The State of Tamil Eelam as a Subject of International Law: Its Status and Rights at the ICJ

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I. Introduction: Tamil Eelam's Statehood and the ICJ

This paper has one simple argument: since 1977, Tamil Eelam has been a state that holds legal personality in international law. This simple argument, of course, requires a full legal justification; this paper begins that process.

Tamil Eelam's international legal personality gives it standing to bring complaints against other states, and to participate in specific types of complaints against UN personnel, at the International Court of Justice (ICJ). It may do so in its own name, as the State of Tamil Eelam. Although Sri Lanka destroyed its government in 2009—after a clear act of recognition in 2003—Tamil Eelam continues to exist. Though it lacks an effective government, this state still exists—in an ironic twist of the relevant law—precisely **because** of Sri Lanka's ongoing military occupation. As a result, it still holds legal title to its territory.

This paper is only a starting point, rather than the final word, in making legal arguments for Tamil Eelam's international judicial recognition. While meticulously researched and sourced, it does not claim to have discovered all possible avenues for legal action. Nor does it attempt to anticipate all possible counter-arguments.[1] This paper's conclusions are logically valid, based on its sources—but such a case would likely require an ICJ state party's support to move past the ICJ's gatekeepers. Finally, this paper's arguments rest entirely on the Tamil people's will to assert its statehood. This is a political commitment with far-reaching legal consequences.

However, this paper has no wish to exaggerate the importance of ICJ proceedings for the Tamil people. While the ICJ's decisions are usually respected, there are not many consequences when a state refuses to do so. Still, unlike the International Criminal Court (ICC), Sri Lanka has recognized the ICJ. Rulings of the ICJ therefore bind the Sri Lankan government. The UN General Assembly and Security Council appoint the Court's judges, and have a legal mandate to follow its judgements. If Sri Lanka fails to implement an ICJ judgement, that illegality would provide a compelling argument to the UN Security Council and General Assembly for foreign economic and political sanctions.

What does ICJ recognition of Tamil Eelam's statehood involve? The ICJ could legally confirm Tamil Eelam's statehood via either a non-binding Advisory Opinion, or a binding 'jurisdiction and admissibility' ruling *ratione personae* (meaning, a decision that the State of Tamil Eelam has standing to appear before the Court).

Either decision would permit Tamil Eelam to litigate Sri Lanka's **state responsibility** for aggression, genocide, crimes against humanity, and war crimes before the ICJ tribunal. Either decision would also potentially allow Tamil Eelam's litigation against UN personnel for negligence and failure to protect the Tamil people.[2] If successful, such a decision might provide legal grounds for Tamil Eelam to sign other treaties: for example, the Rome Statute establishing the ICC,[3] which would allow individuals to be prosecuted for crimes committed on Tamil Eelam's territory.

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[1] I take full responsibility for any mistakes in this paper. Before its recommendations are acted on, legal counsel—who hold experience at the ICJ—should be consulted.

[2] Krishan Francis, 'UN Chief Says Sri Lanka Killings Prompted Self-Scrutiny' *Seattle Times* (3 Sep 2016) https://www.seattletimes.com/nation-world/un-chief-says-sri-lanka-killings-prompted-self-scrutiny/ accessed 29 Jan 2022.

[3] See International Commission of Jurists, 'Palestine: ICJ Makes Submission to International Criminal Court Arguing for Jurisdiction Over Serious Crimes' (18 March 2020) https://www.icj.org/palestine-icj-makes-submission-to-international-criminal-court-arguing-for-jurisdiction-over-serious-crimes/ accessed 28 Jan 2022. It should be noted that in this footnote's article citation, the acronym 'ICJ' refers to the International Commission of Jurists and not to the International Court of Justice. In the rest of this paper, 'ICJ' refers only to the International Court of Justice.

How can Tamil Eelam prove its status to the ICJ? According to Article 34(1) of the ICJ Statute, 'Only states may be parties in cases before the Court.' Article 35(3) of the Statute is clear that states may appear before the Court **without being UN Member States.** *De facto* states such as Israel (*Reparation for Injuries*, 1949),[4] and the Federal Republic of Yugoslavia (*Bosnian Genocide*, 1993),[5] have both had legal standing to appear before the ICJ tribunal—even though **neither one enjoyed international recognition at the time of these cases**.

Reparation for Injuries directly affirmed the Court's jurisdiction to hear legal arguments from *de facto* states. In other words, the ICJ does not discriminate between unrecognized *de facto* states (which exist as a matter of legal fact) and *de jure* states (whose legal status is diplomatically recognized)[6] when it decides whether a political community is a 'state,' under Article 34(1). This paper shows that Article 34(1)'s definition of a 'state' includes Tamil Eelam.

a) The declarative method

International law has largely used either one of two methods to determine whether a political community is a state: the '**declarative**' method and the '**constitutive**' method. The declarative method is the currently accepted doctrine for defining statehood in international law. This paper explains how it applies to Tamil Eelam, and the results that come from this legal reasoning.

Here, the 1933 *Montevideo Convention on the Rights and Duties of States* (or Montevideo Convention), prescribes four legal conditions for a political community to demonstrate its statehood:

i. **a permanent population,**
ii. **a defined territory,**
iii. **government,** and
iv. **capacity to enter into relations with other states**.

Section III below shows how Tamil Eelam fulfills all four of these conditions, from 1977 to today. Importantly, recognition is irrelevant to the declarative method. Outlining the declaratory legal framework, the Montevideo Convention includes the following three statements about recognition.

1. If a political community meets the four conditions of statehood, it is a state with full rights under international law, irrespective of any recognition. According to its Article 3:

> The political existence of the state is independent of recognition by the other states. **Even before recognition the state has the right to defend its integrity and independence**,[7] to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.

2. Article 7 says: 'recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognizing the new state.' Explicit recognition could include an official exchange of diplomats, while any reference to the new state by another state would imply tacit

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[4] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations* (11 Apr 1949) https://www.icj-cij.org/en/case/4 accessed 19 Feb 2022.

[5] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (11 Jul 1996) https://www.icj-cij.org/public/files/case-related/91/091-19960711-JUD-01-00-EN.pdf accessed 5 Feb 2022.

[6] For a full reasoning of why the difference between these terms is less important than usually thought, see Fred L. Morrison, 'Recognition in International Law: A Functional Reappraisal' 34 *University of Chicago Law Review* (1967) 857-883 (Footnote 11) https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3544&context=uclrev accessed 3 Feb 2022.

[7] Emphasis added.

recognition. Article 6 clarifies that—whether express or tacit—'recognition is unconditional and irrevocable.'

3. According to Article 10, any differences between two states should be settled by recognized peaceful methods. This means that aggression (an attack on one state by another) is illegal—a concept that was later integrated into the UN Charter and the Rome Statute.

The Montevideo Convention codifies the customary international law (Section II below defines this term) on statehood. For example, the 1993 European Community Arbitration Commission on the former Yugoslavia fully endorsed the declarative formula. Its Opinion 10 held:

> while **recognition is not a prerequisite for the foundation of a state and is purely declaratory in its impact**, it is nonetheless a discretionary act that other states may perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general international law, and particularly those prohibiting the use of force in dealings with other states or guaranteeing the rights of ethnic, religious or linguistic minorities.'[8]

In this light, Vidmar notes that

> The FRY [Federal Republic of Yugoslavia] appeared before the International Court of Justice (ICJ) in the *Bosnia Genocide* case and the Court established that the case was admissible although the FRY was universally non-recognised at that time. The position of the ICJ thus clearly shows that recognition is not necessary for an entity to be considered as a state.[9]

Section III below is therefore quite clear that Tamil Eelam possesses the rights and duties of statehood. Current conditions of military occupation mean that this status remains legally valid after 2009.

b) Sri Lanka's recognition of Tamil Eelam, and the inapplicable constitutive method

The 'pure' constitutive method applies *realpolitik* (or, the rule of force) to the legal sphere. In the pure constitutive method, no state exists *de jure* (in law) unless other states recognize it, and it can cease to exist if states withdraw that recognition. This is not a legal position, but a political one—in which sovereignty is the ability to force recognition on other states.

Yet, the canonical interpretation of the constitutive method in international law is *not* the 'pure' method. Revered legal scholar Lauterpacht (who also developed the concept of 'crimes against humanity') believed that the declaratory conditions of statehood impose a legal 'duty to recognize' on the international community. Lauterpacht's method is sometimes called the 'declarative-constitutive' approach. He wrote:

> To recognize a political community as a State is to declare that it fulfills the conditions of statehood as required by international law. If these conditions are present, the existing states are under the duty to grant recognition….States do not claim and are not entitled to interests of their national policy and convenience regardless of the principles of international law in the matter. Although recognition is thus declaratory of an existing fact, such declaration, made in the impartial fulfillment of a legal duty, is constitutive…of international rights and duties associated with full statehood.[10]

Though it was once the dominant position, constitutivism is no longer considered valid in international law. Crawford writes, 'State practice demonstrates neither acceptance of a duty to recognize, nor a consistent constitutive view of recognition.'[11]

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[8] Arbitration Commission, E.C. Conference on Yugoslavia, 'Opinion No. 10' (4 July 1992) from 92(6) *International Law Review* 206 https://tu-dresden.de/gsw/phil/irget/jfoeffl3/ressourcen/dateien/voelkerrecht_1/skript-vr-b2.pdf?lang=en accessed 28 Jan 2022. Emphasis added.

[9] Jure Vidmar, 'Explaining the Legal Effects of Recognition' 61(2) *International and Comparative Law Quarterly* (2012) 372.

[10] Hersch Lauterpacht, *Recognition in International Law* (Cambridge 1947) 6.

[11] James Crawford, *The Creation of States in International Law* 2nd ed. (2006) 22.

Nevertheless, on 11 April 2003, the 'Sri Lankan President, Chandrika Kumaratunga…said that the Liberation Tigers of Tamil Eelam (LTTE) has established a "*de facto* separate State" in the north of her country and in parts of the east since entering into peace talks with the Ranil Wickremesinghe Government.'[12] Her statement was a clear act of tacit recognition: one that falls within the scope of Montevideo Convention Article 7. Other states and international organizations followed her lead during the peace process. Tamil Eelam has enjoyed recognition from foreign governments: under Article 6 of the Montevideo Convention, their recognition may not be withdrawn.

c) Tamil Eelam's enduring sovereignty and legal personality after 2009

Section III below shows that—since the Tamil people exercised its right of self-determination, in the electoral referendum of 1977—Tamil Eelam has existed in international law, as a state with full legal rights. According to the declarative method, Tamil Eelam fulfils each of the required conditions for statehood.

In current political science literature, Tamil Eelam is now considered to be 'forcefully reintegrated' into Sri Lanka,[13] and previous foreign recognition—including Sri Lanka's—has been quietly forgotten. Yet, although Sri Lanka has occupied Tamil Eelam's territory since 2009, none of these facts affects its legal status as a state. Conditions of military occupation remove the need for an effective government (as under the third condition of the Montevideo Convention).

A change in the political community's *government* (for example, the change from an administration in Kilinochchi to a transnational government-in-exile) does not alter that community's status as a *state*. Refusal to recognize its government-in-exile does not change the fact that Tamil Eelam has already been recognized. *Brownlie's Principles of Public International Law* tells us:

> the term 'recognition'….is commonly used to refer to two related categories of state acts: first, the recognition of another entity as a state; and second, the recognition of that entity's government as established, lawful or 'legitimate', that is as entitled to represent the state for all international purposes.[14]

To support this statement, *Brownlie's* cites the *Restatement (Third) on Foreign Relations Law of the United States* (1987), Paragraphs 202 and 203: 'Recognition of a state may be independent of the recognition of its government, though the reverse is not true.'[15]

According to Craven, 'it has been accepted that **in the context of belligerent occupation, complete lack of government does not extinguish the sovereignty of the State.**'[16] In the same vein, Crawford writes:

> international law does distinguish between change of State personality and change of the government of the State. There is a strong presumption that the State continues to exist, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government. **Belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.** The legal position of governments-in-exile is dependent on the distinction between government and State.[17]

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[12] Amit Baruah, *The Hindu* '"LTTE Has Set Up De-Facto State"' 12 April 2003 https://www.thehindu.com/todays-paper/ltte-has-set-up-de-facto-state/article27755923.ece accessed 25 Jan 2022.

