture to be admissible as evidence before courts,<sup>249</sup> and provides immunity from prosecution for government agents who may commit wrongful acts, such as torture.<sup>250</sup> In essence, "[t]he [PTA]... constitutes a *de facto* state of emergency suspending fundamental rights and guarantees, including constitutional and international safeguards against acts of torture or ill-treatment."<sup>251</sup> Importantly, the GoSL has announced on 4 January 2020 that the counter-terrorism bill that was proposed by the previous government aimed at reforming the PTA would be withdrawn.<sup>252</sup>
92. The PTA, in effect, paved the way for and fostered widespread and systematic arbitrary detention, torture and enforced disappearances in Sri Lanka.<sup>253</sup> For instance, reportedly, 80 per cent of those who were arrested under the PTA in late 2016 complained of torture following their arrest.<sup>254</sup> The Special Rapporteur on Torture, also found in his 2016 report on Sri Lanka that "credible testimonies that torture and ill-treatment are inflicted on almost all suspects held under the [PTA] during detention by the [CID] and the [TID], as well as sometimes by the armed forces."<sup>255</sup>
93. The Sri Lankan authorities "use [PTA] to disproportionately against members of the Tamil community, it is this community that has borne the brunt of the State's well-oiled torture apparatus."<sup>256</sup> This is especially the case for Tamils who are suspected of having a link to the LTTE, including those who participate in Tamil diaspora activities.<sup>257</sup> This has been long documented by NGOs and international organisations alike.<sup>258</sup> As found by the HRW in 2018, "[c]ountless cases of torture, sexual violence and other ill-treatment have occurred in various official and unofficial places of detention, including but not limited to CID and TID offices in

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<sup>244</sup> A/HRC/30/CRP.2\_E, para. 346.

<sup>245</sup> A/HRC/30/CRP.2\_E, para. 352.

<sup>246</sup> Expert Opinion of Dr Nadarajah, para. 181.

<sup>247</sup> HRW 2018 Report, p. 2.

<sup>248</sup> Expert Opinion of Dr Nadarajah, para. 181; Preliminary Report of UN Special Rapporteur on Terrorism, p. 4; A/HRC/34/54/Add.2, para. 24.

<sup>249</sup> A/HRC/40/52/Add.3, para. 17; Amnesty International, [Sri Lanka: Briefing to Committee Against Torture](#), October 2011.

<sup>250</sup> HRW 2018 Report, p. 13; Human Rights Watch, [Sri Lanka: Events of 2015](#), January 2016. Expert Opinion of Dr Nadarajah, para. 74.

<sup>251</sup> UN Human Rights Council. 22 December 2016. A/HRC/34/54/Add.2, para. 28.

<sup>252</sup> A/HRC/43/19, para. 27

<sup>253</sup> A/HRC/30/CRP.2\_E, para. 51; Preliminary Report of UN Special Rapporteur on Terrorism, p. 3.

<sup>254</sup> Preliminary Report of UN Special Rapporteur on Terrorism, p. 3.

<sup>255</sup> A/HRC/34/54/Add.2, para. 31.

<sup>256</sup> Preliminary Report of UN Special Rapporteur on Terrorism, p. 3; HRW 2018 Report, p. 13.

<sup>257</sup> A/HRC/30/CRP.2\_E, para. 51; Expert Opinion of Dr Nadarajah, paras. 39, 181.

<sup>258</sup> HRW 2018 Report, p. 3.



Colombo.”<sup>259</sup> Similarly, Amnesty International reported in 2018, Sri Lankan authorities “detain Tamils suspected of links to the LTTE under the PTA, which permitted extended administrative detention and shifted the burden of proof to the detainee alleging torture or other ill-treatment...”<sup>260</sup> CERD has also found that the PTA has had “a disproportionate impact on ethnic and ethno-religious minorities such as Tamils, who have reportedly been targeted for arbitrary arrests and detentions under the Act... [which] allows for prolonged detentions without due process...”<sup>261</sup>

94. As early as 2007, the UN Special Rapporteur on Torture reported that torture was widely practiced in Sri Lanka.<sup>262</sup> This was confirmed by the UN Special Rapporteur on Human Rights and Counter-Terrorism in 2017. According to him, torture is “very deeply ingrained in the security sector and all of the evidence points to the conclusion that the use of torture has been and remains today, endemic and routine, for those arrested and detained on national security grounds.”<sup>263</sup> The National Human Rights Commission of Sri Lanka has confirmed this fact by indicating to the Special Rapporteur that “torture in custody was widespread, systemic and institutionalised.”<sup>264</sup> This statement echoed the findings of the UN Committee Against Torture in relation to Sri Lanka: “numerous individuals suspected of having a link, even remote, with the LTTE have been abducted and then subjected to brutal torture, often including sexual violence and rape of men and women... [S]uch practices are carried out by both military and police in unacknowledged places of detention, which have included law enforcement headquarters, army and [IDP] camps and rehabilitation centres.”<sup>265</sup> OISL also documented the “widespread, systematic and particularly brutal use of torture by the Sri Lankan security forces in the final days and the immediate aftermath of the armed conflict when security forces detained *en masse* civilians and former LTTE cadres as they crossed from the Vanni into Government-controlled areas.”<sup>266</sup> OISL documented “the use of torture in multiple facilities, including army camps, police stations, “rehabilitation camps”, and prisons... where torture was carried out on a routine basis.”<sup>267</sup>
95. UN Special Rapporteur on Torture also found in 2016 that “[t]orture and ill-treatment including of a sexual nature, still occur, in particular in the early stages of arrest and interrogation often for the purpose of eliciting confessions... The gravity of the mistreatment inflicted increases for those who are perceived to be involved in terrorism or offences against national security... [T]orture and ill-treatment are inflicted on almost all suspects held under the [PTA] during detention by the [CID] and [TID], as well as sometimes by the armed forces... [S]uspects, particularly detained under the [PTA], are often first detained for interrogation without being registered during the initial hours, days or sometimes weeks of investigation and not brought before a judge.”<sup>268</sup> According to the Special Rapporteur, “[t]he police resort to forceful extraction of information or coerced confessions rather than carrying out thorough investigations using scientific methods.”<sup>269</sup>

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<sup>259</sup> HRW 2018 Report, p. 22.

<sup>260</sup> Amnesty International, [Amnesty International Report 2017/18](#), February 2018, p. 342;

<sup>261</sup> CEDR, Concluding observations on the combined tenth to seventeenth periodic reports of Sri Lanka, 6 October 2016, para. 14.

<sup>262</sup> [Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Sri Lanka.](#)

<sup>263</sup> Preliminary Report of UN Special Rapporteur on Terrorism, p. 3

<sup>264</sup> A/HRC/40/52/Add.3, para. 24.

<sup>265</sup> CAT/C/LKA/CO/5, para. 11.

<sup>266</sup> A/HRC/30/CRP.2\_E, para. 542.

<sup>267</sup> A/HRC/30/CRP.2\_E, para. 545.

<sup>268</sup> A/HRC/34/54/Add.2, paras. 17, 24, 31; UNWGAD 2017 Report, pp. 10-11;

<sup>269</sup> A/HRC/34/54/Add.2, para. 17; See also *Human Rights Watch*, [Sri Lanka: Routine Police Torture Devastates Families](#), 23 October 2015.

