

"FITTING THE BILL": Incorporating International Crimes into Sri Lankan Law

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I. INTRODUCTION

(a) *The Sri Lankan Context*

Since the end of the armed conflict in Sri Lanka, allegations of violations of international humanitarian law (IHL) and international human rights law have been reported by various official and unofficial sources. According to several UN reports, these allegations—if proven—would amount to crimes against humanity and war crimes.¹

In October last year, the Sri Lankan government co-sponsored a resolution at the UN Human Rights Council (HRC) titled “Promoting reconciliation, accountability and human rights in Sri Lanka”. Paragraph 7 of the resolution reads that the HRC:

Encourages the Government of Sri Lanka to reform its domestic law to ensure that it can implement effectively its own commitments, the recommendations made in the report of the Lessons Learnt and Reconciliation Commission, as well as the recommendations of the report of the Office of the High Commissioner, including by allowing for, in a manner consistent with its international obligations, the trial and punishment of those most responsible for the full range of crimes under the general principles of law recognized by the community of nations relevant to violations and abuses of human rights and violations of international humanitarian law, including during the period covered by the Lessons Learnt and Reconciliation Commission.²

Sri Lankan domestic law does not specifically criminalize genocide, crimes against humanity and war crimes committed in the context of a non-international armed conflict.³ However, as this paper demonstrates, incorporation of these international crimes as well as international modes of responsibility into domestic law with retroactive effect is absolutely necessary to enable the “trial and punishment of those most responsible for the full range of crimes [alleged in Sri Lanka]”.⁴

(b) *International Crimes*

International crimes refer to “acts for whose accomplishment international law makes authors criminally responsible”.⁵ According to the Nuremberg Tribunal, the fact “that international law imposes duties and liabilities upon individuals as well as upon states [had] long been recognized”.⁶ However, the category “international crimes” is open-ended and its content as well as the contours of the crimes considered to be international crimes have evolved over time.⁷ For the purpose of this paper the term “international crimes” is used to refer to offences

¹ Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011 [hereinafter UN Expert Panel Report], ¶¶ 246-255; Report of the OHCHR Investigation on Sri Lanka (OISL), 30th session, 16 September 2015, U.N. Doc. A/HRC/30/CRP.2, ¶¶ 204, 205, 322, 675, 938, 1113, 1116, 1118, 1119, 1130, 1135, 1139, 1141, 1152, 1161, 1169, 1174 [hereinafter OISL Report].

² United Nations Human Rights Council, *Promoting reconciliation, accountability and human rights in Sri Lanka*, Resolution 30/1, 30th session, UN Doc. A/HRC/30/1, 1 October 2015, ¶ 7 [hereinafter Resolution 30/1].

³ The Geneva Conventions Act (No. 4 of 2006) only applies to international armed conflicts.

⁴ Resolution 30/1, *supra* note 2, ¶ 7.

⁵ A. Cassese, *International Criminal Law*, Oxford: Oxford University Press, 2004, p. 4.

⁶ International Military Tribunal, *Judgment of 1st October 1946, in The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22 August 1946 to 1 October 1946)*, p. 446 [hereinafter Nuremberg Judgment].

⁷ M. C. Bassiouni notes that “there is a great deal of confusion in the writings of scholars as to what constitutes an international crime, and how these crimes should be referred to. . . [a]mong the reasons for this diversity of

that have been included under the jurisdiction of the international and hybrid tribunals, and the International Criminal Court. They comprise genocide, crimes against humanity and war crimes. These crimes are labelled as the “most serious crimes of concern to the international community” and as those that “deeply shock the conscience of humanity”.⁸ They constitute acts which damage vital international interests, impair the peace and security of the international community, and violate universal moral values and humanitarian principles.⁹

(c) *Scope of the Paper*

The second part of this paper discusses the sources of international law which form the basis for international crimes as they exist today. The third part examines the historical evolution of international crimes and individual responsibility. In particular, it describes the doctrines of joint criminal enterprise (JCE) and command or superior responsibility which are specific to international criminal law. The fourth section of this paper argues that it is unsatisfactory for international crimes to be prosecuted as ordinary crimes under domestic law. It presents general policy arguments as to why ordinary crimes are inadequate including, the international character and stigma attached to international crimes, their gravity and systematic nature, and the patterns of conduct connected to them. Additionally, this and the following section discuss why Sri Lanka’s ordinary crimes and modes of liability are inadequate to address the violations allegedly committed by the Sri Lankan Security Forces and the Liberation Tigers of Tamil Eelam (LTTE) during the civil war. Finally, the sixth part of this paper argues that international crimes, as well as international forms of participation such as JCE and command or superior responsibility can be retroactively incorporated into Sri Lankan law as “general principles of law recognized by the community of nations” under article 13 (6) of the Sri Lankan Constitution. It also argues that these crimes are well-established under customary international law.

II. SOURCES OF LAW: ASCERTAINING THE CONTENT OF INTERNATIONAL CRIMINAL LAW

The sources of international criminal law are the same as those that are generally considered to be sources of international law set out in Article 38(1)(a)-(d) of the statute of the International Court of Justice. These are treaty law, customary law, general principles of law recognized by civilized nations and, as a subsidiary means of determining law, judicial decisions and the writings of the most qualified publicists.¹⁰

labels is the lack of agreement by scholars as to the criteria for international criminalization and the distinctions between categories of international crimes, depending upon the nature of the social interest which is sought to be protected and the harmful consequences sought to be prevented by criminalizing such conduct”. Bassiouni surveyed 281 Conventions and classified 27 international crimes. His categories include aggression, genocide, crimes against humanity, war crimes, as well as financing of terrorism, falsification and counterfeiting. See M. C. Bassiouni, *International Criminal Law Series: Introduction to International Criminal Law*, Martinus Nijhoff, 2012, p.142.

⁸ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, preamble, ¶ 2 [hereinafter ICC Statute].

⁹ Israel, Supreme Court, *Attorney General of Israel v. Eichmann*, 29 May 1962, 36 I.L.R. 277, ¶ 11.

¹⁰ United Nations, Statute of the International Court of Justice, 18 April 1946, article 38 [hereinafter ICJ Statute].

(a) Formal Sources of International Law

Treaty law may provide a basis for the recognition of international crimes. For instance, the 1948 Genocide Convention recognizes that “genocide, whether committed in time of peace or in time of war, is a crime under international law”.¹¹ Most international crimes are also recognized as such under customary international law. Customary international law is a source of law¹² which refers to “general [state] practice accepted as law”.¹³ In addition, the qualification of some acts as international crimes may be justified by reference to the “general principles of law recognized by civilized nations”.¹⁴ General principles of law have been recognized in article 7(2) of the European Convention on Human Rights¹⁵ and article 15 (2) International Covenant on Civil and Political Rights.¹⁶ They are principles of law common to all major legal systems in the world.¹⁷ Therefore, international courts and tribunals have determined the existence of such principles through the examination of national laws and practices in order to deduce a common approach.¹⁸

(b) Subsidiary Means for the Determination of Rules of International Law

Many international crimes are also defined in the statutes of international and hybrid tribunals. For instance, the Charter for the International Military Tribunal at Nuremberg (Nuremberg Charter) defines three categories of international crimes over which the tribunal had jurisdiction: crimes against peace, war crimes, and crimes against humanity.¹⁹ In the contemporary period, international and hybrid tribunals often have jurisdiction over genocide, crimes against humanity and war crimes. However, the definition of these crimes in the statutes of these courts sometimes differs from one to another. For instance, as will be explained below, the definition of crimes against humanity in the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) differs from that adopted in the Statute of the International Criminal Tribunal for the Rwanda (ICTR) and the Rome Statute of the

¹¹ UN General Assembly, Convention of the Prevention and Punishment of the Crime of Genocide, 9 December 1948, U.N.T.S., vol. 78, p. 277 preamble [hereinafter Genocide Convention].

¹² ICJ Statute, *supra* note 10, article 38(b).

¹³ *North Sea Continental Shelf Judgment (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, I.C.J. Reports, p. 3, 20 February 1969, ¶ 74.

¹⁴ ICJ Statute, *supra* note 10, article 38(c).

¹⁵ Council of Europe, European Convention on Human Rights and Fundamental Freedoms (1950), Art. 7(1).

¹⁶ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, U.N.T.S., vol. 999, p. 171, article 15(1) [hereinafter ICCPR].

¹⁷ Cassese et al., *International Criminal Law Cases and Commentary*, Oxford: Oxford University Press, 2011, p. 193; Judgment, *Prosecutor v. Kupreskic et al.* (IT-95-16-T), Trial Chamber, 14 January 2000, ¶ 677 (“[I]t is now clear that to fill possible gaps in international customary and treaty law, international and national criminal courts may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world. Where necessary, the TC shall use such principles to fill in any lacunae in the Statute of the International Tribunal and in customary law”).

¹⁸ Judgment, *Prosecutor v. Furundzija* (IT-95-17/1), Trial Chamber, 10 December 1998, ¶ 177 (“The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity . . . it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws”).

¹⁹ United Nations, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”), 8 August 1945, 82 U.N.T.S. 279, article 6 [hereinafter Nuremberg Charter].

International Criminal Court (ICC Statute). Despite the differences in the definition of the crimes in their statutes, international and hybrid courts have interpreted the relevant provisions by reference to customary international law or to the general principles of law recognized by civilized nations. In this respect, the work of the international and hybrid tribunals contributes to the determination of the elements of international crimes under international law. In fact, as expressly stated in article 38 of the statute of the International Court of Justice, judicial decisions are a subsidiary means for the determination of rules of law.²⁰

III. HISTORICAL DEVELOPMENTS: INTERNATIONAL CRIMES AND MODES OF LIABILITY

This section provides a detailed overview of the evolution of the constitutive elements of international crimes and modes of liability in international law.

(a) *International Crimes*

International and hybrid tribunals generally have jurisdiction over crimes against humanity, war crimes and genocide. As explained below, the elements of these crimes have evolved over time.

i. Crimes Against Humanity

The first international reference to crimes against humanity is believed to be in a joint declaration by France, Great Britain, and Russia in 1815, denouncing the Turkish government's massacre of the Armenian population in Turkey as constituting "crimes against civilization and humanity" for which all members of the Turkish government and agents would be held responsible.²¹ The term "laws of humanity" later appeared in the preamble of the First Hague Convention of 1899 on the Laws and Customs of War and in the Fourth Hague Convention of 1907. However, it was not until the 1945 Nuremberg Charter that crimes against humanity and individual responsibility for these crimes were defined in an international instrument.²²

Since Nuremberg, crimes against humanity have been included in the statutes of the international and hybrid tribunals as well as in domestic criminal laws. However, the contextual elements of the crimes and their underlying acts have evolved over time. In the Nuremberg Charter, crimes against humanity were connected to the context of war because they were seen as an extension of war crimes.²³ This approach was adopted by the ICTY Statute, requiring crimes against humanity to be committed in the context of an armed

²⁰ ICJ Statute, *supra note* 10, article 38(d).

²¹ M. C. Bassiouni, *Crimes Against Humanity Historical Evolution and Contemporary Application*, Cambridge: Cambridge University Press, 2011, p. 88 [hereinafter M.C. Bassiouni Crimes Against Humanity].