[13] Adrian Floria, '*De Facto* States: Survival and Disappearance (1945-2011)' 61(2) *International Studies Quarterly* (Jun 2017) 337-351.

[14] James Crawford, *Brownlie's Principles of Public International Law*, 8th Ed. (OUP, 2012) 143.

[15] Crawford, *Brownlie's*, 143. See Footnote 14 above.

[16] Matthew C.R. Craven, 'The European Community Arbitration Commission on Yugoslavia,' 66(1) *British Yearbook of International Law* (1995) 333-413 (361). Emphasis added.

[17] Crawford, *Creation of States,* 34. See Footnote 11 above. Emphasis added.

Thus, the ICJ would probably find that Tamil Eelam lacks effective government, or that its government-in-exile lacks effective control over its territory. However, it would be well within the Court's scope to conclude that Tamil Eelam itself remains sovereign under international law, despite conditions of occupation.

Recognition of Tamil Eelam is a fact: one that *cannot* be legally undone. It is only debatable whether it has a government-in-exile or no government at all, under current conditions of occupation. However, that debate does not affect Tamil Eelam's legal status as a sovereign state. Because of its legal personality, due to the illegal nature of aggression and occupation, and regardless of whether or not it still possesses a government, Tamil Eelam remains a state: it is protected by all relevant instruments of international law.

d) Methodology and structure of this paper

This work is based on a qualitative legal research methodology, applying international law to the political experiences of the Eelam Tamil people. These experiences, as they relate to self-determination and statehood, are summarized largely in the 1976 Vaddukoddai Resolution and the Tamil United Liberation Front's (TULF's) 1977 election platform.

This paper identifies several written instruments of customary international law that define Tamil Eelam's status of statehood. Most importantly, the Montevideo Convention[18] codifies the declarative approach, as described above. Furthermore, the UN International Law Commission's *Draft Articles on State Responsibility for Internationally Wrongful Acts*[19] (or the ILC Draft Articles) also describe the acts of a movement that succeeds in establishing a new state on the territory of the old state as 'acts of state.' These are both instruments of customary international law, as defined in Section II below.

This paper draws on international jurisprudence, such as the *Reparation for Injuries* and *Bosnian Genocide* cases at the ICJ, to demonstrate Tamil Eelam's legal personality. Other ICJ judgements, such as the *Continental Shelf* ruling on territorial demarcation (the drawing of borders) and *Pedra Blanca* decision on 'original title' to territory, also support its central argument. The *Kosovo* Advisory Opinion justifies the 1977 Eelam Tamil electoral referendum in terms of international law. Finally, this work also relies on doctrinal authorities on international law, to help clarify these legal instruments and international judgements.

Section II below defines certain basic terms and key concepts in international law that are needed to arrive at this paper's conclusions. Each definition can be challenged, and its boundaries stretched or shrunken, to serve one purpose or another. These are simply foundational concepts, which show how public international law works in theory.

Section III applies the declarative method of defining a state in international law. It shows—based on the Montevideo Convention—that Tamil Eelam is indeed a state, though it is under occupation, and has no effective government. Based on the declarative method, this status appears virtually incontestable.

Section IV concludes that Sri Lanka withdrew from the CFA in 2008, and invaded Tamil Eelam to reverse its 2003 act of recognition. International law universally prohibits invasion, known as the act of **'aggression.'** [20] Section IV then identifies three situations in which this understanding can affect legal proceedings, and in which arguments of Tamil statehood may affect a judge's opinion.

1. Challenging the legal rationale of court judgements against defendants linked to the LTTE.
2. Hearing complaints of genocide, crimes against humanity, war crimes, and aggression (litigating Sri Lankan state responsibility for internationally wrongful acts). Individual UN personnel could also bear responsibility for allowing these acts to take place without external witnesses or intervention.

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[18] Housing and Land Rights Network, *Montevideo Convention on the Rights and Duties of States* (1933) http://hlrn.org/img/documents/Montevideo_Convention.pdf

[19] UN Office of Legal Affairs, *Draft Articles on State Responsibility for Internationally Wrongful Acts* (2001) https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

[20] The crime of aggression includes acts such as invasion, or assassinations, intended to undermine the sovereignty of another state. This will be shown in Section IV.

3. Arguing for reparations from Sri Lanka in the form of a UN-supervised referendum—to terminate Sri Lanka's occupation of Tamil Eelam, and to restore the Tamil people's exercise of self-determination.

The rights of states include those to **compensation and reparations** for internationally wrongful acts, which the ICJ can prescribe. While these war crimes, crimes against humanity, genocide, and aggression are also **criminal acts**, this paper does not examine that route. Sri Lanka *prima facie*[21] violated each of these international norms: against Tamil Eelam, and against the Tamil people who comprised the state. Even though Tamil Eelam's most effective government was crushed violently, this state continues to exist, and to benefit from these rights, in international law.

II. Concepts and Definitions

To understand why Tamil Eelam is a state under international law, this section briefly explains the concepts that international law uses to determine the existence, rights, and duties of states.

The traditional list of the sources of international law is contained in Article 38 of the *Statute of the International Court of Justice* (ICJ Statute).[22] These four sources are:

1. Article 38(a): **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
2. Article 38(b): **international custom**, as evidence of a general practice accepted as law;
3. Article 38(c): the **general principles of law** recognized by civilized nations;
4. Article 38(d): …**judicial decisions** and the **teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.

Beyond the sources of international law, one more definition is needed:

5. **International legal personality**.

This paper now examines each of these concepts.

a) ICJ Statute *Article 38(a): 'international conventions'*

'International conventions' include all agreements between states: such as treaties, protocols to existing treaties, and statutes that establish international organizations and courts. A state signs and ratifies a convention to show that it is willing to be legally bound by that convention.

After ratification, the signatory state may not 'derogate' from (or break) that convention, unless it qualifies under one of two exceptions. First, the state may expressly indicate—at the time of ratification—that it reserves the right to depart from a specific clause of the convention ('reservation'). Second, it may fulfill the list of conditions that the convention requires to terminate a state's consent. Apart from these two exceptions, a state that derogates from its treaty obligations may be brought before the relevant international court or tribunal.

During times where two or more states disagree on how to interpret a provision in an international convention, Section 3 (Articles 31, 32, and 33) of the *Vienna Convention on the Law of Treaties* (VCLT) is considered a customary authority, which lays down **interpretive rules**. When deciding on the correct interpretation, judges must interpret the treaty according to the VCLT interpretive rules.

The key phrase in ICJ Statute Article 38(a) is that, to be a source of international law, the convention must be 'expressly recognized.' This means that, in general, a state or its personnel cannot be bound by a treaty that the state has not signed. (The exception to this rule will be shown in subsection II[b], on customary international law, below.)

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[21] *Prima facie* is a Latin expression meaning that there is a well-founded suspicion that the accused has committed these crimes, although this has not yet been proven in court, and that this suspicion is reasonable enough to hear the case.
[22] UN Office of Legal Affairs, *Statute of the International Court of Justice* (1945) https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf accessed 22 Jan 2022.

Because of ICJ Statute Article 38(a), Sri Lankan personnel seem to escape the direct jurisdiction of the International Criminal Court (ICC). Sri Lanka has not signed the Rome Statute, the treaty that establishes the ICC. It has not given its 'express recognition' to be bound by the Rome Statute.

However, Sri Lanka has signed and ratified both the ICJ Statute, and the *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention). By ratifying these conventions, the state has given its 'express recognition' to the ICJ, and to the authority of the Genocide Convention. Sri Lanka is, therefore, bound by the Genocide Convention—and by the ICJ's authority to interpret and apply that convention to it.

b) ICJ Statute *Article 38(b): 'international custom'*

A more common wording for this concept is 'customary international law.' Customary international law is not written down, but is considered to be a common practice among states, in the belief that they are acting in a way that is legally prescribed.

In Paragraph 77 of its 1969 judgement on the *North Sea Continental Shelf Cases*,[23] the ICJ outlined these two conditions for a rule to be considered customary international law. First, 'the acts concerned [must] amount to a settled practice' among states. This is known as '**state practice**.' Second, these acts 'must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.' This is known as ***opinio juris***.

Provisions of customary international law may later be written down. Here, the provision is considered to be a part of international law, whether or not any particular state has actually signed the convention that contains it. Paragraph 73 of the *Continental Shelf* ICJ decision carefully notes that 'even without the passage of any considerable period of time, a very **widespread and representative participation in the convention** might suffice of itself' to turn a rule contained in that convention into a general rule of international law, 'provided it [i.e. that this participation] included that of States whose interests were specially affected.'

Most importantly for this paper, the rules on the existence and recognition of states are considered to be customary international law. First, the Montevideo Convention is considered to be written customary law on statehood (as shown above, it defines the declarative approach). Second, the ILC Draft Articles are considered to be a very influential codification of existing customary international law, on the responsibility of states for the acts they carry out.[24]

Section IV will argue below, based on 'widespread and representative participation in the convention' (as stated in Paragraph 73 of *Continental Shelf*), that the *First Additional Protocol to the Geneva Conventions* (Additional Protocol I or AP-1) and the UN's 'Manila Declaration' on states' obligation to settle disputes peacefully, also constitute customary international law.

c) ICJ Statute *Article 38(c): General principles of law*

Article 38(c) can be subdivided into two sections. 'General principles of law' is considered to be a legitimate wording. In contrast, 'recognized by civilized nations' requires a little uncomfortable wriggling to justify today, since this phrase assumed that there are uncivilized nations.

According to Kohen and Schramm, 'general principles of law' are concepts that 'constitute necessary rules for the very functioning of the system.'[25] Like customary international law, these principles are rarely, if ever,

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[23] ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (20 Feb 1969) https://www.icj-cij.org/public/files/case-related/52/052-19690220-JUD-01-00-EN.pdf accessed 4 Feb 2022.

[24] Fernando Lusa Borin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63(3) *International and Comparative Law Quarterly* (535).

[25] Marcelo Kohen and Bérénice Schramm, 'General Principles of Law' (2019) *Oxford Bibliographies Online* https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0063.xml, accessed 8 Jan 2022.

written down—but judges almost always assume that they apply. General principles of law include, for example, the rule of procedure that a person should not be tried more than once for the same offence (*res judicata*). There is no exhaustive list of the general principles of law, and arguments can be made for or against the identification of new general principles.

Important 'general principles' relevant to this paper include: the right of peoples to self-determination, the obligation to settle international disputes peacefully (which is connected to the prohibition on aggression), the prohibition on genocide, and not depriving a person of the right to life without due process of law. These are all known as ***jus cogens*** principles of law.

Dating back to at least Roman times, *jus cogens* principles are considered to be self-evident, common to all systems of law. They are also considered to be **peremptory** or **non-derogable**: meaning that there is no defence for violating these principles. Even if duly passed through a national legislature, a law that violates a *jus cogens* principle is considered to be internationally illegal.

d) ICJ Statute *Article 38(d): Judicial decisions and teachings of the most highly qualified publicists of the various nations*

Like 38(c), Article 38(d) can be separated into two sections—**judicial decisions**; and **legal doctrine** written by, for instance, highly distinguished professors of international law. Where no international conventions or previous case law can address the situation directly, either of these can become a source of international law.

Court decisions, including (and particularly) those of the ICJ, can expand international law to cover unforeseen situations. These may be useful in uncovering general principles, and customary international law, that can apply in new ways.

Legal doctrine becomes a source of international law when, in the absence of any other possible source, a court refers to that written doctrine to clarify a point of international law. Examples include *Brownlie's* and high-profile academic books and articles on international law.

e) Legal Personality

The final essential concept in international law for this paper is 'legal personality,' or legal personhood. This concept goes back at least to Roman times, when corporations were considered 'persons' in the eyes of the law. To have the status of a 'legal person' is to have rights and duties in a system of law.[26]

In international law, states are the fundamental unit that have international legal personality. States may sue other states, and defend themselves against suit, in international forums like the ICJ and the Permanent Court of Arbitration (PCA). However, in its 1949 Advisory Opinion on *Reparation for Injuries*, the ICJ decided that the UN also had legal personality to sue a *de jure* or *de facto* state—whether or not that state is a UN member.