96. Importantly, sexual violence has been a key feature of the widespread and systematic attack carried out by the GoSL against Tamils. As reported by the HRW, “[r]ape appears to have been a key element of the broader torture and ill-treatment of suspected LTTE members and others believed linked to the LTTE... [It] was one of the unlawful tools used by the Sri Lankan military and police against alleged LTTE members or supporters to gather intelligence on the LTTE network during...and immediately after the conflict ended in May 2009, as well as to obtain information about any remnants of the LTTE since then, whether in Sri Lanka or abroad [as well as] one of them methods used to force persons in custody to confess to membership in the LTTE and, as with other forms of torture, it may have been part of a broader government effort to instil terror in the Tamil community to discourage involvement with the LTTE.”<sup>270</sup>
97. This finding was confirmed by the UN OISL investigation: “[a]ll the information gathered by OISL indicates that incidents of sexual violence were not isolated acts but part of a deliberate policy to inflict torture to obtain information, intimidate, humiliate and inflict fear. The practices followed similar patterns, using similar tools over a wide range of detention locations, time periods, and security forces, reinforcing the conclusion that it was part of an institutional policy within the security forces.”<sup>271</sup> UNSG has also reported that “abductions, arbitrary detention, torture, rape and other forms of sexual violence have increased in the post-war period. Notably, Tamil women and girls have reported sexual abuse in the context of the ongoing militarization of their areas of residence. Allegations of sexual violence by the Sri Lankan security forces against members of the Tamil community in the closing months of the war and in the post-conflict period have been extensively documented, but rarely addressed. Testimony of women released from detention in 2014 indicates that acts of sexual torture were accompanied by racial insults and specifically directed against individuals perceived as having been linked to the [LTTE].”<sup>272</sup>
98. Furthermore, the similarity of the experiences of the Victims as well as numerous other victims whose accounts were documented by NGOs and international organisations in terms of the methods of torture they were subjected to,<sup>273</sup> including rape and sexual violence, by the perpetrators indicate a pattern and that the practices of the GoSL security forces were systematic and institutionalised.<sup>274</sup>
99. The recurrent nature of criminal acts described above, their persistent commission over decades all over Sri Lanka, and the involvement of the GoSL officials in their commission indicate the existence of a widespread and systematic attack against the civilian Tamil population in Sri Lanka by the GoSL authorities. GoSL officials committed these crimes as a part of its anti-LTTE campaign/policy in order to crush any possibility of a revival by the LTTE or Tamil separatism in Sri Lanka. As indicated above, the GoSL authorities made repeated statements indicating that this is their primary national security concern. While the exact numbers of victims are unknown, the consistent reporting by international organisations and NGOs indicate that the GoSL attack against the Tamil population has been ongoing at least since the beginning of the civil war in Sri Lanka in the 1980s and conservatively concerns tens of thousands of crimes and victims.

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<sup>270</sup> HRW 2013 Report, p. 29.

<sup>271</sup> A/HRC/30/CRP.2\_E, para. 591; See also *ibid.*, pp. 29-30

<sup>272</sup> UN Security Council, [Conflict-Related Sexual Violence](#), S//2015/203, 23 March 2015, para. 77.

<sup>273</sup> See above paras 36; ITJP 2015 Report; ITJP 2014 Report; A/HRC/30/CRP.2\_E, paras. 552-560; HRW 2013 Report.

<sup>274</sup> ITJP 2015 Report, p. 16;

**C. The crimes were committed by the Sri Lankan authorities within the temporal and territorial jurisdiction of the Court**

100. The GoSL authorities committed the crimes detailed in the preceding sections of this Communication against the Victims within the respective territories of Sri Lanka and the UK. While Sri Lanka is not a State Party to the Rome Statute, the UK has been a State Party since 30 November 1998.<sup>275</sup> The Court's baseline temporal jurisdiction is 1<sup>st</sup> of July 2002, i.e. the date that the Statute entered into force.
101. All of the criminal acts committed against the Victims took place after 1 July 2002. As such, no contention arises regarding the Court's temporal jurisdiction over these crimes.
102. Since Sri Lanka is not a State-Party to the Statute, the Court cannot exercise jurisdiction over the Sri Lankan perpetrators on the basis of their nationalities. Instead, it must be demonstrated that the crimes outlined in this Communication have been committed within the territorial jurisdiction of the Court. In line with the recent jurisprudence of the Court emerging from the situation in Myanmar/Bangladesh, this requires a demonstration of the fact that at least one legal element or a part of these crimes were committed on the territory of a State Party, even if they had commenced in the territory of a non-State Party.<sup>276</sup>
103. The authors submit that at least one legal element or a part of the crimes of deportation, deprivation of the right to return and persecution have been committed in the territory of the UK. As will be discussed below, regardless of the fact that these crimes have commenced in Sri Lanka, they have continued or been completed in the UK due to the ongoing acts and intent of the perpetrators and the presence of the Victims therein.

*The Court has territorial jurisdiction over the deportation of the Victims to the UK on the basis of the continuing nature of the crime*

104. The authors submit that the deportation of the Victims has taken place in part within the territory of the UK. This is regardless of the fact that their initial deportation has either been to a non-State Party (e.g. India), the international airspace or international waters. This is so due to the fact that the deportation, as a continuing crime, continues to be committed until the victims are allowed to return to their home State. As such, its commission extends to the location where the victims are located as refugees.
105. This argument was initially put forward by GRC during the Article 19(3) litigation in the Myanmar/Bangladesh situation.<sup>277</sup> In its response to the interveners, the OTP argued, in *obiter*, against the continuing nature of the crime of deportation.<sup>278</sup> The authors respectfully disagree with the OTP's assessment on this issue and would like to take this opportunity to submit their counterarguments.
106. In arguing that deportation is an instantaneous crime, the OTP put forward three arguments. First, the OTP argued that "the fact that the protected value underlying a crime may continue to be infringed does not *ipso facto* render the crime a continuing crime."<sup>279</sup> To support this

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<sup>275</sup> ICC, [United Kingdom, Signature Status](#).

<sup>276</sup> Myanmar/Bangladesh Article 19(3) Decision, para. 72; Myanmar/Bangladesh Authorisation Decision, para. 61.

<sup>277</sup> ICC, ICC-RoC46(3)-01/18, [Submissions on Behalf of the Victims Pursuant to Article 19\(3\) of the Statute](#), 30 May 2018, (GRC Submissions) paras. 81-87.

<sup>278</sup> ICC, ICC-RoC46(3)-01/18, [Prosecution Response to Observations by Intervening Participants](#), 11 July 2018, (OTP Response), para. 30(1).

<sup>279</sup> *Ibid.*

argument, the OTP used the example of murder and argued “the protected value underlying murder is the right to life. Murder invariably entails the permanent violation of the victim’s right to life, since killing is irreversible. This does not mean that the crime of murder ‘continues’ for as long as the victim is dead. Rather, it is incontrovertible that it is completed at the moment life is extinguished.”<sup>280</sup>

107. We agree with the OTP that, in addition to the continuing infringement of the protected value, there are other factors that must be taken into account in characterising a crime as continuing in nature. These include: (i) the continuing and accumulating harm on the victims after the precipitating act, and (ii) the continuing conduct (i.e. acts or omissions) of the perpetrators that cause the continuation of the harm in question.<sup>281</sup> These three factors must be considered in tandem in identifying and characterising the temporal nature of a particular crime. Another useful way of distinguishing continuing violations from instantaneous violations in the law of state responsibility is to see whether the remedy of cessation of the criminal act is still available to the offending State, or only restitution in kind or compensation suffices to provide reparation.<sup>282</sup> If it is the former, the violation is considered continuing, whereas if it’s the latter, it is considered instantaneous.
108. The authors contend that when these factors are cumulatively taken into account, it is clear that the crime of deportation qualifies as a continuing crime. Deportation starts with the coercive acts carried out by the perpetrator which creates a coercive environment that forces the victims to flee from their State of origin. These acts create an unlawful state of affairs where the victim is left without a genuine choice to remain and enjoy his/her fundamental right to live in the State in which they are lawfully present.<sup>283</sup> This right is susceptible to continuing infringement since it is not extinguished once the victim is deported. The right to return of the victim to his home State remains intact. As such, the victim’s right continues to be infringed as long as he/she is not allowed to return to his/her State of origin. This may be the case due to either the perpetrator’s (i) continuing acts that maintain the coercive environment that forced the victim to leave in the first place, which also prevent his/her return, or (ii) failure/omission to establish the conditions necessary for the victim’s return in safety and dignity. The crime continues as long as the perpetrator does not cease such conduct to allow the victims to return to their homes. The harm caused to the victim due to being away from his home State accumulates over time as long as he/she is not allowed to return.
109. In this sense, the authors respectfully disagree with the analogy that the OTP established between murder and deportation. The right to life of a murder victim is extinguished the moment he/she is killed. Accordingly, the legally protected interest under the crime of murder (i.e. right to life) is not susceptible to continuing infringement since it is *extinguished* the moment the victim dies. Furthermore, upon the death of the victim, the crime is simultaneously consummated and completed, since the harm caused to the victim as well as the conduct of the perpetrator ceases. Conversely, imprisonment is a continuing crime since the legally protected interest of the victims (i.e. right to liberty) is not extinguished the moment the victim is imprisoned but continues to be infringed until the victim is released. As long as the perpetrator does not cease his/her omission to release the victim, the harm caused to the victim, and,

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<sup>280</sup> *Ibid.*

<sup>281</sup> GRC Submissions, para. 68; For a study on the elements of continuing crimes, see U.Y. Aysev, *Continuing or Settled? Prosecution of Israeli Settlements under Article 8(2)(b)(viii) of the Rome Statute*, *Pal. Y. B. Int. Law* 20(1), 33-83, 2020, (Aysev) pp. 50-51;

<sup>282</sup> J. Pauwelyn, *The Concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems*, 66 *Brit. Y.B. Int’l L.* 415, 1996, p. 420; A. Nissel, *Continuing Crimes in the Rome Statute*, 25 *Mich. J. Int’l L.* 653, 2004, p. 667; Aysev, p.48.

