

**SRI LANKA AND THE INTERNATIONAL CRIMINAL COURT:
AN UNEASY RELATIONSHIP**

ALOKA WANIGASURIYA*

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INTRODUCTION

The decades-long civil war between the Sri Lankan government armed forces and the Liberation Tigers of Tamil Eelam (“LTTE”) came to an end in 2009.¹ The conflict received much international attention

*Aloka Wanigasuriya is a doctoral candidate at the Faculty of Law at the University of Copenhagen (Denmark). Aloka's PhD project investigates the potential impact of the International Criminal Court in post-Soviet countries. Aloka is an Australian qualified lawyer who has previously worked at Lund University (Faculty of Law), the Raoul Wallenberg Institute for Human Rights, the Danish Institute for Human Rights, and at the Special Court for Sierra Leone (Trial Chamber II, Prosecutor v Taylor). Aloka has been a visiting researcher at the Castan Centre for Human Rights Law at Monash University (Australia), Lund University (Sweden), and at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law (Luxembourg). Aloka's research interests lie within the fields of international criminal law and public international law.

1. Rupavahini, *Live broadcast: Victorious Speech by President of Sri Lanka HE Mahinda Rajapaksa at Parliament on 09-05-19 - Part 03*, LANKAN TV (May 19,

in 2009 due to allegations of international crimes perpetrated by both parties during the final stages of the civil war.² United Nations (“UN”) experts estimated 40,000 civilians were killed during the final offensive that lasted from January to May 2009.³ However, the Sri Lankan government placed the death count at 9,000, with no civilian casualties.⁴ Several UN bodies have found credible allegations that both parties committed international crimes, some of which amount to war crimes and crimes against humanity.⁵

Since the conclusion of the civil war, multiple national and international actors have repeatedly called for impartial and transparent investigations and prosecutions.⁶ However, progress has been minimal. Nearly twelve years after the end of the conflict, victims of the alleged international crimes and their loved ones continue to await justice. Until recently, international interest in the alleged crimes committed during the civil war and calls for action seemed to have greatly diminished. However, in January 2021, the United Nations High Commissioner for Human Rights, Michelle Bachelet, outlined “a number of options [available to UN member states] to advance criminal accountability and

2009), <https://www.youtube.com/watch?v=sf-aSI4RB74>; Deutsche Presse Agentur, *Sri Lankan President Formally Announces End of Civil War*, RELIEFWEB (May 19, 2009), <https://reliefweb.int/report/sri-lanka/sri-lankan-president-formally-announces-end-civil-war>.

2. Thamil Ananthavinayagan, *Making Human Rights Violations Visible: The UN Commission of Inquiry on Sri Lanka*, JUST. IN CONFLICT (Jun. 21, 2015), <https://justiceinconflict.org/2015/06/21/making-human-rights-violations-visible-the-un-commission-of-inquiry-on-sri-lanka/>.

3. U.N. Secretary-General, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, ¶ 137 (Mar. 31, 2011) [hereinafter UNSG Panel of Experts Report].

4. Charles Haviland, *Sri Lanka government publishes war death toll statistics*, BBC (Feb. 24, 2012), <http://www.bbc.com/news/world-asia-17156686>.

5. Violations of Common Article 3 of the Geneva Conventions, including unlawful killings, torture, sexual and gender based violence, hostilities on civilians and civilian objects, abductions, and forced recruitment, etc. *Rep. of the OHCHR Investigation on Sri Lanka (OISL)*, Human Rights Council on Its Thirtieth Session, ¶ ¶ 1113-1174, U.N. Doc. A/HRC/30/CRP.2 (Sept. 16, 2015), <https://www.refworld.org/docid/55ffb1d04.html> [hereinafter OISL Report]; UNSG Panel of Experts Report, *supra* note 3, at ii-iv.

6. *War Crimes in Sri Lanka*, INT’L CRISIS GRP. (May 17, 2010), <https://www.crisisgroup.org/asia/south-asia/sri-lanka/war-crimes-sri-lanka>; *Sri Lanka: UN Members Should Back Hybrid Court*, HUM. RTS. WATCH (Sept. 16, 2015), <https://www.hrw.org/news/2015/09/16/sri-lanka-un-members-should-back-hybrid-court>.

provide measures of redress for victims of the conflict.”⁷ She specifically mentioned submitting the situation of Sri Lanka to the International Criminal Court (“ICC”).⁸ She then reiterated this in an edited version of the report released in February 2021.⁹

In response, the government of Sri Lanka rejected the proposal from the United Nations High Commissioner for Human Rights “to advance accountability options at the international level,” including her proposal to take steps towards referring Sri Lanka to the International Criminal Court.¹⁰ Subsequently, the United Nations Human Rights Council (“UNHRC”) adopted a resolution that:

[D]ecid[ed] to strengthen ... the capacity of the Office of the High Commissioner to collect, consolidate, analyze and preserve information and evidence and to develop possible strategies for future accountability processes for gross violations of human rights or serious violations of international humanitarian law in Sri Lanka, to advocate for victims and survivors, and to support relevant judicial and other proceedings.¹¹

These recent events have redirected attention back to the alleged international crimes committed during the Sri Lankan civil war.¹²

7. Rep. of the OHCHR on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka: Report of the Office of the High Commissioner for Human Rights (Advance Unedited Version), Human Rights Council on Its Forty-Sixth Session, Feb. 22-Mar. 19, 27 January 2021, ¶ 59, U.N. Doc. A/HRC/46/20 (Jan. 27, 2021).

8. *Id.*

9. *Id.* ¶ 59.

10. Comments received from the Permanent Mission of Sri Lanka on the report of the Office of the United Nations High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka (A/HRC/46/20), Human Rights Council on Its Forty-Sixth Session, Feb. 22-Mar. 19, 2021, at 21, U.N. Doc. A/HRC/46/G/16 (Mar. 1, 2021).

11. Rep. of the OHCHR on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, Human Rights Council on Its Forty-Sixth Session, Feb. 22-Mar. 23, 2021, ¶ 6, U.N. Doc. A/HRC/46/L.1/Rev.1 (Mar. 16, 2021).

12. Andreas Schüller, *Universal Jurisdiction—The Most Difficult Path to Achieve Justice for Sri Lanka*, JUST SECURITY (Feb. 24, 2021), <https://www.justsecurity.org/74941/universal-jurisdiction-the-most-difficult-path-to-achieve-justice-for-sri-lanka/>; Kate Cronin-Furman, *UN Human Rights Council Outlines Sri Lanka Abuses, But Demurs on Action*, JUST SECURITY (Mar. 26, 2021), <https://www.justsecurity.org/75510/un-human-rights-council-outlines-sri-lanka-abuses-but-demurs-on-action/>; Press Release, Amnesty Int’l, *Sri Lanka: Landmark UN*

While some victims' rights groups¹³ as well as the Tamil diaspora¹⁴ have welcomed calls for an ICC referral of the matter, it is important to examine the realities and parameters within which such a process would operate. It is equally important to examine Sri Lanka's relationship with the ICC and the possibility of the country willingly subjecting itself to the Court's jurisdiction.

Against this background, this article first attempts to set out the ICC's jurisdictional parameters with regard to the situation in Sri Lanka. The purpose is to discuss the steps that need to be taken in order for the ICC's jurisdiction to apply to Sri Lanka and, more specifically, to the situation in Sri Lanka with regard to the alleged international crimes committed during the civil war. First, the article attempts to address any obstacles that may arise when seeking to refer the situation to the International Criminal Court. Second, the article seeks to explore Sri Lanka's relationship with the ICC from the Court's formative years to the present. This article specifically outlines the country's cooperation with, objections to, and attitudes towards the Court, with a view towards ascertaining the reasons behind Sri Lanka's decision not to accede to the ICC's constitutive instrument—the Rome Statute—or accept the Court's jurisdiction pursuant to a declaration. Especially given the recent renewed interest in the situation and calls to refer Sri Lanka to the ICC, this article aims to set out some of the most relevant issues and considerations surrounding Sri Lanka's relationship with the Court.