The ICJ stated, at Paragraph 148 of its Advisory Opinion on *Western Sahara*:[27]

> In the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*, the Court observed: 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community' (Z.C.J. Reports 1949, p. 178). In examining the propositions of Mauritania regarding the legal nature of the Bilad Shinguitti or Mauritanian entity, the Court gives full weight both to that observation and to the special characteristics of the Saharan region and peoples with which the present proceedings are concerned. Some criterion has, however, to

[26] Corporations have international legal personality at the International Centre for the Settlement of Investment disputes, where they may bring complaints against states who have signed an investment treaty with the state where they are incorporated. Both individuals and states have legal personality to file suit against states at the European Court of Human Rights.

[27] ICJ Advisory Opinion, *Western Sahara* (16 Oct 1975) https://www.icj-cij.org/public/files/case-related/61/061-19751016-ADV-01-00-EN.pdf accessed 12 Feb 2022. Emphasis added.

> be employed to determine in any particular case whether what confronts the law is or is not legally an 'entity.' The Court, moreover, notes that in the *Reparation* case the criterion which it applied was to enquire whether the United Nations Organization—the entity involved—was in **'such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect'** (ibid.). In that Opinion, no doubt, the criterion was applied in a somewhat special context. Nevertheless, it expresses **the essential test where a group, whether composed of States, of tribes or of individuals, is claimed to be a legal entity distinct from its members.**

It follows from the *Reparation for Injuries* ICJ Advisory Opinion (combined with ICJ Statute Article 35[2] and UN Security Council Resolution 9 [1946], as Section IV will show) that, if a *de facto* state can be sued at the ICJ, then a *de facto* state has legal personality to sue other states at that forum. The *Bosnian Genocide* case, as seen above, continued this jurisprudence. Both cases make clear that *de facto* states have international legal personality, equal to that of *de jure* states.

Therefore, the legal personality of a state, and its capacity to bring suit to the ICJ against another state, does not depend on whether its status was *de facto* or *de jure* at the time of the alleged injury; this is particularly true since that distinction is not relevant under the declaratory method.

As *Reparation for Injuries* noted, legal personality is not exactly the same for the UN. According to Article II (Section 2) of the *Convention on the Privileges and Immunities of the United Nations* (1946),[28] the UN generally enjoys immunity from any form of legal process—including at the ICJ—unless it has waived its immunity. However, Article VIII reads as follows:

> SECTION 29. The United Nations shall make provisions for appropriate modes of settlement of:
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> (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
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> (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.
>
> SECTION 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

Thus, requesting an ICJ Advisory Opinion on the UN's responsibility for the crimes committed at the end of the war would require the cooperation of a UN Member State. Alternate dispute resolution processes are also permitted where UN responsibility may involve the individual decisions of a UN official, or any violation of a private contract that the UN has signed. However, most relevantly to this paper, the ICJ has the power to determine whether the UN, or its officials, benefit from immunity from their responsibilities or not.

Having explained the relevant fundamental concepts, this paper now turns to explain the declarative method of determining whether Tamil Eelam is a state.

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[28] UN, *Convention on the Privileges and Immunities of the United Nations* (13 Feb 1946) https://treaties.un.org/doc/Treaties/1946/12/19461214%2010-17%20PM/Ch_III_1p.pdf accessed 17 Feb 2022.

III. The Declarative Method: Tamil Eelam is a State

The declarative method is based on a textual analysis of the 1933 Montevideo Convention, with roots extending in customary international law before that time. Using this approach, the legal personality of *de facto* states seems self-evident, based on a reading of the Montevideo Convention.

As Sections I and II noted, the Montevideo Convention codifies the customary international law on statehood. The Montevideo Convention's conditions for statehood are, in Article 1, as follow: 'The state as a person of international law should possess the following qualifications: **(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.**'

This section will apply the facts of Tamil Eelam's existence to the legal conditions of the declaratory method. The result is virtually certain: Tamil Eelam is a state, arguably with a government-in-exile. To demonstrate this claim, this subsection applies the terms of the Vaddukoddai Resolution and TULF election platform to the Montevideo Convention.

The 1976 Vaddukoddai Resolution, a Tamil national manifesto that bolstered the Tamil United Liberation Front's (TULF's) 1977 electoral platform, stated in part: 'This convention resolves that restoration and reconstitution of the Free, Sovereign, Secular, Socialist State of TAMIL EELAM, based on the right of self determination inherent to every nation, has become inevitable in order to safeguard the very existence of the Tamil Nation in this Country.'[29]

The 1977 TULF election platform then stated:

> The Tamil nation must take the decision to establish its sovereignty in its homeland on the basis of its right to self-determination. The only way to announce this decision to the Sinhalese government and to the world is to vote for the Tamil United Liberation Front. The Tamil-speaking representatives who get elected through these votes, while being members of the National State Assembly of Ceylon, will also form themselves into the National Assembly of Tamil Eelam which will draft a constitution for the state of Tamil Eelam and establish the independence of Tamil Eelam by bringing that constitution into operation either by peaceful means or by direct action or struggle.[30]

The right of self-determination is recognized as a *jus cogens* or peremptory norm that cannot be derogated from in international law (Section II, above, defines these terms). The UN Human Rights Committee's General Comment 12 on the *International Covenant on Civil and Political Rights* (ICCPR) Article 1 notes:

> The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants [ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)] and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.[31]

In international law, the basic unit of self-determination is 'peoples.' A UN report on self-determination (A/69/272) explains: 'Participants at a UNESCO expert meeting on self-determination endorsed what has been called the "Kirby definition", recognizing as a "people" a **group of persons** with a **common historical tradition**,

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[29] Tamil United Liberation Front, 'Vaddukoddai Resolution' (14 May 1976) https://www.sangam.org/FB_HIST_DOCS/vaddukod.htm accessed 19 Feb 2022.
[30] Tamil United Liberation Front, 'General Election Manifesto' (Jul 1977) https://sangam.org/FB_HIST_DOCS/TULFManifesto77.htm accessed 23 Jan 2022.
[31] UNHRC 'ICCPR General Comment No. 12: Article 1 (Right of self-determination) The Right of self-determination of Peoples' (13 March 1984) available at RefWorld https://www.refworld.org/docid/453883f822.html accessed 12 Feb 2022.

racial or **ethnic identity**, **cultural homogeneity**, **linguistic unity**, religious or **ideological affinity**, **territorial connection**, or **common economic life**.'[32]

The Vaddukoddai Resolution thus provides the basis for response to the conditions of status as a people. Eelam Tamils self-evidently constitute a **group of persons**.

- These persons hold **a common historical tradition**, with a recorded literary history of at least two millennia.
- By virtue of identification as Tamils, they hold a common **ethnic identity**.
- Their habits of daily life, dress, cuisine, etc. demonstrate **cultural homogeneity**.
- As speakers of the Tamil language (especially its Eelam variety), they hold **linguistic unity**.
- The Vaddukoddai Resolution, and Eelam Tamil social practice, enshrine a secular society respecting Hindus, Muslims, and Christians. Eelam Tamils hold **ideological affinity** based on the principles of 'nationhood, homeland, and self-determination.'
- The Vaddukoddai Resolution indicates the demographic claim of the Eelam Tamil population to the contiguous Northern and Eastern Provinces of the island of Ceylon, indicating **territorial connection**.
- Eelam Tamils are demonstrably bound together, both within their national territory and worldwide, by commercial, charitable, and familial **economic ties**.

The UN's Independent Expert on the promotion of a democratic and equitable international order, author of document A/69/272, further notes: 'To this should be added a subjective element: the will to be identified as a people and the consciousness of being a people.'

- The Vaddukoddai Resolution specifically mentions the Eelam Tamil people's 'will to exist as a separate entity ruling themselves in their own territory…a nation distinct and apart from the Sinhalese.'

Eelam Tamils therefore fulfill each condition constituting a 'people' under the 'Kirby definition.' As such—equally in 1977 and today—the Eelam Tamil people holds the right of self-determination under ICCPR and ICESCR Article 1. As Section III shows below, the 1977 electoral referendum exercised that right with full legality at the national and international levels. This act formed the state of Tamil Eelam, and established its legal title to the territory of the traditional homeland of the Tamil people.

In the 1977 Sri Lankan election, Eelam Tamils withdrew their consent to be governed by Sri Lanka by voting for the TULF on this platform. The TULF won the Northeastern areas by a landslide, electing 17 MPs to the Sri Lankan Parliament who held a popular mandate for secession.[33] Through the election, Eelam Tamils legally and peacefully exercised their right of self-determination by referendum.

Through this election, the TULF ascertained the will of the Eelam Tamil **permanent population**, a people who had legally exercised its sovereign right to a separate state. These TULF state representatives represented the **defined territory** of the Northern and Eastern provinces. As state representatives, they formed Tamil Eelam's **government.** As their right to sit in the Sri Lankan Parliament indicated, they had the **capacity to enter into relations with other states**. The state of Tamil Eelam came into existence, through the will of the sovereign Tamil people, fulfilling the four Montevideo Conventions, in 1977.

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[32] UN General Assembly (A/69/272) *Interim Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order* (7 Aug 2014) para. 4, available at https://undocs.org/A/69/272 accessed 12 Feb 2022. See also Michael Kirby, speech delivered at the UNESCO International Meeting of Experts on Peoples' Rights and Self-Determination, Budapest (25-29 September 1991) available at https://www.michaelkirby.com.au/images/stories/speeches/1990s/vol24/906-Peoples%27_Rights_and_Self_Determination_-_UNESCO_Mtg_of_Experts.pdf accessed 16 Feb 2022.

[33] Anton Balasingham, *War and Peace* (Fairmax 2004) 29.

From the 1977 election onward, Tamil Eelam has existed as a state with legal personality. International law shows that, despite changes in government since the TULF, its status has neither been extinguished by occupation of its territory, nor by the destruction of the LTTE-backed civilian government of Tamil Eelam.

a) Permanent population

The Vaddukoddai Resolution remains recognized as the basis of Eelam Tamil identity today. It defined the citizenry of Tamil Eelam. It affirms, in part:

> the State of Tamil Eelam shall consist of the people of the Northern and Eastern provinces and shall also ensure full and equal rights of citizenship of the State of Tamil Eelam to all Tamil-speaking people living in any part of Ceylon and to Tamils of Eelam origin living in any part of the world who may opt for citizenship of Tamil Eelam.[34]

The TULF election platform echoes this wording. These two documents thus clearly define the permanent population of Tamil Eelam to comprise three distinct sub-groups, as follow:

1. **The people of the Northern and Eastern Provinces.** (The Eelam Tamil people are historically 'the people of' the Northeast of the island, whereas settler populations can be considered to be 'people who reside in' the Northeast.)

2. **All Tamil-speaking people living in any part of Ceylon, who choose to hold Tamil Eelam citizenship.** (Ceylon is the colonial name of the island, prior to it being called Sri Lanka. This formula includes the Muslim population, and the Up-Country Tamil population, both of whom speak Tamil.)

3. **Any Tamils of Eelam origin, living in any part of the world, who choose to hold Tamil Eelam citizenship.** (This clearly refers to the Tamil diaspora, which had begun to take shape even in the 1970s.)

Therefore, Tamil Eelam has a **permanent population**, as defined under the Vaddukoddai Resolution. It fulfills the first condition of Montevideo Convention, Article 1.

b) Defined territory

By defining the citizenship of the State of Tamil Eelam as the people of the Northern and Eastern Provinces of the island, the Vaddukoddai Resolution also defines this state's territory. The population of the Northwestern Puttalam region is composed of an ethnically Tamil population who often speak Sinhalese, and was claimed for Tamil Eelam in the TULF election platform.

This falls within the Vaddukoddai Resolution's reference to Tamils' precolonial 'history of independent existence as a separate state over a distinct territory.'[35] The TULF election platform reads:[36]

> the territory stretching in the western seaboard from Chilaw through Puttalam to Mannar and thence to the Northern Regions and in the East, Trincomalee and also the Batticaloa Regions that extended southwards up to Kumana or to the northern banks of the river Kumbukkan Oya were firmly established as the exclusive homeland of the Tamils. This is the territory of Tamil Eelam.

Maps 1 and 2 below show the defined territory of Tamil Eelam.