<sup>283</sup> Myanmar/Bangladesh Article 19(3) Decision, para. 58.

therefore, the crime continues. Accordingly, the authors contend that deportation in this regard can be distinguished from murder and is more akin to imprisonment.

110. Second, the OTP argued that “[d]eportation, *stricto sensu* is concerned with the unlawful and forcible ejection of a person from the State in which they were lawfully present, whereas any ‘continuing’ crime of deportation *arguendo* amounts to preventing the ability of the victim to return to their State of origin. The perpetrator’s conduct thus differs in the same way that throwing a person out of a house is different from subsequently locking the door – the initial act(s) of coercion which led to the deportation will not always suffice to maintain the state of affairs excluding the victim(s) from returning.”<sup>284</sup> The OTP further noted that “deportation does not require the permanent displacement of the victim(s)... [which] make[s] it difficult to draw a direct analogy to the continuous nature of enforced disappearance.”<sup>285</sup> The OTP further contended that “deportation may not be directly analogous to the enlistment or conscription of children under the age of 15 years, where criminal liability inheres in their membership with an armed force or group. In this circumstance, the perpetrator may be liable on a ‘continuing’ basis not simply for the continued effects of the initial act of recruitment, but for their conduct in ‘maintaining’ the status of the victim as a member of the group.”<sup>286</sup>

111. In arguing this, the OTP appears to suggest, without substantiation, that continuing crimes cannot involve subsequent types of conduct that differ from the precipitating acts that initiated the crime. The example put forward by the OTP, i.e. the crime of enlistment or conscription of child soldiers, illustrates perfectly the frailty of this argument. Indeed, the initial conduct of recruitment of children into the armed forces by the perpetrator (i.e. throwing a person out of the house) are often different from the subsequent conduct that maintains them there (i.e. locking the door). The children are often forced to remain in the armed force through certain disciplinary/coercive measures enforced by the perpetrator designed to prevent desertion or simply due to his/her culpable omission to remove the children from the armed forces. Regardless, enlistment and conscription of child soldiers is recognised as a continuing crime by the ICC.<sup>287</sup> In this sense, a direct analogy can be established between deportation and enlistment/conscription of child soldiers. Just as the criminal liability in the crime of enlisting/conscribing child soldiers inheres in the continuing membership within an armed force or group,<sup>288</sup> criminal liability in deportation inheres in the perpetuation of the victims’ removal from their State of origin by the subsequent conduct of the perpetrator, i.e. the maintenance of the coercive environment that forced the victim to flee in the first place or a culpable omission to ensure that the victims can return to their home State in safety and dignity.

112. Lastly, the OTP argued that “[p]otential harms resulting from denial of any ‘right to return’ need not be addressed only by construing deportation as a ‘continuing’ crime. For example, the possibility cannot be excluded that such conduct might, in appropriate circumstances, potentially be prosecuted as an aspect of persecution or other inhumane acts, if the requisite elements were met.”<sup>289</sup>

113. While the authors wholeheartedly support the possibility of construing deprivation of the right to return as an inhumane act or as an underlying act of persecution, we contend that this does

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<sup>284</sup> OTP Response, para. 30(2).

<sup>285</sup> OTP Response, para. 30(2), fn. 66.

<sup>286</sup> OTP Response, para. 30(3).

<sup>287</sup> ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, [Judgment pursuant to Article 74 of the Statute](#), 14 March 2012, para. 572; Ntaganda Trial Judgment, para. 42, fn. 111-112.

<sup>288</sup> OTP Response, para. 30(3).

<sup>289</sup> OTP Response, para. 30(4).

not constitute a valid reason for not acknowledging deportation as a continuing crime. There are four principal reasons for this: First, whether a crime is of continuing nature or not is not determined by whether the potential harm is addressed by another crime or not. Rather, it should be assessed based on the factors outlined above.

114. Second, the scope of criminal acts that may be prosecuted under a charge of deportation (as a continuing crime) would inevitably be broader than other inhumane acts. A deportation charge would cover the initial criminal acts that caused the victim to flee as well as the subsequent acts that prevented him/her from returning, whereas ‘an other inhumane acts’ charge would only encompass the latter. As for persecution, while it is true that this charge may also allow for a broader scope of criminal acts to be taken into consideration, this would only be the case where the additional elements required to establish that a particular crime also amounts to persecution can be established. In this regard, there may be many situations where deportation was solely committed as a war crime due to the impossibility of establishing the existence of an associated widespread or systematic attack against a civilian population, meaning that neither other inhumane acts or persecution may be available as an alternative charge.
115. Third, in some cases, it may be difficult to demonstrate great physical or mental suffering of the victims (as required under Article 7(1)(k)) due solely to the deprivation of the right to return. Some victims may not suffer from such harm solely due to the fact that they cannot return to their homelands, but rather due to the totality of the criminal acts committed against them, including the coercion that forced them to flee their home States.
116. Fourth, as is the case with the Victims, construing deportation as a continuing crime would allow the Court to exercise territorial jurisdiction over deportation cases where the victims ended up in the territory of a State Party after passing through the high seas or the territories of non-States Parties. Not doing so, on the other hand, would render the Court unable to exercise jurisdiction in situations where the victims escaped their home State through the territory of a non-State Party or the high seas.

*The Court has territorial jurisdiction over the deprivation of the right to the return of the Victims*

117. As previously acknowledged by the Court as well as the OTP, at least one element of part of the crime of denial of the right to return under Article 7(1)(k) (i.e. unlawfully compelling the victims to remain outside their own country and the grave harm caused on the victims) occurs within the territory where they are present.<sup>290</sup> This is so even in situations where the measures to secure and consolidate the expulsion of the victims were taken by the perpetrators on the territory of a non-State Party.<sup>291</sup> Thus, if the victims who are deprived of their right of return are present in the territory of a State Party, the Court may exercise territorial jurisdiction over this crime.
118. As indicated above, the Victims are all *bona fide* refugees in the UK who are currently present therein. They have been deprived of their right to return while they were/are present in the UK. They have also suffered great mental harm due to the violation of their right to return in the territory of the UK. Accordingly, the deprivation of their right to return has been committed by the perpetrators on the territory of the UK, meaning that the Court may exercise territorial jurisdiction over the commission of this crime.

*The Court has territorial jurisdiction over the persecution of the Victims*

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<sup>290</sup> Myanmar/Bangladesh Article 19(3) Decision, para. 77-78; OTP Request, para. 125.

<sup>291</sup> OTP Request, para. 125.

119. The authors submit that the Victims were subjected to persecution by the Sri Lankan authorities partly in the territory of the UK. As previously argued by the Prosecution, deportation and deprivation of the right to return may be underlying acts of persecution.<sup>292</sup> Thus, if it can be proven that these crimes had a territorial link to the UK, the totality of the persecutory conduct inflicted upon the Victims by the perpetrators may fall into the Court's jurisdiction.
120. As discussed above, the Victims were deported from Sri Lanka by the perpetrators on ethnic/political grounds, meaning that deportation was committed as an underlying act of persecution. Since the Victims managed to make their way to the UK, the crime of deportation (as a continuing crime) has partly taken place therein. Indeed, the authors contend that the crime of deportation continues where the victims are present as long as they continue to be deprived of their right to live in their home States. Further, the Victims were deprived of their right to return in the UK on ethnic and political grounds, meaning that both the crimes of deprivation of the right to return and persecution are being committed within the territory of the UK.
121. Based on the foregoing, the authors submit that both the crimes of deportation and deprivation of the right to return as underlying acts of persecution have taken place, in part, within the territory of the UK. This means that the crime of persecution committed against the Victims has also partly taken place in the UK, bringing it within the territorial jurisdiction of the Court.