²² Article 6(c) of the Nuremberg Charter defines crimes against humanity as the following acts: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

²³ M.C. Bassiouni Crimes Against Humanity, *supra note* 21, p. 95.

conflict.²⁴ Despite this condition, the jurisprudence of the ICTY rejected any connection between crimes against humanity and armed conflict because, according to the tribunal, it was no longer required by customary international law.²⁵ The ICTR Statute replaced the formulation in the ICTY Statute with the requirement that the underlying crimes be committed in the context of “a widespread or systematic attack against any civilian population”.²⁶ When the ICC Statute was adopted in 1998, it rejected the requirement of a nexus to an armed conflict, and stated the required context to be “a widespread or systematic attack directed against any civilian population”.²⁷ In addition, the ICC Statute requires that the attack is carried out “pursuant to or in furtherance of a state or organizational policy to commit such attack”.²⁸ The ICC Statute defines underlying acts that could occur in the context of crimes against humanity, which include murder, torture, rape and enforced disappearance.²⁹

ii. War Crimes

War crimes are “serious violations of the laws and customs applicable in armed conflict which give rise to individual criminal responsibility under international law”.³⁰ It is generally accepted that (i) war crimes must constitute a violation of a rule of international humanitarian law; (ii) the rule breached must be customary law or treaty law; (iii) the violation must be serious; and (iv) the violation entails individual criminal responsibility of the person breaching the rule.³¹

The rules of IHL are found in numerous treaties and custom. One of the most important early treaties is the 1907 Hague Regulations which regulate the means and methods of warfare.³² Many of the provisions of the Hague Regulations are now recognized as customary law.³³ In addition, the Geneva Conventions (GC) of 1949 provide specific protection to civilians and to those *hors de combat*. They deal with sick and wounded in the field (GC I), the wounded, sick and shipwrecked at sea (GC II), prisoners of war (GC III) and civilians (GC IV). These rules were complemented by the 1977 Additional Protocol I applicable in international armed conflicts³⁴ and the Additional Protocol II applicable in non-international armed conflicts.³⁵

²⁴ UN Security Council, Statute of the International Tribunal for the Former Yugoslavia, 25 May 1992, article 5 [hereinafter ICTY Statute].

²⁵ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic* (IT-94-1-AR 72), Appeals Chamber, 2 October 1995, ¶¶ 73-83.

²⁶ UN Security Council, Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, article 3 [hereinafter ICTR Statute].

²⁷ ICC Statute, *supra* note 8, ¶ 7(1).

²⁸ *Ibid.*, article 7(2).

²⁹ Both the Statute of the ICTR and ICTY cover the underlying acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape; persecutions on political, racial and religious grounds, and other inhumane acts. The ICC Statute contains the same list of acts but adds forced transfer of the population, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, enforced disappearance and the crime of apartheid.

³⁰ R. Cryer, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2010, p. 267 [hereinafter Cryer].

³¹ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic* (IT-94-1-AR 72), Appeals Chamber, 2 October 1995, ¶ 94.

³² Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907.

³³ See for example International Committee for the Red Cross, *Rules of Customary International Law*, Rules 58, 59, 70 [hereinafter ICRC Study].

³⁴ International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

War crimes were formally criminalized for the first time in article 6(b) of the Nuremberg Charter.³⁶ Subsequently, war crimes have been included in the statutes of the international and hybrid courts. The ICTY Statute criminalizes grave breaches of the Geneva Conventions³⁷ as well as violations of other laws and customs of war.³⁸ The ICTR Statute criminalizes serious violations of Common Article 3 to the GCs and Additional Protocol II of 1977.³⁹ The ICC Statute contains an extensive list of war crimes including grave breaches of the GCs, serious violations of Common Article 3 to the GCs and other serious violations of the laws and customs applicable in armed conflicts not of an international character.⁴⁰ For a criminal act to be considered a war crime, a nexus to an armed conflict must be established.⁴¹ This requires offences to be carried out with “a view of somehow contributing to attain the ultimate goals of a military campaign or, at a minimum, in unison with the military campaign”.⁴²

iii. Genocide

Genocide was criminalized under international criminal law in response to the horrors of the Holocaust. Although the crimes that were tried by the Nuremberg Tribunal “were very much constitutive of genocide [...] they could not be defined as such because the crime of genocide was not defined until later”.⁴³ Acts of genocide were first banned and made punishable by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which requires State Parties to prevent and punish genocide whether committed in time of peace or war.⁴⁴ By 1951, the International Court of Justice had declared that the prohibitions contained in the Genocide Convention were part of customary international law.⁴⁵

The Genocide Convention prohibits acts of: killing; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.⁴⁶ The mental element requires both the requisite intention to commit the prohibited act and the intent special to genocide “to destroy, in whole or in part, a national, ethnical, racial or

³⁵ International Committee of the Red Cross, 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, 1125 U.N.T.S. 609 [hereinafter AP II].

³⁶ War crimes are defined as “violations of the laws or customs of war. Such violation shall include, but not be limited to, murder, ill-treatment or deportation for slave labour or for any purpose of civilian population of or in occupied territory, murder of ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity”.

³⁷ ICTY Statute, *supra* note 24, article 2.

³⁸ ICTY Statute, *supra* note 24, article 3.

³⁹ ICTR Statute, *supra* note 26, article 4. The ICTR was created with the “sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for [these violations] in the territory of neighboring states” (Security Council Resolution 955, 8 November 1994, ¶ 1).

⁴⁰ ICC Statute, *supra* note 8, article 8.

⁴¹ Judgment, *Prosecutor v. Semanza* (ICTR-97-20-1), Trial Chamber, 6 October 1999, ¶ 14.

⁴² A. Cassese, ‘The Nexus Requirements for War Crimes’, *J. Int. Criminal Justice* 2012 10 (5), p. 1397.

⁴³ Judgment, *Prosecutor v. Kambanda* (ICTR 97-23-S), Trial Chamber, 4 September 1998, ¶ 16.

⁴⁴ Genocide Convention, *supra* note 11, article 1.

⁴⁵ *Reservations to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, 1951 I.C.J. Reports, 28 May 1951, ¶ 23.

⁴⁶ Genocide Convention, *supra* note 11, article 2.

religious group, as such.”⁴⁷ This *mens rea* of genocide was adopted verbatim in the statutes of the ICTY,⁴⁸ ICTR,⁴⁹ and ICC.⁵⁰ However, the ICC Elements of Crimes requires an additional material element that in relation to each prohibited act “[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”.⁵¹

(b) Individual Responsibility for International Crimes

The principle according to which the commission of international crimes triggers individual criminal responsibility has long been accepted. This was recognized by the Nuremberg Charter⁵² and emphasized in the Judgment which held that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.⁵³

In 1950, the International Law Commission codified the ‘Nuremberg Principles’ and submitted them to the United Nations General Assembly.⁵⁴ These principles form the building blocks for a theory of individual criminal responsibility in international criminal law. They include the following principles: first, “[a]ny person who commits an act which constitutes a crime under international law is responsible thereof and liable to punishment” (Principle I); second, “[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law” (Principle II); third, “participation in a common plan or conspiracy’ to commit an act constituting a crime against peace is punishable (Principle VI(a)(ii)); and fourth, “complicity in the commission of a crime against peace, a war crime, or a crime against humanity [...] is a crime under international law” (Principle VII).

The principle according to which the commission of international crimes entails individual criminal responsibility has also been recognized by national courts. For instance, the Israeli Supreme Court held that acts committed by members of the armed forces contrary to the laws and customs of war “entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilized nations”.⁵⁵

i. Principals and Accessories

The statutes of the international and hybrid courts confirmed and refined the principle of individual criminal responsibility.⁵⁶ Generally, there are two categories of persons who may

⁴⁷ *Ibid.*

⁴⁸ ICTY Statute, *supra* note 24, article 4.

⁴⁹ ICTR Statute, *supra* note 26, article 2.

⁵⁰ ICC Statute, *supra* note 8, article 6.

⁵¹ International Criminal Court, *Elements of Crimes*, 2011, ISBN No. 92-9227-232-2, p. 2-4.

⁵² Article 6 provides that “leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [war crimes, crimes against humanity, crimes against peace] are responsible for all acts performed by any persons in execution of such a plan”.

⁵³ Nuremberg Judgment, *supra* note 6, p. 447.

⁵⁴ Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal: Report of the International Law Commission on the Work of its Second Session, UN GOAR, 5th Sess. Supp. No. 12 UN Doc. A/1316 (1950).

⁵⁵ Israel, Supreme Court, *Attorney General of Israel v. Eichmann*, 29 May 1962, 36 I.L.R. 277, ¶ 293.

⁵⁶ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic* (IT-94-1-AR 72), Appeals Chamber, 2 October 1995, ¶ 106 (“[T]he violation of the rule [of international humanitarian law]

incur responsibility for the commission of international crimes: ‘principals’ or ‘perpetrators’ and ‘accomplices’ or ‘accessories’. Principals are those who commit the crime either on their own or jointly with another person or persons.⁵⁷ Accomplices are generally less deeply involved in the crimes.⁵⁸ The ICTY and ICTR Statutes provide individual responsibility for “a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime” referred to in the statutes.⁵⁹ The ICC Statute adopts a different approach. Article 25(3) of the ICC Statute contains four different modes of participation: committing a crime individually, jointly, or through another person; ordering, soliciting, or inducing a crime; aiding, abetting and otherwise assisting a crime; and contributing to a group crime.⁶⁰

ii. Joint Criminal Enterprise

The jurisprudence of the international tribunals has developed the doctrine of JCE as a form of participation. The doctrine first emerged as a mode of responsibility in the *Tadic* case,⁶¹ and has been relied on by other international and hybrid tribunals.⁶² Three forms of JCE exist under international criminal law, each with the same objective element: (i) a plurality of persons; (ii) a common plan aimed at or involving a crime; and (iii) a significant contribution by the accused to the common plan.⁶³ The difference between the three forms of JCE lies in the subjective element of the crime. The first category of JCE, also known as the ‘basic’ form or JCE I “covers responsibility for acts agreed or acted upon pursuant to a common plan or design where all participants share the intent to commit the concerted crime, although only some of them physically perpetrate the crime”.⁶⁴ An accused will be criminally responsible for the agreed crime if his/her contribution in furtherance of the common criminal plan or design is significant.⁶⁵ The second category of JCE known as the ‘systematic’ form is a variation to the first category and applies to systems of ill-treatment such as detention and concentration camps. It requires the accused to have knowledge of the nature of the system

must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule”).

⁵⁷ A. Cassese, *The Oxford Companion to International Criminal Justice*, Oxford: Oxford University Press, 2009, p. 83.

⁵⁸ *Ibid.*

⁵⁹ ICTY Statute, *supra* note 24, article 7(1); ICTR Statute, *supra* note 26, article 6(1).

⁶⁰ ICC Statute, *supra* note 8, article 25(3).

⁶¹ Judgment, *Prosecutor v. Tadic* (IT-94-1-A), Appeals Chamber, 15 July 1999, ¶¶ 195-226.

⁶² Judgment, *Prosecutor v. Ntakirutimana and Ntakirutimana* (ICTR-96-10-A), Appeals Chamber, 13 December 2004, ¶¶ 461-468; Judgment, *Prosecutor v. Simba* (ICTR-01-76-A), Appeals Chamber, 27 November 2007, ¶¶ 243-255; Judgment, *Prosecutor v. Karemera and Ndirumpatse* (ICTR-98-44-A), Appeals Chamber, 29 September 2014, ¶ 110; Judgment, *Prosecutor v. Sesay et al.* (SCSL-04-15-A), Appeals Chamber, 26 October 2009, ¶¶ 397-400; Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I/AC/R176bis), Appeals Chamber, 16 February 2011, ¶¶ 236-249.

