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COMMUNICATION UNDER ARTICLE 15 OF THE ROME STATUTE:

Request to Open a Preliminary Examination into Crimes Committed Against Eelam Tamils in the Territories of States Parties (Deportation and Persecution)

To Mr. Karim A. A. Khan QC:

We are writing on behalf of Tamil Rights Group (TRG) and International Tamil Refugee Assistance Network (I-TRAN), to request that the Office of the Prosecutor at the International Criminal Court open a preliminary examination into crimes within the jurisdiction of the Court committed against Eelam Tamils.

The international community has arrived at a turning point with respect to Sri Lanka.¹ There is mounting evidence that the Eelam Tamil population in Sri Lanka was subject to atrocities that amounted to crimes against humanity and war crimes, particularly in the final years of the protracted armed conflict that ended in 2009.² There is also a growing body of evidence that Sri Lanka is unwilling to investigate and prosecute these crimes in their national domestic systems. It was as a result of this latter point that the Office of the High Commissioner for Human Rights, in January 2021, advised member states to become involved in working to end the impunity surrounding the Sri Lankan armed conflict, both by utilizing the principle of universal jurisdiction to initiate prosecutions in foreign domestic courts, and by taking steps toward seeking justice at the international level, including at the International Criminal Court.³

Sri Lanka is not a state party to the Rome Statute. However, there is compelling evidence that various actors, including members of the Sri Lankan government and armed forces, committed the crimes against humanity of persecution and deportation through coercive acts, and that part of the *actus reus* of these crimes occurred on the territories of state parties, including Canada, Australia, Germany, France, the United Kingdom, and Switzerland.

¹ *Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the Office of the High Commissioner for Human Rights*, advance unedited version, UNHRC, 46th Sess, UN Doc A/HRC/46/20 (2021) [OHCHR Report].

² *Report of the OHCHR Investigation on Sri Lanka (OISL)*, OHCHR, 30th Sess, UN Doc A/HRC/30/CRP.2 (2015) [OISL].

³ *Ibid* at para 59.

These were states parties to which Tamils in Sri Lanka fled. Analogous to *Myanmar/Bangladesh*, there is compelling evidence that this constituted deportation through coercive acts as well as persecution.

In this communication, we kindly request that the Prosecutor initiate an investigation *proprio motu* into this situation. To assist in this endeavour, we summarize some of the pertinent facts; clarify on what bases the Court may have subject-matter jurisdiction, territorial jurisdiction, and temporal jurisdiction; and address the admissibility requirements of complementarity and gravity.

Sincerely,

Per: Tamil Rights Group

Per: International Tamil Refugee Assistance Network

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1. FACTS

From 1983 to 2009, Sri Lanka was embroiled in a civil war, with fighting largely occurring between the Sinhalese-dominated Sri Lankan government and the LTTE. This decades-long armed conflict did not arise out of nowhere: ethnic tensions between the Sinhalese and Tamil people were long-standing in Sri Lanka.⁴

The armed conflict officially began when, on July 24, 1983, 150,000 Tamils became displaced and 3,000 died in the anti-Tamil pogrom known as “Black July”.⁵ The pogrom consisted of riots against the Tamil people in Colombo, Sri Lanka.⁶

The civil war ended in May 2009.⁷ The final weeks of the armed conflict were characterized by a series of high-casualty incidents which have come to collectively be known as the “Mullivaikkal Massacre”.⁸ In the months and years that followed, there was mass arbitrary detention of Eelam Tamils in military-run camps and detention centres; widespread use of torture and sexual assault; and land grabs and “Sinhalization” of Tamil areas.

This section is not intended to provide a comprehensive summary of all the evidence of atrocities committed against the Eelam Tamil population in the context of the Sri Lankan armed conflict.⁹ Rather, this section summarizes only some of the pertinent facts – enough to provide an example of the types of atrocities faced by the Eelam Tamils in Sri Lanka, and enough to ultimately demonstrate that the requirements of subject-matter jurisdiction and gravity are likely satisfied in this situation.

1.1. “Mullivaikkal Massacre”

Between January and May 2009, the Sri Lankan government established three No Fire Zones (“NFZs”) and encouraged approximately 400,000 civilians to gather in these zones in order to escape the violence of its ongoing battle with the Liberation Tigers of Tamil Eelam (the “LTTE”).¹⁰ On May 8, 2009, the government announced a third NFZ situated between Karayamullivaikkal and Vellmullivaikkal (“NFZ3”).¹¹ By May 13, 2009, the UN estimated that tens of thousands of civilians were located in the two-to-three square

⁴ Nithyani Anandakugan, “The Sri Lankan Civil War and Its History, Revisited in 2020” (2020 August 31), online: *Harvard International Review* <<https://hir.harvard.edu/sri-lankan-civil-war/>> [Anandakugan].

⁵ “The Sri Lankan Civil War and Its History, Revisited in 2020” (2020 August 31), online: *Harvard International Review* <<https://hir.harvard.edu/sri-lankan-civil-war/>>; David Matas, “I-TRAN Calls for an End to Anti-Tamil Persecution in Sri Lanka” (2018), online (pdf): *I-TRAN* <<https://i-tran.ca/wp-content/uploads/2018/11/itrans-calls-for-an-end.pdf>>.

⁶ *Ibid.*

⁷ Jayshree Bajoria, “The Sri Lankan Conflict” (2009 May 18), online: *Council on Foreign Relations* <<https://www.cfr.org/background/sri-lankan-conflict>>.

⁸ Shubhanhi Misra, “What is the Mullivaikkal War & Why Has the Demolition of Memorial for its Victims Triggered a Row” (2021 January 10), online: *The Print* <<https://theprint.in/theprint-essential/what-is-mullivaikkal-war-why-has-the-demolition-of-memorial-for-its-victims-triggered-a-row/582976/>>; Jeevan Ravindran, “‘The Deaths Can’t Be Erased’: Tamils and the Fight for Justice in Sri Lanka” (2021 March 2), online: *World Politics Review* <www.worldpoliticsreview.com/articles/29463/sri-lanka-tamils-fight-for-recognition-of-the-mullivaikkal-massacre> [Ravindran].

⁹ There have numerous comprehensive summaries of this sort already prepared by independent international bodies. See, for example, OISL, *supra* note 2 and OHCHR Report, *supra* note 1.

¹⁰ OISL, *supra* note 2 at para 87.

¹¹ *Ibid* at para 873.

kilometres that made up NF3.¹² The location of NFZ3 was such that it placed civilians between the Sri Lankan Army (“SLA”) and LTTE fighters, endangering these civilians from both sides.¹³

Witnesses have given evidence that there was continuous shelling and devastation in NFZ3 during the final weeks of the armed conflict, and that this was largely perpetrated by the SLA. In such a densely populated space, this meant that nearly every time a shell fell, civilians were injured or killed.¹⁴ This occurred despite the extensive use of Unmanned Aerial Vehicle technology equipped with video cameras by the SLA, which presumably would have allowed them to locate military targets and avoid civilians to the best of their ability.¹⁵ The shelling of the NFZs by Sri Lankan government forces attracted the immediate consternation of the U.N. High Commissioner for Human Rights at the time, who issued a statement expressing concerns that these government attacks were indicative of war crimes and crimes against humanity.¹⁶

The shelling of NFZs occurred after the Sri Lankan government encouraged civilians to move into them, including through leaflets dropped from aircrafts.¹⁷ There is also 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 NFZs.¹⁸ Witnesses interviewed by OISL described that civilian targets of airstrikes included food distribution queues, hospitals, and UN facilities.¹⁹ There were reported instances of casualties among Red Cross and other humanitarian workers.²⁰

The Office of the High Commissioner for Human Rights found that there were reasonable grounds to believe that at least some of these targets were deliberate attacks on civilians.²¹

According to the Panel of Experts established by the United Nations Secretary-General in 2010, this final phase of the war was catastrophic in terms of civilian casualties. Early U.N. reports estimated “as many as 40,000 civilian deaths”.²² In more recent years, there has been a growing recognition that that figure is likely far higher. For example, the International Truth and Justice Project estimates that as many as 169,796 civilians may have been killed during the final phase of the war.²³

OISL specifically noted in its 2015 report that the patterns of conduct “consisted of multiple incidents which occurred over time” and that “such systemic acts, if established in a court of law, may constitute war crimes and crimes against humanity, and give rise to individual criminal responsibility”.²⁴ Former High Commissioner Zeid similarly articulated that the OISL’s findings “identified patterns of grave violations ... strongly indicating that war crimes and crimes against humanity were most likely committed by both sides to the conflict”.²⁵

¹² *Ibid* at 874.

¹³ *Ibid* at para 876.

¹⁴ *Ibid*.

¹⁵ *Ibid* at paras 875, 980.

¹⁶ *Ibid* at para 90.

¹⁷ *Report of the Secretary-General’s Internal Review Panel on United Nations Action in Sri Lanka* (2012 November) at page 9.

¹⁸ UN Secretary-General, “Report of the UN Secretary General’s Panel of Experts on Accountability in Sri Lanka” (2011 March 31) at para 169 [2011 Report]; OISL, *supra* note 2 at paras 751-752.

¹⁹ OISL, *supra* note 2 at paras 802-887.

²⁰ Ravindran, *supra* note 8.

²¹ OISL, *supra* note 2 at para 864.

²² 2011 Report, *supra* note 18 at para 137.

²³ “How many Tamils were killed in 2009?” (2021 March 12) online: *Tamil Guardian* <<https://www.tamilguardian.com/content/how-many-tamils-were-killed-2009>>.

²⁴ OISL, *supra* note 2 at para 6.

²⁵ “Zeid urges creation of hybrid special court in Sri Lanka as UN report confirms patterns of grave violations” (2015 September 16), online: *United Nations High Commissioner of Human Rights* <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16432&LangID=E>>.

1.2. Shelling of Health Facilities and Obstruction of Medical Care

According to the Report of the Office of the High Commissioner for Human Rights Investigation on Sri Lanka (“OISL”), there is substantial evidence that suggests the SLA targeted and knowingly shelled at least nine hospitals and health facilities during the final months of the civil war, including seven within the government-established NFZs.²⁶ Alongside civilians who had set up shelters near medical facilities, patients in the midst of receiving care and medical personnel were among those most often killed in these attacks.²⁷ In addition, the Sri Lankan government and security forces detrimentally obstructed access to life-saving medicines and medical assistance.²⁸

The nine facilities subjected to SLA shelling identified by the OISL were: Kilinochchi hospital; Mullaitivu hospital; Vallipunam hospital; Udayaarkaadu hospital; PTK hospital; Putumattalan hospital; Valayarmadam hospital; Mullivaikkal hospital; Mullivaikkal primary health facility and; Vellmullivaikkal health facility.²⁹

It has been confirmed that these facilities were clearly marked with the Red Cross emblem and that the facilities’ GPS coordinates were relayed to Sri Lankan forces in an attempt to ensure that they were not attacked.³⁰ Despite this, the aforementioned facilities were often hit by SLA shelling more than once.³¹ Indeed, the attack on Vallipunam hospital occurred only a day after the GPS coordinates of the facility were relayed to Sri Lankan security officials.³²

Medical facilities were often relocated into schools and, towards the end of the conflict, into tents which were also marked with the Red Cross emblem and the coordinates of these facilities were also shared.³³ These too were regularly hit by SLA shelling.³⁴

According to witnesses, at least one makeshift medical facility stopped using the Red Cross sign “in an effort to remain hidden and decrease the likelihood of attack”.³⁵ This clinic was not shelled.³⁶

The series of events surrounding Vellmullivaikkal health facility is indicative of the pattern of attacks perpetrated by the SLA against the health facilities listed above. Vellmullivaikkal health facility was the single health facility set up in a small former school that provided health care for NFZ3.³⁷ This health facility was shelled on several occasions between May 8-12, 2009; this was a period in which NFZ3 was subject to “intense daily bombardment” by the Sri Lankan air force, navy, and artillery.³⁸ As shelling continued to fall on May 13, the hospital’s function was severely reduced and an International Committee of the Red Cross ship that would have been able to provide life-saving care was unable to dock.³⁹ As shelling got closer and heavier in the area, the hospital stopped functioning on May 14, 2009.⁴⁰

²⁶ OISL, *supra* note 2 at paras 778-881

²⁷ *Ibid* at para 783.