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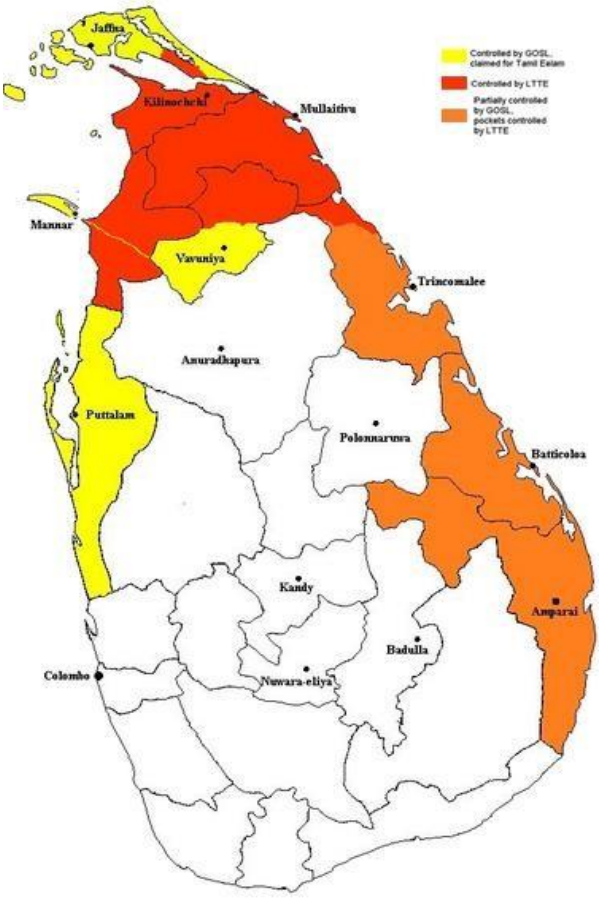
[34] TULF, 'Vaddukoddai Resolution.' See Footnote 29 above.

[35] TULF, 'Vaddukoddai Resolution.' See Footnote 29 above.

[36] TULF, 'General Election Manifesto.' See Footnote 30 above.

Map 1

Source: *The Economist* (9 June 2007) 'A War Strange as Fiction'[37]



Map 2

Source: Office of Strategic Affairs, Ministry of Defence, Sri Lanka (2005)[38]

[37] See https://www.economist.com/briefing/2007/06/07/a-war-strange-as-fiction, accessed 22 Jan 2022.
[38] In Adam Roberts, 'International Order and Violent Extremism: Lessons from Sri Lanka,' Slide 12 https://www.slideserve.com/egil/adam-roberts-british-academy-and-oxford-university accessed 23 Jan 2022.

i. 'Defined Territory' and LTTE control

Map 1 shows the defined territory of Tamil Eelam in pink, under the name 'Eelam.' The first objection to this characterization is that not all of the territory claimed was ever under the full control of the LTTE (who provided military defence, permitting the civilian administration of Tamil Eelam to perform its functions). The second objection is that today, none of the region claimed for Tamil Eelam is under the control of any government besides Sri Lanka's. This subsection answers each objection in turn.

A. Objection 1: The LTTE never had full control of Tamil Eelam's territory

It is true that the LTTE never controlled the full territory of Tamil Eelam. This fact, however, is not relevant to the legal claim that Tamil Eelam is a state, nor to the fact that it fulfills Montevideo Convention's second condition. It is sufficient to show that the government of Tamil Eelam operated within a certain territory.

In its section called 'Determining Title,' *Brownlie's* notes that 'international law developed a notion of entitlement to territory well before the state itself developed as a normative concept. Thereafter title arose not simply by physical occupation (i.e. actual administration, often referred to as *effectivités*) but through acquisition in accordance with law.'[39]

According to *Brownlie's*, then, **effective administration of territory**, combined with **acquisition in accordance with law**, are the two traditional conditions needed to show title to territory. While Sri Lanka now does display effective administration of the territory, this section shows that it did not legally acquire this territory from Tamil Eelam. That territory is therefore under belligerent occupation.

1. Tamil Eelam's acquisition of territory in accordance with law

The TULF platform notes, in full historical context for this territorial delimitation, that:

> For several centuries before the advent of Europeans to Ceylon in the 16th century, the Tamils have been living in this territory under their own Kingdom. Tamils reigned supreme in this country with their own national colours and their own military forces….It is also a fact that the entire Island was under the sway of Tamil Kings at times and the Sinhalese Kings at other times. **From this background of alternating fortunes, emerged, at the beginning of the 13th century a clear and stable political fact.**
>
> At this time, the territory stretching in the western sea-hoard from Chilaw through Puttalam to Mannar and thence to the Northern Regions and in the East, Trincomalee and also the Batticaloa Regions that extended southwards up to Kumana or to the northern banks of the river Kumbukkan Oya were firmly established as the exclusive homeland of the Tamils. **This is the territory of Tamil Eelam.** [40]

The first paragraph in this quote refers to 'original title' based on the region of historic habitation, and the stabilized sovereign control of the Tamil kings. By its final sentence, the second paragraph becomes a description of Tamil Eelam's present-day territory, as the people voted on it in 1977.

The TULF election platform said, 'The Tamil United Liberation Front views the forthcoming general election as an opportunity to obtain the mandate of the Tamil Nation and on the basis of its right to self-determination, re-establish the independence of the State of Tamil Eelam, the expression of the sovereignty of the Tamil Nation.'[41] Tamil Eelam was established in the legal exercise of the Eelam Tamil people's *jus cogens* right of self-determination. Thus, the peaceful establishment of Tamil Eelam via 1977's electoral referendum was the first legal means of acquiring title to the territory of Tamil Eelam.

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[39] Crawford, *Brownlie's,* 216. See Footnote 14 above.

[40] TULF, 'Election Manifesto.' See Footnote 30 above. Emphasis added.

[41] TULF, 'General Election Manifesto.' See Footnote 30 above.

In Paragraph 109 of its *Kosovo* Advisory Opinion,[42] the ICJ held that 'persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration' had drafted Kosovo's 2008 declaration of independence. In Paragraph 122 of *Kosovo*, the ICJ concluded that 'the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.' Thus, the *Kosovo* Opinion upheld the principle that unilateral declarations of independence, in and of themselves, violate no rule of international law, nor had this particular unilateral declaration violated the domestic Constitution. Paragraph 80 of the *Kosovo* Advisory Opinion makes clear that territorial integrity cannot be invoked to deny a people's exercise of its right of self-determination, stating: 'the scope of the principle of territorial integrity is confined to the sphere of relations between States.'

Similarly, the Sixth Amendment to Sri Lanka's Constitution, which bans advocacy of secession, was not passed until 1983. The TULF had even greater legitimacy than the drafters of Kosovo's declaration of independence, as it acted entirely within the constitutional authority of the Sri Lankan Parliament. The people of Tamil Eelam decided, in its sovereign will, to form a separate state in 1977. As such, the people of Tamil Eelam established its separate legal identity as a state through electoral referendum, having voted on the territory that they wished to be incorporated into the new state.

A second means of acquiring title was 'original title.' The TULF election platform delimited the territory of Tamil Eelam on the basis that this was the area of historic habitation for the Tamil people, formerly ruled by Tamil sovereigns. It adds that, in 1619:

> The Portuguese who subdued the State of Tamil Eelam continued to govern it as a separate state. So did the Dutch who captured it, in turn from the Portuguese….This Tamil State was captured from the Dutch by the British who too continued to retain its separate status till 1833 when, for convenience of administration, it was brought under one all island authority, the Government of Ceylon.'[43]

Sabaratnam records: 'The Portuguese captured the Jaffna Kingdom by defeating King Sankili in battle.'[44] He is clear, however, that Tamil sovereigns continued to contest that status through the different phases of colonization.

> Pandara Vanniyan, the last king of Vanni [formerly part of the Jaffna Kingdom], was the most formidable of Vanni chieftains. He fought against the Dutch and the British….In a surprise attack on the British garrison in Mullaitivu in 1803 Pandara Vanniyan's forces, consisting mainly of Tamils of Vanni, overran the garrison and captured their cannons. The British forces under the command of Lt. von Drieberg withdrew to Mannar. Pandara Vanniyan's forces overran the whole of Vanni and advanced up to Elephant Pass. Vanniyan's victory was short-lived. The British forces under the command of Drieberg…defeated Pandara Vanniyan, captured and executed him on August 25, 1803.[45]

Thus, Tamil sovereigns vigorously defended their claim to their territory. (Contrast this to the behaviour of Belgium with respect to the Netherlands, which still resulted in recognition of Belgium's territorial title. In 1959's *Frontier Land* case, the ICJ ruled on the question of 'whether Belgium has lost its sovereignty [over a certain border area], by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands at different times since 1843.'[46] It found, by a majority vote, that despite more

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[42] ICJ Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (22 Jul 2010) https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf accessed 5 Feb 2022.

[43] TULF, 'Election Manifesto.' See Footnote 30 above.

[44] T. Sabaratnam, Chapter 5: 'Tamils Lose Sovereignty' in *Sri Lankan Tamil Struggle* (27 Aug 2010) https://sangam.org/2010/08/Tamil_Struggle_5.php accessed 13 Feb 2022.

[45] Sabaratnam, Chapter 6: 'Birth of a Unitary State' in *Sri Lankan Tamil Struggle* (3 Sep 2010) https://sangam.org/2010/09/Tamil_Struggle_6.php accessed 13 Feb 2022.

[46] ICJ, *Case Concerning Sovereignty Over Certain Frontier Land (Belgium/Netherlands)* (20 Jun 1959) https://www.icj-cij.org/public/files/case-related/38/038-19590620-JUD-01-00-EN.pdf accessed 13 Feb 2022.

than 100 years of Dutch effective control of the territory, and despite Belgium's acquiescence to the Netherlands' acts of sovereignty over the territory, Belgium had retained its sovereignty over—and its title to—the disputed territory.)

The Vaddukoddai Resolution notes, again, how 'the British Colonists, who ruled the territories of the Sinhalese and Tamil Kingdoms separately, joined under compulsion the territories of the Sinhalese and the Tamil Kingdoms for purposes of administrative convenience on the recommendation of the Colebrooke Commission in 1833.'[47] In 1833, the Colebrook-Cameron commission merged the two different sovereign territories. It was only from this point onward that the Tamil region of the island was even considered politically subsumed into a larger British colonial unit known as Ceylon.[48]

The Resolution is clear that its mandate was aimed at '**the restoration and reconstitution**' of the Tamil state. The Vaddukoddai Resolution and TULF platform therefore make clear that **the state of Tamil Eelam succeeds in its territorial title to the Tamil kingdom.** This kingdom's original title was undermined not only by several waves of colonization, but also—most importantly—by the British territorial and political merger of 1833.

ICJ case law bears out this claim. In the *Pedra Branca*[49] case (2008), the ICJ examined 'whether Malaysia, which contends that its predecessor—the Sultanate of Johor—held original title to Pedra Branca/Pulau Batu Puteh and retained it up to the 1840s, has established its claim.' The ICJ confirmed that 'the Sultanate of Johor had original title to Pedra Branca/Pulau Batu Puteh.' Malaysia therefore succeeded to that title.

The *Pedra Branca* decision appears to bear out the controverted 'doctrine of reversion,' as discussed in the *Right of Passage over Indian Territory* case (1960)—where Indian sovereignty was restored over territory that had belonged to the Marathi Kingdom before colonization 100 years previously. In *Right of Passage Over Indian Territory*, the tribunal ruled that a 1779 treaty signed between Portugal and the Marathi Kingdom—prior to British colonization of India—still applied in 1960. This treaty, the Court held, gave Portugal a right of passage in parts of present-day India.[50] Despite his dissenting opinion (in which he stated: 'It…does not appear that the Marathas had abandoned their *de facto* and *de jure* sovereignty over the enclaves despite the fact that they issued the necessary permits for every such passage'), Judge Quintana wrote:

> When it became independent, India made no fundamental change in the established system. We must not forget that India, as the territorial successor [to the British Empire], was not acquiring the territory for the first time, but was recovering an independence lost long since. Its legal position at once reverted to what it had been more than a hundred years before, **as though the British occupation had made no difference**.[51]

Thus, it would appear that both the Court's judgement and Judge Quintana's dissent agreed: India, when it ceased to be a colony of Great Britain, reverted to its pre-colonial status of territorial sovereignty despite more than 100 years of occupation.

