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December 28, 2020

The Right Honourable Justin Trudeau, P.C., M.P.
Prime Minister of Canada
Langevin Block
Ottawa, Ontario K1A 0A2

Dear Prime Minister:

Re: Appointment of Air Chief Marshal Sumangala Dias as Sri Lanka's High Commissioner to Canada

On behalf of Tamil Rights Group (TRG), I would like to bring to your attention our serious concerns about the potential appointment of Air Chief Marshal Sumangala Dias as Sri Lanka's next envoy to Canada. TRG is a newly established federal non-profit organisation, headquartered in Markham, Ontario which advocates for transitional justice and accountability for the Tamils of Lanka through international law measures, expanded global diplomacy, and defending their civil liberties within Sri Lanka.

On November 10, 2020, the Committee on High Posts of the Parliament of Sri Lanka approved the appointment of Air Marshal Dias by the Government of Sri Lanka to assume the role of High Commissioner of Sri Lanka to Canada. We request that the Government of Canada notify the Government of Sri Lanka that Air Marshal Dias would be unacceptable and unwelcome, *persona non grata*. We also request that Canada initiate an investigation to determine whether further restrictive measures are warranted against him pursuant to the *Justice for Victims of Corrupt Foreign Officials Act, 2017* (Sergei Magnitsky Law).

The reason for this request is the compelling evidence of criminal command responsibility by Air Marshal Dias for war crimes, crimes against humanity, and genocide, as well as his violation of the standards of the *Commonwealth Charter*. The basis for this conclusion is set out in the enclosed legal opinion.

We welcome the opportunity to further discuss this matter with your office as soon as possible.

Yours sincerely,

DocuSigned by:


Navarathnam Srinarayanathas
President, Tamil Rights Group

Cc. The Honourable François-Philippe Champagne, Minister of Foreign Affairs
The Honourable David Lametti, Minister of Justice and Attorney General of Canada
The Honourable Mary Ng, Member of Parliament for Markham-Thornhill

Legal Opinion

To: Navaratnam Srinarayanathas, Tamil Rights Group
From: David Matas, C.M. and Sarah Teich
Date: December 21, 2020
Re: **Criminal Command Responsibility by Air Chief Marshal Sumangala Dias**

The Vienna Convention on Diplomatic Relations and the Commonwealth Charter

The Committee on High Posts of the Parliament of Sri Lanka approved on November 10, 2020 the appointment of Air Marshal Sumangala Dias by the Government of Sri Lanka to assume the role of High Commissioner of Sri Lanka to Canada.¹ The Government of Canada is entitled to and has good reason to notify the Government of Sri Lanka that Air Marshal Dias would be unacceptable and unwelcome, *persona non grata*.

The Vienna Convention on Diplomatic Relations provides that a receiving State may, at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.² Both Sri Lanka and Canada are states parties to this Convention.

The Vienna Convention on Diplomatic Relations further provides, that if the sending State does not agree to the notification that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable, the receiving State may refuse to recognize the person concerned as a member of the mission. If

¹ <https://www.newsfirst.lk/2020/11/10/07-new-sri-lankan-ambassadors-approved-by-high-post-committee/>

² Article 9

Sri Lanka does not agree to the notification from Canada that Air Marshal Dias is *persona non grata* and Air Marshal Dias arrives in Canada, Air Marshal Dias could be prosecuted in Canada for crimes against humanity, war crimes and genocide.

If Air Marshal Dias were to set foot in Canada today on a private visit, he would be prosecutable in Canada for war crimes, crimes against humanity and genocide. It would be perverse to grant such a person immunity from prosecution by accepting his appointment as High Commissioner.

This is not the first time that the Government of Sri Lanka has attempted to provide immunity to a person implicated in war crimes, crimes against humanity or genocide through a diplomatic posting. Sri Lankan General Jagath Jayasuriya was appointed in 2015 to be Sri Lanka's ambassador to Brazil with responsibility also for Colombia, Peru, Chile, Argentina, and Surinam. In August 2017, once he had assumed his posting, a coalition of human rights groups filed a war crimes lawsuit against him in Brazil.³ The groups urged the expulsion of Jayasuriya from his diplomatic post, so that the case could proceed.⁴ Jayasuriya went back to Sri Lanka before a decision was made on the request.⁵

Canada should not be a haven for criminals against humanity. It is a corruption of the diplomatic process to allow it to be used to provide immunity, for Air Marshal Dias or anyone else.