I. THE JURISDICTION OF THE INTERNATIONAL CRIMINAL

resolution marks crucial turning point on justice and accountability (Mar. 23, 2021), <https://www.amnesty.org/en/latest/news/2021/03/sri-lanka-landmark-un-resolution-marks-crucial-turning-point-on-justice-and-accountability/>; Julia Crawford, *Bachelet Denounces Continued Inaction on Sri Lanka War Crimes*, JUSTICE INFO. (Mar. 26, 2021), <https://www.justiceinfo.net/en/75328-bachelet-denounces-continued-inaction-on-sri-lanka-war-crimes.html> [hereinafter Crawford]; *Sri Lanka: Landmark UN Resolution Promotes Justice*, HUM. RTS. WATCH (Mar. 25, 2021), <https://www.hrw.org/news/2021/03/25/sri-lanka-landmark-un-resolution-promotes-justice>.

13. Crawford, *supra* note 12.

14. *Tamil Diaspora Calls on UNHRC Member States to Pass New Resolution on Sri Lanka: Victim Community Endorses Strong Recommendations of High Commissioner Bachelet*, PR NEWswire (Feb. 2, 2021), <https://www.prnewswire.com/news-releases/tamil-diaspora-calls-on-unhrc-member-states-to-pass-new-resolution-on-sri-lanka-301220293.html>.

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The ICC only released a brief statement regarding the situation in Sri Lanka in 2010, wherein the Court set out its jurisdictional parameters with regard to the situation.¹⁵ Sri Lanka is not a State Party to the constitutive instrument of the ICC, the Rome Statute.¹⁶ Therefore, it is not currently subject to the Court's jurisdiction. It is important to note generally that should Sri Lanka become a State Party to the Rome Statute, it would not be automatically bound by the provisions of the international treaty that it accedes to because the country adopts a dualist approach with respect to its obligations under international law.¹⁷ In particular, Sri Lanka would need to take an additional step to enact national legislation in order for the international legal obligations set out in the treaty to apply domestically.¹⁸

Additionally, it is important to note that the Rome Statute entered into force on July 1, 2002.¹⁹ Therefore, the ICC only has jurisdiction with regard to crimes that were committed on or after July 1, 2002.²⁰ This means any alleged acts amounting to international crimes (i.e. genocide, crimes against humanity, and war crimes)²¹ committed prior to this date, cannot be prosecuted by the International Criminal Court.²² If Sri Lanka were now to become a State Party to the Rome Statute through accession, the ICC could only exercise its jurisdiction with regard to crimes committed on or after the date of accession.²³

15. *Clarification Regarding the Situation in Sri Lanka*, INT'L CRIM. CT. (June 7, 2010), <https://www.icc-cpi.int/Pages/item.aspx?name=pr541>.

16. *The States Parties to the Rome Statute*, ICC, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Apr. 10, 2021) [hereinafter *State Parties to the Rome Statute*].

17. Jeeva Niriella, *An Appraisal on Some Aspects of the Rome Statute of the International Criminal Court*, 21 SRI LANKA J. OF INT'L L. 193, 212 (2009).

18. *Id.*

19. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 2187 U.N.T.S. 90 (1998) [hereinafter *Rome Statute*].

20. *Id.*, art. 11(1).

21. *Id.*, art. 5.

22. It is important to note, however, that additional jurisdictional exceptions apply with regard to the crime of aggression. *Id.*, arts. 8*bis*, 13, 15*bis*, and 15*ter*.

23. *Id.* art. 11(2).

Therefore, any alleged international crimes committed during the period from the date the Rome Statute came into force to the date the Rome Statute would come into effect in Sri Lanka, would be precluded from ICC scrutiny.

Given that the Sri Lankan civil war ended in 2009, unless the alleged crimes were ongoing, this would mean the ICC would not be able to exercise its jurisdiction to investigate and prosecute any core international crimes committed during the Sri Lankan civil war. An exception would be if Sri Lanka accepted the jurisdiction of the ICC through making an Article 12(3) declaration stating that it wishes to subject itself and any alleged crimes previously committed by its nationals or on its territory to the jurisdiction of the Court from an earlier date (albeit, still, no earlier than July 1, 2002).²⁴ This option of lodging an Article 12(3) declaration will be discussed further below.

Currently, two avenues exist through which any alleged commission of core international crimes during the civil war in Sri Lanka can be investigated and prosecuted by the International Criminal Court. The first is through a self-referral of the situation to the ICC by Sri Lanka, pursuant to Article 12(3) of the Rome Statute. This process entails lodging a declaration with the ICC's registrar accepting the Court's jurisdiction with regard to such crimes either conditionally (i.e. for a particular set of crimes and/or for a particular period of time), or unconditionally.²⁵ The second is through a United Nations Security Council ("UNSC") referral of the situation to the Court.²⁶ However, the chances of either an Article 12(3) declaration being lodged with the ICC or a UNSC referral of the situation to the ICC remains highly unlikely.

In May 2009, the UNSC expressed concern regarding the humanitarian crisis unfolding in northeast Sri Lanka.²⁷ However, no affirmative action was taken at that time. Moreover, despite the alleged international crimes committed during the civil war in Sri Lanka, predominantly during the final stages of the conflict, considered as being on par with those crimes committed in Libya and Darfur

24. *Id.*

25. Aloka Wanigasuriya, *Justice Delayed, Justice Denied? The Search for Accountability for Alleged Wartime Atrocities Committed in Sri Lanka*, 33 PACE INT'L L. REV. 219, 245 (May 2021) [hereinafter Wanigasuriya].

26. *Id.*

27. Press Release, Security Council, *Security Council Press Statement on Sri Lanka*, U.N. Press Release SC/9659 (May 13, 2009).

(Sudan),²⁸ the Sri Lankan situation failed to attract similar levels of international attention.²⁹ Furthermore, despite the Court's twenty-three year existence (with its jurisdiction operational for nineteen years), the UNSC has only referred two situations to the ICC from non-State Parties to the Rome Statute (i.e. Libya and Darfur (Sudan)).³⁰ Twelve years have elapsed since the end of the conflict in Sri Lanka. With international pressure waning, at present it is doubtful whether there is sufficient momentum that would push the UNSC to act in a similar manner. Moreover, the prospects of a UNSC referral of the situation in Sri Lanka to the ICC remains especially bleak due to Sri Lanka's links to countries such as Russia and China that have a powerful geopolitical presence. Sri Lanka's close ties to both Russia and China are particularly noteworthy given that both countries are permanent UNSC member states. Hence, there is a strong likelihood that any attempts to refer the situation in Sri Lanka to the ICC would be met with opposition and vetoed by both Russia and China.

Indeed, strong evidence exists of Sri Lanka's close ties with China and Russia. "During the previous Mahinda Rajapaksa government, China was ... one of Sri Lanka's greatest allies at the UNHRC who lobbied to defend Sri Lanka against war crimes allegations."³¹ During a recent diplomatic visit to Sri Lanka in January 2020, the Chinese Foreign Minister, Wang Yi, made assurances of China's continued friendship with Sri Lanka to Sri Lankan President, Gotabaya Rajapaksa, stating that "China will not allow any outside influences to interfere with matters that are essentially internal concerns of Sri Lanka."³² China is also one of Sri Lanka's largest infrastructure

28. Amanda Kramer & Rachel Killean, *Security Council Referral to the ICC: A Politicised System*, 7 IRISH Y.B. INT'L L. 117, 142 (2012).

29. Wanigasuriya, *supra* note 25, at 246.

30. Libya: UNSC Resolution 1970 (Feb. 26, 2011); Darfur (Sudan): UNSC Resolution 1593 (Mar. 31, 2005).

31. *Russia and China Pledge to Protect Lanka's Sovereignty Against Western Meddling*, SOUTH ASIAN MONITOR (Jan. 15, 2020), <https://southasianmonitor.net/public/en/srilanka/russia-and-china-pledge-to-protect-lankas-sovereignty-against-western-meddling>; Wanigasuriya, *supra* note 25, at 246-47.

32. *Three World Powers in Sri Lanka for Diplomatic Talks*, NEWS FIRST (Jan. 14, 2020), <https://www.newsfirst.lk/2020/01/14/three-world-powers-in-sri-lanka-for-diplomatic-talks/>.

investors.³³ More recently, Sri Lanka also became a beneficiary of China's vaccine diplomacy during the COVID-19 pandemic, receiving 600,000 doses of the Chinese-manufactured Sinopharm vaccine in March 2021.³⁴ Russia has also issued lines of credit, military equipment and aircraft during the civil war and afterwards, and continues to supply such resources to Sri Lanka.³⁵ Russia has previously viewed any international attempts at probing any alleged international crimes committed during the civil war in Sri Lanka to be counterproductive.³⁶ Such ties make a UNSC referral of the Sri Lankan situation to the ICC highly unlikely.