## **II. THE POTENTIAL CASES AGAINST PERPETRATORS OF DEPORTATION, DEPRIVATION OF THE RIGHT TO RETURN AND PERSECUTION IN SRI LANKA AND THE UNITED KINGDOM WOULD BE ADMISSIBLE UNDER ARTICLE 17**

### *Law*

122. In determining whether to initiate an investigation, the Prosecutor has to determine whether potential cases arising from a situation would be admissible pursuant to article 17.<sup>293</sup> Article 17(1) provides that 'the Court shall determine that a case is inadmissible where:
- A. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
  - B. The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
  - C. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
  - D. The case is not of sufficient gravity to justify action by the Court.
123. These criteria embody the two limbs of the admissibility test before the ICC: (a) the complementarity test pursuant to Article 17(1)(a)-(c), and (b) the gravity test pursuant to Article 17(1)(d). For a case to be admissible under article 17 it must satisfy both limbs.<sup>294</sup>

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<sup>292</sup> OTP Request para. 172; OTP Response, para. 30(4).

<sup>293</sup> Rome Statute, article 53(1)(b).

<sup>294</sup> *Ibid.*, para 52,



124. In determining admissibility during the preliminary examination phase, the Prosecutor must base her assessment on ‘one or more potential cases within the context of a situation based on a preliminary knowledge of the type of groups and/or persons or incidents that fall within the jurisdiction of the Court that are likely to be within the focus of future investigations and case(s).’<sup>295</sup> This preliminary selection of incidents and persons/groups is not binding on the formation of future concrete cases that are initiated subsequent to the closing of the preliminary examination and the initiation of the actual investigation, through the issuance of an arrest warrant pursuant to Article 58 of the Statute by the Pre-Trial Chamber.<sup>296</sup>

### A. Complementarity

125. The potential cases against perpetrators of deportation, deprivation of the right to return, and persecution arising from the situation in Sri Lanka satisfy the requirements of the complementarity test set out in article 17(a)-17(c) of the Statute. This is due to the inaction of the Sri Lankan authorities in investigating or prosecuting the commission of these crimes. Accordingly, the intervention of the ICC as an international complementary judicial body is critical in order to ensure accountability in relation to the commission of deportation, deprivation of the right to return, and persecution in Sri Lanka and the UK, and redress for the Victims.

#### *Law*

126. The complementarity test under Article 17 of the Statute is based on an assessment as to whether genuine investigations and prosecutions have been or are being conducted in the State(s) that has jurisdiction over the relevant crimes. Accordingly, the first step of the complementarity test is to ascertain whether there are ongoing investigations or prosecutions or whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned pursuant to Article 17(1)(a)-(c).<sup>297</sup> For a case to be inadmissible before the ICC, the domestic investigations and prosecutions “must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.”<sup>298</sup> This assessment has to be undertaken on the basis of concrete facts as they exist at the time and not on hypothetical national proceedings that may or may not take place in the future.<sup>299</sup>

127. Complete inaction on the part of the State having jurisdiction over a potential case will fail the first step of the complementarity test, automatically rendering the case admissible.<sup>300</sup> Under such circumstances, the second step of the test in relation to unwillingness/inability need not be addressed.<sup>301</sup>

#### *Facts*

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<sup>295</sup> ICC, Situation in the Republic of Kenya, [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#), Case No. ICC-01/09, 31 March 2010, (Kenya Authorisation Decision) para 48-50.

<sup>296</sup> *Ibid.*, para. 50.

<sup>297</sup> ICC, *Prosecutor v. Katanga*, [Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case](#), ICC-01/04-01/07-1497, 25 September 2009, (Katanga Admissibility Decision) para 78.

<sup>298</sup> ICC, *Prosecutor v. Gaddafi & Al-Senussi*, ICC-01/11-01/11 OA 4, [Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 1 May 2013 entitled “Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi”](#), 21 May 2014, para. 60; ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11 OA, [Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute”](#), 30 August 2011, para 40.

<sup>299</sup> ICC, *Prosecutor v. Kony et al*, ICC-02/04-01/05, [Decision on the Admissibility of the Case under Article 19\(1\) of the Statute](#), 10 March 2009, paras. 49-52.

<sup>300</sup> Katanga Admissibility Decision, para 78; Kenya Authorisation Decision, para 52.

<sup>301</sup> Katanga Admissibility Decision, para 78.



*The suspected perpetrators of the crimes*

128. As indicated by the Victims and reported by NGOs, white van abductions are generally carried out by the CID and TID, as well as in some cases the military, including the military intelligence.<sup>302</sup> While the Victims do not know the exact locations they were taken to, they have indicated in their statements that their interrogators and torturers often identified themselves as belonging to Sri Lankan security forces such as CID, TID and SLA.<sup>303</sup>
129. Accordingly, the authors were able to identify the following non-exhaustive list of potential suspects of the crimes of deportation, deprivation of the right to return and persecution that the authors were able to identify through an assessment of the statements made by the Victims and open-source research. While more in-depth investigations must be made to delineate the extent of their individual criminal responsibility, the authors contend that these individuals should be regarded as the primary suspects of the crimes committed against the Victims by the virtue of their respective positions of command and/or authority over the GoSL security units that were directly involved in the acts of abduction, unlawful detention, torture, deportation, deprivation of the right to return, and persecution outlined in this Communication.
- Gotabaya Rajapaksa (President; Former Secretary of Defence)
130. Gotabaya Rajapaksa is the current president of Sri Lanka, elected in November 2019. He previously served as the Secretary of Defence under his brother Mahinda Rajapaksa's government between 2005 and 2015, leading the SLA as well as the Sri Lankan Police Forces such as CID and TID that were directly implicated in the crimes described in this Communication. As detailed in the complaint submitted to US courts by a number of torture victims in 2019 against Gotabaya, Gotabaya oversaw the daily operations of the Ministry of Defence, and commanded the SLA from 2005 to 2015 and the police forces from 2005 to August 2013 (when the police were moved to the newly created Ministry of Law and Order).<sup>304</sup>
131. The Ministry of Defence ('MoD') in Sri Lanka is responsible for the formulation and execution of strategies with regard to the defence and protecting the territorial integrity and sovereignty of Sri Lanka. It is responsible for "all the State agencies which perform a defence or security role." Until August 2013, all branches of the security forces, including the police, came under the MoD. In addition to its role in military operations, from 2006, the high-level coordination meetings of all humanitarian operations into the Vanni took place at the Ministry of Defence.<sup>305</sup> As the Secretary of Defence, Gotabaya was the chair of the National Security Council and as such acted as the critical link between police/army operations and the political leadership of his brother, the President Mahinda Rajapaksa.<sup>306</sup>
132. The Secretary of Defence is the primary senior civil servant in the MoD. Under the emergency Regulations of 2005, the Secretary of Defence "was given sweeping powers to order arrests

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<sup>302</sup> ITJP 2014 Report, pp. 21, 31; ITJP, [Sri Lanka: Torture & Sexual Violence by Security Forces 2020-21, September 2021](#), p. 40; A.HRC.30.CRP.2\_E, para. 346, 352, 412, 541, 544, 561, 588-589

<sup>303</sup> See above para. 35.

<sup>304</sup> US District Court Central District of California, *Plaintiffs v. Gotabaya Rajapaksa*, [First Amended Complaint](#), 26 June 2019, (Gotabaya Complaint), para. 24.

<sup>305</sup> A.HRC.30.CRP.2\_E, para. 106.