⁶³ Judgment, *Prosecutor v. Tadic* (IT-94-1-A), Appeals Chamber, 15 July 1999, ¶ 227; Judgment, *Prosecutor v. Brdanin* (IT-99-36-A), Appeals Chamber, 3 April 2007, ¶ 430; Judgment, *Prosecutor v. Karemera and Ndirumpatse* (ICTR-98-44-A), Appeals Chamber, 29 September 2014, ¶ 145.

⁶⁴ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I/AC/R176bis), Appeals Chamber, 16 February 2011, ¶ 237, citing the World War II cases in which JCE found its origins.

⁶⁵ *Ibid.*

and intention to further its criminal purpose.⁶⁶ The third ‘extended’ form of JCE takes place in the context of JCE I or JCE II when

participants in a criminal enterprise agree and act according to the main goal of the criminal plan or design (for instance, the forcible expulsion of civilians from an occupied territory), but, as a consequence of such agreement and its execution, incidental crimes are committed by one or more participants (for instance, killing or wounding some of the civilians in the process of their expulsion).⁶⁷

However, in this case, liability only arises if “(i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk”.⁶⁸

iii. Command and Superior Responsibility

In addition to principal and secondary liability for international crimes, the notion of command and superior responsibility has evolved as a mode of liability specific to international criminal law. The doctrine holds commanders or superiors criminally responsible for acts committed by their subordinates,⁶⁹ and applies to both military and civilian leaders.⁷⁰ The development of command responsibility is largely attributed to the prosecution of senior leaders for crimes related to World War II. In *Yamashita*, one of the first cases to apply this doctrine, the International Military Tribunal for the Far East (Tokyo Tribunal) found that a Japanese military commander failed to discharge his military duty to control subordinate troops under his command.⁷¹ On appeal, the U.S. Supreme Court affirmed the Tokyo Tribunal’s decision, and held that commanders have a duty to take “appropriate measures within [their] power to control the troops under [their] command for the prevention of the specified acts which are violations of the law of war”.⁷²

The doctrine of command responsibility is codified in Additional Protocol I of the Geneva Conventions.⁷³ Subsequently, this mode of responsibility was adopted in the statutes of the international and hybrid tribunals, as well as in the ICC Statute, and was extended to include the responsibility of civilian leaders (superior responsibility).⁷⁴ The doctrine requires the satisfaction of three elements: (i) a superior-subordinate relationship; (ii) that the superior knew or had reason to know that the criminal act was about to be or had been committed: (iii)

⁶⁶ Judgment, *Prosecutor v. Tadic* (IT-94-1-A), Appeals Chamber, 15 July 1999, ¶ 228; Judgment, *Kvocka et al.* (IT-98-30/1-A), Appeals Chamber, 28 February 2005, ¶ 82.

⁶⁷ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I/AC/R176bis), Appeals Chamber, 16 February 2011, ¶ 239.

⁶⁸ Judgment, *Prosecutor v. Tadic* (IT-94-1-A), Appeals Chamber, 15 July 1999, ¶ 228.

⁶⁹ Cryer, *supra* note 30, p. 387.

⁷⁰ Judgment, *Prosecutor v. Delalic et al.* (IT-96-21-A), Appeals Chamber, 20 February 2001, ¶ 195 (“The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law”).

⁷¹ *Trial of General Tomoyuki Yamashita*, United States Military Commission, Manila, October 8-December 7, 1945, IV Law Rep. Trials War Crim. 1 (UN War Crimes Comm’n, 1948), 81-82.

⁷² *Re Yamashita*, 327 U.S. 1 (1945), p. 14-15.

⁷³ AP I, *supra* note 34, article 86(2).

⁷⁴ ICC Statute, *supra* note 8, article 28; ICTY Statute, *supra* note 24, article 7(3); ICTR Statute, *supra* note 26, article 6(3).

the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator.⁷⁵

The first element requires superiors to have “effective control” over the subordinate, which is defined as “the material ability to prevent and punish the commission of [...] offences”.⁷⁶ The second element requires the superior to have the requisite knowledge of the perpetration of acts by subordinates which constitute violations of international law. The ICTY Statute provides for responsibility of superiors if they “knew or had reason to know” that their subordinate was about to or had already committed a crime.⁷⁷ Under the ICC Statute the *mens rea* varies for military commanders and civilian superiors. For military commanders, the *mens rea* is the same as the one recognized under the ICTY Statute. However, the standard is higher for non-military superiors who must have known or “consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit the crimes”.⁷⁸ If the first and second conditions are satisfied, the commander or superior is liable if he/she failed to comply with two distinct duties.⁷⁹ First, a commander must punish his subordinates for crimes when he has the requisite knowledge that they have committed these crimes in the past. Second, he must prevent crimes when he has the requisite knowledge that they are about to be committed in the future.⁸⁰ The ICC Statute also requires both civilian and military commanders to use “necessary and reasonable measures within his or her power to prevent or repress” the commission of crimes or to “submit the matter to the competent authorities for investigation and prosecution”.⁸¹

IV. INADEQUACY OF PROSECUTING ATROCITY CRIMES AS ORDINARY CRIMES

Sri Lanka does not specifically criminalize genocide, war crimes or crimes against humanity. Therefore, violations committed by the LTTE and Sri Lankan Security Forces may only be prosecuted as ordinary domestic crimes. This is unsatisfactory for a number of reasons. First, some acts that are criminal under domestic law may yet be lawful if committed in the context of an armed conflict. Failure to incorporate IHL applicable in non-international armed conflict and to criminalize war crimes may lead to unfair situations where combatants may be prosecuted for domestic crimes despite acting in accordance with the generally accepted laws of armed conflict. On the other hand, as explained below, acts that are illegal under IHL and amount to war crimes may not be criminal under Sri Lankan law. Finally, for many crimes, domestic offences inadequately cover the relevant elements of international crimes.

⁷⁵ Judgment, *Prosecutor v. Delalic et al.* (IT-96-21-T) Trial Chamber, 16 November 1998, ¶ 346; Judgment, *Prosecutor v. Kordic and Cerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, ¶ 839.

⁷⁶ Judgment, *Delalic et al.* (IT-96-21-T) Trial Chamber, 16 November 1998, ¶ 707. The Rome Statute modifies the control requirement for civilian leaders. While in the military context the ICC Statute merely states that a commander is responsible for the crimes committed by “forces under his or her effective command and control,” in the civilian context it adds that the crimes must have “concerned activities that were within the effective responsibility and control of the superior.” ICC Statute, *supra* note 8, ¶ 28(a), (b)(ii).

⁷⁷ ICTY Statute, *supra* note 24, article 7(3).

⁷⁸ ICC Statute, *supra* note 8, article 28.

⁷⁹ ICTY Statute, *supra* note 24, article 7(3); ICTR Statute, *supra* note 26, article 6(3); UN Security Council, Statute of the Special Court for Sierra Leone (SCSL), 16 January 2002, article 29; ICC Statute, *supra* note 8, article 28.

⁸⁰ ICTY Statute, *supra* note 24, article 7(3); ICC Statute, *supra* note 8, article 28.

⁸¹ ICC Statute, *supra* note 8, article 28(a)(ii), (b)(iii).

(a) ***Conduct Criminal under Domestic Law but Legal under IHL***

According to IHL, some acts which would normally be criminal under domestic law, are lawful when committed in the context of an armed conflict.⁸² For instance, under IHL, it is lawful for a soldier or a member of an armed group taking part in a non-international (or international) armed conflict to intentionally damage or destroy certain types of objects or buildings and injure or kill certain categories of people in order to gain a military advantage.⁸³ These include military objectives,⁸⁴ combatants,⁸⁵ or civilians actively participating in hostilities.⁸⁶

In addition, under IHL, causing death or injury to civilians who are not directly participating in hostilities or damage to objects that do not constitute military objectives is not necessarily illegal either. IHL recognizes that civilians may be harmed, or civilian objects damaged as a result of a military operation. Accordingly, causing civilian injury or death or damage to civilian objects in the course of a military attack against a military objective is legal providing that the necessary precautions (including effective warnings) were taken⁸⁷ and that the expected civilian casualties or damage to civilian objects are proportional to the anticipated military advantage.⁸⁸

This is at odds with domestic criminal law which does not recognize similar exceptions to murder or culpable homicide,⁸⁹ to voluntarily causing (grievous) hurt,⁹⁰ or mischief.⁹¹

In *Wijesuriya and another v. The State*, the Court of Criminal Appeal expressed the view that civil law is suspended when a country is at war with another, or when an area is proclaimed under martial law.⁹² Despite the ready intuitive appeal of this claim, there does not appear to be any legal provision in Sri Lanka to sustain it.⁹³

The relevant provision in the criminal law with the potential to exempt the conduct of armed forces conducting military operations from the regular criminal law is section 69 of the Penal Code which provides that:

Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

⁸² For a detailed discussion of IHL rules relevant to the Sri Lankan conflict see SACLs paper: I.Lassée, “The Last Stages of the War: Clarifying the Application of IHL”, 2015, available at <https://drive.google.com/open?id=0B23wOWtSdN14NC1DYWVocGFDSUU> [I. Lassée, IHL paper]

⁸³ *Ibid.*

⁸⁴ Rule 7, ICRC study, applicable to Non-international Armed Conflicts (NIACs). Military objectives are “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstance ruling at the time, offers a definite military advantage”.

⁸⁵ Rule 1, ICRC Study, applicable to NIACs; see also Article 13(2) AP II.

⁸⁶ Rule 6, ICRC Study, applicable to NIACS; see also Article 13 (3) AP II. For more discussion, see I. Lassée IHL paper, *supra* note 82.

⁸⁷ Rule 20, ICRC Study, applicable to NIACs.

⁸⁸ Rule 14, ICRC Study, applicable to NIACs.

⁸⁹ Penal Code, sections 293-295.

⁹⁰ *Ibid.*, sections 312-313.

⁹¹ *Ibid.*, section 408.

⁹² See *Wijesuriya and another v. The State* [1973] 77 NLR 25.

⁹³ *Ibid.* The Court of Criminal Appeal quotes scholarly opinion to support this position. Nothing in the Penal Code or the Army Act supports this position.

The provision relating to the legality of orders made within the Army (similar provisions exist with respect to the Navy and Air Force)⁹⁴ is section 100 (2) of the Army Act which provides that

Every person subject to military law who disobeys any lawful command given by his superior officer shall be guilty of a military offence.

The resulting position under domestic law is therefore that soldiers are bound to obey lawful commands made by superior officers. However, the Army Act does not specify the rules governing the conduct of soldiers by which lawful commands may be distinguished from unlawful ones, nor have such rules been promulgated by any authorized entity. In other words, the conduct of hostilities does not appear to be regulated in any way by laws, rules or regulations sanctioned by a lawful authority within Sri Lanka.

In light of this, it would be necessary to incorporate IHL applicable in non-international armed conflicts into domestic law and provide for exceptions to criminal offences for belligerent acts carried out in accordance with the laws and customs of war. Failure to do so could lead to an absurd situation where members of armed groups and soldiers could be prosecuted under the regular criminal law for conduct that is legal under IHL.

Conversely, many acts underlying crimes against humanity and war crimes are not criminalized under Sri Lankan law at all. As a consequence of this gap in the law, it will not be possible to hold perpetrators of mass atrocities accountable for these crimes. Below are some examples of acts which are not criminalized under Sri Lankan law, but are alleged to have been committed by the LTTE and/or the Sri Lankan Security Forces.