²⁸ *Ibid* at para 948.

²⁹ *Ibid* at paras 796-7, 805, 814, 824, 843, 855, 869, 877.

³⁰ *Ibid* at para 784

³¹ *Ibid* at para 792.

³² *Ibid* at paras 804-5.

³³ *Ibid* at paras 783-4

³⁴ *Ibid* at para 783

³⁵ *Ibid* at para 786.

³⁶ *Ibid* at para 820

³⁷ *Ibid* at para 877.

³⁸ *Ibid* at para 878.

³⁹ *Ibid* at para 882.

⁴⁰ *Ibid*.

As mentioned, reports suggest that the Government of Sri Lanka and the SLA carried out these attacks despite having knowledge of the health facility's location. The OISL notes in their report the following regarding the series of SLA attacks that occurred:

The GPS coordinates of most hospitals and other humanitarian facilities, including when they were relocated due to fighting, were transmitted to the Sri Lankan government, the SFHQ [Security Forces Head Quarters] in Vavuniya and other Sri Lankan security forces ... to ensure that these facilities would be protected from attack."⁴¹

In addition, satellite imagery confirmed that the health facility was clearly marked with the Red Cross emblem to notify both SLA and LTTE fighters of its location.⁴²

These facts suggest that the Government of Sri Lanka and the SLA had knowledge of the location of the health facility and knowingly shelled persons given protected status by international law, as the health facility treated civilians as well as LTTE fighters who were *hors de combat*. Although the Sri Lankan government has denied that hospitals were targeted or hit during the shelling, information gathered by the OISL suggests that such attacks were "part of a pattern where the SLA not only failed to take adequate measure to ensure that protected facilities are not hit but, in some cases, may have deliberately targeted the facilities."⁴³

The OISL has identified that at the same time civilians and medical personnel were being killed as a result of shelling, others died from a lack of medical care as a result of the Sri Lankan government's obstruction of medical assistance and supplies.⁴⁴ The Sri Lankan government placed severe restrictions on essential medical supplies entering the conflict area and systematically reduced the quantities of supplies that had been requested by medical personnel.⁴⁵ In addition, the "military refused to authorize the transportation of certain medical supplies" into the conflict zone.⁴⁶

This situation has been summarized by the OISL as follows:

Despite knowledge about the increasingly severe humanitarian situation in the Vanni [the conflict zone] and the impact of shelling on hospitals and makeshift medical facilities, the Government and the security forces denied permission to send in emergency medical supplies, including certain life-saving supplies. The Government further failed to ensure the protection of medical personnel and facilities through shelling.⁴⁷

1.3. Mass Arbitrary Detention of Eelam Tamils

Following the conclusion of the war on May 18, 2009, more than 250,000 civilians were transferred to military-run closed Internally Displaced Persons (IDP) camps, where they were held without charge. Although the lifespan of these camps varied, the final operational IDP camp held civilians from May 2009 to September 2012.⁴⁸ In the largest camp, "Manik Farm", up to 220,000 civilians were held at one time in

⁴¹ *Ibid* at para 784.

⁴² *Ibid* at para 782.

⁴³ *Ibid*.

⁴⁴ *Ibid* at paras 982, 1001-1022.

⁴⁵ *Ibid* at paras 1001, 1003.

⁴⁶ *Ibid* at para 1003.

⁴⁷ *Ibid* at para 1022.

⁴⁸ Sulakshani Perera, "Sri Lanka's displacement chapter nears end with closure of Menik Farm" (2012 September 27), online: [UNHCR <www.unhcr.org/news/latest/2012/9/506443d89/sri-lankas-displacement-chapter-nears-end-closure-menik-farm.html>](http://www.unhcr.org/news/latest/2012/9/506443d89/sri-lankas-displacement-chapter-nears-end-closure-menik-farm.html) [Perera].

abysmal living conditions as military personnel worked to identify those with links to the LTTE.⁴⁹ Once held, detainees lived in fear that military personnel would send them to detention centres within which evidence shows that torture was used to interrogate suspects and elicit forced confessions of connections to the LTTE.

By June 2009, 40 military-run IDP camps had been established in Vavunya, Mannar, and Jaffna.⁵⁰ Approximately 284,000 people who had been trapped in LTTE-controlled conflict zones were transferred to these closed and guarded camps without any idea of when they would be allowed to leave.⁵¹ Authorities did not differentiate between fighters and civilians in determining who would be held in IDP camps or detention centres and on what grounds. The population forced into IDP camps reportedly included the elderly and approximately 50,000 children.⁵² IDPs were confined to these camps for months or years without charge or trial.⁵³ The movement of IDPs even within the camps was often restricted to designated zones.⁵⁴

Based on the accounts of witnesses and statements from the Sri Lankan government, it is evident that the “principal reason for holding the IDPs for prolonged periods in closed camps without allowing freedom of movement was to screen them for LTTE suspects.”⁵⁵ On the basis of information gathered by the OISL:

There are reasonable grounds to believe that the IDPs were treated as suspects and detained because of their Tamil ethnicity and because they had come out of LTTE-controlled territory.⁵⁶

The OISL determined that this “may amount to discrimination under international human rights law, and, if established by a court of law, may amount to the crime against humanity of persecution.”⁵⁷

Although Sri Lanka was entitled to temporarily deprive IDPs of their liberty in order to identify fighters, the deprivation must have been for the shortest time possible in order to be lawful, and in any case it would only have been permissible if there were “serious and legitimate reasons to believe that the IDPs would seriously prejudice the security of the state.”⁵⁸ For individuals to be detained for longer periods of time, there must have been a legal basis for that detention, and charges must have been brought against each person.⁵⁹ The failure of Sri Lankan authorities to adhere to these principles means that this conduct amounted to arbitrary detention and was a breach of Sri Lanka’s domestic laws as well as customary international law.

The conditions that IDPs were subjected to within the camps were appalling. The following are the typical issues the detained civilians had to endure within the IDP camps:

- 1) Shelter was often provided by tents which were washed away in monsoons;
- 2) Each tent housed roughly around 15 people in sweltering heat;
- 3) Significant overcrowding in general based on the camp size and the number of inhabitants;
- 4) Lack of water, potable or otherwise;

⁴⁹ OISL, *supra* note 2 at para 1071.

⁵⁰ *Ibid* at para 1963.

⁵¹ *Ibid.*

⁵² “Unlock the Camps in Sri Lanka” (2009), online: *Amnesty International* <www.amnesty.org/download/Documents/48000/asa370162009en.pdf>.

⁵³ Perera, *supra* note 48.

⁵⁴ OISL, *supra* note 2 at paras 1071-1072.

⁵⁵ *Ibid* at para 1065.

⁵⁶ *Ibid* at para 1174.

⁵⁷ *Ibid.*

⁵⁸ *Ibid* at para 1066.

⁵⁹ *Ibid.*

- 5) Inadequate number and poor maintenance of toilets; and
- 6) unhygienic communal kitchen facilities; and
- 7) Lack of access to adequate medical care or supplies.⁶⁰

These conditions resulted in the common spread of disease and ailments.⁶¹ Health facilities established within the camps were often inadequate and restrictions on movement impeded IDPs from accessing medical care beyond the confines of the camps.⁶² These conditions resulted in preventable deaths, especially amongst the most vulnerable of the IDP population such as the elderly.⁶³ The OISL found that the state of IDP camps “amounted to violations of the right to health and to an adequate standard of living, including food, water, housing and sanitation.”⁶⁴

There have also been allegations that sexual violence committed by military personnel against IDPs was commonplace.⁶⁵ This is in addition to the evidence of widespread sexual violence of Tamils in detention centres, as described below.

Once held in IDP camps, survivors, including children, were identified as being associated with the LTTE and taken away to detention centres without any formal process or trial.⁶⁶ It is estimated that at one point 11,000 civilians were held in these detention centres (often referred to as “rehabilitation centres” by the Sri Lankan government) including 550 children.⁶⁷ In addition to the fact that that no formal process was associated with identifying those suspected to have connections to the LTTE, no consideration was given to the fact that a number of civilians had been forcibly recruited by the LTTE.⁶⁸

1.4. Sexual Violence and Torture of Eelam Tamils in Detention Centres

There is ample and mounting evidence of the widespread torture of Eelam Tamil detainees in detention centres.⁶⁹ As they were tortured, detainees were consistently subjected to ethnic slurs such as “Tamil dog”.⁷⁰ Such language was also used when acts of sexual violence were used to torture detainees. As documented in the OISL report:

In many cases, the attitudes of the alleged perpetrators described by the witnesses highlighted a persecutory and degrading behaviour towards the victim, often referring to them as “Tamil dogs”, the intent clearly being to break down that person emotionally and physically. Most of the reported cases occurred in 2009 and 2010.⁷¹

The widespread use of torture and sexual violence was used to pressure detainees to provide information or to forcibly confess connections to the LTTE. However, it also went beyond these aims. Many of the former detainees interviewed for the OISL who were subjected to sexual violence were also raped, and this had a slightly different purpose:

⁶⁰ *Ibid* at paras 1085-6.

⁶¹ *Ibid* at paras 1086, 1089.

⁶² *Ibid*.

⁶³ *Ibid* at para 1091.

⁶⁴ *Ibid* at para 1173.

⁶⁵ *Ibid* at para 616.

⁶⁶ *Ibid* at para 1046.

⁶⁷ “Sri Lanka: End Indefinite Detention of Tamil Tiger Suspects” (2010 February 1), online: *Human Rights Watch* <www.hrw.org/news/2010/02/01/sri-lanka-end-indefinite-detention-tamil-tiger-suspects>.

⁶⁸ OISL, *supra* note 2 at para 1046.

⁶⁹ *Ibid* at paras 540-565.

⁷⁰ *Ibid* at para 603.

⁷¹ *Ibid* at para 587.

The purpose of the actual rape was not directly to obtain information in many of these cases, but a combination of sexual gratification, degradation and humiliation of the victims, and the instilling of fear through degrading abuse of the detainees who were at the mercy of their captors and had no power to protect themselves.⁷²

A report from Human Rights Watch titled, “*We Will Teach You a Lesson*”: *Sexual Violence against Tamils by Sri Lankan Security Forces*, focuses on rape and other sexual violence committed by members of the Sri Lankan security forces from 2006-2012 against women and men in state custody.⁷³ The report provides evidence of 75 cases of rape committed by members of state security forces: specifically, 31 cases of rapes of men, 41 cases of rapes of women, and 3 cases of rapes of boys under the age of 18.⁷⁴ Human Rights Watch found that in all of the documented cases of rape and sexual violence, state security forces accompanied this with “other forms of torture and cruel, inhuman, and degrading treatment by state security forces”.⁷⁵

The summarized in the “Findings” section of the report:

Human Rights Watch’s research into rape and other sexual violence by Sri Lankan security forces during and since the armed conflict with the LTTE uncovered disturbing patterns, strongly suggesting that it was a widespread and systematic practice. Rape appears to have been a key element of broader torture and ill-treatment of suspected LTTE members and others believed linked to the LTTE. This torture was intended to obtain confessions—whether accurate or false—of involvement in LTTE activities, obtain information on others including spouses and relatives, and, it appears, to instil terror in individuals and the broader Tamil population. Our research suggests that rape as a form of torture in formal and informal detention centers continues up to the present.⁷⁶

1.5. Land Grabs and “Sinhalization”

A substantial number of IDPs and detainees who were deemed to not be a threat and were released in the aftermath of the armed conflict could not go home, as there was widespread confiscation of their lands by Sri Lankan military forces.⁷⁷ This military occupation of Eelam Tamil land began in the immediate aftermath of the conflict, and in some cases has continued for years. The Centre for Policy Alternatives reported in 2016 that a total of 12,751 acres of land continues to be under occupation in the northern province of Sri Lanka, and hundreds of thousands of people remain unable to return to their lands.⁷⁸

In addition, the Ministries of Land and Tourism have engaged in a “Sinhalization” of these areas. Where the Sri Lankan military forces have occupied lands, they have also unlawfully erected Sinhalese victory monuments and Buddhist temples.⁷⁹ For example, in the Mullaitivu area, three war museums were

⁷² *Ibid* at para 603.