II. SRI LANKA'S RELATIONSHIP TO THE INTERNATIONAL CRIMINAL COURT

Following many years of discussion,³⁷ the United Nations General Assembly ("UNGA") convened the United Nations Diplomatic

33. Chinese infrastructure investment to Sri Lanka amounted to \$12.1 billion between 2006 and July 2019. See Ganeshan Wignaraja et al., *Chinese Investment and the BRI in Sri Lanka*, CHATHAM HOUSE, at 2 (March 2020), <https://www.chathamhouse.org/sites/default/files/CHHJ8010-Sri-Lanka-RP-WEB-200324.pdf>; Contracts are said to have been awarded to a Chinese company to build two upcoming irrigation tanks in Sri Lanka. Zulfik Farzan, (Video) *Chinese to build reservoirs inside UNESCO Heritage #Sinharaja as part of Water Project?*, NEWS FIRST (Mar. 21, 2021), <https://www.newsfirst.lk/2021/03/21/video-chinese-to-build-reservoirs-inside-unesco-heritage-sinharaja-as-part-of-water-project/>.

34. *Jointly Advance the China-Sri Lanka Friendship and Build the Great Wall Against COVID-19—Remarks by Ambassador Qi Zhenhong at the Handover Ceremony of the COVID-19 Vaccines Donation*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA (Apr. 1, 2021), https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/t1866141.shtml.

35. *US sanctions on Russia firms hurting Sri Lanka, against SOFA for American forces: President*, ECONOMYNEXT (Jun. 26, 2019), <https://economynext.com/us-sanctions-on-russia-firms-hurting-sri-lanka-against-sofa-for-american-forces-president-14556/>.

36. Shihar Aneez, *Russia rejects proposed war crimes probe for Sri Lanka*, REUTERS (Feb. 14, 2014, 8:23 AM), <https://www.reuters.com/article/us-srilanka-russia-rights-idUSBREA1D17520140214>.

37. The idea for establishing a permanent international criminal court was germinated through United Nations General Assembly Resolution 260 (Dec. 9, 1948). U.N. Office of Legal Affairs, *Rome Statute of the International Criminal Court: Overview*, <https://legal.un.org/icc/general/overview.htm> (last visited Sep. 30, 2020);

Conference of Plenipotentiaries on the Establishment of an International Criminal Court (“Rome Conference”). From June 15 to July 7, 1998 the UNGA met in Rome, Italy to finalize and adopt a convention establishing the International Criminal Court.³⁸ Earlier the same year, the Preparatory Committee met from March 16 to April 3, 1998, during which it completed the preparation of the draft Statute of an International Criminal Court. The Statute was subsequently transmitted to the Rome Conference.³⁹

A. Sri Lankan Cooperation With the International Criminal Court at the Court’s Inception

The Rome Conference was “attended by 160 States as well as by the observers of the Palestine Liberation Organization, sixteen intergovernmental organizations and other entities, five specialized agencies and related organizations, and nine United Nations programmes and bodies.”⁴⁰ In accordance with UNGA resolution 52/160 of December 15, 1997, “representatives of 135 non-governmental organizations participated in the work of the Conference.”⁴¹ Sri Lanka was one of the states taking part in the Rome Conference.⁴² One of the Sri Lankan representatives at the Rome Conference, John de Saram, also took part in the initial working groups

U.N.G.A. Res. 260 III A-C’ (Dec. 9, 1948), <https://www.legal-tools.org/doc/cee5ed/pdf> (last visited Sept. 30, 2020).

38. U. N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court (Apr. 14, 1998), A/CONF.183/2/Add.1, <https://undocs.org/en/A/CONF.183/2/Add.1> (last visited 31 March 2021) [hereinafter Report of Prep. Committee on Establishment of an ICC].

39. International Law Commission, Draft code of crimes against the peace and security of mankind (Part II)—including the draft Statute for an international criminal court (Dec. 4, 2017), https://legal.un.org/ilc/summaries/7_4.shtml#a46 (last visited Mar. 31, 2021); Report of Prep. Committee on Establishment of an ICC, *supra* note 38.

40. U. N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (July 17, 1998), https://legal.un.org/diplomaticconferences/1998_icc/ (last visited Mar. 31, 2021).

41. *Id.*

42. U. N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, A/CONF.183/10, Annex II, pg. 11 (Jul. 17, 1998).

that initiated the process of a draft statute for an international criminal court.⁴³ At these early stages, he took part in the working groups in his capacity as a member of the International Law Commission (“ILC”). For instance, John de Saram was both a member of the “Working Group on the question of an international criminal jurisdiction”⁴⁴ and later, the “Working Group on a draft statute for an international criminal court,”⁴⁵ which were both set up by the International Law Commission.

The Sri Lankan delegation at the Rome Conference consisted of: Mr. John de Saram, Mr. H. M. G. S. Palihakkara, Dr. A. R. Perera, Mr. H. L. de Silva, and Ms. S. N. Mayadunne.⁴⁶ As previously stated, the Rome “Conference had before it the draft Statute which was assigned to the Committee of the Whole for its consideration.”⁴⁷ Here, the Sri Lankan delegation made several submissions regarding the ICC’s parameters for the exercise of jurisdiction. For instance, Sri Lankan representative, John de Saram, submitted “that, given the clarity of general international treaty law and customary law with respect to the crime of genocide, it was reasonable to expect that a State becoming a party to the Statute should thereby accept the Court’s jurisdiction with

43. *Id.* at 34

44. E.g. John de Saram, was a member of the “Working Group on the question of an international criminal jurisdiction,” which was re-established at the ILC’s 2298th meeting on 17 May 1993 (on 25 May 1993, at its 2300th meeting, the ILC decided to rename this working group the “Working Group on a draft statute for an international criminal court”). See *Report of the Commission to the General Assembly on the Work of Its Forty-Fifth Session*, Y.B. Int’l L. Comm’n (1993) Vol. II(2), A/CN.4/SER.A/1993/Add.1 (Part 2) & Doc. A/48/10, at 10.

45. E.g. John de Saram, was a member of the “Working Group on a draft statute for an international criminal court” approved by the ILC at its 2332nd meeting on 5 May 1994. See *Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May—22 July 1994, Official Records of the General Assembly, Forty-Ninth Session, Supplement No. 10*, Y.B. Int’l L. Comm’n Vol. II(2), Doc. A/49/10, at 15-16.

46. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Official Records, Volume II: Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, (2002), A/CONF.183/13 (Vol.II), (June 15—July 17, 1998), https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf (last visited March 30, 2021), at 34 [hereinafter Rome Conference Official Records].

47. International Law Commission, *Draft code of crimes against the peace and security of mankind (Part II) including the draft Statute for an international criminal court*, (Dec, 4, 2017), https://legal.un.org/ilc/summaries/7_4.shtml (last visited Apr. 13, 2021).

respect to that crime.”⁴⁸ However, he opined that “[t]he same clarity did not obtain with respect to war crimes and crimes against humanity ... [and that] therefore ... acceptance of jurisdiction over those crimes should be in accordance with the so-called opt-in procedure.”⁴⁹

Moreover, in terms of the preconditions for accepting jurisdiction (draft Article 7), with regard to non-State parties to the Statute, Sri Lanka supported an approach where such a “State may, by an express declaration deposited with the Registrar of the Court, agree that the Court shall exercise jurisdiction in respect of the acts specified in the declaration.”⁵⁰ Furthermore, Sri Lanka favored the inclusion of an added requirement requiring “the consent of the State in which the suspect was present.”⁵¹

The Prosecutor’s *proprio motu* powers—and the complementarity assessment that forms part of the Prosecutor’s considerations when deciding whether to exercise such powers—is linked to the issue of the exercise of jurisdiction.⁵² During the Rome Conference, the Sri Lankan delegation objected to the *proprio motu* powers entrusted to the Court’s Prosecutor in draft Article 12.⁵³ Instead, the Sri Lankan delegation viewed “the position of a prosecutor in international jurisdictions [as being] differ[ent] from his or her position in national jurisdictions.”⁵⁴ Sri Lanka lamented that no justification in international law existed for the Prosecutor’s *proprio motu* powers as envisaged under draft Article 12, which in its view “seriously threatened the principle of complementarity.”⁵⁵ However, with regard to the issue of complementarity (as encompassed in the admissibility assessment outlined in draft Articles 15 and 16), the Sri Lankan delegation submitted that: “Once the crimes to come before the Court had been determined, the question of complementarity was a necessary but not an essential component.”⁵⁶

48. Rome Conference Official Records, *supra* note 46, at 314.

49. *Id.*

50. *Id.*; Report of Prep. Committee on Establishment of an ICC, *supra* note 38, at 31.