(b) *Conduct Criminal under International Law but not Criminal under Sri Lankan Law*

Sri Lanka is a party to the 1949 Geneva Conventions which criminalize conduct that constitutes grave breaches of IHL. However, the Geneva Conventions only apply to international armed conflict. Sri Lankan law does not specifically criminalize conduct that constitutes grave breaches of IHL in non-international armed conflict and may accordingly constitute war crimes. These offences include the use of human shields and the intentional deprivation of humanitarian aid.

i. Use of Human Shields

IHL prohibits parties to an armed conflict from intentionally using civilians to shield military objectives from attacks.⁹⁵ The use of human shields requires an intentional co-location of military objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives.⁹⁶ Therefore, the use of human shields is a special intent breach of international law. This means that the breach occurs only if the party intended to use the co-location of military objectives and civilians (or persons *hors de*

⁹⁴ Air Force Act (1950), section 100; Navy Act (1950), section 69.

⁹⁵ Rule 97, ICRC Study, applicable to NIACs.

⁹⁶ See definition under Rule 97, ICRC Study. In particular, the study specifies that the prohibition of using human shields in the Geneva Conventions, Additional Protocol I and the Statute of the ICC Statute are couched in terms of using the presence (or movements) of civilians or other protected persons to render certain points or areas (or military forces) immune from military operations. Most examples given in military manuals, or which have been the object of condemnations, have been cases where persons were actually taken to military objectives in order to shield those objectives from attacks.

combat) in order to shield military objectives.⁹⁷ The intentional co-location of military objectives and civilians is prohibited irrespective of whether civilians are harmed because they were used as human shields.

During the last stages of the Sri Lankan armed conflict, there have been numerous reports of the co-location of LTTE combatants, ammunition and equipment in close proximity to civilians.⁹⁸ This conduct could amount to a war crime if the *mens rea* requirement is satisfied. However, Sri Lanka—unlike many other states⁹⁹—does not criminalize the use of human shields in armed conflict. In addition, no other provision of the Penal Code adequately covers this offence by reflecting both the specific *actus reus* and *mens rea*. For example, sections 330 and 331 of the Penal Code criminalize wrongful restraint and wrongful confinement. The *actus reus* of wrongful restraint is constituted when a person “voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed”.¹⁰⁰ The *actus reus* of wrongful confinement requires the wrongful restraint of “any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits”.¹⁰¹ None of these elements are required for the *actus reus* of the use of human shields. In fact, mere co-location suffices for the *actus reus* of this crime to be constituted. In addition, the *mens rea* of the crime of using human shields is very specific. It requires the intention to prevent the targeting of a military object. Neither wrongful restraint nor wrongful confinement requires this intention. Therefore, if the use of human shields is not criminalized, egregious conduct which amounts to a complete disregard of the laws and customs of war as well as civilian life cannot be prosecuted as such.

ii. Starvation of the Population and Denial of Humanitarian Relief

International law prohibits the intentional use of starvation of the civilian population as a method of warfare.¹⁰² Starvation may be caused by attacks on objects indispensable to the survival of the civilian population;¹⁰³ denying access of humanitarian aid intended for civilians in need, including deliberately impeding humanitarian aid;¹⁰⁴ or restricting the freedom of movement of humanitarian relief personnel.¹⁰⁵ Starvation of civilians as a method of warfare in non-international armed conflict constitutes a war crime under the legislation of several states.¹⁰⁶ To the extent it is widespread and systematic, starvation can also amount to an inhumane act as a crime against humanity.

The OHCHR Investigation on Sri Lanka (OISL) report found that the Sri Lankan Government “placed considerable restrictions on the freedom of movement of humanitarian personnel and on humanitarian activities in the Vanni” which “impacted on the capacity of humanitarian

⁹⁷ *Ibid.*

⁹⁸ UN Expert Panel Report, *supra* note 1, ¶ 128, iii and ¶¶ 80, 97, 177(c); Report of the Commission of Inquiry on Lessons Learnt and Reconciliation, November 2011, ¶¶ 4.268, 4.350; OISL Report, *supra* note 1, ¶ 791.

⁹⁹ See Rule 97, ICRC Study citing the legislation of Azerbaijan, Belarus, Democratic Republic of the Congo, Germany, Georgia, Lithuania, Poland, and Tajikistan. The Study also cites legislation of Peru and Yemen which does not exclude the application of the rule in time of non-international armed conflict.

¹⁰⁰ Penal Code, section 330.

¹⁰¹ Penal Code, section 331.

¹⁰² Rule 53, ICRC Study, applicable to NIACs.

¹⁰³ Rule 54, ICRC Study, applicable to NIACs.

¹⁰⁴ Rule 55, ICRC Study, applicable to NIACs.

¹⁰⁵ Rule 56, ICRC Study, applicable to NIACs.

¹⁰⁶ See Rule 53, ICRC Study citing the legislation of Azerbaijan, Belarus, Bosnia and Herzegovina, Croatia, Ethiopia, Germany, Lithuania, Slovenia, and Yugoslavia.

organizations and personnel to effectively exercise their functions and ensure access to relief of civilians in need”.¹⁰⁷ In addition the Panel of Experts notes that:

As a result of the Government’s low estimates, the food delivery by WFP to the Vanni was a fraction of what was actually needed, resulting in widespread malnutrition, including cases of starvation. Similarly, the medical supplies allowed into the Vanni were grossly inadequate to treat the number of injuries incurred by the shelling.¹⁰⁸

However, intentional use of starvation as a method of warfare is not criminal under Sri Lankan law. No other offence adequately covers this crime since the crime of starvation is constituted irrespective of the harm caused to those being deprived of relief and other humanitarian aid. This example therefore demonstrates that very serious criminal conduct that allegedly took place during the armed conflict cannot be prosecuted if international crimes are not incorporated into Sri Lankan law.

Finally, as the following demonstrates, the characterization of international crimes as domestic crimes fails to reflect the full criminality of these acts, the values protected and the scale and gravity of the conduct prohibited under international law.

(c) *Failure to Reflect the Criminality of International Crimes*

International and ordinary crimes are different in nature and in terms of the values protected. Atrocity crimes usually involve grave, large-scale violence with systematic elements. Thus, characterizing international crimes as ordinary offences fails to recognize the context in which the crimes were committed: an armed conflict, a widespread and systematic attack or pursuant to a state policy to destroy a protected group. Additionally, international crimes connote offences of such a grave and heinous nature that one of the purposes of their punishment “lies precisely in stigmatizing conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole [...]”.¹⁰⁹

The Penal Code of Sri Lanka and existing legislation criminalize some offences that are similar to the underlying acts of war crimes and crimes against humanity. These include torture,¹¹⁰ hostage taking,¹¹¹ murder,¹¹² rape,¹¹³ sexual harassment and grave sexual abuse.¹¹⁴ However, prosecution based on these ordinary offences rather than as war crimes and crimes against humanity fails to encapsulate the context in which the crimes were committed by the Sri Lankan Security Forces and the LTTE.

In addition, prosecuting offences specific to the conduct of hostilities as wrongful constraint and wrongful confinement,¹¹⁵ causing hurt,¹¹⁶ using force,¹¹⁷ assault,¹¹⁸ or mischief¹¹⁹ is also

¹⁰⁷ OISL Report, *supra* note 1, ¶ 1166.

¹⁰⁸ UN Expert Panel Report, *supra* note 1, ¶ 128.

¹⁰⁹ Sentencing Judgment, *Prosecutor v. Erdemovic* (IT-96-22), Trial Chamber, 29 November 1996, ¶ 64-65.

¹¹⁰ The Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act (No. 22 of 1994) adopts the same definition of torture as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Convention Against Torture.

¹¹¹ The 2000 Prevention of Hostage Taking Act adopts the same definition of hostage taking as the 1979 International Convention against the taking of hostages.

¹¹² Penal Code, section 294.

¹¹³ *Ibid.*, section 363.

¹¹⁴ *Ibid.*, sections 345, 365B.

¹¹⁵ *Ibid.*, sections 330, 331.

¹¹⁶ *Ibid.*, sections 310-326.

¹¹⁷ *Ibid.*, sections 340, 341.

inadequate. In fact, this fails to reflect the rationale for the protection granted by IHL and therefore does not adequately convey the gravity of the breaches of IHL rules. The concrete examples below demonstrate why prosecuting IHL violations as ordinary crimes rather than international crimes is unsatisfactory.

i. Difference in Values Protected

A specific conduct prohibited under IHL and amounting to a war crime may also be criminal under Sri Lankan law. However, the rationale for the criminalization and therefore the values protected may be very different. For example, the ICTY recognizes that intentionally attacking protected objects not used for military purposes is a war crime¹²⁰ provided that the damage to the property is sufficiently serious.¹²¹ The ICC Statute, on the other hand, recognizes as war crimes attacks against specially protected objects irrespective of the damage to these objects.¹²² These are medical units and transports exclusively assigned to medical purposes and which are not being used to commit acts harmful to the enemy;¹²³ medical and religious objects displaying the distinctive emblems of the Geneva Conventions in conformity with IHL;¹²⁴ installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission;¹²⁵ buildings dedicated to religion, education, art, science or charitable purposes; and historic monuments.¹²⁶

Attacks by the Security Forces on hospitals and medical units,¹²⁷ churches,¹²⁸ humanitarian facilities and food distribution centres¹²⁹ were alleged in various reports. Sri Lankan law does not criminalize the targeting of civilian objects or specifically protected objects in the context of an armed conflict. Nonetheless, these acts may be characterized as mischiefs. According to section 408 of the Sri Lankan Penal Code:

Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously, commits “mischief”.¹³⁰

However, the criminalization of the direct targeting of protected objects under mischief is not satisfactory. Indeed, while mischief intends to prevent the destruction of any property, the protection granted by IHL to specific objects serves a very different purpose which varies depending on the category of object protected. The protection of objects performing a

¹¹⁸ *Ibid.*, sections 342.

¹¹⁹ *Ibid.*, section 408-426.

¹²⁰ Decision on Interlocutory Appeal, *Prosecutor v. Strugar* (IT-01-42-AR72), Appeals Chamber, 22 November 2002, ¶ 10; ICTY, Judgment, *Prosecutor v. Strugar* (Case No. IT-01-42-T), Trial Chamber, 31 January 2005, ¶¶ 223-226.

¹²¹ Judgment, *Prosecutor v. Strugar* (Case No. IT-01-42-T), Trial Chamber, 31 January 2005, ¶ 225.

¹²² ICC Statute, *supra* note 8, articles 8(e) (ii), 8(e) (iii), 8(e) (vi).

¹²³ Rule 28 and 29, ICRC Study, applicable to NIACs.

¹²⁴ Rule 30, ICRC Study, applicable to NIACs.

¹²⁵ Rule 32, ICRC Study, applicable to NIACs.

¹²⁶ Rule 38, ICRC Study, applicable to NIACs.

¹²⁷ UN Expert Panel Report, *supra* note 1, ¶¶ 200, 202; OISL Report, *supra* note 1, ¶¶ 843, 844, 845, 847, 849, 852, 855, 857, 869, 870, 871, 878, 879, 881, 882, 1150.

¹²⁸ OISL Report, *supra* note 1, ¶¶ 855, 858.