⁷³ “*We Will Teach You a Lesson*”: *Sexual Violence against Tamils by Sri Lankan Security Forces* (2013 February 26), online: *Human Rights Watch* <<https://www.hrw.org/report/2013/02/26/we-will-teach-you-lesson/sexual-violence-against-tamils-sri-lankan-security-forces#>>.

⁷⁴ *Ibid* at page 2.

⁷⁵ *Ibid* at page 3.

⁷⁶ *Ibid* at page 29.

⁷⁷ Perera, *supra* note 48; Sam Jones, “Sri Lanka accused of waging ‘silent war’ as Tamil land is appropriated by army” (2015 May 28), online: *The Guardian*, <<https://www.theguardian.com/global-development/2015/may/28/sri-lanka-army-land-grabs-tamil-displacement-report-oakland-institute>> [Jones].

⁷⁸ “Land Occupation in the Northern Province: A Commentary on Ground Realities and Recommendations for Reform” (2016 March), online (pdf): *Centre for Policy Alternatives (CPA)* <<https://reliefweb.int/sites/reliefweb.int/files/resources/Land-Occupation-in-the-Northern-Province.pdf>> [CPA] at 7-8.

⁷⁹ Piratheeca Vimalarajah, “Post-War Ground Realities of Dissolving Territories and Protracted Displacement of Eelam Tamils in Sri Lanka: An Analysis of the Militarization and Land Confiscation under the Lens of Persecution and Forcible Displacement as

established post-war, to mark the military's entry into the tourist industry, and military-built Buddhist temples were erected on both private and state land.⁸⁰

The subsequent action of taking-over of Eelam Tamil civilian owned land in the aftermath of the armed conflict, effectively prevented many IDP detainees from returning to their homes, which inflated the number of displaced persons and exacerbated the refugee crisis. The effects of this are seen to the present day. As of July 2015, there were still an estimated 73,700 IDPs in Sri Lanka, according to the Internal Displacement Monitoring Centre (IDMC); approximately 100,000 Eelam Tamils remain living in camps across Tamil Nadu in India; and further tens of thousands of Tamils have sought refuge elsewhere across the globe, including in state party countries such as Canada, Australia, Germany, France, the United Kingdom, and Switzerland.⁸¹

1.6 Abductions and Enforced Disappearances

As mentioned, this document is not meant to provide a comprehensive account of the brutality experienced by the Eelam Tamil people at the hands of the Sri Lankan government. In addition to the evidence of the crimes laid out above, the OISL Report has outlined various other forms of violence perpetrated against Tamil people in the final stages and following the conclusion of the Sri Lankan civil war. This includes the prevalence of abductions and enforced disappearances of Tamil civilians. The number of documented enforced disappearances increased in the final years of the Sri Lankan civil war and the period directly following the conclusion of the conflict in May 2009.⁸² Between May 2006 and March 2008, Sri Lanka was among the countries with the highest number of new cases of enforced disappearances in the world.⁸³ Ethnic Tamil individuals, in particular young Tamil men abducted by government security forces, made up the majority of these disappearances.⁸⁴

The history of abduction and enforced disappearances has been entrenched in Sri Lanka where the Tamils have been persecuted in this way over an extended period of time. From the time of the failed Norwegian mediated peace process (2006), there was a resurgence of disappearances, with these crimes continuing to be carried out with impunity. A notable dreaded feature of these abductions and disappearances was the use of white vans without number plates and these crimes were carried out even during curfew hours, including in High Security Zones.

The U.N. Secretary-General's Panel of Experts Report (on Sri Lanka) notes that:

In addition to its regular military operations, the Government employed clandestine operations to uncover LTTE safe houses, dismantle the LTTE networks in the South and eliminate persons believed to be associated with the LTTE. A potent symbol of these operations was the "white van". White vans were used to abduct and often disappear critics of the Government or those suspected of links with the LTTE, and, more generally, to instil fear in the population. An elite unit within the Special Task Force (STF) of the police is implicated in running these white van operations. Those abducted were removed to secret locations, interrogated and tortured in a variety of ways, including through beatings, forced nudity, suffocation with plastic bags, partial drowning, extraction of finger or toe nails, or administering electric shocks. Many were killed and their bodies

Crimes Against Humanity" (2018) 2 PKI Global Just J 28; A Mittal, "The Long Shadow of the War: The Struggle for Justice in Postwar Sri Lanka" (2015) The Oakland Institute.

⁸⁰ *Ibid.*

⁸¹ CPA, *supra* note 78.

⁸² OISL, *supra* note 2 at paras 405-408.

⁸³ "Recurring Nightmare: State Responsibility for 'Disappearances' and Abductions in Sri Lanka" (2008 March) online: *Human Rights Watch*: <<https://www.hrw.org/sites/default/files/reports/srilanka0308web.pdf>> at page 3.

⁸⁴ *Ibid* at pages 6-7.

disposed of secretly. Human rights workers, journalists, newspaper editors and humanitarian workers accused of being “Tiger sympathizers” were also caught in the net. In the period between 2006 and the end of the war, 66 humanitarian workers were either disappeared or killed.⁸⁵

The report also points out that “credible allegations point to a widespread practice in Sri Lanka, prior to, during and after the final stages of war, of disappearances carried out by agents on behalf of the State ... whereby such individuals were abducted and removed in white vans and never seen again”.⁸⁶

This violates numerous provisions of international human rights law.⁸⁷ It also created untold fear and mental agony amongst young Tamils, contributing to the coercive environment in Sri Lanka during and in the aftermath of the armed conflict.

2. JURISDICTION

Three specific jurisdictional elements must be satisfied for the Prosecutor to initiate an investigation:

1. *Subject-matter jurisdiction.* The Court is only empowered to investigate and prosecute genocide, crimes against humanity, war crimes, and in some cases, the crime of aggression. These crimes are set out in article 5 and defined in articles 6-8 of the Rome Statute.
2. *Territorial or personal jurisdiction.* The Court can only prosecute crimes that either occurred on the territory of a state party (territorial jurisdiction) or were committed by a state party’s nationals (personal jurisdiction), pursuant to article 12(2) of the Rome Statute.
3. *Temporal jurisdiction.* The Court is only empowered to investigate and prosecute crimes that allegedly took place after the Rome Statute entered into force.

In the present case, there is likely subject-matter jurisdiction, as there is compelling evidence that various actors, including members of the Sri Lankan government and armed forces, committed the crimes against humanity of persecution and deportation through coercive acts. There is likely territorial jurisdiction, as there is compelling evidence that at least part of the *actus reus* of these crimes occurred on the territories of states parties, including Canada, Australia, Germany, France, the United Kingdom, and Switzerland. Finally, there is likely temporal jurisdiction, as the Rome Statute came into force, in general and for all these states parties, years before the documented crimes against humanity in the present situation.

2.1. Subject-Matter Jurisdiction

The Court must have *subject-matter jurisdiction* in any given case. For a Prosecutor to initiate an investigation *proprio motu* –in other words, on their own initiative– there must be a reasonable basis to believe that the conduct falls within the category of crimes set out in article 5 of the Rome Statute.⁸⁸ These crimes include genocide, war crimes, crimes against humanity, and in some circumstances, the crime of aggression. In the present situation, there is compelling evidence that many of these crimes were committed in Sri Lanka, by Sri Lankan government forces.⁸⁹ However, for reasons that will be detailed in the

⁸⁵ *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka* (2011 March 31) online: *United Nations*: <<https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20Rep%20on%20Account%20in%20Sri%20Lanka.pdf>> at para 63.

⁸⁶ *Ibid* at para 234.

⁸⁷ *Ibid* at 233.

⁸⁸ *Rome Statute of the International Criminal Court*, (17 July 1998), 2187 UNTS 90 at article 7 (1 July 2002) [Rome Statute]; *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*, 01/19, Pre-Trial Chamber III (14 November 2019) (International Criminal Court) at para 40 [Myanmar/Bangladesh Article 15 Decision].

⁸⁹ These allegations are described in detail in numerous independent investigative reports. See, for example, OISL, *supra* note 2 and OHCHR Report, *supra* note 1.

subsequent section on territorial jurisdiction, it is possible only for the crimes against humanity of deportation and persecution to be investigated by the Court.⁹⁰ As a result, only these crimes will be considered for purposes of subject-matter jurisdiction.

2.1.1. Contextual Elements

The chapeau of article 7 of the Rome Statute sets out the contextual elements of crimes against humanity as “a widespread or systematic attack directed against any civilian population”.⁹¹ Article 7(2)(a) clarifies that “an attack directed against any civilian population” must involve “the multiple commission of acts referred to in [article 7(1)] against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack”.⁹² Finally, any of the underlying crimes alleged (in this case being deportation and persecution) must have been committed as part of the widespread or systematic attack. Although a *mens rea* component is also part of the contextual elements of crimes against humanity contained in the chapeau of article 7, the Court has repeatedly found that the requirement that the perpetrator have knowledge of the attack need not be addressed until there is a suspect before the Court.⁹³

There is a reasonable basis to believe that the crimes addressed below were committed as part of a widespread or systematic attack directed against a civilian population. Looking at the allegations, which have already been comprehensively described by independent investigative bodies including OISL, there is clear evidence that they constitute a “course of conduct involving multiple commission of acts referred to in article 7, paragraph 1” against the Tamil civilian population.

As discussed in the factual section above, there was regular, intense shelling of civilians and civilian targets, including in the government declared NFZs, after Sri Lankan government forces actively encouraged civilians to move into those zones. There was mass arbitrary detention of Eelam Tamil civilians in military-run IDP camps, and the seemingly arbitrary removal of Eelam Tamil individuals from IDP camps to detention centres. Particularly in the detention centres, but also commonly in IDP camps, Sri Lankan government forces engaged in widespread torture, sexual violence, and rape, and these actions were explicitly linked to victims’ ethnic Eelam Tamil identities. It is likely that at least 40,000 civilians (but likely much more) were killed in the final stages of the conflict, and hundreds of thousands were arbitrarily detained. These allegations of violence are evidently large-scale, widespread, methodical and systematic.⁹⁴

There is also ample evidence that these acts were committed pursuant to a state policy to attack the Eelam Tamil population. It is significant that the shelling of civilian targets by Sri Lankan government forces, particularly in the NFZs, occurred after the Sri Lankan government actively encouraged civilians to move into those areas.⁹⁵ Further, the Office of the High Commissioner for Human Rights found that there was a reasonable basis to believe that some civilian targets were specifically targeted.⁹⁶ Following the conclusion

⁹⁰ Because Sri Lanka is not a state party to the Rome Statute, only those crimes where part of the *actus reus* occurred on the territory of a state party can be subject to the Court’s jurisdiction (see, for example, Myanmar/Bangladesh Article 15 Decision, *supra* note 88). This is described in detail in the following section covering territorial jurisdiction.

⁹¹ Rome Statute, *supra* note 88; Myanmar/Bangladesh Article 15 Decision, *supra* note 88 at para 63.

⁹² *Ibid.*

⁹³ *Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 01/09-19-Corr, Pre-Trial Chamber II (2010 March 31) (International Criminal Court) at para 79; *Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”*, ICC-01/17-X-9-US-Exp, 25 October 2017, 01/17-9-Red, Pre-Trial Chamber III (2017 November 9) (International Criminal Court) [Burundi Article 15 Decision] at footnote 43; Myanmar/Bangladesh Article 15 Decision, *supra* note 88 at footnote 99.

⁹⁴ See section 1., “Facts”; “Definitions: Crimes Against Humanity”, online: *United Nations Office on Genocide Prevention and the Responsibility to Protect*, <<https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>>.

⁹⁵ *Report of the Secretary-General’s Internal Review Panel on United Nations Action in Sri Lanka* (2012 November) at page 9.

⁹⁶ OISL, *supra* note 2 at para 864.

of the war, there was mass arbitrary detention of Tamil civilians by government forces, in military-run camps, and torture and sexual violence, committed by government forces against Tamil detainees, was widespread and intended to both humiliate detainees and elicit forced confessions.⁹⁷ The entire apparatus was clearly state-run.