The behaviour of Air Marshal Dias is contrary to the core values and principles of the Commonwealth as set out in the Charter of the Commonwealth.⁶ Both Canada and Sri Lanka are members of the Commonwealth. There is substantial evidence that Air Marshal Dias has violated a number of values and principles enshrined in the Commonwealth Charter, including the values of human rights; international peace and security; tolerance, respect and understanding; rule of law; good governance; and access to health, education, food and shelter.⁷ As part of the Charter, Canada has agreed to “[speak] out on major issues ... and [be] devoted to improving the lives of all peoples of

³ <https://thedi diplomat.com/2018/05/can-the-application-of-universal-jurisdiction-foster-accountability-in-sri-lanka/>

⁴ <https://www.bbc.com/news/world-asia-41089396>

⁵ <https://thedi diplomat.com/2018/05/can-the-application-of-universal-jurisdiction-foster-accountability-in-sri-lanka/>

⁶ Charter of the Commonwealth

⁷ Articles II, III, IV, VII, VIII, and XI

the Commonwealth".⁸ It would be contrary to the principles of the Charter for Canada to turn a blind eye to the evidence of violations of the Commonwealth Charter by Air Marshal Dias and permit his entrance to Canada as a High Commissioner designate. Declaring Air Marshal Dias *persona non grata* would be a means for Canada to honour the values and principles enshrined in the Commonwealth Charter.

Summary of evidence of war crimes, crimes against humanity and genocide committed by Air Marshal Dias

Air Marshal Dias was appointed the 17th Commander of the Sri Lankan Air Force in May 2019.⁹ As a result of his nomination to High Commissioner of Sri Lanka to Canada, he relinquished his command on November 2, 2020.¹⁰

Prior to his role as Commander, Dias held a variety of leadership positions in the Sri Lankan Air Force, including in the period covered by the High Commissioner's report, namely, 2002-11. In June 2002, following his completion of Staff College, he became the Commanding Officer of No 06 Helicopter Squadron at Sri Lanka Air Force Base Vavuniya.¹¹ In June 2005, he was appointed to the role of Base Commander at Sri Lanka Air Force Base Hingurakgoda. In 2008, he was appointed to the role of Senior Air Coordinator for the final stages of the war.¹² As Senior Air Coordinator, Dias "actively performed duties" with the ground commanders of the 57th, 58th, and 59th Divisions, until the completion of the war in 2009.¹³ According to the Defence Secretary Major General (Retired) Kamal

⁸ Page 8.
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<https://srilankancanadian.ca/index.php/2020/11/05/air-marshal-sumangala-dias-promoted-to-the-four-star-rank-of-air-chief-marshal/>

¹⁰ <https://www.businessnews.lk/2020/11/03/air-chief-marshal-sumangala-dias-bids-adieu-to-the-sri-lanka-air-force/>
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<https://srilankancanadian.ca/index.php/2020/11/05/air-marshal-sumangala-dias-promoted-to-the-four-star-rank-of-air-chief-marshal/>

¹² <https://dailynews.mk/en/canadians-call-on-government-to-reject-sri-lankan-war-crimes-accused-ambassador/>
¹³

<https://srilankancanadian.ca/index.php/2020/11/05/air-marshal-sumangala-dias-promoted-to-the-four-star-rank-of-air-chief-marshal/>

Gunaratne, Dias' contribution in this role had been instrumental in successfully ending the conflict.¹⁴ At Dias' felicitation ceremony on November 2, 2020, Gunaratne said of Dias' involvement coordinating the air support that it was "pivotal for the successful conduct of land operations" and "highly praised and respected by all ranks and files in the field".

There is compelling evidence implicating the Sri Lankan Air Force in war crimes, crimes against humanity and genocide during the time when Dias held leadership roles with the Sri Lankan Air Force. Specifically, there is evidence of "indiscriminate bombing missions against civilian targets", including missions originating from Hingurakgoda base.¹⁵ For example, the United Nations High Commissioner for Human Rights 2015 report found that in April 2006 the Sri Lankan Air Force engaged in airstrikes in the Sampur area, where LTTE targets were reportedly located "in the vicinity of the civilian population", making the airstrikes a serious violation.¹⁶ Hingurakgoda base is the closest Sri Lanka Air Force base to Sampur; it is only 108 km removed.

In August 2006, the Sri Lankan Air Force engaged in another serious airstrike in LTTE territory, in a forest area near Vallipunam Village.¹⁷ Approximately fourteen fragmentation bombs were dropped, and the attack hit Chencholai Girls Orphanage where it killed at least 53 girls and injured approximately 129 others. Regarding the Chencholai incident, the High Commissioner's report found that there were "reasonable grounds to believe that the Sri Lankan Air Force knew at the time that there were children present yet undertook a disproportionate attack against a primarily civilian object and failed to take any precautions to avoid or minimise incidental loss of civilian life, which [was] clearly excessive in relation to the concrete and direct military advantage anticipated". Although Hingurakgoda base was not the closest in proximity to this bombing (Vavuniya base was closest), it was still close by in the northeast area of the island, and Hingurakgoda (and by extension Dias) may still have been involved. Prior to Dias' appointment to Base Commander at Hingurakgoda, he held a Sri Lankan Air Force leadership role at Vavuniya.