¹²⁹ UN Expert Panel Report, *supra* note 1, ¶¶ 200, 210; OISL Report, *supra* note 1, ¶ 838, 854, 856, 859-864.

¹³⁰ Penal Code, section 408.

medical, humanitarian, educational or religious function is to ensure that these important functions continue to be discharged despite the armed conflict. In addition, historical buildings are protected because the “deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world”.¹³¹ Criminalizing the intentional damage or destruction of these protected objects under mischief is therefore inadequate. In fact, it does not reflect the rationale underpinning the specific prohibition and the importance of the values protected through the criminalization of such conduct.

ii. Scale and Systematic Nature of the Violations

Unlawful killings,¹³² torture,¹³³ sexual violence,¹³⁴ and enforced disappearances¹³⁵ were reportedly carried out in a widespread manner during the Sri Lankan armed conflict as well as outside the context of the armed conflict. However, prosecuting these crimes as ordinary crimes of murder, rape and sexual violence, kidnapping or abduction under the Penal Code would fail to acknowledge the widespread nature of the acts allegedly committed by the Sri Lankan Security Forces and the LTTE and would minimize the criminality of the conduct.

In addition, prosecuting these crimes as ordinary offences fails to recognize that they may have been committed pursuant to a specific policy often devised or condoned at the highest level of the LTTE or the state. For instance, according to the OISL Report “the patterns of sexual violence appear to have been a deliberate means of torture to extract information and to humiliate and punish persons who were presumed to have some link to the LTTE”.¹³⁶ Therefore, prosecuting these acts as the ordinary crimes of rape and sexual abuse would not account for the possibility that these crimes were perpetrated in pursuance of a policy rather than being isolated incidents perpetrated by individuals acting for their own benefit.

Enforced disappearance is defined in the ICC Statute as:

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a state or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.¹³⁷

It means that the policy of enforced disappearance has to originate not from personal intentions, but from the policy of a state or from the activity of a political organization. If disappearances that allegedly took place in Sri Lanka were prosecuted merely as kidnappings or abductions under the Penal Code, it would not recognize the pervasive nature of the disappearances and the policy in pursuance to which they allegedly took place.

As illustrated above, prosecuting criminal acts allegedly committed by LTTE cadres and members of Sri Lankan Security Forces as domestic crimes is unsatisfactory as it fails to capture the gravity and large scale nature of the offences. Such an approach could trivialize

¹³¹ UN Educational, Scientific and Cultural Organisation (UNESCO), Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, preamble.

¹³² OISL Report, *supra* note 1, ¶¶ 216-232, 1116-1119.

¹³³ *Ibid.*, ¶¶ 535-570, 1129, 1130.

¹³⁴ *Ibid.*, ¶¶ 571, 572, 575, 581-620, 1131-1135.

¹³⁵ *Ibid.*, ¶¶ 386-388, 394, 401-443, 1124, 1127, 1128.

¹³⁶ *Ibid.*, ¶ 1131.

¹³⁷ ICC Statute, *supra* note 8, article 7(2)(i).

crimes that are recognized by the community of nations as extremely serious.¹³⁸ Indeed, the qualification of the crimes should take due cognizance of the context in which they were perpetrated and the extreme seriousness of the allegations.¹³⁹ This explains why international tribunals as well as domestic courts recognize the inadequacy of prosecuting atrocity crimes as ordinary crimes.

iii. Inadequacy Recognized by International and Domestic Courts

International and domestic crimes are not recognized as equivalent in the international jurisprudence. In fact, while the principle *ne bis in idem* prohibits the prosecution of an accused for the same conduct, it does not prevent the prosecution of an accused for international crimes, even if the accused has already been charged or convicted for domestic crimes. Thus, according to the statutes of the ICTY and ICTR, the tribunals may try a person who has allegedly committed an atrocity crime even if he/she had already been tried domestically for a domestic crime.¹⁴⁰ The ICTY Appeals Chamber has underlined that recourse to ordinary crimes to prosecute atrocity crimes would be “a travesty of law and a betrayal of the universal need for justice”.¹⁴¹

Moreover, the jurisprudence of the ICTY and ICTR have determined that labelling acts as ordinary crimes does not satisfy the requirements of Rule 11 bis, which allows the referral of cases to domestic courts.¹⁴² Thus, in the *Bagaragaza* case, the ICTR refused to refer the case to Norway on the grounds that the country did not have specific provisions on genocide and was not equipped with an adequate legal framework to criminalize the alleged behavior of the accused and to impose an appropriate punishment if found guilty.¹⁴³

National courts have also highlighted the inadequacy of prosecuting international crimes as ordinary offences. In the Argentinian case of *Julio Simon*, the court emphasizes the fact that crimes against humanity constitute conduct that is criminal according to the law of nations and that therefore, the facts must be judged according to the rules that were developed by the international community so as to take into account all the dimensions of the conduct. The court concluded that analyzing the facts solely from the perspective of the Argentinian

¹³⁸ W.N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, 2006 (The Hague, T.M.C. Asser Press, 2006), at 211 citing Klabbers 2003, p. 59 (“To reduce genocide or crimes against humanity to multiple murder or multiple assault and battery cases is to somehow misconstrue them and turn them into banalities”); L. S. Wexler “The Interpretation of the Nuremberg Principles by the French Court of Cassation : From Touvier to Barbie and Back Again”, 21 *Colum. J. Transnat’l L.*, 1994, p. 326-327 (“To state that a crime against humanity is just like any other crime, but with something extra added, banalizes it”).

¹³⁹ See Judgment, *Prosecutor v. Jean-Paul Akayesu* (ICTR-96-4-T), 2 September 1998, ¶ 732. The Trial Chamber addressed the nature of sexual violence and rape in the context of war crimes and crimes against humanity (“This sexualized representation of ethnic identity graphically illustrates that tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group -destruction of the spirit, of the will to live, and of life itself”).

¹⁴⁰ ICTY Statute, *supra* note 24, article 10(2)(a); ICTR Statute, *supra* note 26, article 9(2)(a).

¹⁴¹ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic* (IT-94-1-T), Appeals Chamber, 2 October 1995, ¶ 58.

¹⁴² Rule 11 bis states that after an indictment has been confirmed and prior to the commencement of trial, cases may be referred to national authorities if the tribunal is satisfied, based on inter alia consideration of the “gravity of the crimes charged and the level of responsibility of the accused” and whether the accused “will receive a fair trial and that the death penalty will not be imposed or carried out”.

¹⁴³ Decision on the Prosecution motion for referral to the Kingdom of Norway, *Prosecutor v. Bagaragaza* (ICTR-2005-86-R11bis) Trial Chamber III, 19 May 2006, ¶ 21. The Appeals Chamber confirmed the decision. See Decision on Rule 11 bis Appeal, *Prosecutor v. Bagaragaza* (ICTR-05-86-AR11bis), Appeals Chamber, 30 August 2006.

Criminal Code would be undoubtedly insufficient.¹⁴⁴ The Supreme Court of Canada in the *Finta* case has also observed that “a war crime or a crime against humanity is not the same as a domestic offence. [...] There are fundamentally important additional elements involved in a war crime or a crime against humanity”.¹⁴⁵

V. INADEQUACY OF PROSECUTING ATROCITY CRIMES UNDER DOMESTIC MODES OF RESPONSIBILITY

Sri Lanka’s criminal code provides for ordinary modes of liability including perpetration and co-perpetration,¹⁴⁶ as well as abetting. Section 100 of Sri Lanka’s Penal Code provides:

A person abets the doing of a thing who- Firstly- Instigates any person to do that thing; or Secondly- Engages in any conspiracy for the doing of that thing; or Thirdly-Intentionally aids, by any act or illegal omission, the doing of that thing.¹⁴⁷

However, Sri Lanka’s Penal Code does not include other modes of responsibility that are recognized under international law. These modes of responsibility—including ordering, command responsibility and JCE¹⁴⁸—are necessary to enable the prosecution of those most responsible for international crimes.

International crimes are often committed on a much larger scale than ordinary crimes and involve a greater complexity. For this reason, the participation of a much bigger group of people is often vital in facilitating the commission of these crimes.¹⁴⁹ According to the ICTY, it therefore follows that “the moral gravity of the participation [of those who facilitated the commission of the crimes] is no less or no different from those who directly carry out the [criminal] acts”.¹⁵⁰ In fact, the political or military leadership, or others in a command authority are generally recognized as bearing the greatest responsibility for international crimes.¹⁵¹ Modes of responsibility recognized under international law are therefore necessary to enable the prosecution of those “most responsible for international crimes”. Moreover, as the following demonstrates modes of liability such as JCE, ordering, and command responsibility are inadequately covered under the modes of responsibility provided for by the Sri Lankan Penal Code. Accordingly, UNHRC Resolution 30/1 encourages a reform of Sri Lanka’s domestic laws so as to enable the prosecution of “those most responsible for the full range of crimes under the general principles of law recognized by the community of nations.”¹⁵²

¹⁴⁴ Argentina, *Julio Simon* (Case no. 8686/2000, “Simon, Julio, Del Cerro, Juan Antonion s/sustraccion de menores de 10 anos”), Judge Gabriel Cavallo of the Buenos Aires Federal Court, 6 March 2001, 2000/B Nueva Doctrina Penal 527. III

¹⁴⁵ Canada, Supreme Court, *R. v. Finta*, Cory J, 1 R.C.S., 24 March 1994, p. 705.

¹⁴⁶ Penal Code, section 32.

¹⁴⁷ *Ibid.*, section 100.

¹⁴⁸ The ICC adopts the mode of responsibility of joint control based on co-perpetration rather than JCE. The jurisprudence of the international tribunals has found that this notion does not have a basis in international custom. See Judgment, *Prosecutor v. Stakic* (IT-97-24-A-), Appeals Chamber, 22 March 2006, ¶ 62.

¹⁴⁹ Judgment, *Prosecutor v. Tadic* (IT-94-1-A), Appeals Chamber, 15 July 1999, ¶ 191.

¹⁵⁰ *Ibid.*

¹⁵¹ UN Secretary Council, Report on the Establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, ¶ 30.

¹⁵² Resolution 30/1, *supra* note 2, ¶ 7.

(a) *JCE*

JCE covers three distinct forms of liability. However, as demonstrated below, only JCE I liability is covered by Sri Lankan criminal law.

i.JCE I

Participation on the basis of the first form of JCE covers situations where the accused significantly contributes to the furtherance of “a common design or common enterprise and with a common intention”.¹⁵³ In a JCE I scenario, all those who participated in the design of the common plan possess the same criminal intention.

The relevant law in Sri Lanka on participation in crimes carried out by a plurality of persons is found in section 32 of the Penal Code, which states:

[w]hen a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

Section 32 makes an accused liable for a criminal act which is caused partially or predominately by another person so long as he/she commits an act in furtherance of a common intention shared by him/her and other participants in the offence.¹⁵⁴ Therefore, the two fundamental requirements of section 32 are “(i) the sharing of a common criminal intention between or among accused persons, and (ii) the doing of a criminal act by each of the accused persons in furtherance of a common intention by all”.¹⁵⁵ The common intention must materialize in the form of a pre-arranged plan which may be proved through direct or circumstantial evidence.¹⁵⁶

Participation on the basis of JCE I is therefore adequately covered by Section 32 of the Sri Lankan Penal Code. However, this is not the case for JCE II and III.

ii.JCE II

JCE II is often referred to as the systemic form of JCE and is meant to cover so-called concentration camp cases where the plan or design consists in a system of ill-treatment (typically a prison or internment camp) within which crimes are committed. While the *actus reus* of JCE II is the same as JCE I, the *mens rea* is different. In fact, JCE II merely requires personal knowledge of the criminal plan (generally a system of ill-treatment).¹⁵⁷ Therefore, the accused need not possess the specific intent attached to the commission of the crime (or crimes) committed as part of the system.