In the Pre-Trial Chamber's *Myanmar/Bangladesh* decision, the Chamber found that there existed "a reasonable basis to believe that there may have been a state policy to attack the Rohingya" given the "many sources indicating the heavy involvement of several government forces and other state agents".⁹⁸ This bar is easily met in the present case, based on the information summarized above. It is important to note that while the Court may not be permitted to conduct proceedings in relation to alleged crimes that fall outside its territorial jurisdiction (such as some of the atrocities outlined above), being crimes that occurred entirely on the territory of Sri Lanka, the Court would still have "the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes within its competence".⁹⁹

In other words, any Pre-Trial Chamber eventually constituted to authorize a Prosecutor's *proprio motu* investigation into this situation would still be permitted to consider extra-jurisdictional facts in order to establish the contextual elements, as Pre-Trial Chamber III did in the situation of *Myanmar/Bangladesh*.¹⁰⁰

2.1.2. The Crime Against Humanity of Deportation

Pursuant to article 7(1)(d) of the Rome Statute, deportation or forced transfer of a population is committed when the following requirements are met:

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another state or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.¹⁰¹

The act of deportation and the act of forcible transfer are two distinct crimes.¹⁰² For the crime against humanity of deportation, the forcible displacement must result in the civilians crossing an international border. For forcible transfer, the forcible displacement need only result in the civilians moving to a different area of the state's territory.¹⁰³ As such, there is an added element to the crime of deportation specifically: the forced transfer across an international border. For either crime, there must be evidence that the displacement occurred by expulsion or by other coercive acts.¹⁰⁴

In the *Myanmar/Bangladesh* situation, Pre-Trial Chamber III found that deportation by coercive acts was made out when, as a result of coercive acts taking place in Myanmar, Rohingya victims were "forced to seek refuge in Bangladesh".¹⁰⁵ The coercive acts considered in that case included alleged killings, arbitrary

⁹⁷ See section 1.2.

⁹⁸ Myanmar/Bangladesh Article 15 Decision, *supra* note 88 at para 92.

⁹⁹ *Ibid* at para 93; *Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 01/13-34, Pre-Trial Chamber I (2015 July 16) (International Criminal Court) at para 17.

¹⁰⁰ Myanmar/Bangladesh Article 15 Decision, *supra* note 88 at para 93.

¹⁰¹ *Elements of Crimes*, Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess, UN Doc E.03.V.2 (2002), article 7(1)(d) [Elements of Crimes].

¹⁰² *Decision on the Prosecution Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 01/18, Pre-Trial Chamber I (2019 September 6) (International Criminal Court) at para 55 [Myanmar/Bangladesh Article 19 Decision].

¹⁰³ *Ibid*.

¹⁰⁴ Elements of Crime, *supra* note 94 at article 7(1)(d).

¹⁰⁵ Myanmar/Bangladesh Article 15 Decision, *supra* note 88 at paras 26, 53, 108.

detentions, sexual violence, and destruction or seizure of victims' properties.¹⁰⁶ Victims described that they had no choice but to flee from Myanmar as a result of the coercive acts of the state which created a coercive environment. The only choice and the only way for the victims to protect themselves and to protect their families from the possibility of being subjected to torture or death, was for the victims to flee.¹⁰⁷

Tamils in Sri Lanka have faced an analogous situation to that faced by the Rohingya victims in Myanmar, in numerous ways. There is a reasonable basis to believe that both marginalized groups faced killings, arbitrary detentions, sexual violence, and the destruction or seizure of property. This has similarly compelled many Tamils to seek refuge in other states, including Canada, Australia, Germany, France, the United Kingdom, and Switzerland.

Tamils in Sri Lanka faced mass arbitrary killings: the indiscriminate shelling targeting civilians in the NFZs, described above, which was continuous in the final weeks of the armed conflict, is sufficient to constitute this coercive act, although there is further evidence that extrajudicial killings in a variety of contexts were pervasive throughout the armed conflict.¹⁰⁸ There was also mass and prolonged arbitrary detention of Tamil civilians in the military-run IDP camps and detention centres. Approximately 284,000 civilians were transferred to these closed and guarded camps without any idea of when they would be allowed to leave.¹⁰⁹ This reportedly included the elderly and approximately 50,000 children.¹¹⁰ Detainees faced widespread sexual violence.¹¹¹

Then if and when detainees were released, they regularly could not go home. Similar to the situation in *Myanmar/Bangladesh*, there was widespread confiscation of lands by Sri Lankan military forces.¹¹² This military occupation of Tamil land began in the immediate aftermath of the conflict, and in some cases continued for years. The Centre for Policy Alternatives reported that as of 2016, a total of 12,751 acres of land continued to be under occupation, with hundreds of thousands of people still unable to return to their lands.¹¹³ One example of the long-standing nature of this problem can be seen in the Mullikulam area, as reported by Human Rights Watch in 2018:

On April 29, 2017, the Sri Lankan navy high command announced it would release 100 acres of land that security forces had been occupying in the Mullikulam area since 2007 to the original owners. For the displaced residents of this coastal village in Mannar on Sri Lanka's northwest coast, the news came as a huge relief. More than one year later, however, as of August 2018, no land has been released and the people remain displaced, undergoing severe hardship living in semi-permanent shelters with limited livelihood options. Lamented Francis Croos, a village elder, "Now there is no war. It's now peacetime. So why can't we go back home?"¹¹⁴

¹⁰⁶ *Ibid* at paras 28-33.

¹⁰⁷ *Ibid*.

¹⁰⁸ There are numerous accounts of Tamils being killed after they surrendered or after they were taken into government custody. There is compelling [video evidence](#) that displays executions of Tamil men, and the corpses of naked women who appear to have been raped. One video shows the shooting of three bound prisoners at close range. This apparent pervasiveness of extrajudicial killings of Tamils by Sri Lankan government forces, has attracted international rebuke from human rights groups and international organizations. The British Foreign Office Minister at the time [described](#) the footage as "horrific" and "containing evidence of violations of international humanitarian and human rights law". For further information on extrajudicial killings in a variety of contexts throughout the armed conflict, see OISL, *supra* note 2, and OHCHR Report, *supra* note 1.

¹⁰⁹ OISL, *supra* note 2 at para 1071.

¹¹⁰ "Unlock the Camps in Sri Lanka" (2009) at 5, online (pdf): *Amnesty International* <www.amnesty.org/download/Documents/48000/asa370162009en.pdf>.

¹¹¹ OISL, *supra* note 2 at paras 587, 603, and 616.

¹¹² Perera, *supra* note 48; Jones, *supra* note 77.

¹¹³ CPA, *supra* note 78.

¹¹⁴ "'Why Can't We Go Home?' Military Occupation of Land in Sri Lanka" (9 October 2018), online: *Human Rights Watch* <<https://www.hrw.org/report/2018/10/09/why-cant-we-go-home/military-occupation-land-sri-lanka>> [Why Can't We Go Home].

Like in the *Myanmar/Bangladesh* case, there is a reasonable basis to believe that it was as a result of these coercive acts and this coercive environment that Tamil refugees were forced to seek refuge in other states, including Canada, Australia, Germany, France, the United Kingdom, and Switzerland. This is supported by witness statements which provide a clear connection between the coercive acts committed by the Sri Lankan government and armed forces and the direct and indirect deportation of Tamil civilians from the country's borders.

One witness we interviewed, S.K., is a Sri Lankan citizen who left Kilinochchi on October 5, 2008 as government shelling in the area escalated. S.K.'s family relocated several times in an attempt to escape the Sri Lankan military, eventually arriving in Vallipunam in early 2009:

When I was in Vallipunam, I heard via the news, radio (Illangai Vaanoli) and leaflets that were dropped by the Sri Lankan Government via helicopters, about the safe zones/ no fire zones. The government announced that locations such as Suthanthirapuram, Udayarkattu, Puthukkudiyiruppu and Vallipunam were government protected areas. The Sri Lankan Government would notify us in Tamil and print these leaflets in Tamil so that the Tamil citizens could understand. The government kept urging Tamil citizens via these modes of communication to go to these locations as they claimed that the citizens would be safe from any attacks. However, after these announcements, I could see and hear those safe zones being continuously and vigorously attacked by the multi-Barrels. These attacks in these safe zones were more aggressive and more frequent compared to the other shelling I have seen from the government.

Then the Government announced that Putumattalan, Ampelavanpokkani and Valayanmadam were safe zones, however, shortly after these announcements, again, those areas would be shelled. There have been times where shelling occurred immediately after the Government urged the Tamil civilians to go to these safe zones. I could also see shelling occurring in those safe zones during these announcements. The Government kept telling us that they were going to stop attacking these safe zones however, they never did. Other civilians and I did not trust the Sri Lankan Government however, we had no choice but to go to these locations as we were trying to flee from being captured by the Sri Lankan army. I knew that the Government would attack these safe zones, however, I could not face the pain or treatment I would receive if I was captured by or surrendered to the Sri Lankan army.

In February 2009, S.K. arrived in Mullivaikal and came to witness the devastation that came with the relentless shelling by government forces of the no-fire zone established there, including the targeted attack of a hospital. Fearing for their safety, S.K. and their family first attempted to leave Sri Lanka by boat in April 2009:

Many families including my own, simply made the decision to leave Sri Lanka to save our lives from our government. I did not feel safe to surrender to the army or go towards the government troops to seek refuge as I heard from other victims that those that surrendered to the army were treated in an extremely violent manner. For example, people were beaten and women were sexually assaulted. Also, for us to even get to the Sri Lankan forces, we were told by the army that to surrender, we would have to walk to them, completely naked. I knew that if I were captured by the army, I would be treated in such a humiliating way or could die. Therefore, I decided to leave the country and go to India as I heard that other families had done the same. I wanted to go to India mainly because I thought I would be able to live peacefully. During that time, a lot of civilians were planning to escape via the sea as they thought that would be the safest.

My first attempt to leave Sri Lanka was on 18 April 2009, exactly one month before the war ended. My family and I were fleeing from Ambalampokkani which was an LTTE controlled area without the LTTE's approval. I wanted to escape as no area was safe to seek refuge and the 'No Fire Zones' were hit with indiscriminate shelling by the Sri Lankan Government. My family and I decided to escape to India via a boat with several other families.

When they tried to escape to India, S.K. and their family were apprehended and detained by the Sri Lankan Navy and held for a month without charge at the Point Pedro naval base before being transferred to the Trincomalee Naval base. They were held at the Trincomalee base for five years without charge, during which they were not allowed to leave their living quarters and were given no access to legal support, before being released in Vavuniya on December 5, 2014. During their detention, S.K. overheard a guard say "that under Gotabaya's instruction, there were 700 Tamils captured and detained" at another location.

Following their release and upon learning that 35 other families had been held at the base, S.K. began to speak out about the mass incarceration of Tamil citizens by the Sri Lankan government before receiving threats from individuals involved in "Joseph Camp" – a detention site known for its torture of Tamil individuals.

My breaking-point and what made me plan to escape to Canada was an incident that occurred in September 2016. On this day, my son told me that intelligence officers had slowed down their vehicle, approached my son and made passive aggressive statements to him. My son was just finishing his lessons at school. I realised that it was no longer safe for my family to stay in Sri Lanka, so I decided to come to Canada as I have family there and I thought I would be safe there. Even though the government had changed, the intelligence officers and the people working for the government remained the same, so I was not protected in Sri Lanka.

Another witness, a Tamil journalist, S.K.2., recorded the events that took place in various government established NFZs in the final stages of the civil war. On April 25, 2009, S.K.2. sustained serious injuries while recording the events taking place in Mullivaikaal:

On the 20th of April 2009, the Sri Lankan Army were taking over the areas from Pokkanai to Puthumathalan. Not knowing what to do, the civilians stayed in the bunkers. The military suspected all the people remained in the bunkers as the enemies. So, the advancing Sri Lankan army killed all the people in bunkers by throwing grenades and buried them without any consideration between the dead, injured and survived members in the bunkers. Civilians were buried alive and trapped in their bunkers, unable to escape. This happened because after the advancing soldiers had used grenades and other weaponry to try to kill the people in the bunkers, behind them were other Sri Lanka soldiers in backhoes. These soldiers were using the backhoes to fill the collapsed bunkers shut whilst the civilians inside were crying, screaming and begging for help. These violations at large took place in Valignarmadam and between Iraddaivaikkaal and Puthumathalan along the 2 km coastal areas between 20th-25th of April 2009.

I was injured when I saw these killing unfold on another day - 25th of April 2009. These incidents were witnessed by hundreds of people who were there moving towards the Sri Lankan army and had put themselves in the surrendering position to avoid being shot at. Ironically, whilst we were doing this, we were listening to the announcement by the government saying that the government forces were involved in the most extensive humanitarian operation to rescue the people, and that there were zero casualties.