¹⁴ <https://www.businessnews.lk/2020/11/03/air-chief-marshal-sumangala-dias-bids-adieu-to-the-sri-lanka-air-force/>

¹⁵ <https://dailynews.mk/en/canadians-call-on-government-to-reject-sri-lankan-war-crimes-accused-ambassador/>

¹⁶ https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.CRP.2_E.docx at page16

¹⁷ Page 17.

Incidents of large-scale human rights violations, strongly indicating war crimes and crimes against humanity, intensified as the war drew to a close in 2008-2009, during which time Dias held the role of Senior Air Coordinator. In 2009, witnesses described that multiple airstrikes targeted the food distribution queues.¹⁸ These clearly targeted civilians, and many were killed in the attacks, including women and children. The High Commissioner found that "the Sri Lankan Air Force were systematically informed of the location and time of food distributions", providing "reasonable grounds to believe that [the food distribution queues] were deliberately targeted".

There are also many reports of intense shelling of civilians and civilian targets, including inside areas declared No Fire Zones by the Sri Lankan government, and including multiple hospitals and United Nations facilities.¹⁹ The shelling of No Fire Zones occurred after the Sri Lankan government encouraged civilians to move into them, including through leaflets dropped from aircrafts.²⁰ These shellings attracted consternation by human rights groups and international organizations. The High Commissioner for Human Rights issued a statement on March 13, 2009, expressing concerns that the shelling of civilian areas in No Fire Zones suggested war crimes and crimes against humanity may have been committed.²¹ According to the Panel of Experts established by the United Nations Secretary-General in 2010, the final phase of the war was catastrophic in terms of civilian casualties, with several credible sources estimating "as many as 40,000 civilian deaths".²²

In addition, there is evidence in the form of witness accounts that the Sri Lankan government used cluster bomb munitions and white phosphorous against civilians and civilian targets, including in the

¹⁸ At page 171

¹⁹ https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.CRP.2_E.docx

²⁰ Report of the Secretary-General's Internal Review Panel on United Nations Action in Sri Lanka, November 2012, page 9.

²¹ https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.CRP.2_E.docx, page 20

²² Report of the Secretary-General's Internal Review Panel on United Nations Action in Sri Lanka, November 2012, page 14.

No Fire Zones.²³ Use of these weapons, particularly against civilians and civilian targets, is a contravention of the United Nations Convention on Cluster Munitions and the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons. Sri Lanka and Canada are states parties to both instruments.

These instruments contain mechanisms to facilitate and clarify compliance. Under the Convention on Cluster Munitions, Canada as a State Party may submit, through the U.N. Secretary-General, a request for clarification of compliance by Sri Lankan forces under the command of Air Marshal Dias. If Canada deems the response unsatisfactory, Canada may raise the matter at the next Meeting of States Parties.²⁴ The States Parties must consult together if and when a dispute arises, and recourse may be sought by a variety of means, including through referral to the International Court of Justice.²⁵

The Incendiary Weapons Protocol provides that States Parties agree to

“consult each other and to cooperate with each other bilaterally, through the Secretary-General of the United Nations, or through other voluntary international procedures, regarding any concerns which relate to the fulfilment of their legal obligations or to resolve any issue that may arise...”.²⁶

Use of these weapons is a serious international violation.

Canada should invoke the compliance mechanisms in the Convention and Protocol to initiate an

²³ Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, March 2011, page 65 and page 150

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.CRP.2_E.docx

²⁴ Convention on Cluster Munitions, Article 8

²⁵ Article 10

²⁶ Decision on a Compliance Mechanism Applicable to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (As adopted by the Third Review Conference on 17 November 2006), Article 1

independent investigation into whether Sri Lankan forces under the command of Air Marshal Dias used prohibited weapons. This investigation and a result which clears Air Marshal Dias should be a precondition to his acceptance by Canada as High Commissioner.

The law on command responsibility and its application to Air Marshal Dias

The Crimes Against Humanity and War Crimes Act contains parameters for command responsibility. Under the Crimes Against Humanity and War Crimes Act, there are three requirements that must be met in order for a military commander to be held responsible for the international crimes of their subordinates:

1. The military commander fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits a crime against humanity, war crime, or genocide.

2. The military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence.

3. The military commander subsequently fails to take, as soon as practicable, all necessary and reasonable measures within their power
 - (i) to prevent or repress the commission of the offence, or the further commission of offences, or
 - (ii) to submit the matter to the competent authorities for investigation and prosecution.²⁷

In other words, a superior may be held criminally responsible for the international crimes of his or her subordinates if

- (a) s/he knew (or should have known) that they were committing or about to commit such crimes, and

²⁷ Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, s. 7

(b) s/he failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter for investigation and prosecution.