The same applies to Tamil Eelam. First, the *Kosovo* Opinion (Paragraphs 109, 122, and 80) showed that the Tamil people's unilateral declaration of independence violated no existing rule, and that the 'parent state' cannot invoke territorial integrity. Second, the *Pedra Branca* case (Paragraphs 46 and 75) showed that original title can be reclaimed by a successor state after decolonization. Finally, the *Right of Passage over Indian Territory* case showed that sovereignty is not lost during colonization, nor (as in *Frontier Land*) is it lost to another power's effective territorial control.

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[47] TULF, 'Vaddukoddai Resolution.' See Footnote 29 above.

[48] See *The Colebrooke-Cameron Papers: Documents on British Colonial Policy in Ceylon, 1796–1833.* Ed. G. C. Mendis. (OUP, 1957) 2 vols.

[49] ICJ, *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (23 May 2008) paras. 46 and 75 https://www.icj-cij.org/public/files/case-related/130/130-20080523-JUD-01-00-EN.pdf accessed 13 Feb 2022.

[50] ICJ, *Case Concerning Right of Passage over Indian Territory (Portugal v India)* (12 Apr 1960) https://www.icj-cij.org/public/files/case-related/32/032-19600412-JUD-01-00-EN.pdf accessed 29 Jan 2022.

[51] ICJ, *Right of Passage Over Indian Territory*, Dissenting Opinion of Judge Morena Quintana. See Footnote 50 above. Emphasis added.

Tamil Eelam therefore holds legal title to its territory, succeeding to the title of previous Tamil kingdoms from the 13th century onwards**,** as claimed in the Vaddukoddai Resolution and TULF election platform. In voting to make this area of Tamil historic habitation their new state's territory, **the Eelam Tamil people gained title to its territory of Tamil Eelam in accordance with law.** However, the TULF was unable to provide effective administration of that territory. That role fell to the LTTE.

2. Tamil Eelam's effective administration of territory

Map 2 shows the territory under the control of the LTTE, circa 2005, in red. The orange portion of the map shows mixed control by the LTTE and Government of Sri Lanka. The yellow parts were contested in 2005, despite LTTE lacking any control over those portions of territory. Map 2 is based, in part, on the peace conditions established in the 2002 CFA, signed by both Sri Lanka and the LTTE.[52] The civilian administration protected by the LTTE was the effective administration of Tamil Eelam. However, this statement requires historical context.

Here, it is important to delineate between the Eelam Tamil people, who is the sovereign of the state, and the TULF or LTTE, who formed two different governments of the state. Despite having founded the state of Tamil Eelam, the TULF failed as an effective government.[53] As noted above, it was unable to exercise the legal title to Tamil Eelam's territory that it had acquired.

This became particularly clear in Black July 1983, when Sri Lankan government-directed pogroms killed approximately 3,000 Tamils and displaced hundreds of thousands of others. The TULF was powerless to protect them or to retaliate. Over the next few years, leadership of the movement passed from the TULF to the LTTE. During the interim, there was no clear leadership of the new State.

However, the Thimpu peace talks demonstrated that Tamil Eelam continued to exist. At Thimpu, all major armed groups plus the TULF joined forces under an umbrella group: the Eelam National Liberation Front (ENLF). On 15 August 1985, the ENLF delegation entered the following into the records of the peace talks:

> We wish to state emphatically that the six organisations comprising of the Tamil delegation at the Thimpu talks are not mere negotiators representing a clientele - we are a liberation movement who are the sole legitimate representatives of the Tamils of Eelam or Tamil Eelam. In short, we represent the Tamil Nation.[54]

International law legitimizes the ENLF's claim. As Crawford stated above: 'There is a strong presumption that the State continues to exist, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government.' The period of approximately 1983-89—in which several armed groups both combated one another and represented Tamil Eelam at the Thimpu peace talks—could be considered a period of revolutionary change in the government of Tamil Eelam.

The ILC's Comment 5 on Draft Article 10 clarifies that, where there is a struggle for power over a state,

> the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions.…The situation requires that **acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government.**

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[52] ReliefWeb, 'Agreement on a ceasefire between Sri Lanka and the Liberation Tigers of Tamil Eelam' (22 Feb 2002) https://reliefweb.int/report/sri-lanka/agreement-ceasefire-between-sri-lanka-and-liberation-tigers-tamil-eelam accessed 25 Jan 2022.

[53] See K.T. Rajasingham, 'Sri Lanka: The Untold Story' Chapter 28, *Asian Times* (Singapore, 2002) https://sangam.org/sri-lanka-the-untold-story-chapter-28/ accessed 28 Jan 2022.

[54] ELNF, 'Thimpu Talks—July/August 1985: Joint Statement made by Tamil Delegation on Question of Recognition of its Representative Character' (15 Aug 1985) https://tamilnation.org/conflictresolution/tamileelam/85thimpu/850815tamil_delegation_statement_representative_character.htm accessed 28 Jan 2022.

Here, the insurrectionary groups (including the LTTE) struggled to wrest leadership of Tamil Eelam from the established (elected) government of the TULF, due to the latter's inability to respond to the existential threat that neighbouring Sri Lanka posed to the Tamil people. This reading is present in Article 9 of the ILC Draft Articles:[55]

> **Article 9. Conduct carried out in the absence or default of the official authorities**
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Subparagraphs 1-3 of the ILC's commentary on Draft Article 9 clarify:

> 1. Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase 'in circumstances such as to call for.' Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative.
>
> 2. The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces: in effect it is a form of agency of necessity….
>
> 3. Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, **the conduct must effectively relate to the exercise of elements of the governmental authority**, secondly, **the conduct must have been carried out in the absence or default of the official authorities**, and thirdly, **the circumstances must have been such as to call for the exercise of those elements of authority**.[56]

From Black July 1983, until the LTTE emerged as the authoritative leadership of the Tamil movement for self-determination in approximately 1989, it was clear that there was, first, a **default of governmental authority's duty of protection** towards the Tamil people. Lethal pogroms and Sri Lankan army attacks[57] were, second, **circumstances such as to call for the exercise of those elements of authority**. As the statement of 15 August 1985 from Thimpu made clear, the six groups comprising the ENLF together engaged, third, in **conduct relating to the exercise of governmental authority** as a result.

Whether one sees the default of state protection towards Eelam Tamils from the perspective of the Sri Lankan state or that of the new state of Tamil Eelam under TULF leadership, the armed groups' function in 1983-89 fulfilled the requirements prescribed under Article 9 of the ILC Draft Articles. The ENLF, as its statement of 15 August 1985 indicates, represented the exercise of governmental authority. The acts of these six groups acting together formed conduct attributable to the State of Tamil Eelam. Their remarks at Thimpu confirm this.

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[55] UN International Law Commission, Draft Articles on State Responsibility. See Footnote 19 above.

[56] Emphasis added.

[57] Before walking out of the Thimpu talks, the ENLF stated:

> As we have talked here in Thimpu, the genocidal intent of the Sri Lankan state has manifested itself in the continued killings of Tamils in their homeland. In the most recent incidents which have occurred during the past few days more than two hundred innocent Tamil civilians including young children, innocent of any crime other than that of being Tamils, have been killed by the Sri Lankan armed forces running amok...

See TamilNation.org, 'Tamil Joint Statement Prior to Walk Out' https://tamilnation.org/conflictresolution/tamileelam/85thimpu/850817tamil_joint_statement_prior_to_walk_out.htm, accessed 28 Jan 2022.

By approximately 1989 (though this is only a rough date), leadership of the movement had passed to the LTTE. This is the situation foreseen under the ILC's Comment 5 to Draft Article 10: 'Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State.'

The TULF's democratic electoral mandate had established Tamil Eelam's legal title to its territory, but Sri Lanka impeded the exercise of that title, by means of army attacks and mob violence. The LTTE fought for and won leadership of the new state in order to provide military defence. As a result, under Draft Article 10(2), the LTTE's military activities legally defended Tamil Eelam's territorial title.

Draft Article 10(2) reads: 'The conduct of a **movement, insurrectional or other**, which succeeds in **establishing a new State in part of the territory of a pre-existing State** or in a territory under its administration **shall be considered an act of the new State** under international law.'[58]

Here, the ILC Draft Articles reason clearly that both non-insurrectional and insurrectional movements may legitimately establish a new state within international law. The LTTE and its civilian administration fall within the definition of 'an insurrectional movement' under Draft Article 10(2). It inherited the leadership of the movement, and thus the government of the State of Tamil Eelam, from the 'non-insurrectional' TULF—following an interim period, where there was a default of governmental authority, as described in Draft Article 9.

In Comment 4 on Draft Article 10, the ILC states:

> where the movement achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government.

Under Draft Article 10(3), legal attribution of prior acts of the movement to the new state are 'without prejudice' to whether its acts are considered internationally wrongful or not. Therefore, 'continuity between the movement and the eventual Government' means that all acts of the movement that have led up to the government of the new state can be attributed to that government. It is not relevant whether those acts are wrongful or lawful.

The 1977 electoral referendum was 'conduct' of the movement of the Eelam Tamil people that established legal title to the territory of Tamil Eelam (as described in the TULF election platform, and as shown in Map 1). Following a power struggle for leadership of the new state, this same movement—under a new leadership of state—eventually gained effective control over part of that territory. In 2002, the LTTE and the Government of Sri Lanka concluded the CFA—leading to the distribution of effective territorial control shown in Map 2. In this way, the LTTE-protected civilian government of Tamil Eelam inherited the legal title established by the TULF's electoral referendum, succeeding to the 'original title' that the Tamil sovereign held before colonization.

3. Regarding the TULF's lack of territorial control, and the imprecise borders of the LTTE's territorial control

Map 2 marks one zone in orange, which refers to mixed control of the Eastern region. Another zone in yellow refers to lack of LTTE effective control over parts of the Jaffna Peninsula and Northwestern regions of Tamil Eelam. The red zone was controlled by the LTTE. This marks the height of Tamil Eelam's territorial control.

[58] Emphasis added.

International jurisprudence agrees that precise borders are not necessary to define a state—in other words, that the Montevideo Convention's requirement for 'defined' territory does not necessarily mean hard borders.[59] In Paragraph 46 of the *Continental Shelf* Decision, the ICJ held the view that precise territorial delimitation was not relevant to the rights that could be exercised on that territory. It stated:

> The appurtenance[60] of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance **no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not**, as is shown by the case of the entry of Albania into the League of Nations (*Monastery of Saint Naoum*, Advisory Opinion, 1924, P.C.I.J., Series B, No. 9, at p. 10).[61]

Similarly, when deciding what legal ties may have existed between Western Sahara (a *de facto* state recognized by the African Union, but not by many other countries) and Morocco, the ICJ stated that it could answer the question without 'any form of territorial delimitation by the Court.'[62] In other words, Western Sahara could possess legal personality to conclude legal ties with Morocco, and the ICJ could decide on the status of both legal considerations, without the ICJ having previously determined what Western Sahara's precise territorial borders were.

Brownlie's notes that sometimes, states never agree on where to draw the boundaries between themselves. This does not prevent them from existing, nor even from co-operating.

> The need for co-operation in the exploitation of such resources in areas that are subject to competing unresolved territorial claims, or where the resources straddle maritime boundaries, has led to the practice among states of establishing joint development zones (JDZs). In other cases the establishment of a JDZ may actually be **a permanent alternative to drawing a definitive boundary line**.[63]

This description in *Brownlie's* appears to coincide strongly with the distribution of territorial control in Map 2's orange zones.

Similarly, at Paragraph 67 of the *Pedra Branca* case,[64] the ICJ cited earlier jurisprudence from the Permanent Court of Arbitration (PCA) to show:

> as pointed out in the *Island of Palmas* case, State authority should not necessarily be displayed 'in fact at every moment on every point of a territory' (Island of Palmas Case (Netherlands/United States of America), Award of 4 April 1928, RIAA, Vol. II (1949), p. 840). It was further stated in the Award that : '[I]n the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space . . . The fact that a state cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accord-

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[59] As the Sovereign Military Order of Malta's recognition at the United Nations and by most governments shows, possessing territory is not always necessary. However, that is an exceptional case to the Montevideo conditions, which does not apply to Tamil Eelam.