While being treated for his injuries, S.K.2. survived an attack on the hospital by Sri Lankan forces:

I also have the details of the hospital attack carried out by the navy on the 29th of April 2009. Also, naval forces used cannon fire, targeting the civilian population indiscriminately with malicious intent. Due to the high density of the tarpaulin tents, several people succumbed to death at the ground level. In the early days of 2009, we counted the dead in hundreds (200-450), but from April, it went above 1000 per day. We couldn't report on what was happening in the final days. At this phase, grief-stricken people left behind the dead, sometimes severely injured due to the intensity of the bombardment. There was hardly any medication to treat or hospitals available. The reason for the stench in the last days was attributed to deaths.

The war reporting on casualties during the Mullivaikaal was not possible as many of the colleagues were killed during the indiscriminate firing of multi-barrel rocket launchers' attacks and relentless attack by air, sea and land by area weaponry. Without helping the injured and burying the dead, it was impossible to pass by without earning their contempt. Saving the lives of the injured became the number one priority for us gradually. We could not take photographs of the bombed sites as such goring scene were not publishable...As the hospital became quite vulnerable and used the medicine as a weapon of war, ICRC shipped them safely to other areas for treatment. The deliberate naval shelling on the ICRC medical evacuation ship caused delays and deaths of the seriously injured people.

On May 17, 2009, Sri Lankan soldiers transferred S.K.2. to Mancholai hospital in Mullaithivu where he and others were treated for their injuries while surrounded by armed security forces. After he recovered, he realized he had to leave Sri Lanka for his safety:

Once I recovered, I found that the military was running the civil affairs and the high volume of military presence forced me to leave the country to save my life. In 2008, 12 journalists were killed in Sri Lanka. Sri Lanka was identified by Time Magazine as number 3 on the list of underreported stories in 2008 and claimed the war was deadlier than Afghanistan. We could not even report to the police on human rights violations, intimidations and civil rights as they would not record any crimes on that basis. I had no choice but to flee to save my life and avoid any detention orders leaving my family behind. I am very patriotic, and I never wanted to leave my country, but sadly, because of this deliberate targeting of Tamils, I had to flee to survive.

... I choose to flee to the nearest country by finding a safe passage; I wanted to find a place where I could live peacefully and where journalists would not be persecuted. I left Vavuniya on November 23rd 2009 and went to Thailand. I left on the November 23rd 2009 as that was the only opportunity I had. I was help in Vavuniya for 19 days against my will and I escaped. Then I immediately came to Thailand. I thought I could stay there for a while and head back home when things settled down, but I heard that many Sri Lankan Tamils were being remanded in custody without any legal support, and many were suffering in prison in Thailand. I was in constant fear and when the first opportunity I had to take a boat to Canada, I took it. I got on the boat on May 2nd 2010 and arrived in Canada on the 12th of August 2010.

Another witness we interviewed, S.V., born in Kilinochchi, arrived in the NFZ established in Suthanthirapuram in March 2008 with his family. After being severely injured, S.V. was treated in a “UN tent” that was later hit by a “barrage of rockets”. S.V. identified the attack as part of “the declared policy of Defence Secretary Gotabaya Rajapaksa”. S.V. was among the few patients who survived the attack on the hospital and was admitted to another “makeshift hospital.” As government attacks continued, S.V. found he had no choice but to enter territory controlled by Sri Lankan armed forces to seek further medical attention. Realizing S.V. was in danger receiving treatment under the supervision of Sri Lankan soldiers, his mother intervened:

Finally, I had to go to the territory of the Sri Lankan forces to save my life and the SL army admitted me to the Vavuniya hospital on the 16th of May 2009. The government medical team did not spend much effort as they were overloaded with many new cases by the hour. I was hospitalised there for a week. While I was at the hospital, no medical treatment was provided except painkillers. I was under the custody of the SL Army even though I was hospitalised. Realising my fate, my mother bribed me and took me out of the hospital and sent me to India for treatment.

I was taken by fishermen in the boat from Mannar and transferred onto an Indian boat to Tamil Nadu, India. I called my relatives by phone and was met by relatives at the shore and admitted to the hospital for treatment at Chennai Hospital. They reopened the wound and found some post-operational soil pads left inside during operation and stitched inside! As I entered Indian territory illegally, I had to get out quickly without wasting any time, I fled to Thailand and sailed to Canada. As India was supporting the war in Sri Lanka, I never felt safe in India. I also had experienced and witnessed violations by IPKF and feared them all my life.

S.V. provided a statement that speaks to the experiences of many Tamil individuals forced from their home by the coercive acts outlined above – that despite the dangers and uncertainty that lay ahead in their escape from Sri Lanka, to protect their freedom and safety they had no other choice but to leave.

Compared to lived experience in the war zone, the perilous journey was the only hopeful choice like an escape to freedom.

The U.N. Refugee Agency documented “extensive new internal displacements” in Sri Lanka in 2009.¹¹⁵ They also counted 145,712 refugees from Sri Lanka that year¹¹⁶ – up 35% from 2005.¹¹⁷ To Australia alone, over 3,000 asylum seekers travelled by boat from Sri Lanka between the years of 2008 and 2013.¹¹⁸

The witness statements we have collected indicate that there is likely the requisite link, as there was in the *Myanmar/Bangladesh* case, between these coercive acts and the mass fleeing of Tamils from Sri Lanka. The evidence demonstrates that the Tamils in Sri Lanka faced a coercive environment – ripe with extrajudicial killings, mass arbitrary detentions, torture, rape, and the destruction or seizure of property – which caused many to feel they had no choice but to flee the country. As will be discussed below, in the section on territorial jurisdiction, the Court has the authority to investigate Sri Lanka’s breaches of this crime, because many Tamils fled to the territories of states parties, including Canada, Australia, Germany, France, the United Kingdom, and Switzerland.

¹¹⁵ “2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons” (2010 June 15), online: *UNHCR* <<https://www.unhcr.org/4c11f0be9.pdf>>.

¹¹⁶ *Ibid.*

¹¹⁷ “2005 Global Refugee Trends: Statistical Overview of Populations of Refugees, Asylum-Seekers, Internally Displaced Persons, Stateless Persons, and Other Persons of Concern to UNHCR” (2006 June 9), online: *UNHCR* <<https://www.unhcr.org/4486ceb12.pdf>>.

¹¹⁸ *Report of the Expert Panel on Asylum Seekers* (2012 August), online (pdf): <<https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/expert-panel-report.pdf>> at page 70.

2.1.3. The Crime Against Humanity of Persecution

The crime against humanity of persecution, within the meaning of articles 7(1)(h) and (2)(g)¹¹⁹, is committed when, either through a single act or series of acts¹²⁰:

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 as defined in article 7, paragraph 3, of the Statute, 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, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.¹²¹

The evidence indicates that Sri Lankan officials have persecuted the Tamils in Sri Lanka, in satisfaction of each of the above requirements contained in articles 7(1)(h) and (2)(g).

2.1.3.1. A Severe Deprivation of Fundamental Rights

First, for the crime against humanity of persecution to be made out, there must be “a *severe deprivation* of a person’s *fundamental rights* contrary to international law” (emphasis added).¹²² The case law from the Court clarifies that “fundamental rights” for this purpose includes the right to life, the right to education, freedom of assembly and association, freedom of expression, and the right to not be subjected to torture or other cruel, inhuman or degrading treatment.¹²³

In the present situation, there are reasonable grounds to believe that the Tamil population in Sri Lanka were severely deprived of their fundamental rights contrary to international law. As the evidence in the previous sections has made apparent, they were severely deprived of their right to life (for the same reasons they were subject to arbitrary killings in the previous section¹²⁴) and their right to not be subjected to torture or other cruel, inhuman or degrading treatment. As discussed, Tamils in Sri Lanka were arbitrarily detained in IDP camps and detention centres, wherein torture, including sexual violence as a form of torture, was widespread, and used to forcibly elicit confessions, to degrade, and to humiliate.¹²⁵

2.1.3.2. Identifiable Group or Collectivity

Pursuant to the second and third elements, persons must have been targeted “by reason of the identity of a group or collectivity”, or the group or collectivity must have been targeted itself. The targeting must be based on “political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law”.¹²⁶

¹¹⁹ Elements of Crime, *supra* note 94 at articles 7(1)(h) and 7(2)(g). Article 7(2)(g) of the Rome Statute states that “prosecution” means an intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

¹²⁰ Burundi Article 15 Decision, *supra* note 93 at para 130.

¹²¹ Myanmar/Bangladesh Article 15 Decision, *supra* note 88 at para 100.

¹²² *Ibid* at para 101; Burundi Article 15 Decision, *supra* note 93 at para 132.

¹²³ *Ibid*.

¹²⁴ See section 2.1.2., “The Crime Against Humanity of Deportation”, for a discussion of arbitrary killings amongst the Tamil population. See also footnote 108.

¹²⁵ See section 1.3., “Mass Arbitrary Detention of Eelam Tamils”.

¹²⁶ Elements of Crime, *supra* note 94 at articles 7(1)(h) and 7(2)(g).

In the *Myanmar/Bangladesh* situation, Pre-Trial Chamber III clarified that a mixed subjective-objective approach may be adopted in assessing whether a group is identifiable on one of these bases.¹²⁷ The Chamber further clarified that “based on objective considerations”, an ethnic group may be “a group whose members share a common language and culture”, and a religious group may be a group “whose members share the same religion, demonization or mode of worship”.¹²⁸ Then the subjective considerations include “the perception of the group by the perpetrator as well as the perception and self-identification of the victims”.¹²⁹

In the present situation, there is compelling evidence that civilians were severely deprived of their rights due to their Tamil ethnicity, and that Tamils were targeted as a collectivity. This is apparent from the OISL’s findings¹³⁰, and widely accepted features of the conflict, which saw the Sinhalese-majority (government forces) pitted against the Tamil minority.¹³¹ As discussed in detail in previous sections, it was specifically Tamil civilians that were arbitrarily killed¹³², and it was specifically Tamil detainees that were subject to widespread torture and sexual violence.¹³³ The perpetrators made the ethnic dimension of this torture apparent to their victims, as they used ethnic slurs such as “Tamil dog” while committing torture, sexual violence, and rapes.¹³⁴ There is also clear evidence that Tamil civilians were detained in IDP camps and detention centres specifically because of their Tamil ethnicity. The OISL found reasonable grounds to support this conclusion based on their collection and analysis of evidence including witness testimonies:

On the basis of the information in OISL possession, there are reasonable grounds to believe that the IDPs were treated as suspects and detained because of their Tamil ethnicity and because they had come out of LTTE-controlled territory.¹³⁵

¹²⁷ Myanmar/Bangladesh Article 15 Decision, *supra* note 88 at para 102.

¹²⁸ *Ibid* at para 103; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, 95-1-T, Trial Chamber II (1999 May 21) (International Criminal Tribunal for Rwanda) at para 98; *The Prosecutor v. Jean-Paul Akayesu*, 96-4-T, Chamber I (1998 September 2) (International Court Tribunal for Rwanda) at paras 513 and 515. The latter two judgments were in the context of genocide, but the *Myanmar/Bangladesh* case cited both judgments in the context of the crime against humanity of persecution.