51. Rome Conference Official Records, *supra* note 46, at 314.

52. Rome Statute, *supra* note 19, arts. 15 and 17.

53. Rome Conference Official Records, *supra* note 46, at 314.

54. *Id.*

55. *Id.* at 339.

56. *Id.* at 314.

Another of Sri Lanka's arguments against consenting to the ICC's jurisdiction related to the issue of war crimes. One of the Sri Lankan representatives submitted "that there was a need for a high threshold with respect to war crimes, as not all crimes committed in time of war amounted to grave breaches of the rules of war."⁵⁷ Furthermore, the Sri Lankan delegation raised particular concerns regarding provisions linked to war crimes committed during non-international armed conflicts.⁵⁸ This was perhaps unsurprising given that the Sri Lankan civil war, which was ongoing at the time, would have been classified as a non-international armed conflict.⁵⁹

At the Rome Conference, Sri Lanka expressed concerns regarding draft Article 5(D), which addressed war crimes committed during armed conflicts not of an international character.⁶⁰ Sri Lanka viewed this draft provision as problematic when applied in the context of internal conflicts "in States with functioning legal systems and institutions," seeing it as conflicting with the principle of complementarity.⁶¹ However, "[i]n a spirit of compromise," the Sri Lankan "delegation was prepared to consider accepting the provision contained in section D, subparagraph (f), on the clear understanding that an opt-in regime would be adopted in respect of war crimes."⁶² Draft Article 5(D)(f) addressed the issue of forcibly recruiting children to take part in active hostilities.⁶³

This willingness to compromise on the inclusion of war crimes provisions pertaining to the recruitment of child soldiers was perhaps unsurprising given that, at the time, Sri Lanka was embroiled in an internal armed conflict against the LTTE, a guerilla group, which were allegedly recruiting child soldiers.⁶⁴ The LTTE's recruitment and use

57. *Id.* at 339.

58. *Id.*

59. *The Law of Armed Conflict: Non-International Armed Conflict*, INT'L COMM. OF THE RED CROSS: UNIT FOR RELATIONS WITH ARMED AND SECURITY FORCES 25 (Jun. 2002), https://www.icrc.org/en/doc/assets/files/other/law10_final.pdf.

60. *Id.*

61. *Id.*

62. *Id.*

63. Report of Prep. Committee on Establishment of an ICC, *supra* note 38, at 23.

64. *Living in Fear: Child Soldiers and the Tamil Tigers in Sri Lanka*, HUM. RTS. WATCH (Nov. 11, 2004), <https://www.hrw.org/report/2004/11/10/living-fear/child->

of child soldiers has been labeled “one of the worst aspects of the ... conflict”⁶⁵ and “a vital part of the LTTE strategy.”⁶⁶ Additionally, during the Rome Conference, Sri Lanka “strongly advocated [for] the inclusion of nuclear weapons in the list of prohibited weapons,” in provisions relating to war crimes.⁶⁷

The Sri Lankan delegation also supported the inclusion of the crime of terrorism and crimes related to illicit drug trafficking in the Statute.⁶⁸ One of the Sri Lankan representatives, H. M. G. S. Palihakkara, submitted that “[h]is delegation believed that [such] an inclusive approach would promote more broad-based support for the Statute and the universality of its jurisdiction.”⁶⁹ In connection to this, Sri Lanka, India, and Turkey proposed the inclusion of the act of terrorism in the definition of crimes against humanity.⁷⁰ The Sri Lankan delegation argued that “[t]o exclude terrorism and drug trafficking from the scope of the Statute would constitute a grave omission” as “[t]he distinction between core crimes and treaty crimes was an artificial one: the infliction of indiscriminate violence on innocent civilians was legally unacceptable and morally reprehensible in times of war and peace alike.”⁷¹

soldiers-and-tamil-tigers-sri-lanka [hereinafter *Living in Fear*]; P. SINGER, *CHILDREN AT WAR 5* (U. of CA Press, Los Angeles ed. 2006); David H. Gray and Tom Owen Matchin III, *Children: The New Face of Terrorism*, 6 INT’L NGO J. 108, 109 (2008).

65. *Living in Fear*, *supra* note 64.

66. The LTTE is said to have begun using children in the nine to twelve years age range due to a shortage in manpower when fighting against Indian peacekeeping forces present in Sri Lanka in the 1980s. P.W. SINGER, *CHILDREN AT WAR 5* (2006); Furthermore, of the LTTE combatants killed during the 1990s, forty to sixty percent were children under the age of eighteen. *Living in Fear*, *supra* note 65; Gray, *supra* note 64, at 108, 109..

67. Rome Conference Official Records, *supra* note 46, at 339.

68. *Id.* at 176.

69. *Id.*

70. U.N. DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, ROME, 15 June—17 July 1998, Official Records, Volume III: Reports and Documents, (2002), A/CONF.183/C.1/L.27/REV.1 (2002); U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ‘Proposal Submitted by India, Sri Lanka and Turkey. Article 5. Crimes within the jurisdiction of the Court,’ A/CONF.183/C.1/L.27/Rev.1 (1998).

71. Rome Conference Official Records, *supra* note 46, at 339.

Sri Lanka's proposal to include the crime of terrorism and crimes related to illicit drug trafficking in the Statute may have been inspired by national conditions prevalent at the time. For instance, the LTTE had been accused of possibly engaging in narcotics trafficking in order to raise revenue for their activities.⁷² The LTTE was also gaining a reputation as a terrorist organization due to numerous incidents of carrying out "suicide terrorism."⁷³ It is claimed to have been "the only group that has successfully assassinated two heads of state" (i.e. Indian Prime Minister Rajiv Gandhi in 1991⁷⁴ and Sri Lankan President Ranasinghe Premadasa in 1993)⁷⁵ as well as "several presidential candidates ... five cabinet ministers[, and] ... numerous other political, governmental, military, and security force personnel."⁷⁶

In the years leading up to the Rome Conference, the LTTE had also successfully conducted suicide-bombing attacks against some of Sri Lanka's major economic institutions (e.g. Central Bank bombing, Colombo in 1996) and cultural institutions (e.g. the Temple of the Tooth Relic bombing, Kandy in 1998).⁷⁷ The United States had already designated the LTTE "a Foreign Terrorist Organization ("FTO") as early as 1997."⁷⁸ However, despite Sri Lanka's efforts, the proposal did not attract significant support and neither terrorism nor drug trafficking

72. C. Christine Fair, *Urban Battle Fields of South Asia: Lessons Learned from Sri Lanka, India, and Pakistan*, RAND CORPORATION (2004), at 31, 33; *A Global Overview of Narcotics Funded Terrorist and Other Extremist Groups*, THE LIBRARY OF CONGRESS 7-8 (May 2002), https://www.loc.gov/rr/frd/pdf-files/NarcsFundedTerrs_Extrems.pdf.

73. The LTTE is said to have carried out 168 of the 271 known suicide attacks executed by all groups throughout the world between 1980 and 2000. Fair, *supra* note 72, at 37, 40.

74. Justin Huggler, *Tamil Tigers apologize for suicide bomber's murder of Rajiv Gandhi*, INDEPENDENT (Oct. 9, 2011), <https://www.independent.co.uk/news/world/asia/tamil-tigers-apologise-suicide-bomber-s-murder-rajiv-gandhi-405781.html>.