[60] The UN Convention on the Law of the Sea refers to 'appurtenance' as follows: 'The test of appurtenance is designed to determine the legal entitlement of a coastal State to delineate the outer limits of the continental shelf throughout the natural prolongation of its land territory to the outer edge of the continental margin.' Commission on the Limits of the Continental Shelf (13 May 1999) https://www.un.org/depts/los/clcs_new/documents/Guidelines/CLCS_11.htm, accessed 25 Jan 2022.

[61] This reference is in the original text of the *Continental Shelf* decision. That judgment of the Permanent Court of International Justice can be read here: https://jusmundi.com/en/document/decision/en-monastery-of-saint-naoum-advisory-opinion-thursday-4th-september-1924. It indeed confirms that Albania was admitted to the League of Nations before its borders had been settled. Empasis added.

[62] ICJ, *Western Sahara* Advisory Opinion, para. 158. See Footnote 28 above.

[63] Crawford, *Brownlie's*, 343. See Footnote 14 above. Emphasis added.

[64] ICJ, *Pedra Branca*, para 67. See Footnote 49 above.

> ance with the particular circumstances.' (Island of Palmas Case (Netherlands/United States of America), Award of 4 April 1928, RIAA, Vol. II (1949), p. 855.)

Paragraph 67 of *Pedra Branca* appears to explain the presence of the yellow and orange zones on Map 2.

For clarity, this subsection does not argue about how to delimit Tamil Eelam's territory. That claim was made above, in the discussion of 'original title' with respect to the TULF election platform. This subsection only argues that the TULF's and LTTE's failure to control all the territory it claimed is **not relevant** to its status as a state. Without *effectivité* over all its claimed territory, Tamil Eelam still fulfills the second condition of the Montevideo Convention.

The red and orange areas in Map 2 are sufficient to demonstrate Tamil Eelam's **effective control over territory**. The yellow and orange zones are covered by *Pedra Branca*'s (Paragraph 67) citation of the 1928 *Island of Palmas* case at the PCA. The red and orange zones denote the LTTE's **legal acquisition of territory—**in the sense that Draft Article 10(2) and Comments 4 and 5 on Draft Article 10 demonstrate continuity of the state's actions, between the movement's non-insurrectional and insurrectional phases. This legal acquisition was continuous with the TULF's establishment of legal title to that territory, as shown in *Kosovo*, *Pedra Branca* (Paragraphs 46 and 75), and *Right of Passage over Indian Territory* above.

Tamil Eelam thus has a 'defined territory,' in the sense of the Montevideo Convention, as Map 1 shows.

B. Objection 2: Today, Sri Lanka is the only government that controls the territory claimed for Tamil Eelam

The second objection to Tamil Eelam's fulfillment of the Montevideo Convention's second condition, that Sri Lanka is now in effective control of the entire territory claimed for Tamil Eelam, is also true at first glance. For example, as Oeter writes:

> There exists a limit, at least in terms of the 'declaratory theory.' Can the previous territorial sovereign indefinitely uphold claims of territorial sovereignty, even if it has factually lost all [its] control over territory and people? The phenomenon of 'stabilized *de facto* regimes' creates severe problems for a purely declaratory approach, since it is difficult to explain why long-standing factual authority of one sovereign effectively excluding the other does not constitute effective authority, and thus sovereign statehood.[65]

An opposing argument to Tamil Eelam's statehood could apply this statement in the reverse. In other words, Sri Lanka has been in effective *de facto* control of the entire disputed territory for over a decade now. Any possible competing claims to that territory ought to be extinguished by the fact that Tamil Eelam has had no effective territorial control for an extended time.

First, *Brownlie's* notes that '[b]ecause **there are no well-defined criteria for state extinction**, subjective factors may be pertinent, including **the state's own claim to continuity**, as well as **recognition by other states**.'[66] The fact of bringing a case to the ICJ would indicate a claim to continuity, as does (potentially) the existence of a government-in-exile. Similarly, Sri Lanka's irreversible recognition in 2003 also shows a subjective factor.

Second, **conditions of occupation mean that the state of Tamil Eelam continues to exist.**[67] As both Crawford and Craven have stated above, belligerent occupation rebuts the Montevideo Convention's presumption that a state must have a government: for its sovereignty resides in its people.

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[65] Stefan Oeter, 'Recognition and Non-Recognition with Regard to Secession,' *Self-Determination and Secession in International Law,* Eds. Christian Walter, Antje Von Ungern Sternberg, and Kavus Abushov (Oxford, 2014) 52.

[66] Crawford, *Brownlie's,* 427. See Footnote 14 above. Emphasis added.

[67] As a side point, a principle laid down in the *Corfu Channel* case at the ICJ stated that victim states are subject to a lower burden of evidence when they lack territorial control over the area where the injury took place. In Paragraph 47, the Court ruled:

> the fact of…exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this

Today, Tamil Eelam is in a state of belligerent military occupation. In a 2021 report, the Oakland Institute states: 'The military occupation is extreme—with roughly one military member for every six civilians.'[68] Thus, the Hague Regulations encompass Sri Lanka's military presence on the territory of Tamil Eelam. Article 42 of the 1907 Hague Regulations, annexed to the Fourth Hague Convention, reads: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'

In Paragraph 89 of its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[69] the ICJ held that 'the provisions of the Hague Regulations have become part of customary law,' and therefore applied Article 42 in the case of Israel and occupied Palestine. The Court later applied its finding in the *Wall* decision to the *Armed Activities* dispute[70] between the Democratic Republic of the Congo and Uganda.

Recognition of an occupying power as holding legitimate title to the territory it occupies would be a clear denial of justice. Especially since it was the party that formally withdrew from the CFA in 2008,[71] Sri Lanka's *effectivité* (or effective control over territory) has been secured through the precise violations of international law that a potential case at the ICJ would be seeking justice for. To deny that an occupation exists, through 'effective control' arguments, would legitimize those illegal acts and deny justice to the victims. It would undermine the very reason that international law was created in the first place: to uphold peace between nations and peoples. **Here, the international legal maxim '*ex injuria jus non oritur*' applies: law cannot arise from injustice.**

In accordance with *Kosovo* Paragraph 80, Tamil Eelam benefits from the right to territorial integrity in its relations with other states. These states include Sri Lanka.

ii. Conclusions on Defined Territory

This subsection has shown that Tamil Eelam has a defined territory: as displayed in Map 1, and as described in the TULF's 1977 election platform—which was democratically ratified. However, that territory is under military occupation in the sense of the Hague Convention Article 42, which forms part of customary international law. Neither the fact that the LTTE was never in full control of that territory, nor the fact that Sri Lanka is currently administering that territory, alters the existence of the State of Tamil Eelam and its fulfillment of the Montevideo Convention's 'defined territory' criterion.

Case law of the ICJ—such as *Frontier Land* (1959), *Right of Passage over Indian Territory* (1960), *Palestine Wall* (2004), *Armed Activities* (2005), *Pedra Branca* (2008; with reference to the PCA's 1928 *Island of Palma* case), and *Kosovo* (2010)—all bear out this reading at the ICJ. A ruling that Sri Lanka's effective control of the disputed territory gives it title to that territory would legitimize the illegal acts that it carried out to gain that effective

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> exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.

Thus, lack of effective control over territory gives Tamil Eelam a legal advantage—in that the evidence it must provide to prove injury (for example, evidence of the genocidal intent of land grabs and military occupation) is subject to a lower bar. See ICJ, *Corfu Channel (United Kingdom v Albania)* (9 Apr 1949) http://www.worldcourts.com/icj/eng/decisions/1949.04.09_corfu1.htm accessed 13 Feb 2022.

[68] Oakland Institute, *Endless War: the Destroyed Land, Life, and Identity of the Tamil People in Sri Lanka* (7 Mar 2021) https://www.oaklandinstitute.org/tamils-sri-lanka-endless-war accessed 29 Jan 2022.

[69] ICJ Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 Jul 2004) https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf accessed 29 Jan 2022.

[70] ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (19 Dec 2005) https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-00-EN.pdf accessed 29 Jan 2022.

[71] Sean McCormack, 'Government of Sri Lanka's Withdrawal from the Ceasefire Agreement' *US Department of State Archive* (3 Jan 2008) https://2001-2009.state.gov/r/pa/prs/ps/2008/jan/98381.htm accessed 29 Jan 2022.

control. Such a ruling would violate the very foundation of international law, by allowing grave international crimes to create legal relations.

Considering these facts, Tamil Eelam has a defined territory. It therefore fulfills the Montevideo Convention's second condition for statehood.

c) *Government*

In its commentary on Draft Article 9, the ILC adds: 'A general *de facto* Government…is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by [Draft] article 4…' Draft Article 4 describes the conduct of states in general. Thus, like the *Reparation for Injuries* and *Bosnian Genocide* cases at the ICJ, there is no difference under the ILC Draft Articles whether the new state is *de facto* or *de jure*.

This paper shows that Tamil Eelam has had four phases of government since it was founded by electoral referendum in 1977.

1. As demonstrated above, its first government was **the TULF** in 1977.

2. As also shown above, its second phase of state acts was then characterized by the absence of governmental authority. Here, **several groups** worked together to represent Tamil Eelam under the ENLF. They also fought one another for leadership of the state. This situation is covered by ILC Draft Article 9, which is customary international law on acts of state.

3. Its third phase of government was **the civilian administration protected by the LTTE**, from approximately 1989 until 18 May 2009. On the latter date, Tamil Eelam state functionaries surrendered to Sri Lankan forces, while waving a white flag. They were assassinated in a *prima facie* act of aggression and wartime murder.

4. Its fourth phase, from 19 May 2009 until the present day, can either be considered **a period of no government, or of one with a government-in-exile**. This situation is covered under Article 42 of the Hague Regulations, which is customary international law on occupation.

In the present fourth phase, the question of whether Tamil Eelam has no government at all, or possesses a government-in-exile, is not relevant to its existence as a state. Section I's citation of doctrine, that the total absence of government does not generally alter the presumption that the state continues to exist, bears repeating.

Tamil Eelam has therefore had at least two phases of government since it was founded in 1977, with the period of approximately 1983-89 without a clear government; and it is debatable whether it has one today. In these two cases, any lack of a government does not disqualify it from statehood under the Montevideo Convention. Neither Tamil Eelam's sovereignty (which resides in its people, not in a government), nor its title to its territory, is legally affected by either of these periods where it may have lacked government.

d) Capacity to enter into relations with other states

As shown above, Tamil Eelam's capacity to enter into relations with other states in its first phase of government was shown by **TULF MPs' right to sit in the Sri Lankan Parliament.**

In its second phase, each of the armed groups in the ENLF had entered into **relations with external powers such as India, and all of them took part in negotiations with Sri Lanka** in Thimpu, Bhutan.

In Tamil Eelam's third phase of government, as seen previously, the LTTE secured **recognition from Chandrika Kumaratunga, then-president of Sri Lanka,** for Tamil Eelam as a '*de facto* separate state.'

Today, in Tamil Eelam's fourth phase of government, the Diaspora (a part of Tamil Eelam's permanent population as defined in the Vaddukoddai Resolution) vigorously **lobbies governments** around the world. Elected and voluntary Tamil representatives also **visit UN proceedings**, speaking to diplomats and other government representatives.

Thus, since 1977, the State of Tamil Eelam has had the uninterrupted capacity to enter into relations with other states, and has continuously exercised that capacity. The Eelam Tamil people, and not any given government, is the sovereign of the state.

e) Conclusions on applying the Montevideo Convention to Tamil Eelam

Section III, using the prevailing declaratory approach toward the existence of a state, has shown that Tamil Eelam has continuously fulfilled all four conditions of the Montevideo Convention since 1977. In 1977, an electoral referendum allowed the sovereign Tamil people to succeed to the original title of the Tamil sovereign, as held prior to colonization. The Montevideo Convention codifies the customary international law to define states.

Tamil Eelam's fulfillment of the conditions of 'territory' and 'government' are open to certain types of counter-argument. However, the case law of the ICJ, customary international law in the form of the ILC Draft Articles, and state practice in situations of occupation, have demonstrated that these objections can be overcome.

Tamil Eelam possesses **a permanent population**, **territory**, **government** (or, lacking government, can appeal to conditions of occupation as evidence of its continued sovereignty), and **a capacity to enter into relations with other states**. Tamil Eelam is therefore a state with legal personality in international law. Consequently, it has standing to appear before the ICJ, and to bring complaints against Sri Lanka (and potentially, UN personnel).