¹²⁹ Myanmar/Bangladesh Article 15 Decision, *supra* note 88 at para 103. To substantiate this point, Pre-Trial Chamber III cited extensive case law: *The Prosecutor v. Bosco Ntaganda*, 01/04-01/06-2359, Trial Chamber VI (2019 July 8) (International Criminal Court) at paras 1010-11; Burundi Article 15 Decision, *supra*, note 93 at para 133; *The Prosecutor v. Dominic Ongwen*, 02/04-01/15-422-Red, Pre-Trial Chamber II (2016 March 23) (International Criminal Court) at paras 25, 39, 52, and 65; *The Prosecutor v. Charles Blé Goudé*, 02/11-02/11-186, Pre-Trial Chamber I (2014 December 11) (International Criminal Court) at para 123; *The Prosecutor v. Laurent Gbagbo*, 02/11-01-656-Red, Pre-Trial Chamber I (2014 June 12) (International Criminal Court) at para 204; *The Prosecutor v. Simone Gbagbo*, 02/11-01/12-2-Red, Pre-Trial Chamber III (2012 March 2) (International Criminal Court) at para 21; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 01/09-02/11-382-Red, Pre-Trial Chamber II (2012 January 23) (International Criminal Court) at para 283; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 01/09-01/11-373, Pre-Trial Chamber II (2012 January 23) (International Criminal Court) at para 172; *Situation in Libya, Decision on the ‘Prosecutor’s Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 01/11-01/11-1, Pre-Trial Chamber I (2011 June 27) (International Criminal Court) at para 65; *The Prosecutor v. Goran Jelešić*, 95-10-T, Trial Chamber (1999 December 14) (International Tribunal for the former Yugoslavia) at para 70; *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, 96-3-T, Trial Chamber I (1999 December 6) (International Criminal Tribunal for Rwanda) at para 56; *The Prosecutor v. Milorad Krnojelac*, 97-25-A, Appeals Chamber (2003 September 17) (International Tribunal for the former Yugoslavia) at para 185; *The Prosecutor v. Mladen Naletilić, aka “Tuta” and Vinko Martinović, aka “Štela”*, 98-34-T, Trial Chamber (2003 March 31) (International Tribunal for the former Yugoslavia) at para 636.

¹³⁰ OISL, *supra* note 2.

¹³¹ See for example, Anandakugan, *supra* note 4.

¹³² See footnote 108.

¹³³ OISL, *supra* note 2 at paras 540-565, 587, and 603.

¹³⁴ *Ibid* at paras 587 and 603.

¹³⁵ *Ibid* at para 1174.

2.1.3.3. Connection with Other Crimes

The final element requires the persecution be connected to another crime within the Rome Statute. As will be discussed in detail below, for this crime to come within the territorial jurisdiction of the Court, it must be connected specifically to the crime against humanity of deportation.

In the present case, there is a reasonable basis to believe that the conduct amounting to persecution was carried out in connection with the crime against humanity of deportation. As noted, there is compelling evidence that Tamils were targeted, specifically because of their Tamil ethnicity, in the context of arbitrary killings, detention, torture and sexual violence.¹³⁶ There is also compelling evidence that Tamil-owned property was confiscated specifically because of the owners' Tamil ethnicities.¹³⁷ This is in keeping with the fact that the entire nature of the conflict was rooted in long-standing ethnic tensions between the Sinhalese majority and the Tamil minority, wherein Tamils as an ethnic group were marginalized and disenfranchised.¹³⁸

This relates to the crime against humanity of deportation because arbitrary killings, detention, torture, sexual violence, and seizures of property – are the claimed coercive acts in the context of the crime against humanity of deportation. As there is compelling evidence that these associated coercive acts were committed against Tamils specifically because of their Tamil ethnicity – the crime against humanity of persecution can be seen as connected with the crime against humanity of deportation.¹³⁹

2.1.4. Evidence of Intent

As mentioned, at this stage it is not necessary to speak to the *mens rea* component of the alleged deportation and persecution of Eelam Tamil people by the Sri Lankan government and armed forces. That said, we are confident that the discriminatory intent to specifically target the Eelam Tamil community required to satisfy the elements of persecution, as well as an underlying intent to target the Eelam Tamil people so as to force them out of Sri Lanka's borders, will be found. In the alternative, it can reasonably be argued that the deportation of Tamil civilians was reasonably foreseeable by the Sri Lankan government and armed forces as a result of the coercive acts committed by them.

The information gathered and presented by the OISL and others suggests that Eelam Tamil individuals were specifically targeted by the Sri Lankan government and armed forces in the perpetration of the crimes outlined above. This is further supported by Anti-Eelam Tamil sentiment that been expressed by Sri Lankan leaders for decades and continued following the conclusion of the armed conflict.

As early as 1955, Sri Lanka's then- Prime Minister SWRD Bandaranaike expressed concern that the Tamil population in Sri Lanka would come to dominate the Sinhalese. This concern was used by Bandaranaike to justify the marginalization of the Eelam Tamil population. Bandaranaike stated:

“If parity is granted, it will mean disaster to the Sinhalese race ... Tamil with their language and culture and the will and strength characteristic to their race ... would come to exert their dominant power over us.”¹⁴⁰

¹³⁶ See section 2.1.3.2., “Identifiable Group or Collectivity”.

¹³⁷ See section 1.5., “Land Grabs and ‘Sinhalization’”, as well as the relevant portions of section 2.1.2., “The Crime Against Humanity of Deportation”, for detailed discussion of the confiscation of Tamil land.

¹³⁸ Anandakugan, *supra* note 4.

¹³⁹ In Myanmar/Bangladesh Article 15 Decision, *supra* note 88, the crime against humanity of persecution was similarly linked to the crime against humanity of deportation.

¹⁴⁰ Prime Minister SWRD Bandaranaike, 1955 November 13, cited in *Ceylon Daily News*, 1955 November 14.

Removing the Tamil population so as to appease the Sinhalese community in Sri Lanka has been alluded to by Sri Lankan leadership. Then-President JR Jayawardane spoke about starving out the Eelam Tamil people from Sri Lanka for the benefit of the Sinhalese population in July 1983:

“I am not worried about the opinion of the Tamil people ... now we cannot think of them, not about their lives or their opinion ... the more you put pressure in the north, the happier the Sinhala people will be here ... Really if I starve the Tamils out, the Sinhala people will be happy.”¹⁴¹

An explicit and startlingly violent anti-Tamil statement was given by cabinet minister Gamini Dissanayake closely following the anti-Tamil pogrom that has come to be known as “Black July”. Not only does the minister discuss spilling “the blood of every Tamil” in Sri Lanka in the span of “14 minutes”, but Dissanayake also discusses the decision to “colonise” the land:

“Who attacked you? Sinhalese. Who protected you? Sinhalese. It is we who can attack and protect you. They are bringing an army from India. It will take 14 hours to come from India. In 14 minutes, the blood of every Tamil in the country can be sacrificed to the land by us. It is not written on anyone’s forehead that he is an Indian or Jaffna Tamil, a Batticaloa Tamil or upcountry Tamil, Hindu Tamil or Christian Tamil. All are Tamils ... We have decided to colonise four districts including Mannar with Sinhalese people by destroying forests. A majority of Sinhalese will be settled there.”¹⁴²

On May 19, 2009, the day after the armed conflict was declared over, President Mahinda Rajapaska stated that the Tamil people of Sri Lanka were “no longer” and intimated that any who remained constituted a “lesser group” of those who “do not love” the state. Classifying the Tamil population as such insinuates that their elimination, in the eyes of the President, is a positive outcome of the war.

“We have removed the word minorities from our vocabulary three years ago. No longer are the Tamils, Muslims, Burghers, Malays and any others minorities. There are only two peoples in this country. One is the people that love this country. The other comprises the small groups that have no love for the land of their birth. Those who do not love the country are now a lesser group.”¹⁴³

2.2. Territorial Jurisdiction

In the event of a *proprio motu* investigation under article 13(c) of the Rome Statute, the Court may exercise jurisdiction if one of more of the following states are parties to the Statute:

- (a) The state on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the state of registration of that vessel or aircraft;
- (b) The state of which the person accused of the crime is a national.¹⁴⁴

¹⁴¹ President J.R. Jayawardane (1977 – 1988), cited in *Daily Telegraph*, 1983 July 11.

¹⁴² A relevant speech pertaining to Black July was cabinet minister Gamini Dissanayake’s speech delivered to the Tamil estate workers a month after the event. Gamini Dissanayake, Minister of Land and Land Development, is an influential figure that was involved within the resettlement and colonization schemes that the government had sponsored. Shanmugathan, Nagalingam (1984) Sri Lanka: The Story of the Holocaust. *Race and Class* 26(1): 63-82.

¹⁴³ President Mahinda Rajapaska during the ceremonial opening of the Sri Lankan Parliament on 2009 May 19, cited in *The Sunday Leader*, 2009 May 24.

¹⁴⁴ Rome Statute, *supra* note 88 at article 12(2).

In other words, the Court can only investigate alleged crimes if the conduct in question took place on the territory of a state party to the Rome Statute, or if the conduct in question was committed by nationals of a state party.¹⁴⁵

Sri Lanka is not a state party to the Rome Statute. However, based on the precedent set by the *Myanmar/Bangladesh* case, and the evidence that Eelam Tamils fled, due to coercive acts, to the territories of states parties (including Canada, Australia, Germany, France, the United Kingdom, and Switzerland) – the Court should have jurisdiction to investigate the crimes against humanity of deportation and persecution committed by Sri Lankan officials, described above.

2.2.1. The Myanmar/Bangladesh Precedent

The Pre-Trial Chamber in the situation in *Myanmar/Bangladesh* clarified that the preconditions for the exercise of the Court’s territorial jurisdiction are “fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a state party”.¹⁴⁶

In the context of that case, the alleged crime against humanity of deportation was initiated in Myanmar but completed in Bangladesh, when victims were “forced to seek refuge in Bangladesh”.¹⁴⁷ The Pre-Trial Chamber noted that the crime against humanity of deportation, specifically, is an “inherently transboundary crime”.¹⁴⁸ The Chamber noted that since an inextricable element of that crime is the “forced displacement across international borders”, the conduct related to deportation “necessarily takes place on the territories of at least two states”.¹⁴⁹ The Chamber articulated that such an interpretation of the crime against humanity of deportation was in line with the intention of the drafters of the Rome Statute, who did not limit the crime to the forced transfer from one state party to another state party.¹⁵⁰ Neither article 7(2)(d) nor the Elements of Crimes make any such specification.¹⁵¹

The deportation by coercive acts of the Tamils from Sri Lanka, is an analogous situation in many ways to the claimed deportation by coercive acts of the Rohingya from Myanmar. As in the *Myanmar/Bangladesh* case, there is a reasonable basis to believe that Tamils were deported by coercive acts from the territory of a non-state party (Sri Lanka) to the territories of states parties. As discussed, following the intensification of violence in 2009 that saw continuous shelling of NFZs and mass arbitrary detentions and torture of Tamils, hundreds of thousands of Tamils fled Sri Lanka and sought refuge in other states, including in several states that are parties to the Rome Statute. These include Canada, Australia, Germany, France, the United Kingdom, and Switzerland.

Therefore, as in the *Myanmar/Bangladesh* case, part of the *actus reus* of this deportation by coercive acts “necessarily” took place on the territories of the states parties to which Tamils fled. This provides a reasonable basis to believe that these crimes against humanity of deportation may fall within the territorial jurisdiction of the Court.

If the allegations of deportation may reasonably fall within the territorial jurisdiction of the Court, so too may the allegations of persecution. As Pre-Trial Chamber III held in the *Myanmar/Bangladesh* situation, if

¹⁴⁵ There are exceptions to this general rule: if the UN Security Council refers a situation to the Court, or if the state in question files a declaration under article 12 accepting the court’s jurisdiction in a particular situation.

¹⁴⁶ Myanmar/Bangladesh Article 19 Decision, *supra* note 102 at para 64.

¹⁴⁷ Myanmar/Bangladesh Article 15 Decision, *supra* note 88 at paras 26, 53, and 108; Victoria Colvin and Phil Orchard, “The Rohingya jurisdiction decision: a step forward for stopping forced deportations” (2019) 73:1 Australian J Intl Affairs 16-21 at 18.

¹⁴⁸ Myanmar/Bangladesh Article 19 Decision, *supra* note 102 at para 71.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

the alleged coercive conduct that led to the deportation “was directed against an identifiable group or collectivity”, the crime against humanity of persecution may fall within the territorial jurisdiction of the Court as well, by virtue of its connection with the crime against humanity of deportation.¹⁵² This is because, in cases where the crime of persecution is linked to the crime of deportation, “an element or part of this crime (i.e. the cross-border transfer) takes place on the territory of a state party”.¹⁵³

2.2.2. Direct and Indirect Deportation

In the *Myanmar/Bangladesh* case, Rohingya refugees fled directly across the border from Myanmar (a non-state party) to Bangladesh (a state party). In the situation of Sri Lanka, the paths that Tamil refugees took were varied. Many Tamils were deported “directly”, meaning, they crossed a single international border from Sri Lanka into the territory of a state party. However, other Tamils were deported “indirectly”, meaning, they first crossed into another non-state party before reaching the territory of a state party. An example of “direct” deportation is the thousands of Tamils who fled, by boat, directly from Sri Lanka to Australia (a state party). An example of “indirect” deportation is Tamils fleeing from Sri Lanka to Thailand (another non-state party), in transit to Canada (a state party). We submit that both situations satisfy the territorial jurisdiction requirements of the Court.