<sup>306</sup> Gotabaya Complaint, para. 42.

and detention if he is of the opinion that the arrest is necessary *inter alia* in the interests of national security, and, from 2006 onwards, in relation to terrorism.”<sup>307</sup> The Secretary of Defence has the role of coordinating operations between the Armed Forces and police, as well as directing investigations.<sup>308</sup>

133. After the election of Mahinda Rajapaksa in 2005, Gotabaya and Mahinda (fierce promoters of Sinhala-Buddhist nationalism) built a strong-arm campaign to end the conflict with the LTTE through a final military solution. Gotabaya was the chief architect of this campaign, targeting Tamil opposition with little distinction between civilians and combatants.<sup>309</sup> After the end of the war, the Rajapaksa regime’s military and police forces continued to operate a system of detention centers around the country where countless Tamil citizens were subject to systematic torture and sexual violence.<sup>310</sup>
134. Specifically, as the Secretary of Defence, Gotabaya had control over the following Sri Lankan security forces that are directly implicated in abductions, unlawful detention, torture, deportation and persecutory harassment of Tamils during his term as the Secretary of Defence:
  - A. Sri Lankan Armed Forces: Gotabaya had authority over all appointments, promotions and disciplinary matters, including prosecuting offenders in a court-martial;
  - B. Intelligence: Gotabaya controlled the internal and foreign intelligence services, including the Military Intelligence Corps and State Intelligence Service;<sup>311</sup>
  - C. Police: Gotabaya exercised operational control over all wings of the police, including units such as the CID, TID, the Special Task Force (‘STF’), and the Colombo Crimes division.<sup>312</sup>
135. As the Secretary of Defence, Gotabaya was the real force behind security decisions and as such exercised control through a formal chain of command, opting at times to give direct orders to an inner circle of loyalists in these GoSL security institutions.<sup>313</sup> An insider witness, a white van abductor, stated that his director received confidential orders to threaten, torture and kill suspects directly from Gotabaya Rajapaksa in weekly meetings.<sup>314</sup> He further stated that Gotabaya instructed them to employ physical torture during the interrogations.<sup>315</sup> The direct perpetrators belonged to “a special team [within CID] that worked for the Secretary of Defence.”<sup>316</sup> A Tamil victim of torture, on the other hand, stated that his torturers boasted that they work directly under the Secretary of Defence and that they can do whatever they want without any consequences.<sup>317</sup>
  - Maj. Gen. Kamal Gunaratne (Secretary of Defence)

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<sup>307</sup> A.HRC.30.CRP.2\_E, para. 108.

<sup>308</sup> A.HRC.30.CRP.2\_E, para. 108.

<sup>309</sup> Gotabaya Complaint, para. 29.

<sup>310</sup> Gotabaya Complaint, para. 33.

<sup>311</sup> SIS functions in “close coordination, including weekly meetings under the Secretary of Defence, of the different intelligence services, including the SIS, police intelligence units and the Directorate of Military Intelligence to exchange information on the LTTE.” A.HRC.30.CRP.2\_E, para. 127.

<sup>312</sup> Gotabaya Complaint, para. 38-40.

<sup>313</sup> Gotabaya Complaint, para. 37.

<sup>314</sup> ITJP 2015 Report, p. 52.

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.* pp. 51-52.

<sup>317</sup> *Ibid.* p. 51.

136. Kamal Gunaratne is the current Secretary of Defence of the GoSL. During the armed conflict, he was the commander of one of the most powerful military divisions, i.e. the 53<sup>rd</sup> Division,<sup>318</sup> which was involved in acts of torture during and after the war.<sup>319</sup>
137. He was in charge of one of the most notorious army torture camps in Vavuniya, the Joseph Camp (also known as the Vanni Security Force Headquarters), for 18 months between July 2009 to December 2010, in the immediate aftermath of the war.<sup>320</sup> Illegal detention, interrogation and torture were committed systematically and routinely in Joseph Camp.<sup>321</sup> Those who have been tortured there describe purpose-built torture rooms inside the camp and systematic torture and sexual violence by the military in the presence of senior officers.<sup>322</sup>
138. Gunaratne acted as the “Competent Authority for IDPs” from November 2009 until the end of 2010.<sup>323</sup> In this role, he was one of the principal army officers in charge of the IDP camp in Manik Farm where hundreds of thousands of civilians were illegally detained in the immediate aftermath of the armed conflict.<sup>324</sup> In this role, he was also involved in the screening of the IDP during the post-war period for putting them in rehabilitation programmes.<sup>325</sup> During the screening process, Tamils were subjected to arbitrary detention, enforced disappearance, torture, rape and other forms of sexual violence.<sup>326</sup>
- Jagath Jayasuriya (Former Army Commander; Former Chief of Defence Staff)
139. Jagath Jayasuriya is the former Army Commander and Chief of Defence Staff of the SLA between 2007-2015. He was the commander of the Vanni Security Force between August 2007 and July 2009.<sup>327</sup> In this role, he was also the commander of the infamous Joseph Camp where, as indicated above, countless Tamils were interrogated and tortured by the SLA.<sup>328</sup>
140. During Jayasuriya’s command, the Joseph Camp was the “hub for the notorious ‘white vans’ used by the Sri Lankan security forces to abduct suspects.”<sup>329</sup> An insider victim explained: “[w]hen there were “white van” abductions ordered, at least a Sergeant was given the order to make the abduction and he would take four corporals and a number of us who worked with them... At Joseph Camp we had about four such vans... When were ordered to abduct a specific target we never wore uniforms. We always looked like ordinary civilians.”<sup>330</sup> Witnesses explained that Joseph Camp had torture Chambers where objects such as metal bars, poles, barrels of water, pulleys and other apparatus were located.<sup>331</sup>
- Successive Inspector-Generals of Sri Lanka since 2002

<sup>318</sup> International Truth and Justice Project Sri Lanka, [Kamal Gunaratne Secretary of Defence Sri Lanka: Dossier, December 2019](#), (Gunaratne Dossier), p. 3; A.HRC.30.CRP.2\_E, para. 116.

<sup>319</sup> A.HRC.30.CRP.2\_E, para. 544.

<sup>320</sup> Gunaratne Dossier, p. 39.

<sup>321</sup> Gunaratne Dossier, p. 39, 82; A.HRC.30.CRP.2\_E, paras. 371, 557, 563, 595, 597 and 602.

<sup>322</sup> Gunaratne Dossier, p. 39.

<sup>323</sup> Gunaratne Dossier, p. 43.

<sup>324</sup> Gunaratne Dossier, p. 43; See above para. 30.

<sup>325</sup> Gunaratne Dossier, p. 45.

<sup>326</sup> Gunaratne Dossier, p. 45, 83; A.HRC.30.CRP.2\_E, paras. 607-620.

<sup>327</sup> International Truth and Justice Project Sri Lanka, [General Jagath Jayasuriya: Fact Sheet](#), (Jayasuriya Dossier I), p. 2.

<sup>328</sup> International Truth and Justice Project Sri Lanka, [Joseph Camp: Fact Sheet](#), (Jayasuriya Dossier II), p. 1; See above paras. 33 and 136.

<sup>329</sup> Jayasuriya Dossier II, p. 1.

<sup>330</sup> Jayasuriya Dossier II, p. 1.

<sup>331</sup> Jayasuriya Dossier II, p. 1.