Section 32 of the Penal Code expressly refers to the “common intention of all” and therefore does not cover JCE II mode of liability. Conspiracy under Sri Lankan law does not cover JCE II either. Section 113 A of the Penal Code provides that:

¹⁵³ Closing order indicting Kaing Guek Eav alias Duch, Amicus brief for Pre-Trial Chamber on Joint Criminal Enterprise from Professor Kai Ambos, 27 October 2008, p. 356.

¹⁵⁴ G.L. Peiris, *General Principles of Criminal Liability in Sri Lanka: A Comparative Analysis*, 436 [hereinafter Peiris].

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.* See *Walsalamuni Richard v. The State* (973) 76 N.L.R. 534.

¹⁵⁷ Judgment, *Prosecutor v. Tadic* (IT-94-1-A), Appeals Chamber, 15 July 1999, ¶ 228; Judgment, *Kvočka et al.* (IT-98-30/1-A), Appeals Chamber, 28 February 2005, ¶ 82.

If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, whether with or without any previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence, as the case may be.¹⁵⁸

For conspiracy to be constituted, there must be an agreement or at least a “meeting of the minds” and “decisions must have been communicated between the parties”.¹⁵⁹ However, JCE II only requires knowledge of the criminal plan.

JCE II mode of liability is necessary to enable the prosecution of those whose contribution was essential to the widespread and systematic nature of some crimes. For example, there have been allegations of the widespread use of torture and sexual violence in detention.¹⁶⁰ Some places of detention are specifically known for the systematic use of torture.¹⁶¹ Those who had knowledge of the “system of ill treatment” and who substantially contributed to the furtherance of the crimes bear a heavy moral responsibility for these crimes and must accordingly be held personally responsible for their commission. This would not be possible without the incorporation of JCE II as a mode of responsibility in Sri Lankan law.

iii. JCE III

Similar to JCE I and II, the *actus reus* for JCE III requires an act that significantly contributes to the furtherance of a common design or common enterprise. However, under this form of liability, the accused is responsible for the commission of acts that go beyond the common plan, provided they constitute a “natural and foreseeable consequence” of the realization of the plan.¹⁶² For the same reasons as previously explained, neither section 32 nor section 113 A of the Penal Code covers JCE III.

At the end of the armed conflict, IDPs who emerged from the conflict zone were incarcerated in Menik Farm and other closed camps guarded by the military and surrounded by barbed wire.¹⁶³ The work of the ICRC and other NGOs and their access to IDPs inside the camps were allegedly restricted.¹⁶⁴ There were also reports of torture by state functionaries who had set up interrogation units inside the camps.¹⁶⁵ The UN Panel of Experts found that the detention in Menik Farm and other places gave rise to credible allegations of crimes against humanity of imprisonment.¹⁶⁶ According to customary international criminal law, those who conceived the detention plan and substantially contributed to its furtherance, despite knowing that torture was a natural and foreseeable consequence of the detention plan, must also be criminally responsible for torture. This would require JCE III mode of responsibility to be incorporated into Sri Lankan law.

¹⁵⁸ Penal Code, section 113A

¹⁵⁹ Scott (1979) 68 Cr. App. R. 164 cited in Clarkson, C. M. V., and Heather M. Keating. *Criminal Law: Text and Materials*. London: Sweet & Maxwell, 1984, p.486.

¹⁶⁰ OISL Report, *supra* note 1, ¶¶ 543-552.

¹⁶¹ For example, Joseph military camp in Vavuniya and the CID “Fourth Floor detention facility in Colombo. See OISL Report, *supra* note 1, ¶ 553.

¹⁶² Closing order indicting Kaing Guek Eav alias Duch, Amicus brief for Pre-Trial Chamber on Joint Criminal Enterprise from Professor Kai Ambos, 27 October 2008, p. 356.

¹⁶³ UN Expert Panel Report, *supra* note 1, ¶¶ 154-155; OISL Report, *supra* note 1, ¶¶ 1056, 1063, 1071-1080, 1172.

¹⁶⁴ UN Expert Panel Report, *supra* note 1, ¶ 156.

¹⁶⁵ *Ibid.*, ¶ 163; OISL Report, *supra* note 1, ¶¶ 545, 547.

¹⁶⁶ UN Expert Panel Report, *supra* note 1, ¶ 251(c).

(b) *Ordering*

Under international criminal law, ordering “requires that a person in a position of authority instructs another person to commit a crime”.¹⁶⁷ The order does not have to be in writing or in any particular form. It can be implicit or explicit, and circumstantial evidence can be used to prove that the order was given.¹⁶⁸ A formal superior-subordinate relationship between the two persons is not required.¹⁶⁹ It is sufficient that the person giving the order possesses authority either in law or in fact to order the commission of the crime.¹⁷⁰ In addition, it must be established that the issuance of the order was a substantially contributing factor to the criminal conduct that was later perpetrated.¹⁷¹ In terms of the *mens rea*, the accused “must intend to bring about the commission of the crime, or have been aware of the substantial likelihood that the crime would be committed as a consequence of the execution or implementation of the order”.¹⁷²

Sri Lankan law does not specifically provide for ordering as a mode of responsibility. However, this form of participation is essential to ensure that those who—by abusing a position of authority—instructed the commission of a crime are held responsible.

In several Sri Lankan cases, those who gave orders for the commission of a crime have been indicted and convicted¹⁷³ for conspiracy, abetment and/or common intention. However—as illustrated in the example below—it is essential to specifically incorporate ordering as a mode of responsibility under Sri Lankan law.

Various reports suggest that at the end of the armed conflict members of the political leadership of the LTTE were executed as they surrendered with white flags.¹⁷⁴ This was a very high profile surrender and foreign intermediaries as well as senior representatives of the Government allegedly took part in the negotiations.¹⁷⁵ If those who allegedly surrendered were in fact *hors de combat*, their execution would amount to a war crime of murder. In addition, if an order to carry out the execution was given, those who gave the order must also be held criminally responsible.

¹⁶⁷ Judgment, *Kaing Guek Eav alias Duch*, (001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, ¶ 527 citing Judgment, *Prosecutor v. Kordic and Cerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, ¶ 28; Judgment and Sentence, *Prosecutor v. Kajelijeli* (ICTR-98-44A-T), Trial Chamber, 1 December 2003, ¶ 763; Judgment, *Prosecutor v. Sesay et al.* (SCSL-04-15-A) Appeals Chamber, 26 October 2009, ¶ 164.

¹⁶⁸ Judgment, *Prosecutor v. Blaskic* (IT-95-14-T), Trial Chamber, 3 March 2000, ¶ 281.

¹⁶⁹ Judgment, *Kaing Guek Eav alias Duch*, (001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, ¶ 527 citing Judgment, *Prosecutor v. Kordic and Cerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, ¶ 28; Judgment; *Prosecutor v. Semanza* (ICTR-97-20-A), Appeals Chamber, 20 May 2005 ¶ 361; Judgment, *Prosecutor v. Sesay et al.* (SCSL-04-15-T), Trial Chamber I, 2 March 2002, ¶ 273.

¹⁷⁰ Judgment, *Kaing Guek Eav alias Duch*, (001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, ¶ 527 citing Judgment, *Prosecutor v. Gacumbitsi* (ICTR-2001-64-A), Appeals Judgment, 7 July 2006, ¶¶ 181-182; Judgment, *Prosecutor v. Limaj et al.* (IT-03-66-T), Trial Chamber, 30 November 2005, ¶ 515; Judgment, *Prosecutor v. Sesay et al.* (SCSL-04-15-T), Trial Chamber I, 2 March 2002, ¶ 273.

¹⁷¹ Judgment, *Prosecutor v. Milutinovic et al.* (IT-05-87-T), Trial Chamber, 26 February 2009, ¶ 87. The ICC found that the order must have a “direct effect on the commission or attempted commission of the crime”. See Decision on Prosecutor’s Application under Article 58, *Prosecutor v. Mudacumura* (ICC-01/04-01/12), Pre-trial Chamber II, 13 July 2012, ¶ 63.

¹⁷² Judgment, *Kaing Guek Eav alias Duch* (001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, ¶ 528.

¹⁷³ See for instance, *Wijesuriya and another v. The State* 77 NLR 25..

¹⁷⁴ UN Expert Panel Report, *supra* note 1, ¶¶ 170-171; OISL Report, *supra* note 1, ¶¶ 288-305.

¹⁷⁵ UN Expert Panel Report, *supra* note 1, ¶ 170; OISL Report, *supra* note 1, ¶¶ 292, 293, 298

If there is evidence that an order was given, charging an accused under modes of liability other than ordering may be problematic. This would impose an additional burden on prosecutors to prove—and on judges to establish—the various elements of conspiracy, abetment and/or common intention. For instance, conspiracy requires the proof of an agreement. In order to prove common intention, prosecutors must establish the intention of all the individuals involved, and the commission by the accused of an act in furtherance of that intention. None of this is required for ordering under international law.

Under international law, ordering is a form of complicity for the commission of a crime.¹⁷⁶ It therefore differs from command and superior responsibility examined in detail below.

(c) *Command and Superior Responsibility*

As discussed above, under international law, the elements of command responsibility are: (i) the existence of a superior-subordinate relationship; (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator.¹⁷⁷

This mode of responsibility was initially recognized under international law to ensure the application of IHL. Indeed, ensuring compliance with the laws and customs of wars requires that commanders take preventative measures which they are in a position to take by virtue of the effective control which they have over their subordinates and punish violations.¹⁷⁸ It therefore follows that under the doctrine of command responsibility commanders are responsible for their failure to comply with their own duty under international law.¹⁷⁹

Command responsibility is not recognized under Sri Lankan law. However, in some cases, Sri Lankan courts have held an accused responsible on the basis of abetting for authorizing or failing to prevent acts contravening criminal law despite being aware of them. In *Weeresoriya v. Marianu Baas*,¹⁸⁰ the accused was charged for an offence committed by individuals over whom he had the type of control usually possessed by a master or employer. The court found that while the accused was fully cognizant of the illegal acts, he has not sought to forbid or prevent them. The accused was found guilty of abetting the acts. In *Ellis v. Stephens*,¹⁸¹ the manager of a company granted permission for the use of tram cars for a purpose involving criminal activities. The court found that he had full knowledge of the purpose for which the tram cars were used and found him guilty of intentionally abetting the commission of the offence.

According to the above jurisprudence, the concept of abetment under Sri Lankan criminal law covers cases where the accused who was in a position of authority knew that an act contravening criminal law was committed and failed to take reasonable measures to prevent

¹⁷⁶ Judgment, *Prosecutor v. Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, ¶ 483; Arrest Warrant Decision, *Prosecutor v. Mudacumura* (ICC-01/04-01/12), Pre-trial Chamber II, 13 July 2012, ¶ 63, citing Decision on the Confirmation of Charges, *Prosecutor v. Germain Ktanga and Mathieu Ngudjolo Chui* (ICC-01/-4-01) Pre-trial Chamber I.