75. However, the LTTE initially denied responsibility. Edward A. Gargan, *Suicide Bomber Kills President of Sri Lanka*, N.Y. TIMES (May 2, 1993), <https://www.nytimes.com/1993/05/02/world/suicide-bomber-kills-president-of-sri-lanka.html?>

76. Fair, *supra* note 72, at 38.

77. *Id.*

78. *Id.* at 36.

offences were included in the final version of the Rome Statute.⁷⁹ Some of the reasons for the exclusion included the lack of agreed definition of the crime, the risk of overburdening the Court with the crime despite the lack of definition, and the fact that the crimes were seen as being adequately addressed under existing international cooperation agreements.⁸⁰

Following five weeks of deliberations, the ICC's constitutive instrument, the Rome Statute, was adopted by a vote of 120 states in favor, 7 states against, and 21 abstentions.⁸¹ Thus, the ICC was created on July 17, 1998 and its jurisdiction became operational on July 1, 2002.⁸² Sri Lanka abstained from voting.⁸³ Afterwards, the Sri Lankan representative, John de Saram, provided an explanation for the abstention, explaining:

[W]hile recognizing the great importance of establishing an international criminal court, he was concerned that the Statute moved into areas of international law that were still unclear. That concern included extending the jurisdiction of the International Criminal Court in relation to national jurisdictions, without national consent and, on occasion, in a manner inconsistent with the law of treaties, in particular, he regretted that the crime of terrorism had not been included within the jurisdiction of the Court."⁸⁴

Since then, Sri Lanka has taken part in several ICC Assembly of States Parties (ASP) meetings as an observer State.⁸⁵ However, over the

79. Roy S. Lee, *An Assessment of the ICC Statute*, 25 *FORDHAM INT'L L. J.* 750, 756 (2001).

80. *Id.*

81. Press Release, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Press Release L/2889, (Jul. 20, 1998).

82. Rome Statute, *supra* note 19.

83. Rome Conference Official Records, *supra* note 46, at 123.

84. *Id.*; Press Release, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Press Release L/2889 (Jul. 20, 1998). The representatives of India, Uruguay, Mauritius, Philippines, Norway, Belgium, United States, Brazil, Israel, China, Turkey, Singapore and the United Kingdom also provided explanations of the vote after the vote.

85. *Fourth Session of the Assembly of States Parties Opens 28 November 2005*, INT'L CRIM. CT. (Nov. 27, 2005), <https://www.icc-cpi.int/Pages/item.aspx?name=fourth+session+of+the+assembly+of+states+parties+opens+28+november+2005>> accessed 14 April 2021; Assembly of States Parties to the Rome Statute of the

years, it has shown limited interest in actively seeking member State status with regard to the ICC or an interest in subjecting itself to the jurisdiction of the Court.

B. Sri Lanka and the International Criminal Court at Present

Some attempts have been made to outline the reasons for states, such as Sri Lanka, deciding to refrain from ratifying or acceding to the Rome Statute.⁸⁶ One of the main reasons for Sri Lanka's non-accession to the Rome Statute has been linked to the country's fears that the ICC could interfere in its internal affairs, thus affecting state sovereignty.⁸⁷ This might also be preventing Sri Lanka from lodging an Article 12(3) declaration accepting the ICC's jurisdiction. Similar fears have been cited for the reluctance of many South Asian countries to join the International Criminal Court.⁸⁸ Sri Lanka's main reluctance to accede to the Rome Statute has been linked to its doubts regarding how the principle of complementarity would operate in terms of the Sri Lankan justice system.⁸⁹

1. Reasons for Non-Accession

While the ICC operates to complement national judicial systems and not to supersede them, only stepping in when a state is either unable or unwilling to carry out national prosecutions, doubts have been raised regarding how the principle of complementarity would operate with regard to Article 4 of the Sri Lankan Constitution, which outlines provisions regarding the exercise of sovereignty.⁹⁰ The UNSC's powers

International Criminal Court, INT'L CRIM. CT. (Nov. 2, 2017), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP16-List-StateParties_ObserverStates_InvitedStates-ENG.pdf accessed 14 April 2020.

86. Niriella, *supra* note 17.

87. *Id.* at 193-194.

88. *Id.*

89. *Id.* at 211.

90. Article 4 of the Constitution stipulates that the "Sovereignty of the People shall be exercised and enjoyed in the following manner: Article 4 (a) "the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;" and Article 4 (c) "the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution

to refer a situation from a non-ICC member state to the Court, and the power entrusted to the ICC Prosecutor to initiate a *proprio motu* investigation into a situation, have especially been flagged by Sri Lankan academics as instances that may violate state sovereignty.⁹¹ In these two scenarios, the fear appears to lie in the fact that Sri Lanka's state sovereignty may be violated due to "political influence ... at [the] national or international level"⁹² with the Court exercising the jurisdictional reach it has over non-state parties to the Rome Statute, "in an arbitrary manner."⁹³ As outlined later in this article, this last concern has also been reiterated by some senior members of the Sri Lankan government.

While the civil war was still ongoing, ratification of or accession to the Rome Statute was seen as being problematic. Sri Lanka considered the armed conflict to be a purely "internal dispute...of the Sri Lanka[n] government security forces with the LTTE" that did not warrant international scrutiny.⁹⁴ Sri Lanka's reluctance to accept international legal obligations that apply to non-international armed conflicts—the category under which its civil war fell—is evident. For instance, the country signed Geneva Conventions I to IV, which apply to international armed conflicts⁹⁵ on February 28, 1959, and later enacted the Geneva Conventions Act, No. 4 of 2006 domestically.⁹⁶ At the date of writing, the Geneva Conventions Act 2006 has not yet been operationalized in Sri Lanka.⁹⁷ Moreover, Sri Lanka has neither signed

or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law." THE CONSTITUTION OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA Oct. 29, 2020; Niriella, *supra* note 17, at 211-12.

91. Niriella, *supra* note 17, at 212.

92. *Id.*

93. *Id.* at 214.

94. *Id.* at 212.

95. This is with the exception of Common Article 3 of the Geneva Conventions that applies to non-international armed conflicts.

96. See *Treaties, State Parties and Commentaries, Sri Lanka*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=LK; Geneva Conventions Act, 2006 (No. 4/2006) (Sri Lanka), https://www.moj.gov.lk/web/images/latest_document//2006/1480651525-a04-geneva-convention-2006-en.pdf (last visited Mar. 26, 2021) [hereinafter Geneva Conventions Act 2006 SL].

97. Wanigasuriya, *supra* note 25 at 236.

nor ratified Additional Protocol II to the Geneva Conventions, which applies to non-international armed conflicts.⁹⁸

Furthermore, the domestic Geneva Conventions Act 2006 does not include any provisions that criminalize violations of Common Article 3 to the Geneva Conventions that apply to non-international armed conflicts.⁹⁹ According to the drafters of the initial Sri Lankan Geneva Conventions Bill (drafted in 2001), the bill contained provisions relating to Common Article 3 of the Geneva Conventions.¹⁰⁰ These provisions were included in the bill following the guidance of legal advisers from the International Committee of the Red Cross headquarters in Geneva.¹⁰¹ No express reasons for excluding the provisions related to Common Article 3 from the final Act were ever given. However, the above indicates Sri Lanka's reluctance to accept and be bound by international legal obligations that apply to non-international armed conflicts such as the country's civil war.

Yet another argument against subjecting itself to the jurisdiction of the ICC has been the view held by many national experts that Sri Lanka possesses "strong substantial and procedural laws to impose . . . criminal liability on individuals who [have] committed crimes" albeit as ordinary Penal Code offences (i.e. murder, assault, criminal force, etc.) prosecuted through the domestic judicial system as opposed to being prosecuted as core international crimes.¹⁰² However, Sri Lanka's national laws do not currently include provisions on modes of liability that recognize superior responsibility, command responsibility, etc.¹⁰³

98. See *Treaties, States Parties and Commentaries, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating To the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475, (last visited Mar. 23, 2021); Wanigasuriya, *supra* note 25 at 236.

99. It is important to note however, that despite this, Sri Lanka continues to be bound by its obligations under customary international law, including with regard to customary international law provisions that apply to non-international armed conflicts. Wanigasuriya, *supra* note 25 at 236; Geneva Conventions Act 2006 SL, *supra* note 96.

100. Dayantha Laksiri Mendis, *Implementing Geneva Resolutions*, SUNDAY ISLAND (Feb. 12, 2021), <https://island.lk/implementing-geneva-resolutions/>.

101. *Id.*

102. Niriella, *supra* note 17, at 212.

103. Wanigasuriya, *supra* note 25 at 260.

In the absence of such national provisions, domestic prosecutions under the current Sri Lankan criminal law provisions may fail to capture the full range of potential perpetrators and full scope of superior and command responsibility that would lead to the prosecution of those most responsible for committing any alleged crimes linked to the civil war.