In the alternative, there was enough “direct” deportation of Tamils to state parties, that even this on its own satisfies the requirements of territorial jurisdiction and justifies opening a preliminary examination into the situation.

2.2.2.1. Direct Deportation

Thousands of Tamils fled directly, by boat, from Sri Lanka to Australia, during the relevant time period. The data shows a jump in the number of Sri Lankan asylum seekers arriving by boat to Australia in the 2008/2009 and 2009/2010 reporting periods.¹⁵⁴ Between 2002 and 2007, only 83 Sri Lankan asylum seekers were recorded among Irregular Maritime Arrivals (IMAs) in Australia.¹⁵⁵ That number rose to 291 and 770 Sri Lankan asylum seekers in 2008/2009 and 2009/2010, respectively.¹⁵⁶ Between 2008 and 2015, the time period coinciding with the end of the Sri Lankan civil war and the persecution of Tamil individuals that followed, a total of 5,212 Sri Lankan asylum seekers travelled directly by boat to Australia’s shores.¹⁵⁷

Unlike the *Myanmar/Bangladesh* situation, where Rohingya crossed a land border from Myanmar to Bangladesh, the deportation of Tamils from Sri Lanka to Australia occurred by boat. This is necessarily so because Sri Lanka is an island, and there is no land border as exists between Myanmar and Bangladesh. As a result, Tamils exited Sri Lanka, onto the High Seas, before entering Australia. Although this route differs in this way from that in *Myanmar/Bangladesh*, we submit that this is not relevant for the characterization of this deportation, and that this is still “direct” deportation. The reason this is not relevant for the characterization is that, as the Chamber made clear in the *Myanmar/Bangladesh* case, deportation is an “inherently transboundary crime”, and one that “necessarily takes place on the territories of at least two states”.¹⁵⁸ Because deportation necessarily occurs on the territories of more than one state, the deportation

¹⁵² Myanmar/Bangladesh Article 19 Decision, *supra* note 102 at para 76; Myanmar/Bangladesh Article 15 Decision, *supra* note 88 at paras 109-110.

¹⁵³ Myanmar/Bangladesh Article 19 Decision, *supra* note 102 at para 76.

¹⁵⁴ *Report of the Expert Panel on Asylum Seekers* (2012 August), online (pdf):

<<https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/expert-panel-report.pdf>> at page 70.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*; Department of Immigration and Border Protection: *Annual Report 2014-15* online: Australian Government

<<https://www.homeaffairs.gov.au/reports-and-pubs/Annualreports/dibp-annual-report-2014-15.pdf>> at page 138.

¹⁵⁸ Myanmar/Bangladesh Article 19 Decision, *supra* note 102 at para 71.

of Tamils from Sri Lanka could not have been completed when they entered the High Seas (which are not a state); deportation must not have been completed until the refugees' arrival on Australian territory. To hold otherwise would also effectively and unfairly limit avenues of redress for victims deported from island states, where there is no land border, and the manner of deportation is necessarily by sea.

We note that in the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, in the *Myanmar/Bangladesh* case, the Prosecutor did not appear to take this above position. In footnote 32 of the request, she noted:

32 As a matter of law, however, it is not necessary to prove entry to another State, but merely that the victim has been ejected from the originating State – as such, a victim may potentially be deported to the high seas. What is crucial is that the international border, *de jure or de facto*, of the originating State is crossed. Hence, customary international law has emphasised consideration of the kinds of borders that might suffice: see e.g. Stakić AJ, para. 300; Đorđević AJ, paras. 533-536; Prlić TJ, Vol. I, para. 47; Popović TJ, para. 892.¹⁵⁹

This suggests that the Prosecutor believed victims may be deported onto the high seas. However, the Chamber which decided the case, disagreed. As the Chamber stated in paragraph 71:

71. In addition, and more specifically, the inherently transboundary nature of the crime of deportation further confirms this interpretation of article 12(2)(a) of the Statute. As discussed, an element of the crime of deportation is forced displacement across international borders, which means that the conduct related to this crime necessarily takes place on the territories of at least two States. What is more, the drafters of the Statute did not limit the crime of deportation from one State Party to another State Party. Article 7(2)(d) of the Statute only speaks of displacement from “the area in which they were lawfully present” and the elements of crimes generally refer to deportation to “another State”. Therefore, the inclusion of the inherently transboundary crime of deportation in the Statute without limitation as to the requirement regarding the destination reflects the intentions of the drafters to, *inter alia*, allow for the exercise of the Court's jurisdiction when one element of this crime or part of it is committed on the territory of a State Party. [emphasis added]¹⁶⁰

By stating explicitly that the crime against humanity of deportation “necessarily takes place on the territories of two States” (emphasis added) – the Chamber made clear by implication that the crime against humanity of deportation would only be completed upon the victims' entering the territory of the second State. The Chamber is the final arbiter of the law on the point; the Prosecution's Request is not.

2.2.2.2. Indirect Deportation

Concerning “indirect” deportation, many of the Tamils who fled to other states parties, particularly ones that were further away, physically, from Sri Lanka – stopped over on the territory of another non-state party. Based on the current state of the law as it relates to the rights of refugees; the purpose of criminalizing deportation; and the practical realities of deportation – we submit that article 7(1)(d) should be interpreted to include this “indirect” deportation. This would mean that the experiences of Eelam Tamils who were forced across Sri Lanka's border and travelled through various other states to later arrive at their destination in the territory of a state party, are within the scope of the crime in the Statute.

¹⁵⁹ *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, Application Under Regulation 46(3) (9 April 2018) at footnote 32.

¹⁶⁰ Myanmar/Bangladesh Article 19 Decision, *supra* note 102 at para 71.

The state of the law as it relates to the rights of asylum-seekers or refugees protects against indirect deportation.

International legal understandings of non-refoulement protect against the threat of deportation directly or indirectly to a state in which asylum seekers face the risk of threat to their life or freedom.¹⁶¹ Domestic law, such as that of Canada for example, also considers the obligation of the state to avoid violating the principle of non-refoulement by deporting individuals to countries from which they are likely to be sent back to their country of origin.¹⁶² It appears that the unlawful deportation of asylum-seekers in the context of non-refoulement encapsulates an individual’s journey from the country in which they have sought asylum and through a third party country to arrive in their country of origin. An intermediary country or countries through which an asylum seeker may travel on the way to their country of origin are not understood to cause a break in the continuity of the asylum seeker’s deportation. As such, the country to which they are deported is considered their final destination and this allows for the state that originally deported the individual to be held responsible.

Similarly, Canadian immigration and refugee law considers, when determining an individual’s ineligibility for refugee protection, whether a “claimant came directly or indirectly to Canada from a country designated by the regulations” (emphasis added).¹⁶³ This also demonstrates an understanding that intermediate countries do not cause a break in the chain in the continuity of an asylum seeker’s travel path.

To restrict the crime against humanity of deportation solely to “direct” deportation is needlessly inconsistent with these understandings as well as the purpose of article 7(1)(d) and the realities of deportation.

In the Court’s 2020 Report on Preliminary Examination Activities, the purpose of criminalizing deportation under international law is described as follows:

In particular, the crime of deportation is associated with a particular protected legal interest and purposive element. As the International Criminal Tribunal for the former Yugoslavia (“ICTY”) held in the *Popović et al.* case, “[t]he protected interests underlying the prohibition against these two crimes [forcible transfer and deportation] include the right of victims to stay in their home and community and the right not to be deprived of their property by being forcibly displaced to another location”. The Trial Chamber’s judgment went on to observe that this reflects the “[t]he clear intention of the prohibition against forcible transfer and deportation [which] is to prevent civilians from being uprooted from their homes and to guard against the wholesale destruction of communities.”¹⁶⁴

□

Similarly, ICC Pre Trial Chamber I has observed: “The legal interest commonly protected by the crimes of deportation and forcible transfer is the right of individuals to live in their area of residence” and that “the legal interest protected by the crime of deportation further extends to the right of individuals to live in the state in which they are lawfully present.”¹⁶⁵

¹⁶¹ *Refugee Convention*, online (pdf): <<https://www.unhcr.org/4d9486929.pdf>> at article 33(1).

¹⁶² *Kreishan v. Canada (Citizenship and Immigration)*, [2020] 2 F.C.R. 299 (Federal Court of Appeal) at para 4; *Canadian Council for Refugees v. Canada*, [2007] F.C.J. No. 1583 (Federal Court) at para 112.

¹⁶³ *Immigration and Refugee Protection Act* (S.C. 2001, c. 27), section 101(1)(e), <<https://laws.justice.gc.ca/eng/acts/i-2.5/page-19.html#h-275613>>.

¹⁶⁴ “Report on Preliminary Examination Activities 2020” (2020 December 14), online: *Office of the Prosecutor, International Criminal Court* <<https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>> at para 75 (citing *Prosecutor v. Popović et al.*, Trial Judgment, IT-05-88-T, 10 June 2010, para. 900).

¹⁶⁵ *Ibid* (citing Myanmar/Bangladesh Article 19 Decision, *supra* note 102 at para 58).

Of note in this excerpt is a focus on protecting the right of individuals to live in their area of residence and to prevent the destruction of communities. What is notably missing is a qualification that this protection only extends to those who cross the border of their home country directly into the territory of a state party.

There is nothing to suggest the concept of being “forcibly displaced to another location” central to the crime of deportation exclusively means the crossing of a single international border. The Elements of Crimes simply refer to the deportation of “one or more persons to another state or location.”¹⁶⁶ In addition, it appears that the element of cross border transfer has been interpreted liberally to include not only the crossing of a recognized state border but a “de facto border” as well.¹⁶⁷ The same flexibility can and should reasonably be applied in regard to the inclusion of “indirect” deportation so as to recognize the practical realities of deportation and protect all those who are subject to it.

Indeed, to enforce article 7(1)(d) in a way that excludes “indirect” deportation ignores the practical realities often associated with being forced out of one’s country of residence. For instance, such an interpretation might deny redress to those for whom the nations that border their home country are not states parties. Similarly, if asylum seekers did not have the option to take a direct flight to the territory of a state party or had no realistic option other than crossing multiple borders in transit to seek refuge – they may be unable to benefit from the provision. This would not be in keeping with the spirit or purpose of article 7(1)(d).

Finally, according to Article 21 of the Rome Statute, the Court can apply, *inter alia*, the provisions of applicable treaties as a source of law.¹⁶⁸ This provision has been interpreted to include the Vienna Convention on the Law of Treaties (VCLT).¹⁶⁹ According to Article 31 of the VCLT, a treaty is to be interpreted “in their context and in the light of its object and purpose”, and this “context” includes a treaty’s “preamble and annexes”.¹⁷⁰ The Preamble of the Rome Statute states that the Court is “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”¹⁷¹

Accepting territorial jurisdiction over indirect deportation elaborated herein would be in keeping with the object and purpose of the Rome Statute, as it would contribute to ending impunity for the crime of deportation. On the contrary, denying this interpretation of the crime of deportation would further the existing impunity, because it would effectively deny redress to victims for whom the nations that border their home country are not states parties to the Rome Statute, as described above. As such, we submit that the crime of deportation should be interpreted to include indirect deportation within its ambit.

2.3. Temporal Jurisdiction

It is clear that the crimes would fit within the temporal jurisdiction of the Court. Article 11 of the Rome Statute states:

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

¹⁶⁶ Elements of Crimes, *supra* note 101 at article 7(1)(d).

¹⁶⁷ *The Prosecutor v. Milomir Stakić*, IT-97-24-A, Appeals Chamber (2006 March 22) (International Tribunal for the former Yugoslavia), online (pdf): <<https://cld.irmct.org/assets/filings/Judgement-Stakic.pdf>>.

¹⁶⁸ Rome Statute, *supra* note 88 at article 21.

¹⁶⁹ See for example, Separate Opinion of Judge Adrian Fulford to Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2842 (2012 March 14) at para 13.

¹⁷⁰ *Vienna Convention on the Law of Treaties*, done at Vienna on 1969 May 23, entered into force on 1980 January 27, online: *United Nations* <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> at article 31.