141. The Sri Lankan Police ('SLP') is the primary governmental institution responsible for law enforcement in Sri Lanka. Until August 2013, the SLP was under the Ministry of Defence and Urban Development. Since then, it came under the newly formed Ministry of Law and Order. The SLP is headed by the Inspector General of Police ('IGP') who is appointed by the President. The IGP is a member of the National Security Council.<sup>332</sup> Sub-divisions such as TID, CID and the Special Task Forces operate under the auspices of the SLP.<sup>333</sup> These units of SLP have been identified by NGOs, international organisations and the Victims as being involved in abductions, unlawful detention and torture of Tamil nationals suspected of having links to the LTTE.<sup>334</sup>
142. Since 2002, the following individuals have been the Inspector-General of Sri Lanka: (i) T. E. Anandaraja, from 2002 to December 2003, (ii) Indra De Silva, from December 2003 to October 2004, (iii) Chandra Fernando, from October 2004 to October 2006, (iv) Victor Perera, from October 2006 to July 2008, (v) Jayantha Wickramaratna, from July 2008 to November 2009, (vi) Mahinda Balasuriya, from November 2009 to July 2011, (vii) N. K. Illangakoon, from July 2011 to April 2016, (viii) Pujith Jayasundara, from April 2016 to March 2020, and (ix) C. D. Wickramaratne, from November 2020 to present.<sup>335</sup>
- Sisira Mendis (Former Deputy Inspector General in charge of CID and TID)
143. Sisira Mendis was the Deputy Inspector General in charge of the CID and TID during the final phases of the armed conflict from March 2008 until June 2009.<sup>336</sup> The Director of the TID at the time, C.N. Wakishta, carried out his duties under the command of Mendis.<sup>337</sup> Furthermore, between July 2015 and June 2019, Mendis held a senior intelligence role as the Director of the Centre for National Intelligence in the Ministry of Defence, attending to the weekly meetings of the National Security Council.<sup>338</sup>
144. The CID is the branch of the Sri Lankan Police that is primarily responsible for investigating serious and organised crime but also engaged with counter-terrorism activities. The notorious 4<sup>th</sup> Floor facility at Police HQ in Colombo where many detainees are taken for interrogation and CID implement their torture policies.<sup>339</sup> The TID, on the other hand, has a specific focus on preventing and investigating acts of terrorism as defined in the Prevention of Terrorism Act. The exact division of responsibility for the torture between the CID and TID remains unclear.<sup>340</sup>
145. Both the CID and TID have repeatedly been accused by the UN bodies and special rapporteurs as being involved in the abduction, unlawful detention and torture, including sexual violence, of Tamil individuals as well as the reprisals against the families of the disappeared individuals.<sup>341</sup> As indicated above, many of the direct perpetrators that were involved in the

<sup>332</sup> A.HRC.30.CRP.2\_E, para .128.

<sup>333</sup> A.HRC.30.CRP.2\_E, para .129.

<sup>334</sup> See above paras. 35-37, 60, 90 and 92-95.

<sup>335</sup> Sri Lankan Police, [List of Inspector Generals of Police](#).

<sup>336</sup> International Truth and Justice Project Sri Lanka, [The Case Against Sisira Mendis, 15 November 2016](#), (Mendis Dossier), pp. 1, 10.

<sup>337</sup> A.HRC.30.CRP.2\_E, para .135; [Mendis Dossier](#), pp. 10-11.

<sup>338</sup> [Mendis Dossier](#), p. 9.

<sup>339</sup> A.HRC.30.CRP.2\_E, para .134.

<sup>340</sup> A.HRC.30.CRP.2\_E, para .135.

<sup>341</sup> See for instance, PoE Report, paras. 153, 163, 220; A.HRC.30.CRP.2\_E, paras. 346, 352, 369, 371, 373-374, 412-414, 415, 464, 465, 524, 541, 544, 553, 556, 558, 561, 588-589, 595, 606, 1077; Human Rights Council, [Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(Manfred Nowak\): Mission to Sri Lanka](#), 26 February 2008, A/HRC/7/3/Add.6, paras. 70-73; A/HRC/34/54/Add.2, para. 22

abduction, detention and torture of the Victims identified themselves as belonging to the CID or TID.<sup>342</sup>

○ Successive Commandants of the Special Task Force since 2002

146. The Special Task Force ('STF') is an elite paramilitary unit within the police formed in 1983 to provide additional support to the police in relation to the rising LTTE threat. STF cadres resemble the military rather than the police in terms of the uniforms, equipment and weapons that they use. The STF reports to the Inspector-General.<sup>343</sup> The STF is involved in the abduction, detention and torture of suspected LTTE sympathisers.<sup>344</sup>

147. The STF Commandants since 2003 are: (i) Nimal Lewke from September 2003 to March 2008, (ii) K. M. L. Sarathchandra, from March 2008 to March 2011, (iii) R. W. M. C. Ranawana from March 2011 to May 2014, (iv) J. K. R. A. Perera from May 2014 to August 2016, (v) M. R. Latiff, from August 2016 to present.<sup>345</sup>

**b. The inaction of the Sri Lankan authorities renders the potential cases involving the crimes of deportation, deprivation of the right to return and persecution admissible before the ICC**

148. There is no information available which indicates that the suspects named above have been subjected to any genuine domestic investigations or prosecutions for their respective criminal responsibility in the commission of the crimes against humanity of deportation, deprivation of the right to return and persecution against the Victims. As such, an ICC case against them would be admissible.

149. As confirmed by respected international organisations and NGOs over the years, this is primarily a consequence of the culture of impunity in Sri Lanka for the widespread and systematic commission of these crimes by GoSL authorities. The authors contend that the ongoing persecution (including continuing abductions, detention and torture), and the consequential deportation and the denial of the right of the victims to return home of the Victims must be understood in the context of the GoSL's persistent and intentional omission to "hold the security forces accountable, to investigate allegations and to bring to trial those responsible."<sup>346</sup> Through such conduct, over the years, the GoSL "has created a climate of impunity such that those responsible for these violations behave as if they have the approval of the government at the highest level."<sup>347</sup>

150. Indeed, rather than trying to bring those responsible to justice, GoSL routinely denies the commission of these crimes by its officials: as concluded by OISL "the Sri Lankan authorities have for the most part downplayed the phenomenon of enforced disappearances and have denied the involvement of the security forces."<sup>348</sup> During the presidency of Mahinda Rajapaksa from November 2005 onwards (during which Gotabaya Rajapaksa was the Secretary of Defence), especially, GoSL authorities have repeatedly denied any responsibility

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<sup>342</sup> See above para. 35.

<sup>343</sup> A.HRC.30.CRP.2\_E, para. 132.

<sup>344</sup> A.HRC.30.CRP.2\_E, para. 346, 412, 425, 428, 464, 544

<sup>345</sup> Sri Lankan Police, [Commandants of the Special Task Force](#).

<sup>346</sup> ITJP 2014 Report, p. 66.

<sup>347</sup> *Ibid.*, p. 66.

<sup>348</sup> A/HRC/30/CRP.2\_E, para. 396.

for enforced disappearances.<sup>349</sup> Importantly, during the consideration of its periodic report to the Human Rights Committee, the GoSL claimed that “the reference to “white vans” as a means of disappearances is a sensationalised allegation that appeared in some media reports, rather than being based on realistic facts.”<sup>350</sup> As such, as concluded by OISL the GoSL “is not known to have conducted any credible, thorough and independent investigation into [the enforced disappearance] cases to clarify the fate and whereabouts of those taken away.”<sup>351</sup>

151. For instance, the ongoing work of the Human Rights Commission of Sri Lanka (‘HRCSL’) on enforced disappearances since its establishment in 1996 have been significantly disrupted after the change of leadership in 2006: “[o]ne of the first measures the new Chair, Justice Ramanathan, took was to order to staff to cease work on the database of the disappeared.”<sup>352</sup> Furthermore, a number of commissions of inquiry were established by different Governments between 1991 and 2013. Their recommendations, however, were never followed up in a meaningful manner and only a small number of cases led to convictions of those responsible.<sup>353</sup>
152. The Presidential Commission on Abductions, Disappearances and Killings (September 2006) and its follow-on Commission (May 2007) is a case on point. In its unpublished report, the Commission downplayed the cases of disappearances as “a tool of political propaganda against the Government...”<sup>354</sup> Both this report, as well as the one published by the follow-on Commission appeared to be “primarily aimed at undermining and dismissing allegations of disappearances as part of a propaganda campaign to stain the image of [Sri Lanka]. It described as baseless propaganda reports of disappearances, rapes of Tamil women and security forces killings of Tamil youth, and referring to a sensationalisation of minor incidents.”<sup>355</sup> This was regarded by the UN OISL as a confirmation of “the lack of credibility and independence of the investigation.”<sup>356</sup> OISL further found that “[t]he majority of the many commissions of inquiry appear to have been designed to deflect criticism in high profile cases rather than as effective mechanisms to enable accountability...”<sup>357</sup>
153. The lack of political will or interest of the GoSL towards allegations of enforced disappearances by its security forces is also apparent from the fact that the majority of the criminal prosecutions carried out against lower-level perpetrators of the cases of enforced disappearances under the respective governments of Sri Lanka have not produced any tangible results in terms of punishing the perpetrators or providing the victims with redress.<sup>358</sup>
154. In March 2011, the Panel of Experts on Accountability in Sri Lanka (‘Panel’) indicated that the Government’s efforts, nearly two years after the end of the conflict “fall dramatically short of international standards on accountability and fail to satisfy Sri Lanka’s legal duties.” The

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<sup>349</sup> A/HRC/30/CRP.2\_E, para. 397-398

<sup>350</sup> A/HRC/30/CRP.2\_E, para. 398.