2. Political Climate and Pragmatic Considerations

The political climate and other pragmatic considerations prevalent in Sri Lanka are also important considerations when analyzing what may prevent the accession to the Rome Statute and more specifically, prevent the lodging of an Article 12(3) declaration accepting the ICC's jurisdiction. In Sri Lanka, senior government officials and those holding notable state, diplomatic, and military posts have been accused of allegedly committing international crimes during the civil war era.¹⁰⁴ Sri Lanka's current Prime Minister, Mahinda Rajapaksa, was the country's President and the Commander-in-Chief of Sri Lanka's armed forces between 2005 and 2015, when some of the alleged international crimes linked to the civil war were committed.¹⁰⁵ The current Sri Lankan President, Gotabaya Rajapaksa, was the defense secretary in Mahinda Rajapaksa's government, who had direct responsibility for the conduct of government forces from 2005 to 2015.¹⁰⁶ Since his election, the current Sri Lankan president has continued to afford "unprecedented policymaking powers to serving and retired military

104. In a January 2010 cable by the US Ambassador to Sri Lanka Patricia Butenis stated, "There are no examples we know of a regime undertaking wholesale investigations of its own troops or senior officials for war crimes while that regime or government remained in power. In Sri Lanka this is further complicated by the fact that responsibility for many of the alleged crimes rests with the country's senior civilian and military leadership, including President Rajapaksa and his brothers and opposition candidate General Fonseka." *US Embassy Cables: Rajapaksa Shares Responsibility for 2009 Sri Lankan Massacre*, THE GUARDIAN (Dec. 1, 2010, 2:10 PM), <https://www.theguardian.com/world/us-embassy-cables-documents/243811> [hereinafter US Embassy Cables].

105. *Sri Lanka: Justice Under Attack*, HUM. RTS. WATCH (Feb. 1, 2021), <https://www.hrw.org/news/2021/02/01/sri-lanka-justice-under-attack>.

106. *Id.*

officers, many of whom UN or other non-governmental investigations have implicated in human rights and humanitarian law violations.”¹⁰⁷

Sri Lanka has also appointed several decorated ‘war heroes’ to key diplomatic positions despite having played major roles in the civil war against the LTTE.¹⁰⁸ Other controversial military figures have been promoted. For instance, Army General Shavendra Silva, who is alleged to have been involved in the extrajudicial killings and torture of LTTE members that took place during the final stages of the war while he led the 58th Division of the Sri Lankan Army, was promoted to the rank of Lieutenant General and appointed to the post of the commander of the Sri Lankan Army in August 2019.¹⁰⁹ Moreover, following the outbreak of the COVID-19 pandemic, Lieutenant General Shavendra Silva was appointed as Sri Lanka’s Head of the National Operation Centre for Prevention of COVID 19 Outbreak (“NOCPCO”).¹¹⁰ During the

107. Alan Keenan, *Sri Lanka: Prevention Should Be at Heart of Human Rights Council Resolution*, INT’L CRISIS GRP. (Feb. 25, 2021), <https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lanka-prevention-should-be-heart-new-human-rights-council-resolution>; Yasmin Sooka, *Joint Press Release: From the Battlefield to the Boardroom—The Militarisation of Sri Lanka*, INT’L TRUTH AND JUST. PROJECT AND JOURNALISTS FOR DEMOCRACY IN SRI LANKA (Jan. 19, 2019), http://www.jdslanka.org/images/documents/jds_itjp_battlefield_to_boardroom_19_01_2021_en.pdf.

108. E.g. Former Director of Operations Sri Lankan Army: Major General Udaya Perera (appointed as Deputy High Commissioner to Malaysia), Former Air Force Commander and Chief of Defence Staff: Air Chief Marshal Donald Perera (ambassador to Israel), former Navy Commander Admiral: Wasantha Karannagoda (ambassador to Japan), etc.; Mandana Ismail Abeywickrema, *The Militarisation of Sri Lanka’s Diplomatic and Administrative Services*, THE SUNDAY LEADER (Jan. 23, 2011), <http://www.thesundayleader.lk/2011/01/23/the-militarisation-of-sri-lanka%E2%80%99s-diplomatic-and-administrative-services/>.

109. *US Court Dismisses War Crimes Case Against Shavendra Silva*, BBC, https://www.bbc.com/sinhala/news/story/2012/02/120209_shavendra (last visited Mar. 25, 2021); Reuters Staff, *U.N. Suspends Sri Lankan Troops From Peacekeeping Over Army Chief Appointment*, REUTERS (Sept. 25, 2019), <https://www.reuters.com/article/us-sri-lanka-un-peacekeepers/un-suspends-sri-lankan-troops-from-peacekeeping-over-army-chief-appointment-idUSKBN1WA2SL>; *Sri Lankan General Accused of War Abuses Appointed Army Chief*, AL JAZEERA (Aug. 19, 2019), <https://www.aljazeera.com/news/2019/8/19/sri-lankan-general-accused-of-war-abuses-appointed-army-chief>.

110. The NOCPCO was established by President Gotabaya Rajapaksa to “coordinate preventive and management measures to ensure that healthcare and other services are well geared to serve the general public.” President’s Media Division,

ongoing pandemic, General Silva was considered to have “become the public face of the [heavily militarized government pandemic] response, as key decisions and announcements linked to the health crisis continued to be communicated by him.”¹¹¹

When the ICC exercises jurisdiction regarding a situation and initiates prosecutions, the Court usually prosecutes high-level perpetrators, leaving the prosecuting of low-level perpetrators to the national level. If the Sri Lankan situation were to be referred to the ICC by the UNSC or if Sri Lanka accepted jurisdiction pursuant to an Article 12(3), this would pose a risk to high-ranking government and military officials.¹¹² If a potential ICC investigation into the situation in Sri Lanka led to prosecutions, given that the majority of the LTTE leadership was said to have been wiped out during the final stages of the civil war,¹¹³ uncertainty would exist about how many senior LTTE

Army Commander Shavendra Silva Heads National Operation Center for Prevention of COVID- 19 Outbreak, PRESIDENTIAL SECRETARIAT (Mar. 17, 2020), <https://www.presidentsoffice.gov.lk/index.php/2020/03/17/army-commander-shavendra-silva-heads-national-operation-center-for-prevention-of-covid-19-outbreak/>; *Head, NOPCO Appeals the Public to Adopt Strict Health Practices*, SRI LANKA ARMY, NATIONAL OPERATION CENTRE FOR PREVENTION OF COVID-19 OUTBREAK (Oct. 22, 2020, 9:04AM) <https://alt.army.lk/covid19/content/head-nocpc-appeals-public-adopt-strict-health-practices-0>.

111. Bhavani Fonseka & Kushmila Ranasinghe, *Sri Lanka's Accelerated Democratic Decay Amidst a Pandemic*, in PRADEEP PEIRIS ED., *IS THE CURE WORSE THAN THE DISEASE? REFLECTIONS ON COVID GOVERNANCE IN SRI LANKA* 42, 42 (2021).

112. Wanigasuriya, *supra* note 25, at 247-48.

113. The LTTE leader, Velupillai Prabhakaran was killed during the last phases of the war along with other senior LTTE members, including intelligence head, Pottu Amman and Sea Tiger leader, Soosai. UN reports have found further reasonable grounds to believe that additional senior members of the LTTE (e.g. Head of LTTE Peace Secretariat, Seevaratnam Puleedevan; Head of the LTTE Political Wing, Balasingham Nadesan; and LTTE Commander Thambirasa Thurairajasingham alias Col. Ramesh), who either surrendered to or were captured by the Sri Lankan armed forces during the final stage of the civil war, were executed by the security forces. Selvarasa Pathmanathan, *Mark of Respect for Our Supreme Leader: The Indestructible Flame of Freedom*, ILANKAI TAMIL SANGAM (ASSOCIATION OF TAMILS OF SRI LANKA IN THE USA), (May 24, 2009), https://sangam.org/2010/06/LTTE_Announcement_English.pdf; Amantha Perera, *Colombo: Tamil Tiger Leader Killed in Ambush*, TIME (May 18, 2009), <http://content.time.com/time/world/article/0,8599,1899160,00.html>; Report of the United Nations Office of the High Commissioner for Human Rights Investigation on Sri Lanka (OISL), Hum.

leaders would be alive to face prosecution for alleged international crimes they may have committed during the conflict. Remaining notable LTTE members are limited to a handful including, Selvarajah Pathmanathan,¹¹⁴ Vinayagamoorthy Muralitharan,¹¹⁵ and Sivanesathurai Chandrakanthan.¹¹⁶ Therefore, if any prosecutions stemming from the situation were initiated at the ICC, this could lead to the possibility that the majority of those appearing in front of the Court could be high-ranking Sri Lankan government and military officials from the civil war era.¹¹⁷ Given the allegations levelled against some of them, it is highly unlikely the current Sri Lankan executive would want to voluntarily initiate the process of lodging an Article 12(3) declaration accepting the ICC's jurisdiction, that carries the potential risk of these high ranking officials being prosecuted at the International Criminal Court.