¹⁷¹ Rome Statute, *supra* note 88 at preamble.

2. If a state becomes a party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that state, unless that state has made a declaration under article 12, paragraph 3.¹⁷²

It is well established that the Court may only investigate and prosecute crimes committed after the Rome Statute came into force on July 1, 2002. This does not pose a problem for the present situation. Although the Sri Lankan armed conflict began in 1983, and there may be allegations of crimes against humanity that occurred prior to 2002, the contents of this present communication concern allegations from the final phases of the Sri Lankan armed conflict, in 2009, and its aftermath.

The states parties involved in this situation include Canada, Australia, Germany, France, the United Kingdom, and Switzerland. All of these states parties have been members of the Court from its inception, so they do not pose an additional temporal requirement in this situation.

Based on the above, it is clear that the crimes contained in this communication would come within the temporal jurisdiction of the Court.

3. ADMISSIBILITY

Per article 17(1) of the Rome Statute, the Court will determine a case to be 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 further action by the Court.¹⁷³

These criteria can be divided into considerations of complementarity (17(1)(a-c)) and gravity (17(1)(d)).

3.1. Complementarity

There is a reasonable basis to believe that the principle of complementarity will not pose a barrier to the initiation of a *proprio motu* investigation by the Prosecutor in this situation. There is compelling evidence that the Sri Lankan government and judiciary is unwilling to genuinely investigate or launch proceedings against those responsible for the crimes described herein. This unwillingness has been outlined in detail in numerous independent investigative reports, including most recently this year (2021) by the Office of the High Commissioner for Human Rights (OHCHR).¹⁷⁴ The OHCHR noted:

Nearly 12 years after the armed conflict in Sri Lanka ended, impunity for grave human rights violations and abuses by all sides is more entrenched than ever, with the current Government

¹⁷² Rome Statute, *supra* note 88 at article 11.

¹⁷³ *Ibid* at article 17.

¹⁷⁴ OHCHR Report, *supra* note 1.

proactively obstructing investigations and trials, and reversing the limited progress that had been previously made ...¹⁷⁵

While the criminal justice system in Sri Lanka has long been the subject of interference, the current Government has proactively obstructed or sought to stop ongoing investigations and criminal trials to prevent accountability for past crimes.¹⁷⁶

In other words, Sri Lanka is not genuinely investigating or prosecuting those responsible for past crimes; it is unwilling to do so; and this unwillingness has lasted for years.

This year is not the first time that this domestic unwillingness has been noted and criticized. In March 2014, the Human Rights Council requested the OHCHR to undertake a comprehensive investigation into patterns of extrajudicial killings, abductions, and other heinous crimes “given the failure of domestic mechanisms to conduct credible investigations.”¹⁷⁷ When the OISL report was released in September 2015, it shed light on what it termed a “total failure of domestic mechanisms” to genuinely investigate crimes:

A common thread throughout this report ... has been the persistent failings of the successive governments in Sri Lanka to fulfil these obligations. The past years have seen the almost total failure of domestic mechanisms to credibly investigate allegations of serious human rights violations and abuses committed by Government forces, associated paramilitary groups and the LTTE ...¹⁷⁸

These conclusions evidently continued into the present-day, with the latest (2021) OHCHR report articulating that the Human Rights Council is “at a critical turning point in its engagement with Sri Lanka” as the Sri Lankan government “has now demonstrated its inability and unwillingness to pursue a meaningful path toward accountability for international crimes and serious human rights violations, and signalled instead a fundamentally different approach which ... threatens to deny victims their rights to truth and justice and further entrench impunity.”¹⁷⁹ In that vein, the OHCHR further noted that:

Member states have a number of options to advance criminal accountability ... In addition to taking steps towards the referral of the situation in Sri Lanka to the International Criminal Court, member states can actively pursue investigation and prosecution of international crimes ... before their own national courts, including under accepted principles of extraterritorial or universal jurisdiction. The High Commissioner encourages member states to work with the OHCHR, victims and their representatives to promote such avenues for accountability, including through opening investigations into possible international crimes.¹⁸⁰

In direct opposition to addressing accountability, the Sri Lankan government has promoted and protected several alleged war criminals by appointing them to key administrative and/or diplomatic positions. The recent OHCHR report noted that several key administrative appointments were conferred on individuals who, according to UN reports, are “implicated in alleged war crimes and crimes against humanity during the final years of the conflict”.¹⁸¹ These appointees who may be prosecutable for war crimes and crimes against humanity include but are not limited to:

¹⁷⁵ United Nations Office of the High Commissioner for Human Rights, “Sri Lanka on alarming path towards recurrence of grave human rights violations – UN report” (27 Jan 2021), online:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26695&LangID=E>.

¹⁷⁶ OHCHR Report, *supra* note 1 at para 26.

¹⁷⁷ *Ibid* at para 14.

¹⁷⁸ OISL, *supra* note 2 at para 1261

¹⁷⁹ OHCHR Report, *supra* note 1 at para 56.

¹⁸⁰ *Ibid* at para 59.

¹⁸¹ *Ibid* at para 23.

- 1) Lieutenant General Shavendra Silva (appointed to Army Chief in August 2019);
- 2) Major General (retired) Kamal Gunaratne (appointed to Secretary to the Ministry of Defence in November 2019);¹⁸²
- 3) Former General Jagath Jayasuriya (appointed to Sri Lankan ambassador to Brazil, with responsibility also for Colombia, Peru, Chile, Argentina, and Suriname, in August 2015); and
- 4) Air Marshal Sumangala Dias (nominated by the Sri Lankan government in October 2020 to assume the role of High Commissioner of Sri Lanka to Canada; then later to Italy when Canada did not accept him).¹⁸³

The appointments of alleged war criminals to diplomatic positions are particularly concerning in light of the fact that such individuals can exercise the rights and reap the benefits of diplomatic immunity, if foreign domestic prosecutions are brought forward. The diplomatic immunity will remain in effect for as long as such individuals remain in their diplomatic positions.

Taking all these factors into account, it is unlikely that complementarity will pose a barrier to the initiation of an investigation by the Prosecutor in this situation. The Sri Lankan government is demonstrably unwilling to genuinely carry out investigations and hold perpetrators accountable for crimes committed in the final years and the aftermath of the Sri Lankan armed conflict – so much so that the OHCHR has actively encouraged the international community to try to seek accountability through the ICC.¹⁸⁴

3.2. Gravity

An assessment as to gravity includes both qualitative and quantitative considerations.¹⁸⁵ Specifically, the analysis undertaken by the Prosecutor will generally include “an assessment of the scale, nature, and manner of commission of the crimes, and their impact, bearing in mind the potential cases that would be likely to arise from an investigation of the situation” – and keeping in mind that the Appeals Chamber has held that the gravity threshold should not be interpreted in an overly restrictive manner.¹⁸⁶

According to the Prosecutor’s office’s policy paper on preliminary examinations, the *scale* of the alleged crimes refers to “the number of direct and indirect victims” and the extent of the damage that was caused.¹⁸⁷ The *nature* refers to the specific elements of the crimes.¹⁸⁸ The *manner of commission* refers to how the crimes were executed, including the degree of intent and to what extent they were systematic or resulted from a plan or policy.¹⁸⁹ Finally, *impact* may be assessed by looking to the sufferings endured by victims, their heightened vulnerability, or the social, environmental, and socio-economic damage inflicted on the community.¹⁹⁰

¹⁸² *Ibid.*

¹⁸³ David Matas, C.M. and Sarah Teich, “Legal Opinion Re: Criminal Command Responsibility by Air Chief Marshal Sumangala Dias”, December 21, 2020, available at: <<https://19n.75a.myftpupload.com/wp-content/uploads/2020/12/TRG-Canada-PM-Letter-and-Legal-Opinion-Sumangala-Dias-Dec-2020.pdf>>; “Two ex-military officers appointed as Ambassador and Secretary” (2021 April 26), online: *Colombo Gazette* <<https://colombogazette.com/2021/04/26/two-ex-military-officers-appointed-as-ambassador-and-secretary/>>.

¹⁸⁴ OHCHR Report, *supra* note 1 at para 59.

¹⁸⁵ “Policy Paper on Preliminary Examinations” (2013 November), online: *Office of the Prosecutor, International Criminal Court* <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> at para 61.

¹⁸⁶ *Ibid* at paras 9 and 60-61. For this latter point, the OTP cited: *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”*, 01/04, Appeals Chamber (2006 July 13) (International Criminal Court) at paras 69-79.

¹⁸⁷ *Ibid* at para 62.

¹⁸⁸ *Ibid* at para 63.

¹⁸⁹ *Ibid* at para 64.

¹⁹⁰ *Ibid* at para 65.

All four factors suggest that this is a situation of sufficient gravity to warrant action by the Prosecutor. First, the scale is large, with an estimated 40,000 civilians killed in the final stages of conflict alone,¹⁹¹ and hundreds of thousands arbitrarily detained¹⁹² including the elderly and approximately 50,000 children.¹⁹³ Estimations for the precise scale of torture and sexual violence have not yet been established, but a large scale is implied by virtue of the fact that it was found to be widespread.¹⁹⁴ The damage caused can reasonably be inferred to be large, as civilians and civilian targets faced indiscriminate shellings, including in NFZs, where food distribution queues, hospitals, and U.N. facilities were impacted.¹⁹⁵ By way of example, the Vellmullivaikkal health facility faced so much continuous shelling in May 2009 that they stopped functioning by May 14, 2009.¹⁹⁶ The nature of the crimes are equally serious: arbitrary killings, detentions, and widespread torture and sexual violence, and a massive refugee crisis resulting, as hundreds of thousands of Tamils fled Sri Lanka and continue to struggle to seek status.¹⁹⁷ The manner of commission suggests that these crimes were systematic and resulting from a state plan or policy, as discussed.¹⁹⁸ Finally, the impact is large. The entire Tamil community suffered, and continues to suffer, because of the crimes. Tamil lands were confiscated, and there are still Tamils who have no land to return to.¹⁹⁹ The crimes resulted in a massive refugee crisis, with hundreds of thousands of Tamils still displaced across the globe.²⁰⁰ Based on UNHCR's 2020 figures, there are still 143,692 refugees displaced across 64 countries, including 93,312 in India; 23,761 in France; 6,070 in Switzerland; 5,436 in the United Kingdom; 4,422 in Australia; 3,594 in Germany; and 2,278 in Canada.²⁰¹ There are still 13,886 asylum seekers, including 2,684 in Australia; 2,065 in France; 1,423 in the United Kingdom; 1,311 in Germany; 1,152 in Canada; and 1,068 in Switzerland.²⁰² There are still 25,110 internally displaced within Sri Lanka.²⁰³

Taking all this into account and remembering that the gravity threshold should not be interpreted in an overly restrictive manner, it is likely that this situation would satisfy considerations of gravity.

¹⁹¹ 2011 Report, *supra* note 18 at para 137.

¹⁹² OISL, *supra* note 2 at para 1963.

¹⁹³ "Unlock the Camps in Sri Lanka" (2009) at 5, online (pdf): *Amnesty International* <www.amnesty.org/download/Documents/48000/asa370162009en.pdf>.

¹⁹⁴ OISL, *supra* note 2 at paras 540-565, 587, 603, 616.

¹⁹⁵ *Ibid* at paras 802-887.

¹⁹⁶ *Ibid* at paras 877-882.

¹⁹⁷ As of 2020, there are 143,692 Sri Lankan Tamil refugees in 64 countries; 13,886 asylum seekers; and 25,110 Tamil IDPs in Sri Lanka: "Refugee Data Finder", online: *UNHCR* <<https://www.unhcr.org/refugee-statistics/download/?url=wiC2Lh>> [Refugee Data Finder].

¹⁹⁸ See 2.1.1., "Contextual Elements".

¹⁹⁹ Why Can't We Go Home, *supra* note 114.

²⁰⁰ Rina Chandran, "Missing from India's citizenship law: 100,000 Sri Lankan refugees" (2019 December 24), online: *Reuters* <<https://www.reuters.com/article/us-india-refugees-protests-trfn-idUSKBN1YS0VA>>; Refugee Data Finder, *supra* note 197.

²⁰¹ Refugee Data Finder, *supra* note 197.

²⁰² *Ibid*.

²⁰³ *Ibid*.