<sup>351</sup> A/HRC/30/CRP.2\_E, para. 441.

<sup>352</sup> A/HRC/30/CRP.2\_E, para. 472.

<sup>353</sup> A/HRC/30/CRP.2\_E, para. 476; For more information, see para. 478 onwards.

<sup>354</sup> A/HRC/30/CRP.2\_E, para. 488.

<sup>355</sup> A/HRC/30/CRP.2\_E, para. 490.

<sup>356</sup> A/HRC/30/CRP.2\_E, para. 488.

<sup>357</sup> A/HRC/30/CRP.2\_E, para. 1276.

<sup>358</sup> A/HRC/30/CRP.2\_E, para. 496-508



Panel also concluded that the GoSL “has not discharged its responsibilities to conduct a genuine investigation, nor shown any signs of an intention to do so.”<sup>359</sup>

155. In 2013, OHCHR reported that “progress on accountability and reconciliation remained extremely limited, and that disturbing pattern of extrajudicial killings, abductions, enforced disappearances and torture by the security forces and paramilitary groups continued.”<sup>360</sup>
156. The OISL found in 2015 by indicating that “impunity is deeply entrenched in Sri Lanka and... victims of gross human rights violations, serious violations of [IHL] and international crimes have for too long been denied their rights to remedy and reparations. Instead, they have often faced and continue to face, threats, intimidation or even physical abuse when seeking to present complaints to the police or courts.”<sup>361</sup> Furthermore, as reported by the ITJP in 2015, despite clear and convincing evidence of torture taking place in various military camps and detention centres over many years, the GoSL had done little or nothing to bring the perpetrators to justice.<sup>362</sup> According to ITJP, “[t]he perpetrators have such a high degree of impunity that systematic torture, including rape and sexual violence, has become elevated to an industry and is now part of a state-run machinery of corruption and extortion...”<sup>363</sup> This finding appears to be as true in 2015 as it is today. The impunity for past and present torture cases have also been noted by the UN Special Rapporteur on Torture in 2016.<sup>364</sup>
157. In 2017, OHCHR found that “the general and consistent absence of progress [in accountability] conveys the impression of a lack of will to effectively investigate, prosecute and punish serious crimes.”<sup>365</sup> OHCHR further added that “the prevailing culture of impunity for perpetrating torture” has undoubtedly contributed to the routine use of torture by the police in Sri Lanka.<sup>366</sup> A similar finding was made by the Special Rapporteur on Terrorism: “[d]espite the shocking prevalence of the practice of torture in Sri Lanka, the Special Rapporteur notes the lack of effective investigations into such allegations.”<sup>367</sup> The CAT has also in 2017 found that in Sri Lanka “impunity prevails in most cases of torture in [Sri Lanka.]”<sup>368</sup>
158. While the criminal justice system in Sri Lanka has long been subject to interference, the current Gotabaya administration appears to have increased its obstruction of ongoing investigations and criminal trials to prevent accountability for past crimes.<sup>369</sup> Importantly, OHCHR found in 2020 that “the failure to ensure accountability for past violations and to undertake comprehensive security sector reforms to dismantle structures that facilitated them means that the people of Sri Lanka from all communities have no guarantee that violations will not recur...Very little action has been taken to remove individuals responsible for past violations, to dismantle structures and practices that have facilitated torture, enforced disappearance and extrajudicial killings, and to prevent their recurrence.”<sup>370</sup> According to

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<sup>359</sup> PoE Report, para. 441; A/HRC/30/CRP.2\_E, para. 1177

<sup>360</sup> See A/HRC/22/38

<sup>361</sup> A/HRC/30/CRP.2\_E, para. 1178.

<sup>362</sup> ITJP 2015 Report, p. 69, 75

<sup>363</sup> ITJP 2015 Report, p. 122.

<sup>364</sup> A/HRC/34/54/Add.2, para. 90.

<sup>365</sup> A/HRC/34/20, para. 41.

<sup>366</sup> A/HRC/34/20, para. 56.

<sup>367</sup> Preliminary Report of UN Special Rapporteur on Terrorism, p. 3

<sup>368</sup> CAT/C/LKA/CO/5, para. 19

<sup>369</sup> Promotion reconciliation, accountability and human rights in Sri Lanka, A/HRC/46/20, 27 January 2021, paras. 26-28

<sup>370</sup> A/HRC/43/19, para. 34.

OHCHR in 2020, there appears to be “systematic impediments to accountability in the criminal justice system [in Sri Lanka].”<sup>371</sup>

159. As late as 2021, OHCHR found there to be a persistent, longstanding and endemic commission of abductions, custodial deaths, use of torture, sexual violence and other ill-treatment, and extrajudicial killings by Sri Lankan security forces with impunity.<sup>372</sup> Similarly, noting the widespread enforced disappearances, arbitrary detention, torture and sexual violence that occurred in Sri Lanka since the beginning of the armed conflict, the OHCHR has held that “impunity prevailed. Cases that reached the courts were the subject of interminable delays, interference, harassment of victims and witnesses and only exceptionally achieved convictions.”<sup>373</sup> OHCHR further concluded that “[t]he decade-long lack of progress and the insurmountable barriers for victims to access justice... indicate the inability and unwillingness of the State to prosecute and punish perpetrators of crimes when State agents are the alleged perpetrators.”<sup>374</sup> Moreover, “[t]he authorities have not yet demonstrated the capacity or willingness to address impunity for gross violations and abuses of [IHRL] and serious violations of [IHL]... An overall trait of the Sri Lankan justice system is the perceived double standards in the administration of justice with regard to the treatment of State officials or security personnel accused in criminal proceedings.”<sup>375</sup>
160. The main obstacles for accountability in Sri Lanka have been identified as the lack of political will, independent oversight of appointments to the judiciary (including the Human Rights Commission and other bodies), interference of the Executive in judicial matters, undue delays in cases languishing in the courts for many years without progress, threats and reprisals against those who make complaints against security forces and Government officials, as well as lawyers and judicial officials and lack of legislation criminalising international crimes and instituting modes of liability including command/superior responsibility.<sup>376</sup> The abuses by the police forces are especially difficult to hold to account due to factors such as difficulties in filing complaints due to police intransigence, fear of reprisals, retaliatory threats and harassment and overdue delays in reported cases.<sup>377</sup>

### **c. The crimes are sufficiently grave to warrant ICC’s intervention**

#### *Law*

161. The second limb of the admissibility test pursuant to Article 17(1)(d) relates to the gravity of the alleged crimes. A case must be of sufficient gravity to justify action by the Court.
162. The assessment of gravity in relation to a potential case that may arise from a situation includes an assessment of both quantitative and qualitative considerations, taking into account the nature, scale and manner of commission of the alleged crimes, as well as their impact on

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<sup>371</sup> A/HRC/43/19, paras. 20-21

<sup>372</sup> A/HRC/46/20, para. 38.

<sup>373</sup> A/HRC/46/20, para. 8.

<sup>374</sup> A/HRC/46/20, para. 51.

<sup>375</sup> Human Rights Council, [Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka](#), A/HRC/37/23, 25 January 2018, para. 39.

<sup>376</sup> A/HRC/30/CRP.2\_E, para. 1182.