Air Marshal Dias was Senior Air Coordinator at the time of the final apparent violations described in this opinion. This strongly indicates his involvement and responsibility, via his command responsibility. As a military commander, Dias knew or should have known of these international violations. It appears that Dias failed to take action to prevent and repress their commission. As further indication of Dias' involvement, the High Commissioner's report implicated the 57th, 58th, and 59th Divisions in the shellings described in this opinion²⁸, and as noted, Dias coordinated with the ground commanders of these Divisions in his role as Senior Air Coordinator.²⁹

The basis for prosecution in Canada of Air Marshal Dias for War Crimes, Crimes against Humanity and Genocide

The Vienna Convention on Diplomatic Relations provides that a diplomatic agent enjoys immunity from the criminal jurisdiction of the receiving state.³⁰ The Foreign Missions and International Organizations Act states that this provision of the Vienna Convention has the force of law in Canada.³¹

Air Marshal Dias could not be prosecuted in Canada for war crimes, crimes against humanity or genocide while he is High Commissioner. If, however, Canada were to notify Sri Lanka that Air Marshal Dias was *persona non grata*, and he come to Canada anyways, he could be prosecuted. The Canadian Crimes against Humanity and War Crimes Act allows for prosecution of a foreign national

²⁸ https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.CRP.2_E.docx

²⁹ <https://srilankancanadian.ca/index.php/2020/11/05/air-marshal-sumangala-dias-promoted-to-the-four-star-rank-of-air-chief-marshal/>

³⁰ Article 31

³¹ Article 3

who has committed war crimes, crimes against humanity or genocide abroad, as long as the accused foreign national is physically present in Canada.³²

Material immunity protects any individual who performs an official action. However, material immunity does not protect war crimes, crimes against humanity or genocide. Because war crimes, crimes against humanity and genocide violate international law, international law does not give them immunity. It would be inconsistent for international law both to criminalize these acts and then to recognize them as official acts which invoke state immunity.³³

The Government of Sri Lanka has signed and ratified human rights treaties prohibiting acts that occurred in the Sri Lankan civil war, including, among others, the Convention Against Torture and the International Convention on the Protection of all Persons from Enforced Disappearance.³⁴ Violations of these Conventions could not be considered official acts. The No Fire Zones were designated as such by the government of Sri Lanka. Airstrikes in these Zones also could not be considered not official acts.

The Canadian Crimes against Humanity and War Crimes Act includes, in addition to crimes against humanity and war crimes committed in an armed conflict of an international character, also genocide and war crimes committed in an armed conflict not of an international character. The statute penalizes war crimes, crimes against humanity and genocide as those terms are defined according to customary or conventional international law.³⁵

For greater certainty, the legislation states that the definition of war crimes, crimes against humanity and genocide as those terms are defined in the Rome Statute, the statute of the International Criminal Court, are crimes according to customary international law.³⁶ The Rome Statute

³² Section 8(b)

³³ *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 3), 1999, <https://www.iclr.co.uk/wp-content/uploads/media/vote/1996-2014/ac2000-1-147.pdf>

³⁴ <https://indicators.ohchr.org>

³⁵ Section 4(1) and (3)

³⁶ Section 4(4)

criminalizes various acts in armed conflicts not of an international character, including intentionally directed attacks against civilians.³⁷

Genocide is defined to include the killing of members of a national, ethnical, racial, or religious group committed with intent to destroy the group in whole or in part. An intent to destroy the group in part is sufficient, with the requisite acts, to constitute the crime of genocide. The intent to destroy the whole group is not a necessary element of the offence.³⁸ The targeting by elements of the Sri Lanka Armed Forces under the command of Air Marshal Dias of civilians and civilian targets, including hospitals, food distribution queues, and No Fire Zones, is indicative of this intent.

Magnitsky Act sanctions

The Government of Canada has the authority to impose a freeze on the assets of Air Marshal Dias in Canada and bar his entry to Canada under the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law). Popularly called the *Magnitsky Act*, this legislation enables Canada to impose property and visa sanctions on officials of foreign states who have engaged in gross violations of internationally recognized human rights.

Like the Crimes Against Humanity and War Crimes Act, the Magnitsky Act enables Canada to combat impunity. The Magnitsky Act would be an appropriate additional tool for Canada to use to hold Air Marshal Dias to account. There is sufficient evidence to date to justify an investigation to determine whether to invoke this Act against Air Marshal Dias before he comes to Canada, and even if he never comes to Canada.

³⁷ Article 8(2)(e)(i)

³⁸ Rome statute article 6