Furthermore, statements by senior politicians (in successive Sri Lankan governments) display an absence of political will to accept the jurisdiction of any international criminal justice institution that would probe the allegations of international crimes committed during the civil war. For instance, in a January 2010 cable by the US Ambassador to Sri Lanka Patricia Butenis, the US Ambassador explained that the then President of Sri Lanka, Mahinda Rajapakse (who is the current Sri

Rts. Council on its Thirteenth Session, at 62-70, ¶¶ 285-322, U.N. Doc. A/HRC/30/CRP.2 (Sept. 16, 2015).

114. A.k.a. Selvarasa Pathmanathan, a.k.a. Kumaran Pathmanathan, a.k.a. KP, the LTTE's diplomatic chief (Head of International Relations) who was in charge of the LTTE's smuggling and weapon acquisitions, is believed to be the most senior LTTE operative still alive. Manjula Fernando, *Arrest of Nanthagopan: Turning Point in Battle Against LTTE Remnants*, SUNDAY OBSERVER (Apr. 13, 2014), <http://archives.sundayobserver.lk/2014/04/13/fea00.asp>.

115. A.k.a. Colonel Karuna Amman is said to have defected from the LTTE in 2004, and led a paramilitary group, the Tamil Makkal Viduthalai Pulikal, which allegedly committed war crimes including the recruitment of child soldiers. Bhavani Fonseka, *The Long Wait For Justice*, HIMAL SOUTH ASIAN (Aug. 7, 2020), <https://www.himalmag.com/the-long-wait-for-justice-srilanka-2020/>; *Sri Lanka: Probe into LTTE Crimes Should Start with Karuna*, HUM. RTS. WATCH (Mar. 28, 2013), <https://www.hrw.org/news/2013/03/28/sri-lanka-probe-ltte-crimes-should-start-karuna>.

116. A.k.a. Pillayan was a former LTTE cadre and ex-deputy to Colonel Karuna Amman. *Sri Lanka: Collapse of Joseph Pararajasingham Murder Case: A Failure of Justice*, AMNESTY INT'L (Jan. 13, 2021), <https://www.amnesty.org/en/latest/news/2021/01/sri-lanka-collapse-of-joseph-pararajasingham-murder-case-a-failure-of-justice/>.

117. Wanigasuriya, *supra* note 25, at 248.

Lankan Prime Minister) had “personally [promised] to stand up to any international power or body that would try to prosecute Sri Lankan war heroes.”¹¹⁸ Indeed, President Rajapakse expressed his opposition to any international legal process that allowed for the prosecution of Sri Lankan nationals by an international tribunal or through the judicial system of a second state.¹¹⁹ In 2017, he opined that no accused facing such a trial could expect justice to be served and that such prosecutions were always politically motivated.¹²⁰

Successive Sri Lankan governments and senior Sri Lankan government officials have adopted an approach where they push all allegations of international crimes aside, moving forward as if no international crimes have been committed. This approach has been preferred over subjecting itself¹²¹ to the jurisdiction of the ICC, or another investigative and prosecutorial mechanism that would address the alleged violations of international law during the civil war. For instance, addressing journalists in 2019, the former Sri Lankan president, Maithripala Sirisena, stated that Sri Lanka can solve its own issues and instead of revisiting past occurrences and renewing old wounds, everyone should forget past instances and dedicate themselves

118. *US Embassy Cables*, *supra* note 104.

119. “An accused facing trial for an alleged crime committed in one State, at a court of a different foreign State, or facing trial at an international criminal tribunal which is sustained by funds contributed by a group of foreign countries, can never expect justice to be served. Such a trial is always initiated in order to achieve some political motive.” (“එක් රටක සිදුවූවා යැයි කියන අපරාධයක් සඳහා වෙනත් රටක අධිකරණයක, නැතිනම් වෙනත් රටවල් සමූහයක් විසින් මුදල් වැය කරමින් පවත්වාගෙන යන ජාත්‍යන්තර අපරාධ අධිකරණයක නඩුවකට මුහුණ දෙන චූදිතයෙකුට කිසිදාක යුක්තියක් බලාපොරොත්තු විය නොහැකිය. ඒ ආකාරයට නඩු පැවරීමක් සිදු වන්නේ, හැමවිටම දේශපාලන අභිමතාර්ථයක් ඉටුකරගැනීම සඳහාය.” (author’s own translation from Sinhala)). මහින්ද රාජපක්‍ෂ මාධ්‍ය නිවේදනය: යුද අපරාධ ජාත්‍යන්තර අධිකරණ නම වෙනස් කර එයි. [*Press Statement by Mahinda Rajapaksa: The International War Crimes Tribunals Returns Under a Different Name*], LANKA C NEWS (July 2, 2017), <https://lankacnews.com/%E0%B6%BA%E0%B7%94%E0%B6%AF-%E0%B6%85%E0%B6%B4%E0%B6%BB%E0%B7%8F%E0%B6%B0-%E0%B6%A2%E0%B7%8F%E0%B6%AD%E0%B7%8A%E2%80%8D%E0%B6%BA%E0%B6%B1%E0%B7%8A%E0%B6%AD%E0%B6%BB-%E0%B6%85%E0%B6%B0%E0%B7%92/>.

120. *Id.*

121. Albeit pursuant to individual criminal responsibility and not State responsibility.

to peace.¹²² Later the same year, prior to his election as the country's new president, Gotabaya Rajapaksa opined that instead of dwelling on the past, one should focus on the future stating, "We have to move forward, we have to forget about hanging on to old allegations and all that."¹²³

Moreover, successive Sri Lankan governments have repeatedly denied any wrongdoing by the government forces during the civil war. Addressing the parliament in May 2009, former president, Mahinda Rajapaksa stated that Sri Lankan "troops went to [the battlefield] carrying a gun in one hand, the Human Rights Charter in the other," a statement which he later reiterated at the second National Victory Day anniversary celebrations.¹²⁴ Additionally, in a May 2009 interview during his previous tenure as the country's Defense Secretary, Gotabaya Rajapaksa responded to questions regarding the alleged commission of war crimes by Sri Lankan troops.¹²⁵ Here, he stated that the Sri Lankan military had taken all necessary precautions to prevent civilian casualties.¹²⁶ He added that the United Kingdom and the United

122. "We will solve our own problems. It has been 10 years since the war ended. Instead of digging into these issues and renewing old wounds, which would lead to hurt feelings, I hope to urge everyone to forget all of this and dedicate themselves to achieving peace" ("මේ ප්‍රශ්න අපි විසඳගන්නමි. යුද්ධය ඉවර වෙලා දැන් අවුරුදු 10ක් ගත වෙලා නැවත මේ පරණ දේවල් භාර භාර තුවාල පාරගෙන හින් අමනාප කරන්නේ නැතුව අපි සියලු දෙනා ම සාමය සඳහා කැපවෙන්න කියලා ඉල්ලන්න බලාපොරොත්තු වෙනවා මේවා අමතක කරලා") (author's own translation from Sinhala). යුද අපරාධ වෝදනා: "යෝජනා ඉටු කිරීම රණවිරුවන්ට දෝහී වීමක් නොවේ" [*War Crimes Allegations: "Making Recommendations is Not a Betrayal of War Heroes"*], BBC (Mar. 20, 2019), <https://www.bbc.com/sinhala/sri-lanka-47624136>.

123. Krishan Francis, *Sri Lanka Presidential Hopeful Says won't Honor Deal with UN*, ASSOCIATED PRESS NEWS (Oct. 15, 2019), <https://apnews.com/article/b27e1bbb45cc42488b5e6d67415110de>.

124. Mahinda Rajapaksa stated: "I said in the past that our troops went to the battlefield carrying a gun in one hand, the Human Rights Charter in the other They did not target any communities or religions, and did not march ahead with hatred towards anyone." *Sri Lanka: 'Our aim was to liberate our Tamil people from the clutches of the LTTE'—President*, RELIEFWEB (May 20, 2009), <https://reliefweb.int/report/sri-lanka/sri-lanka-our-aim-was-liberate-our-tamil-people-clutches-ltte-president>.

125. *Lanka lashes out at West's criticism*, NDTV (May 22, 2009), <https://www.youtube.com/watch?v=Vtm54Y9USEg> accessed 15 December 2020.