<sup>377</sup> Human Rights Watch, [We Live in Constant Fear: Lack of Accountability for Police Abuse in Sri Lanka](#), 2015, p. 47

the victims.<sup>378</sup> While it can act as an indication of gravity, there is no specific requirement for the crimes to be large-scale or systematic under the gravity test.<sup>379</sup>

163. As indicated in the OTP's policy paper on gravity, "the scale of the crimes may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread."<sup>380</sup> The nature of the crime, on the other hand, "refers to the specific factual elements of each offence such as killings, rapes, other sexual or gender-based crimes, crimes committed against or affecting children, persecution..."<sup>381</sup> The manner of commission "may be assessed in light of, *inter alia*, the means employed to execute the crime, the extent to which the crimes were systematic or resulted from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, the existence of elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination held by the direct perpetrators..."<sup>382</sup> Lastly, the impact of the crimes "may be assessed in light of, *inter alia*, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities."<sup>383</sup>

### *Facts*

164. The authors submit that the crimes committed against the Victims meet the gravity threshold under Article 17(d) to warrant the initiation of an investigation by the Prosecutor. The Victims have been subjected to persecution through the commission of various crimes under the Statute, deported from their homelands, and were subsequently prevented from returning their homes by the GoSL security forces. These crimes have been committed in a widespread and systematic manner by the GoSL against the Victims as well as numerous others. The Victims have suffered and continue to suffer immense physical and mental harm as a result.
165. As explained above, the Victims have been abducted, held in unlawful detention for prolonged periods of time, brutally tortured, subjected to sexual violence (including rape) due to their political and ethnic identities and were, thus, forced to leave Sri Lanka by GoSL authorities.<sup>384</sup> Following their deportation, the Victims were deprived of their right to return to their homes through the continuing surveillance and harassment of the GoSL authorities towards them, as well as their family members who remained in Sri Lanka.<sup>385</sup>
166. As a result of the crimes committed against them, the Victims have suffered severe physical and mental injury. As confirmed by medical professionals (who assessed the physical and mental health of the Victims in the course of their asylum applications to the UK), the Victims have all been suffering from insomnia, nightmares, flashbacks, panic attacks, intrusive thoughts, PTSD and severe depression due to the crimes committed against them in Sri Lanka

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<sup>378</sup> Situation in Comoros, ICC-01/13, [Decision on the Request of the Union of the Comoros to review the Prosecutor's Decision not to Initiate an Investigation](#), 16 July 2015, para. 21; Kenya Authorisation Decision, paras. 60-62; Situation in the Republic of Côte d'Ivoire, ICC-02/11, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire](#), 15 November 2011, paras. 203-205.

<sup>379</sup> Situation in the Democratic Republic of the Congo, ICC-01/04, [Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"](#), 12 July 2006, para 71.

<sup>380</sup> ICC, [OTP Policy Paper on Case Selection and Prioritisation](#), 15 September 2016, para. 38.

<sup>381</sup> *Ibid.*, para. 39.

<sup>382</sup> *Ibid.*, para. 40.

<sup>383</sup> *Ibid.*, para. 41.

<sup>384</sup> See above paras 28-39.

<sup>385</sup> See above paras. 51-62.

and the prospect of being returned to Sri Lanka under the current circumstances. The majority of them have been identified as suicide risks.<sup>386</sup> One of the Victims, for instance, was reported to have “thoughts of suicide and self-harms by scratching his body to cause himself pain.”<sup>387</sup> Another Victim stated that she experiences “memory loss, poor appetite, lack of sleep, headaches, pain on [her] leg and... nightmares about what happened to her in detention in Sri Lanka.”<sup>388</sup> Yet another Victim stated that, upon learning of the harassment of the GoSL authorities towards her mother, “my mental health significantly deteriorated with nightmares and flashbacks, feeling guilty of putting [her] in danger. I believed that ending my life is the only solution, as I am unable to remain in the UK and I can’t even think about returning to Sri Lanka.”<sup>389</sup>

167. The families of the Victims have also suffered immense harm as a result of these crimes committed against their loved ones, as well as the ongoing harassment they face from the GoSL authorities in Sri Lanka. The pain and suffering inflicted by the GoSL authorities on their families, in turn, exacerbated significantly the mental suffering of the Victims.
168. As indicated by numerous international organisations and NGO reports outlined in this Communication, the perpetrators were GoSL authorities abusing their official capacities and were acting with discriminatory intent against Tamils. The methods of torture they employed were particularly cruel and designed to inflict as much pain on the Victims as possible. Due to the pervasive culture of white van abductions that have been enforced by the GoSL authorities for decades now, the Tamil community in Sri Lanka, especially those who have actual or perceived links to the LTTE, lives in constant fear of being abducted, tortured and possibly killed.
169. While the number of the victims represented by GRC is 200, this is only the tip of the iceberg. While the exact numbers of victims are unknown, these crimes have been and continue to be perpetrated by the GoSL authorities against tens of thousands of Tamils suspected of having links to the LTTE in a widespread and systematic manner throughout Sri Lanka, especially in the Eastern and Northern provinces since at least 2002, i.e. the baseline temporal jurisdiction of the Court.

## **CONCLUSION:**

170. The authors contend that the information presented in this Communication sufficiently demonstrates that there is a reasonable basis to believe that the crimes against humanity of deportation, deprivation of the right to return, and persecution under Article 7 of the Statute have been and continue to be being committed in Sri Lanka and the UK.

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<sup>386</sup> Medicolegal Report of Victim 1, para. 37-70; Medicolegal Report of Victim 2, paras. 3-12; Medicolegal Report of Victim 3, paras. 60-68; Medicolegal Report of Victim 4, paras. 41, 51-58; Medicolegal Report of Victim 5, paras. 33-43, 85; Medicolegal Report of Victim 6, para. 52-56, 65; Medicolegal Report of Victim 7, para. 48-56; Medicolegal Report of Victim 8, paras. M2-E4, O1-O3; Outline of Victim 9’s Account, p.3; Medicolegal Report of Victim 10, para. 95-105; Medicolegal Report of Victim 11, para. 23, 67-73, 89; Psychiatric Report of Victim 12, para 14; Outline of Victim 13’s Account, p. 2; Outline of Victim 14’s Account, p. 3; Statement of Victim 16, paras. 30, 39-40; Medicolegal Report of Victim 17, para. 69; Medicolegal Report of Victim 18, para. 38-43; Statement of Victim 19, para. 2-6; Medicolegal Report of Victim 20, paras. E5, E13, O1-O1; Medicolegal Report of Victim 21, para. E2-E5 and Addendum Medicolegal Report of Victim 21, paras. 19-20; Medicolegal Report of Victim 22, paras. 45O-54O; Medicolegal Report of Victim 23, paras. 50-60; Psychiatric Report of Victim 24, para. 16; Medicolegal Report of Victim 25, paras. 34, 47, 65-66; Psychiatric Report of Victim 26, p. A76-A78; Medicolegal Report of Victim 26, para. O1-O10; Medicolegal Report of Victim 27, paras. 116-128; Medicolegal Report of Victim 28, paras. O3-O9.

<sup>387</sup> Medicolegal Report of Victim 1, para. 52.

<sup>388</sup> Statement of Victim 7, para. 44.

<sup>389</sup> Statement of Victim 23, para. 47.

171. The GoSL authorities have been committing the crimes outlined in this Communication for decades, in wanton disregard of international law. As evidenced by the conduct and statements of its officials, the ultimate objective of the GoSL is to annihilate the “LTTE ideology” and Tamil separatism by any means necessary, including through persecution. To this end, GoSL abducted, unlawfully detained, and tortured Tamil nationals suspected of having any affiliation with the LTTE or espousing pro-Tamil/separatist political beliefs. The systematic and widespread commission of these crimes has led countless victims to flee Sri Lanka. Deportation, however, was not the end of it for the victims. GoSL continued to surveil, harass and threaten them, as well as, their families and effectively deprived them of their right to return to their homelands. Most of the Victims represented by the authors, for instance, have been granted asylum in the UK due to their legitimate fears of persecution if they were to return to Sri Lanka.
172. These crimes have been committed against the Victims partly within the territory of the UK due to (i) the continuing nature of the crime of deportation, and (ii) the fact that the Victims are subjected to persecution and deprivation of their right to return within the territory of the UK. Accordingly, the Court may exercise territorial jurisdiction over these three distinct crimes against humanity. The authors contend that the initiation of an investigation by the Prosecutor of the ICC is imperative to ensure that the inalienable rights of the Victims to know the truth, to have access to justice, and request reparations for their losses are realised.