¹⁷⁷ Judgment, *Prosecutor v. Delalic et al.* (IT-96-21-T) Trial Chamber, 16 November 1998, ¶ 346; Judgment, *Prosecutor v. Kordic and Cerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, ¶ 839.

¹⁷⁸ Judgment (acquittal), *Prosecutor v. Halilovic* (IT-01-48-T), Trial Chamber, 16 November 2005, ¶ 39; Sentencing Judgment, *Prosecutor v. Obrenovic* (IT-02-60/2-S), Trial Chamber, 10 December 2003, ¶ 100.

¹⁷⁹ Judgment, *Prosecutor v. Krnojelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, ¶ 171.

¹⁸⁰ *Weeresoriya v. Marianu Baas* [1906] 10 N.L.R 127.

¹⁸¹ *Ellis v. Stephens* [1901] 51 N.L.R 52.

it. However, this falls short of the requirement of superior responsibility under international law. Command and superior liability also expressly covers situations where the superior had reasons to know that a criminal offence is committed or about to be committed, even if he did not actually know that such offences were being or about to be committed. Therefore, command and superior responsibility, unlike abetment in Sri Lankan law, does not require actual knowledge. This mode of liability must therefore be incorporated into Sri Lankan law with retroactive effect.

VI. RETROACTIVE INCORPORATION OF INTERNATIONAL CRIMES AND MODES OF LIABILITY IN SRI LANKAN LAW

(a) General Observations

Sri Lanka is a dualist state, which means that national and international law constitute separate and distinct legal systems that exist alongside each other. Accordingly, international crimes and modes of liability must be incorporated into Sri Lanka's national legal framework through the adoption of specific legislation.

Typically, retroactive criminal laws are impermissible under domestic and international law. The rule against non-retroactivity, or otherwise known as the principle of legality, was first enshrined in article 11(2) of the 1948 Universal Declaration of Human Rights.¹⁸² A similar formulation of the principle was adopted in article 15(1) of the International Covenant on Civil and Political Rights (ICCPR) which reads:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

Article 15(2) of the ICCPR provides for the following exception:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

This confirms and consolidates the legality of prosecutions by the Nuremberg and International Military Tribunals for conduct that was deemed criminal according to the general principles of law recognized by the community of nations.¹⁸³

The Nuremberg Tribunal recognized that war crimes, crimes against humanity and genocide form part of the general principles of law recognized by the community of Nations. As explained previously, the elements of war crimes, crimes against humanity and genocide in international law have substantially evolved since Nuremberg. Despite this evolution, retroactive incorporation of these crimes as defined under contemporary international law would not infringe on the principle of legality. This is because this principle is concerned with "whether the conduct of the accused was criminal at the time of the act and is not concerned

¹⁸² Universal Declaration of Human Rights, 10 December 1948, GA Res. 217A (III), article 11(2) ("No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed").

¹⁸³ European Court of Human Rights, *Kononov v Latvia* (App. No. 36376/04), Grand Chamber, 17 May 2010, ¶ 159.

with whether the offence or mode of liability by which the accused is convicted was defined with the same elements at the time of the act”.¹⁸⁴ The ICTY Appeals Chamber in *Hadzihasanovic* provided the rationale for this conclusion and explained that “as to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision”.¹⁸⁵

Article 13(6) of the Constitution of the Democratic Socialist Republic of Sri Lanka adopts the rule against non-retroactivity, as well as the exception for acts or omissions that are criminal according to general principles of law almost verbatim from the ICCPR.¹⁸⁶ Interestingly, Sri Lanka’s Court of Appeal has relied on this exception to justify the passing of retroactive sections of the Offences Against Aircraft Act of 1942.¹⁸⁷ The remainder of this section will argue that genocide, crimes against humanity, and war crimes, as well as modes of liability of JCE, command responsibility and ordering can be retroactively incorporated in Sri Lankan law on the basis of article 13(6) of the Constitution.

(b) International Crimes

Before the Nuremberg Tribunal, the defendants argued that the retroactive application of crimes against humanity and crimes against peace is “abhorrent to the law of all civilized nations”. In response, the tribunal defined the nature of the general principles of law:

In interpreting the words of the pact, it must be remembered that international law is not the product of international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of the changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.¹⁸⁸

This quotation has been interpreted as reflecting the fact that the Nuremberg Charter was based on the general principles of law, which were regarded as already existing at the time when the alleged criminal offences were committed.¹⁸⁹ Thus, the crimes encapsulated in the

¹⁸⁴ Co-prosecutor’s Appeal Against the Judgement of the Trial Chamber in Case 002/01 (002/19-09-2007-ECCC/SC), Supreme Court Chamber, 28 November 2014, ¶ 16.

¹⁸⁵ Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadzihasanovic* (IT-01-47-AR72), Appeals Chamber, 16 July 2003, ¶ 34.

¹⁸⁶ Art. 13 (6) (“No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence. . . Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations”).

¹⁸⁷ *Attorney General v. Sepala Ekanayake*, 1987 (1) Sri L. R. 107, p. 107 (“ . . . in terms of the proviso that “Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it, was committed, was criminal according to the general principles of law recognised by the community of nations” and because the Offences Against Aircraft Act, No. 24 of 1982 was to give effect to certain conventions relating to the safety of aircraft to which Sri Lanka has become a party . . . We are of the opinion that no court can invalidate the Act or inquire into the validity of this law”).

¹⁸⁸ Nuremberg Judgment, *supra* note 6, p. 445.

¹⁸⁹ J. Thormundsson, *The Sources of International Criminal Law with Reference to the Human Rights Principles of Domestic Criminal Law*, Stockholm Institute for Scandinavian Law, p. 390

Nuremberg Charter, including war crimes and crimes against humanity, and individual responsibility for those crimes amount to “general principles of law recognized by civilized nations”.¹⁹⁰ In addition, the Nuremberg Tribunal has specifically stated that crimes against humanity and war crimes are “general principles of law recognized by civilized nations”. With respect to war crimes, the Tribunal declared:

The rules of land warfare expressed in the convention undoubtedly represented an advance over existing International Law at the time of their adoption. The convention expressly stated that it was an attempt "to revise the general laws and customs of war," which it thus recognized to be then existing, but by 1939 these rules laid down in the convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.¹⁹¹

The Judgment of the Nuremberg Tribunal has been interpreted as recognizing that crimes against humanity in the Nuremberg Charter constituted “violations of already existing conventional and customary international law, as well as general principles of law”.¹⁹² Furthermore, cases in national courts prosecuting offences committed during the Second World War have found that retroactive incorporation of war crimes and crimes against humanity in their national laws is possible based on the “general principles of law recognized by the community of nations”.¹⁹³

Finally, for the crime of genocide, the International Court of Justice confirmed that the crime

¹⁹⁰ M. Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter*, Intersectia, 2002, p. 159.

¹⁹¹ Nuremberg Judgment, *supra* note 6, p. 467.

¹⁹² M. C. Bassiouni Crimes Against Humanity, *supra* note 21, p. 95.

¹⁹³ The Israeli courts in the *Eichmann* case considered inter alia whether crimes against humanity, war crimes and crimes against Jewish people which were criminalized under the Nazi and Nazi Collaborators (Punishment) Law of 1950 violated the principle of non-retroactivity. The District Court found that “. . . all of the above mentioned crimes constituted crimes under the laws of all civilized nations, including the German people, before and after the Nazi regime . . . [a] law which enables the punishment of Nazis and their collaborators does not ‘conflict’, by reasons of its retroactive application, ‘with the rules of natural justice’ . . . on the contrary, it enforces the dictates of elementary justice” (District Court Judgment, *Attorney General v. Adolf Eichmann*, 36 ILR 5, 12 December 1961, para. 5) The Supreme Court of Israel affirmed the District Court’s finding, and further declared that the crimes of which Eichmann had been convicted “must be deemed today as having always borne the stamp of international crimes, banned by the law of nations and entailing individual criminal responsibility” (Israel, Supreme Court, *Attorney General of Israel v. Eichmann*, 36 ILR 277, 29 May 1962, para. 10). In the Canadian Case of *R. v. Finta*, the accused was charged with war crimes and crimes against humanity under the Canadian Criminal Code as a result of acts committed in Hungary during World War II. Section 6(1.91) of the of the Criminal Code provided for an accused to be tried in Canada for war crimes and crimes against humanity committed outside of Canada, if at the time of the commission of the acts Canada could “in conformity with international law” exercise jurisdiction over the person on the basis of the person’s presence in Canada subsequent to the time of the commission of the offences. In a pre-trial motion before the High Court of Justice of Ontario, the defence argued that section 6(1.91) contravened various sections of the Canadian Charter of Rights and Freedoms of the Constitution Act 1982, including the principle of fundamental justice embodied in section 7 of the Charter because it retroactively created an offense. The Court rejected the argument, and found that the effect of “s. 6(1.91) is not to retroactively create an offence but merely to give retrospective operation to existing law”. The Court then referred to section 11(g) of the Canadian Charter which provides that the acts must constitute an “offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations”, and found that this section expressly indicates the intention of Parliament that the legislation be retrospective. After reviewing various international conventions, agreements and treaties, as well as the findings of the Nuremberg Trial the court concluded that “war crimes and crimes against humanity were, by 1939, offences of international law or criminal according to the general principles of law recognized by the community of nations” (*R. v. Finta* (1989 61 DLR(4th) 85).

is a general principle of law recognized by civilized nations and further asserts its customary nature when it held “the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation”.¹⁹⁴

(c) *Modes of Liability*

As set out above, Sri Lankan law does not cover international modes of responsibility such as JCE, ordering and command and superior responsibility. These crimes must therefore be incorporated with retroactive effect. This is made possible by the fact that these modes of liability are also recognized by general principles recognized by the community of nations or in any event are well established under customary international law.

i. JCE

According to the jurisprudence of the ICTY, since the *Tadic* case,¹⁹⁵ the JCE doctrine has been “firmly established in customary international law”.¹⁹⁶ Moreover, JCE has been regularly applied as customary international law in the jurisprudence of the ICTY,¹⁹⁷ as well as the ICTR,¹⁹⁸ the SCSL,¹⁹⁹ and the Special Court for Lebanon (STL).²⁰⁰ The Extraordinary Chambers in the Courts of Cambodia (ECCC) is the only court applying international law that has rejected JCE III for facts that took place in 1975.²⁰¹ The applicability of JCE III to Case

¹⁹⁴ *Reservations to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, 1951 I.C.J. Reports, 28 May 1951, ¶ 12.

¹⁹⁵ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic* (IT-94-1-AR 72), Appeals Chamber, 2 October 1995, ¶¶ 73-83; Judgment, *Prosecutor v. Tadic* (IT-94-1-A), Appeals Chamber, 15 July 1999, ¶¶ 195-226.

¹⁹⁶ Judgment, *Stakic* (IT-97-24-T), Appeals Chamber, 22 March 2006, ¶ 62 citing Judgment, *Prosecutor v. Tadic* (IT-94-1-A), Appeals Chamber, 15 July 1999, ¶ 220.

¹⁹⁷ Judgment, *Krajisnik* (IT-00-39-A), Appeals Chamber, 17 March 2009, ¶¶ 657-666; Judgment, *Dordevic* (IT-05-87/1-A), Appeals Chamber, 27 January 2014, ¶¶ 32-53.