126. *Id.*

States should investigate their own troops before attempting to investigate and try Sri Lankans at war crime tribunals.¹²⁷

Furthermore, in Sri Lanka today, many remain unaware of how the jurisdiction of the ICC and how its sentencing provisions¹²⁸ operate in practice. It has been reported that supporters of former President Mahinda Rajapaksa were under the impression that attempts were being made by some “to send him to the electric chair”¹²⁹ for execution through the ICC process or through another international mechanism.¹³⁰ Speaking in parliament in 2020, the country’s former Foreign Minister, Mangala Samaraweera, stated measures such as co-sponsoring the UNHRC resolution 30/1 were meant to act as an exercise to shield alleged perpetrators of any international crimes from being investigated and prosecuted, and to divert international attention from the issue.¹³¹ He also explained, “[T]hrough resolution 30/1 [we]

127. *Id.*

128. *See generally* Rome Statute, *supra* note 19, arts 76-77.

129. The Rome Statute does not allow the imposition of the death penalty. Rome Statute, *supra* note 19, art. 77 .

130. “The former president and many of his associates stated that some individuals who were jealous of the service he rendered to the country, were attempting to send him to the electric chair. However, Ranil Wickramasighe correctly explained the legal basis that prevents the ICC from prosecuting a senior member of the Sri Lankan government. He explained that as prime minister, he refused to ratify the Rome Statute...” (“රටට කළ සේවයට ඉරිසියා කරන ඇතැමුන් හිටපු ජනපති විදුලි පුටුවට යවීමට අර අදින බව ඔහු මෙන්ම ඔහු වටා සිටි බොහෝ පිරිසක් සඳහන් කළහ. නමුත් අගමැති රනිල් වික්‍රමසිංහ මහතා එය වඩාත් නිවැරදිව ජාත්‍යන්තර අපරාධ අධිකරණය හමුවට ශ්‍රී ලංකාවේ නායකයකු කැඳවිය නොහැකි වීමට සරල නීතිමය පසුබිම පැහැදිලි කරනු ලැබීය. අගමැතිවරයා පළමුවරට තම ධුරයේ කටයුතු කරන විට රෝමන් ප්‍රඥප්තියට අත්සන් තැබීම ප්‍රතික්ෂේප කළ බව සඳහන් කරමින්...” (author’s own translation from Sinhala). මොකක්ද මේ ක්ලස්ටර් (පොකුරු) බෝම්බ චෝදනාව? [*What is the Cluster Bomb Allegation?*], DINAMINA (June 25, 2016), <http://www.dinamina.lk/2016/06/25/18272?page=2>.

131. “During those days the former president Mahinda Rajapaksa went around stating, “They are trying to take me to the electric chair. However, through resolution 30/1 we managed to prevent them from taking him to the electric chair.” (“ඒ කාලයේ හිටපු ජනාධිපති මහින්ද රාජපක්ෂ මැතිතුමා ම කිය කියා ගියා “මා විදුලි පුටුවට ගෙනියන්න හදනවා” කියලා. නමුත් මේ 30/1 යෝජනාව හරහා තමයි, අපි මහින්ද් රාජපක්ෂ විදුලි පුටුවට ගෙන යන එකත් වළක්වාගත්තේ” (author’s own translation from Sinhala). *MP Mangala Samaraweera*, PARLIAMENTARY DEBATES HANSARD 716 (Feb. 20, 2020),

stopped Mahinda Rajapaksa from being taken to the electric chair [for execution].”¹³²

While the former Prime Minister, Ranil Wickramasinghe, is said to have attempted to explain the operation of the ICC’s jurisdictional reach and its limitations due to Sri Lanka not being a State Party to the Rome Statute,¹³³ such confusion still persists. For instance, in early 2019, Tamil National Alliance (“TNA”) parliamentarian M.A. Sumanthiran said that despite preferring a hybrid mechanism for pursuing justice, unless Sri Lanka agreed to include international judges in such an accountability mechanism with the view of ensuring impartiality, his party would “take steps to move Sri Lanka to the International Criminal Court.”¹³⁴ Such statements made in parliament indicate a lack of understanding among Sri Lankan parliamentarians as to how the ICC’s jurisdiction operates (especially given the jurisdictional obstacles since Sri Lanka is a non-State Party to the Rome Statute and the unlikelihood of the situation being referred to the ICC by the UNSC).

Instead of cooperating with bodies that have the potential to probe any alleged international crimes committed during the civil war in Sri Lanka, the current Sri Lankan government has taken steps to distance itself from such bodies and organizations.¹³⁵ In May 2020, at the War Heroes Day marking the 11th anniversary of the Sri Lankan military’s victory over the LTTE, Gotabaya Rajapaksa commented, they “will not hesitate to withdraw from any organization or agency if our war heroes are targeted.”¹³⁶ Hence, given that accepting the jurisdiction

<https://www.parliament.lk/uploads/documents/hansard/1582783760041878.pdf>.

132. *Id.*

133. *Id.*

134. 2019.03.22- Sri Lanka parliament live, NEWS-I (Mar. 22, 2019), <https://www.youtube.com/watch?v=iExheft7KXw&t=4994s>.

135. E.g. On 26 February 2020, the Sri Lankan government announced its withdrawal of support for Human Rights Council Resolution 40/1 (which incorporates Resolutions 30/1 and 34/1) thus withdrawing from its commitment to establish a domestic accountability mechanism that would probe the alleged international crimes committed during the civil war. *High level Segment Statement by Hon. Dinesh Gunawardena, Minister of Foreign Relations of Sri Lanka*, FOREIGN MINISTRY—SRI LANKA (Feb. 26, 2020), <https://mfa.gov.lk/43rd-session-hrc/>.

136. *Sri Lanka Will Withdraw From Any International Forum if ‘War Heroes’ Targeted: Gotabaya Rajapaksa*, NEW INDIA EXPRESS, (May 19, 2020, 9:48 PM), <https://www.newindianexpress.com/world/2020/may/19/sri-lanka-will-withdraw-from-any-international-forum-if-war-heroes-targeted-gotabaya-rajapaksa-2145420.html>.

of the ICC holds the possibility that an investigation by the Court may lead to the prosecution of senior government figures and military personnel, it is unlikely that the present Sri Lankan government will take any steps towards accepting the ICC's jurisdiction.

CONCLUSION

Despite taking part in the Rome Conference and the early drafting stages for a statute to establish a permanent international criminal court, Sri Lanka's relationship with the ICC, especially during the years following the end of the country's decades-long civil war, can be described as strained. Sri Lanka appears to be concerned that accepting the ICC's jurisdiction would contravene its state sovereignty. Attempts at international intervention in probing the alleged international crimes committed during the civil war have repeatedly been rejected. However, the greatest obstacle for accepting the Court's jurisdiction, especially through lodging an Article 12(3) declaration covering the period during which alleged international crimes are said to have been committed, may be posed by the present political climate within the country.

The possibility certainly exists that Sri Lanka is concerned about the political implications of accepting the ICC's jurisdiction.¹³⁷ Across South Asia, some states have accepted the ICC's jurisdiction, but the number of countries is limited to less than a handful and regional heavyweights such as India have remained non-members.¹³⁸ This greatly diminishes pressure on Sri Lanka to accept the Court's jurisdiction. Moreover, limited pressure is exerted by Sri Lankan civil society actors for acceding to the Rome Statute due to their lack of knowledge, experience, and resources.¹³⁹ Lack of understanding regarding the ICC's jurisdictional reach may further prevent Sri Lanka from taking the step towards acceding to the Rome Statute. In any case, a clear lack of political will exists in Sri Lanka to accept the ICC's

137. *Seeking Justice in Sri Lanka: National and International Remedies for Victims of Grave Violations of Human Rights and International Humanitarian Law*, INT'L FED'N FOR HUM. RTS. 6 (2006), <https://www.refworld.org/pdfid/46f146c60.pdf> [hereinafter *Seeking Justice in Sri Lanka*].

138. Only three South Asian States (i.e. Afghanistan, Bangladesh and Maldives) are ICC States Parties. See *South Asia*, THE WORLD BANK (Mar. 30, 2021), <https://www.worldbank.org/en/region/sar/overview>.

139. *Seeking Justice in Sri Lanka*, *supra* note 137, at 27.

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jurisdiction, be it through acceding to the Rome Statute or by lodging an Article 12(3) declaration with the Court. Consequently, justice for the international crimes allegedly committed during the civil war of the past remains, at best, elusive.