IV. Consequences of Tamil Eelam's Statehood in International Law

First, this Section establishes the conditions for arguing Tamil Eelam's legal personality at the ICJ, in light of what this paper has argued above. Then, it moves on to some legal arguments that result from that legal personality.

The fact of Tamil Eelam's statehood, as established in Section III above, opens up several instruments of law to Tamil access. Since the war took place between two sovereign states, this would make the conflict between Sri Lanka and Tamil Eelam an international armed conflict (IAC). This paper's argument potentially provides Tamil Eelam's military and political personnel the protections of all the Geneva Conventions during the conflict of 1983-2009, and not just those of the customary provisions that apply to NIACs. As such, the First Protocol Additional to the Geneva Conventions (or AP-1) also applies to that period.

Finally, it would appear that invading Tamil Eelam constitutes the crime of aggression—a crime that has never been tried in a court, but which has been discussed at length within the international community.

a) Tamil Eelam's legal personality at the ICJ

As previously shown, Article 34(1) of the ICJ Statute prescribes that 'only states may be parties in cases before the Court.' The *Reparation for Injuries* and *Bosnian Genocide* ICJ cases clarifies this term to show that definition of 'states' includes *de facto* states. Article 35(3) is clear that UN membership is also not required. Article 35(2) of the ICJ Statute reads:

> The conditions under which the Court shall be open to other states [meaning, states that have not signed the ICJ Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but **in no case shall such conditions place the parties in a condition of inequality before the Court.**[72]

The UN Security Council's conditions are currently those of Resolution 9 (1946).[73] Paragraph 1 reads:

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[72] ICJ Statute. See Footnote 22 above. Emphasis added.

[73] ICJ, 'Resolution 9 (1946) of the Security Council of the United Nations: Admission of States not Parties to the Statute of the Court' (15 Oct 1946) https://www.icj-cij.org/en/other-texts/resolution-9 accessed 4 Feb 2022.

> The International Court of Justice shall be open to a State which is not a party to the Statute of the International Court of Justice, upon the following condition, namely, that such State shall previously have **deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court**, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and **undertakes to comply in good faith with the decision or decisions of the Court** and to **accept all the obligations of a Member of the United Nations under Article 94** of the Charter…

Article 94 of the UN Charter[74] reads:

1. Each Member of the United Nations undertakes to **comply with the decision** of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, **the other party may have recourse to the Security Council**, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Therefore, the occupied State of Tamil Eelam must do the following in order to appear before the ICJ:

1. The State of Tamil Eelam should deposit a declaration with the Registrar of the ICJ that it accepts the Court's jurisdiction (either for the specific question to be resolved, or in general) under the UN Charter and the ICJ Statute, and accepts the terms and rules of the Court.
2. The declaration should undertake to comply in good faith with the decision(s) of the Court under UNSC Resolution 9 (1946).
3. The declaration should submit the State of Tamil Eelam to its adversaries' recourse to the UN Security Council, if it should fail to uphold the Court's decision under UNSC Resolution 9 (1946).

As previously noted, it is probable that the informal support of an ICJ state party would ensure the ICJ Registrar's receipt of the declaration. Here is Palestine's declaration, from 4 July 2018, as a sample. (It appears that this was a temporary declaration, deposited to deal with the specific dispute of relocating the US Embassy to Jerusalem.)

"Pursuant to Security Council Resolution 9 (1946) of 15 October 1946, which provides the conditions under which the Court shall be open to States not parties to the Statute of the International Court of Justice, adopted by virtue of its powers under Article 35 (2) of the Statute of International Court of Justice, the State of Palestine hereby declares that it accepts with immediate effect the competence of the International Court of Justice for the settlement of all disputes that may arise or that have already arisen covered by Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes (1961), to which the State of Palestine acceded on 22 March 2018. In doing so, the State of Palestine declares that it accepts all the obligations of a Member of the United Nations under Article 94 of the Charter of the United Nations."[75]

b) The armed conflict as an IAC: The White Flag Incident as a war crime, and incorrect reasoning in Dutch Prosecutions of Tamil Coordinating Committee members

The *First Additional Protocol to the Geneva Conventions* (Additional Protocol I, or AP-1) is an instrument of international humanitarian law, which is the special regime of law (*lex specialis*) that applies in armed conflicts. Its provisions include that if a person clearly expresses the intent to surrender, that person is a non-combatant (Article 41[b]). Sri Lanka's potential defence to a litigation of the White Flag Incident is that the conflict was a NIAC, and AP-1 only applies to IACs.

The rule that AP-1 applies only to IACs is contained in AP-1 Article 1(3), which refers in turn to Article 2 common to the Geneva Conventions, which describes IACs. However, AP-1 Article 1(4) expands the definition of IACs to

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[74] UN, Charter of the United Nations (1945) https://treaties.un.org/doc/publication/ctc/uncharter.pdf accessed 19 Feb 2022. Emphasis added.

[75] ICJ, 'States not Parties to the Statute to which the Court may be Open' https://www.icj-cij.org/en/states-not-parties accessed 19 Feb 2022.

include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.'

In *Prosecutor v Ramalingam/LTTE* at the District Court of the Hague,[76] a Dutch court decided that the conflict was a NIAC internal to Sri Lanka. Specifically, the court cited the defence's failure to prove that Sri Lanka was a racist regime within the meaning of Article 1(4) of AP-1. Upholding this decision, the Supreme Court[77] also found that AP-1 did not apply to the armed conflict, because Sri Lanka had not signed that convention. In light of Tamil Eelam's statehood, both decisions were based on flawed reasoning.

The District Court in *Ramalingam* reasoned, in part:

> The Court finds that the armed forces of the LTTE were comparable to those of the government. Combat did not bear the marks of internal disorder and tension, like riots or other isolated and sporadically occurring acts of violence. Indeed, **the LTTE bore all the marks of an independent state**: it had a population it effectively controlled, it had its own armed forces, judiciary and tax system. **There was therefore a non-international armed conflict** between the Sri Lankan authorities and the LTTE. This conclusion is not undermined by allegations that the Tamils were discriminated against in Sri Lanka. Short of the defence sufficiently substantiating that the state of Sri Lanka can be considered a racist regime within the meaning of Article 1(4) of Additional Protocol I to the Geneva Conventions, the conflict remains non-international.[78]

There are two flaws in the foregoing. First, the LTTE was not a state, but rather protected the civilian government apparatus of Tamil Eelam. Confusing a government with a state is contrary to state practice on the issue, as *Brownlie's* showed in Section I(c) above. The government of the state is not the state itself. As *Kosovo* upheld, the people is the sovereign of the state.

Second, regardless of this characterization, it is inherently contradictory to hold that **an 'independent state'** was engaged in a **non-international armed conflict *with another state*.** The fact that Tamil Eelam (and not the LTTE) was a recognized '*de facto* independent state' made the conflict explicitly international. Thus, all of the Geneva Conventions apply to the conflict period as customary international humanitarian law.

Therefore, arguments based on Article 1(4) are unnecessary for AP-1 to apply to the conflict. Tamil Eelam's **statehood** means that AP-1 applies, as the conflict was an IAC. The District Court of the Hague's reasoning was incorrect in *Ramalingam*.

The Dutch Supreme Court's reasoning in the appeal, as Van Sliedregt explained it above, was also incorrect—insofar as it found that Sri Lanka has not signed AP-1 and thus that this treaty did not apply to the conflict. As Van Sliedregt explains it, the defendants' 'plea for combatant immunity was unsuccessful because, according to Supreme Court, combatants in non-international armed conflicts cannot claim combatant privilege.' Van Sliedregt continues, 'The LTTE had declared – before the ceasefire – that they considered themselves bound by [AP-1] but the Dutch Supreme Court held that they could not trigger such applicability unilaterally.'[79]

Additional Protocol I applies to all international armed conflicts regardless of who has signed it: it is customary international humanitarian law. The *Continental Shelf* decision is a source of international law, under ICJ Statute Article 38's definition. As Paragraph 73 of *Continental Shelf* demonstrates, widespread and representative

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[76] See: International Crimes Database, *Prosecutor v Ramalingam/Liberation Tigers of Tamil Eelam* https://www.internationalcrimesdatabase.org/Case/835/Ramalingam-Liberation-Tigers-of-Tamil-Eelam-(LTTE)/ accessed 4 Feb 2022.

[77] Dutch Supreme Court, 4 April 2017, ECLI:NL:HR:2017:575, Nederlandse Jurisprudentie 2018/107, cited in E. Van Sliedregt, 'One Rule for Them: Selectivity in International Criminal Law' 34(2) *Leiden Journal of International Law* 283-290.

[78] *The Prosecutor v. Ramalingam/Liberation Tigers of Tamil Eelam (LTTE),* District Court of the Hague (21 Oct 2011) https://www.internationalcrimesdatabase.org/Case/835/Ramalingam-Liberation-Tigers-of-Tamil-Eelam-(LTTE)/ accessed 4 Feb 2022. Emphasis added.

[79] The LTTE's adoption of AP-1 demonstrates that Tamil Eelam had greater humanitarian concern for Sri Lanka's combatants than Sri Lanka had for Tamil Eelam's: but this observation carries no legal consequences.

adoption of a treaty by specially affected states incorporates that treaty into the body of customary international law.

Additional Protocol I currently has 174 state signatories, including states specially affected by its provisions.[80] Additional Protocol I therefore enjoys widespread adoption, and this has made it an instrument of customary international law since its entry into force in 1978. Thus, Sri Lanka's failure to sign AP-1 does not affect that state's obligation to follow the rules contained within the treaty. The LTTE did not attempt to trigger AP-1's applicability unilaterally; it expressed Tamil Eelam's sovereign will to be incorporated into the international humanitarian legal regime.

The conflict was an IAC because Tamil Eelam is a state, and this fact bears legal consequence. Again, this is irrespective of whether Sri Lanka is a 'racist regime.' Therefore, the defendants reasonably could claim combatant privilege. The Dutch Supreme Court was wrong in its decision in the *Ramalingam* appeal.

As seen above, AP-1 covers violations that include the extrajudicial killings of surrendering combatants, as in the White Flag Incident. By means of these killings, Sri Lanka violated customary international humanitarian law in the form of AP-1. Because Tamil Eelam is a state, the conflict was an IAC. In an IAC, AP-1 applies as customary international law. The White Flag Incident was a war crime, and Sri Lanka's state responsibility for that crime may be litigated before the ICJ. (Arguments that the White Flag Incident was a crime against humanity, and an act of genocide, are available upon request. Tamil Eelam's statehood does not affect their status as crimes.)

c) The armed conflict as an IAC: The crime of aggression and the obligation to settle disputes peacefully

This subsection focuses on Sri Lanka's state responsibility for aggression, which may be litigated at the ICJ. This is different from individual criminal responsibility for that crime, which may be prosecuted at the ICC, using a separate regime of jurisdiction and admissibility. The ILC's commentary on Draft Article 58 notes:

> Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out. Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them.

In other words, litigating state responsibility for an internationally wrongful act does not affect individual criminal responsibility for the same act. This section thus examines how Tamil Eelam's statehood means that Sri Lanka's invasion of Tamil territory, and assassination of its leading figures, constitute the crime of aggression.

United Nations General Assembly Resolution 3314[81] first defined the crime of aggression. Article 1 reads, in part, that 'aggression is the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State.' Article 5(1) notes: '**No territorial acquisition** or special advantage resulting from aggression is or **shall be recognized as lawful**.' Article 3(a) similarly speaks of **invasion, attack, military occupation, and annexation** of the territory of another state as examples of aggression. Article 7 links the prohibition on aggression with the right of peoples to self-determination and their right to struggle against racist regimes. Most importantly, Article 5(2) of Resolution 3314 prescribes that 'a war of aggression is a crime against international peace. **Aggression gives rise to state responsibility.**'[82]

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[80] ICRC, *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) https://ihl-databases.icrc.org/ihl/INTRO/470 accessed 4 Feb 2022.
[81] See Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, 'Resolution 3314' https://crimeofaggression.info/documents/6/General_Assembly_%20Resolution_%203314.pdf, accessed 4 Feb 2022.
[82] Emphasis added.