¹⁹⁸ Judgment, *Ntakirutimana and Ntakirutimana* (ICTR-96-10-A), Appeals Chamber, 13 December 2004, ¶¶ 461-468; Judgment, *Simba* (ICTR-01-76-A), Appeals Chamber, 27 November 2007, ¶¶ 243-255; Judgment, *Karemura and Ngirumpatse* (ICTR-98-44-A), Appeals Chamber, 29 September 2014, ¶ 110.

¹⁹⁹ Judgment, *Sesay et al.* (SCSL-04-15-A), Appeal Chamber, 26 October 2009, ¶¶ 397-400.

²⁰⁰ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/1/AC/R176bis), Appeals Chamber, 16 February 2011, ¶¶ 236-249.

²⁰¹ The Trial Chamber (TC) in Case 001 (Judgment, *Kaing Guek Eav alias Duch* (001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, ¶ 511) as well as the Pre-trial Chamber (PTC) and TC in Case 002 (Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), *Prosecutor v. Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/OCIJ), Pre-Trial Chamber, 20 May 2010, ¶ 83; Decision on the Applicability of Joint Criminal Enterprise, *Prosecutor v. Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/TC), Trial Chamber, 12 September 2011, ¶¶ 30-35) recognized that JCE I and JCE II were part of customary international law prior to 1975. However, the PTC in Case 002 (the application of JCE III was not examined in Case 001) held that JCE III did not exist in customary international law at that time (Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), *Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/OCIJ), Pre-Trial Chamber, 20 May 2010, ¶ 83). The PTC conducted an extensive review of the legal instruments referred to in the *Tadic* Appeal Judgment to establish the doctrine of JCE. The PTC noted that the national legislation and case law examined in *Tadic* did not constitute “irrefutable evidence of international principles or rules under the doctrine that general principles of law are recognized by the nations of the world” (¶ 85). However, the PTC did not rule on whether or not the extended form of JCE III constituted a general principle of law in 1975. Instead, it concluded that, in any event, this mode of responsibility would not have been sufficiently foreseeable and accessible to the accused in 1975 because there was no basis for JCE III liability in Cambodian domestic law (¶ 89). Subsequently, the TC in Case 002 also examined the application of JCE III as a form of responsibility. After conducting its own survey of several national legal systems as of 1975, the TC concluded that state practice in 1975 lacked “sufficient uniformity” for JCE III to be considered a general principle of law at that

002 is the subject of an appeal pending before the Supreme Court Chamber.²⁰² This appeal relates to facts that took place in 1975. For acts that took place since the 1990s, the jurisprudence is uniform. The STL Appeals Chamber, in 2011, confirmed the existence of JCE III in international law, tracing the doctrine's contours to World War II era jurisprudence.²⁰³ The STL Appeals Chamber took note of the ECCC Pre-trial Chamber's finding in Case 002 that JCE III was not part of customary international law in 1975. However, the STL Appeals Chamber found that the three types of JCE exist in international law because its jurisdiction "entails consideration of jurisprudence and legal developments unavailable to the ECCC, starting from the early 1990s".²⁰⁴ Therefore, the jurisprudence of international and hybrid tribunals recognizes that the three forms of JCE form part of international law since Nuremberg or at the very least since the 1990s.

ii. Ordering

Ordering does not exist as a specific mode of liability under Sri Lanka's domestic law. Nevertheless, the international mode of participation of ordering can be retroactively incorporated in Sri Lankan law since it forms part of the general principles of law recognized by the community of nations since Nuremberg. Control Council Law No. 10, which governed the subsequent trials of war criminals by the post-World War II occupying powers, provided that a person who ordered the commission of a crime was an accessory, and would be deemed to have committed that crime.²⁰⁵ The Nuremberg trials devoted considerable attention to ordering as a mode of participation because many of the crimes were committed pursuant to Nazi orders which are known as the Commando Order, the Commissar Order, the Night and Fog Decree.²⁰⁶ Many of the elements that were later adopted by the international tribunals reflect those applied by the Nuremberg Tribunals. For example, in the *High Command case* the Tribunal held that the superior/subordinate relationship could exist either *de jure* or *de facto* as long as the defendant's orders were "binding upon subordinate units to whom they were directed," it was irrelevant whether the subordinates were under the defendant's direct command authority.²⁰⁷ Furthermore, the Tribunal found that orders could be given to concentration camp personnel because they felt "compelled to comply" with the directives.²⁰⁸ Although, the Nuremberg Principles do not refer explicitly to ordering, they recognize "[c]omplicity in the commission of a crime against peace, a war crime, or a crime

time (Decision on the Applicability of Joint Criminal Enterprise, *Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/TC), Trial Chamber, 12 September 2011, ¶¶ 37-38).

²⁰² Co-Prosecutors' Appeal Against the Judgment of the Trial Chamber in Case 002/02 (002/19-09-2007-ECCC/SC), Supreme Court Chamber, 28 November 2014.

²⁰³ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I/AC/R176bis), Appeals Chamber, 16 February 2011, ¶ 237, fn 355.

²⁰⁴ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I/AC/R176bis), Appeals Chamber, 16 February 2011, ¶ 239, fn 360.

²⁰⁵ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 10 December 20 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), article 2(3)(b). Control Council Law No. 10 empowered any of the occupying authorities post World War II to proceed against major war criminals after the initial Nuremberg Trial. There were another 12 trials after Nuremberg.

²⁰⁶ K. J. Heller, *The Nuremberg Military Tribunal and the Origins of International Criminal Law*, Oxford, Oxford University Press 2011, p. 254.

²⁰⁷ US Military Tribunal Nuremberg, Judgment of 27 October 1948, in *Trials of War Crimes Before the Nuremberg Military Tribunal*, Vol. IV, *Von Leeb High Command Trial*, p. 650.

²⁰⁸ *Ibid.*

against humanity,”²⁰⁹ which the ICTY has confirmed includes the mode of liability of ordering.²¹⁰

Ordering is now a well-established mode of liability under international criminal law. The 1949 Geneva Conventions stipulated that the High Contracting Parties were required to enact legislation necessary to provide effective penal sanctions for persons “committing, or ordering to be committed” grave breaches of the Conventions.²¹¹ Ordering was also included as a mode of liability in the statutes of the ICTR,²¹² ICTY,²¹³ and ICC.²¹⁴

iii. Command and Superior Responsibility

The doctrine of command responsibility is widely accepted as a general principle of law that was first applied in several trials following the Second World War.²¹⁵ The jurisprudence of the international and hybrid tribunals has confirmed that command responsibility is a well-established theory of liability under customary international law that applies to both international and internal armed conflicts,²¹⁶ and military and civilian commanders.²¹⁷ In a case regarding the applicability of command responsibility in the Philippines, the court found that the doctrine could be incorporated into Philippines law as a generally accepted principle of international law, as set out in the Philippines constitution, on the basis that “there is a long-standing adherence by the international community to the doctrine of command responsibility, which makes it a general principle of law recognized by civilized nations”.²¹⁸

²⁰⁹ Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal: Report of the International Law Commission on the Work of its Second Session, UN GOAR, 5th Sess. Supp. No. 12 UN Doc. A/1316 (1950), principle VII.

²¹⁰ A.Cassese, Introductory Note of the Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal General Assembly resolution 95 (I) New York, 11 December 1946, citing ICTY, Judgment, *Prosecutor v. Tadic* (IT-94-1-A), Appeals Chamber, 15 July 1999, ¶ 185 *et seq.*

²¹¹ GC I, article 49; GC II, article 50; GC 3, article 129; GC 4, article 141.

²¹² ICTR Statute, *supra* note 26, article 6(1).

²¹³ ICTY Statute, *supra* note 24, article 7(1).

²¹⁴ ICC Statute, *supra* note 8, article 25(3)(b).

²¹⁵ See *Re Yamashita*, 327 U.S. 1 (1945); US Military Tribunal Nuremberg, Judgment of 27 October 1948, in Trials of War Crimes Before the Nuremberg Military Tribunal, Vol. IV, *Von Leeb* High Command Trial, US Military Tribunal Nuremberg, Judgment of 27 October 1948, in Trials of War Crimes Before the Nuremberg Military Tribunal, Vol. IV, List (*Wilhem*) and *ors*, Trial Judgment, Hostage Case; International Military Tribunal Tokyo, *United States v. Toyoda*.

²¹⁶ Decision Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadzihasanovic* (IT-01-47-AR72), Appeals Chamber, 16 July 2008, ¶ 28, 31; Judgment, *Prosecutor v. Delalic et al.* (IT-96-21-A), Appeals Chamber, 20 February 2001, ¶ 195.

²¹⁷ Case 00/2 Judgment, *Khieu Samphan, Nuon Chea* (002/19-09-2007/ECCC/TC), Trial Chamber, 7 August 2014, ¶ 714.

²¹⁸ Philippines, Supreme Court of Manila, *Lourdes D. Rubrico, et al. v. Glorioamacapagal-Arroyo, et al.* En Banc G.R. No. 183871, 18 February 2010, Separate Opinion Caropi Morales, J.

VII. CONCLUSION

As this paper argues, no meaningful prosecution of atrocity crimes of the type alleged in Sri Lanka can take place without incorporating international crimes and corresponding modes of liability—including JCE, ordering, and command and superior responsibility—into Sri Lankan law.

First, domestic crimes are fundamentally ill suited to deal with wartime abuses and violations that occurred as a result of the conduct of hostilities. In fact, if ordinary crimes were to be applied, some conduct may be deemed criminal under Sri Lankan law even if it was in compliance with IHL. On the other hand, some egregious violations of IHL that evidenced an absolute disregard for civilian lives cannot be prosecuted because there are no corresponding offences under Sri Lankan law. Finally, the prosecution of international crimes as ordinary crimes is deeply inadequate as it does not reflect the gravity of the criminal conduct, and risks trivializing atrocity crimes. Even if such conduct were to be prosecuted as domestic offences, such prosecutions would not serve a deterrent purpose or establish a narrative about the gravity of the crimes that were perpetrated. In addition, prosecuting atrocity crimes as domestic crimes on the basis of the domestic modes of liability does not allow for the prosecution of those most responsible for these crimes.

International law recognizes that those most responsible must be held accountable for atrocity crimes. These are crimes which are committed on a widespread and systematic basis or in the specific context of an armed conflict. In either case, those most responsible are those who had the means to design, carry out or facilitate the commission of international crimes. In doing so, they often abuse a position of authority or fail to fulfill the duties attached to their hierarchical position. This paper claims that unless international crimes and modes of liability are incorporated into Sri Lankan law, these individuals most responsible for crimes cannot be effectively prosecuted. Instead, any prosecutions—if conducted under existing Sri Lankan law—would likely focus on those lower down the chain of command and on ‘trigger pullers’ who carried out orders received from their superiors. Prosecuting these individuals rather than those in positions of leadership will fail to meet victims’ demands for justice, undermine public support for trials and breed resentment among the fighting cadre of the armed forces.

It is critical that the incorporation of international crimes into Sri Lankan law must be done with retroactive effect—as provided in Sri Lanka’s constitution and the ICCPR—so as to ensure that the new crimes and modes of liability cover conduct that took place prior to legislative change. Indeed, the government has explicitly committed to this course, co-sponsoring a resolution which called for:

The trial and punishment of those most responsible for the full range of crimes under the general principles of law recognized by the community of nations [...] including during the period covered by the Lessons Learnt and Reconciliation Commission.²¹⁹

It is now essential that these promises are fulfilled, in a manner that would enable justice for victims, fair treatment of those accused, and the rule of law for all.

²¹⁹ Resolution 30/1, *supra* note 2, ¶ 7