Resolution 3314's definition, due to its widespread adoption by specially affected states, is customary international law. This is shown by the fact that much of its wording is incorporated directly into the ICC Statute's Article 8*bis*, which deals with criminal responsibility for aggression, as customary international law. It appears that aggression has never yet been brought before a court.

Sri Lanka's territorial acquisition of Tamil Eelam's territory, this paper argues, was established through grave violations of international law such as genocide and crimes against humanity. The list of crimes now expands to include invasion, attack, annexation, and military occupation (as argued above)—all recognized as forms of aggression. These violations are all the more heinous because they were intended to reverse Sri Lanka's recognition of Tamil Eelam, including by withdrawing from the CFA in 2008. Each of these acts violated Sri Lanka's obligation to settle its disputes peacefully.

The peaceful settlement of disputes is recognized as a *jus cogens* principle. According to Cebada Romero, the '[p]eaceful settlement of international disputes is a fundamental principle of international law of a peremptory character. It is formulated as such in the UN Charter (Article 2.3), and developed in UNGA Resolution 2625 (XXV) on Principles of International Law concerning Friendly Relations and Co-operation among States.'[83]

The general principle that international law exists to preserve peace between nations has been examined at great length within the international legal system. It is recognized as one of the primary purposes that the ICJ was established, and one of the most important roles that it plays today. In Judge Elaraby's Declaration on the *Armed Activities* case at the ICJ, he held that

> The promise and possibilities of the Court, as the principal judicial organ of the United Nations entrusted with the responsibility of settling disputes, requires that States submit their disputes to the Court and accept its jurisdiction. The duty of States to settle their disputes peacefully and in accordance with international law is emphasized in a number of important provisions enshrined in the Charter of the United Nations. Efforts to realize the objective of wider acceptance of the compulsory jurisdiction of the Court have been exerted on many occasions in recent years. The Manila Declaration on the Peaceful Settlement of International Disputes was adopted by the General Assembly on 15 November 1982 (A/RES/37/10)[84] with a particular emphasis on the importance of States recognizing the compulsory jurisdiction of the Court.[85]

The UN Charter and the Manila Declaration are thus cornerstones of the international community's endorsement of the general legal principle that disputes should be settled peacefully. In both, this principle is inextricably linked with the right of self-determination. Article 1(1) of the UN Charter prescribes the peaceful settlement of international disputes, while Article 1(2) enshrines the principle of self-determination. However, Tamil Eelam is not a UN Member State. By contrast, the Manila Declaration is a treaty that has arguably become part of customary international law, on the basis of its near-universal and representative adoption by specially affected states.

In Part I, the Manila Declaration refers to the obligations it imposes on '**all States.**' This includes Article I(2): '**Every state** shall settle its international disputes exclusively by peaceful means.' It also includes Article I(5): '**States** shall seek in good faith and in a spirit of co-operation an early and equitable settlement of their international disputes by any of the following means: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement…or other peaceful means of their own choice, including good offices.'

Contrast this to the Declaration's language in Part II: at the beginning each of its first four articles, Part II uses the words **'Member States'** when referring to countries that belong to the UN. Part I of the Manila Declaration was clearly drafted to apply both to UN Member States and to non-Member States.

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[83] Alicia Cebada Romero, 'Peaceful Settlement of Disputes,' *Oxford Bibliographies* (28 Jul 2021) https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0145.xml accessed 29 Jan 2022.

[84] See the full text at https://peacemaker.un.org/sites/peacemaker.un.org/files/GARES_ManilaDeclaration_ARES3710(english)_0.pdf

[85] ICJ, *Armed Activities* (2006) Declaration of Judge Elaraby https://www.icj-cij.org/public/files/case-related/126/10447.pdf accessed 29 Jan 2022. See Footnote 70 above.

The Manila Declaration, arguably an instrument of customary international law due to its widespread adoption, links self-determination with the peaceful settlement of disputes.[86] It consciously imposes these obligations on 'all states' as opposed to UN 'Member States.' As a UN Member State, Sri Lanka's interests are specifically affected by this Declaration, just as its obligations as an ICJ state party are implicated in Judge Elaraby's opinion above.

This section also recalls Section III's contention that 'to deny that an occupation exists, through "effective control" arguments, would legitimize those illegal acts and deny justice to the victims. It would undermine the very reason that international law was created in the first place: to uphold peace between nations and peoples. **Here, the international legal maxim "*ex injuria jus non oritur*" applies: law cannot arise from injustice.**'

On the basis of these facts, the ICJ could rule that Sri Lanka's occupation of Tamil Eelam is a violation of UNGA Resolution 3314, and that it secured effective control of Tamil Eelam's territory through the crime of aggression. This gives rise to Sri Lanka's state responsibility, and nullifies Sri Lanka's claim to the territory under Article 5(1) of the Resolution.

The ICJ might also rule that specific UN personnel bear responsibility for allowing this to happen, as its Secretary-General Ban Ki-Moon acknowledged shortly afterward. This paper makes note of that route, but does not explore it in detail.

Article 31 of the ILC Draft Articles on State Responsibility reads:

> 1. the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

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[86] In Paragraph 10 of the UN's *Handbook on the Peaceful Settlement of Disputes between States,* we read that

> The links between this principle [of equal rights and self-determination of peoples] and the principle of peaceful settlement of disputes are highlighted in the Manila Declaration which
>
> > (1) reaffirms in its eighth preambular paragraph the principle of equal rights and self-determination as enshrined in the Charter and referred to in the Friendly Relations Declaration and in other relevant resolutions of the General Assembly;
> >
> > (2) **stresses in its ninth preambular paragraph the need for all States to desist from any forcible action which deprives peoples, particularly peoples under colonial and racist regimes or other forms of alien domination, of their inalienable right to self-determination, freedom and independence;**
> >
> > (3) refers in section I, paragraph 12, to the possibility for parties to a dispute to have recourse to the procedures mentioned in the Declaration 'in order to facilitate the exercise by the peoples concerned of the right to self-determination;' and
> >
> > (4) declares in its penultimate paragraph that 'nothing in the present Declaration could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly **peoples under colonial or racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.'**

UN Office of Legal Affairs, Codification Division, *Handbook on the Peaceful Settlement of Disputes Between States* OLA/COD/2394 https://www.un.org/law/books/HandbookOnPSD.pdf accessed 29 Jan 2022. Emphasis added.

Paragraphs 18 and 19 of the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' prescribe reparations adequate to the crimes committed:

> 18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
>
> 19. Restitution should, whenever possible, **restore the victim to the original situation** before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, **enjoyment of human rights,** identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.[87]

In the case of Tamil Eelam, restitution for Sri Lanka's crime of aggression, and ongoing military occupation, includes restoring the Tamil people to a situation of the enjoyment of the human right of self-determination.

An Advisory Opinion, called for by the General Assembly,[88] might establish that the UN's failure—to protect the Tamil people, by allowing such acts of aggression against a sovereign state—calls for a remedy. An Advisory Opinion would not impose a binding obligation on any state or group of states.

Or, a case brought in Tamil Eelam's own name, with the Court establishing jurisdiction *ratione personae* for Tamil Eelam to stand before it as a state, would impose a legal obligation on Sri Lanka (and potentially any other state found to have aided it in committing the crime of aggression) to make reparations. Failure to make reparations would result in a referral to the UNSC for sanctions.

Restoration of the enjoyment of human rights, and reparations for the failure to protect the Tamil people, could take the form of a UN-supervised process to end the military occupation of Tamil Eelam's territory. Such a referendum could re-establish Tamil Eelam's effective government, reaffirm its historic title to its territory, and restore Tamil Eelam's effective control over its territory, through mechanisms of international legality.

V. Conclusion

This section summarizes this paper's conclusions about Tamil Eelam's legal personality at the ICJ.

1. The State of Tamil Eelam has existed since the TULF held the electoral referendum of 1977. The Eelam Tamil people, which fulfills each of the 'Kirby Conditions' for peoplehood, exercised its right of self-determination under ICCPR Article 1 and ICESCR Article 1 to form an independent state—based on the TULF election platform and the Vaddukoddai Resolution.

    a. The Vaddukoddai Resolution and TULF election platform emphasized their mandate to restore the historical existence of a pre-colonial Tamil state. They made a territorial claim in doing so. Through the 1977 electoral referendum, Tamil Eelam legally acquired title to this historically Tamil territory, through a non-insurrectional movement in the sense of Article 10(2) of the ILC Draft Articles. This acquisition was valid under both the Sri Lankan Constitution that prevailed in 1977, and under international law as discussed in *Frontier Land* (1959), *Right of Passage over Indian Territory* (1960), *Pedra Branca* (2008) and the *Kosovo* Advisory Opinion (2010).

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[87] OHCHR, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx accessed 5 Feb 2022. Emphasis added.

[88] ICJ, 'Organizations and Agencies Authorized to Request Advisory Opinions' https://www.icj-cij.org/en/organs-agencies-authorized accessed 19 Feb 2022.

b. The LTTE defended that legal title (in the sense of continuity established under Article 10[2] of the ILC Draft Articles, and Comments 4 and 5 on Draft Article 10) to exercise effective control over parts of Tamil Eelam's territory as an insurrectional movement.

c. Sri Lanka's claim to territorial integrity is subject to Tamil Eelam's *jus cogens* right of self-determination and to the *jus cogens* obligation to settle disputes peacefully. As the ICJ established in *Kosovo* Paragraph 80, Sri Lanka may not invoke territorial integrity to prevent the Tamil people from exercising its right of self-determination. Rather, **Tamil Eelam** benefits from the right to territorial integrity in its relations with other states.

d. Sri Lanka's acquisition of Tamil Eelam's territory was accomplished through the crime of aggression. Under Article 5(1) of UNGA Resolution 3314, this fact nullifies Sri Lanka's claim to that territory.

2. Since 1977, the State of Tamil Eelam has fulfilled all four conditions of the Montevideo Convention: a permanent population, territory, government, and a capacity to enter into relations with other states.

   a. Recognition is not necessary for the state to exist, but Sri Lanka has granted its recognition to Tamil Eelam under Article 7 of the Montevideo Convention. That recognition cannot be revoked, as Article 6 of the Convention prescribes.

   b. Exact territorial delineation is not necessary for the ICJ to rule on Tamil Eelam's legal rights and responsibilities. This is upheld in the ICJ's *Continental Shelf* decision, its *Western Sahara* Advisory Opinion, and *Pedra Branca*'s citation of the Island of Palmas case at the PCA.

   c. In the period of 1983-89 where Tamil Eelam lacked a clear government, ILC Draft Article 9 covers the acts of the ENLF and its member organizations as acts of state.

   d. During the period of 2009 to the present day, Hague Regulations Article 42 indicates the existence of a military occupation. Occupation and colonization do not extinguish the sovereignty of a state, nor its title to territory—as shown in the *Frontier Land* and *Right of Passage over Indian Territory* ICJ decisions, and UNGA Resolution 3314. The fact of an occupation rebuts the presumption of Montevideo Convention Article 1, that the state should have a government.

   e. The *Reparation for Injuries* case established, and the *Bosnian Genocide* case affirmed, that *de facto* states have legal personality to appear before the ICJ.

3. In light of points 1 and 2 above, Tamil Eelam has legal personality to appear before the ICJ. As a non-State Party to the ICJ Statute, it may benefit from the rules of access to the Court that are outlined in ICJ Statute Article 35(2) and UN Security Council Resolution 9 (1946).

4. Tamil Eelam's statehood means that the armed conflict with Sri Lanka was an IAC. Therefore, all of the Geneva Conventions, AP-1, and several other instruments of international humanitarian law fully cover the period of 1983-2009. Sri Lanka's failure to ratify AP-1 is irrelevant—since AP-1 is an instrument of customary international law, due to widespread adoption by specially affected states (as in Paragraph 73 of *Continental Shelf*). The LTTE indicated its willingness to be bound by AP-1 early in the conflict. This means that Tamil Eelam may litigate Sri Lanka's state responsibility for war crimes in an IAC, and aggression; in addition to crimes against humanity and genocide. It also means that LTTE personnel benefit from combatant privilege.

5. The UN failed in its responsibility to protect the people of Tamil Eelam, as Secretary-General Ban Ki-Moon has acknowledged. Though it benefits from general legal immunity, an Advisory Opinion might establish that responsibility in a non-binding manner. Reparations for its failure to protect could include supervising a referendum to affirm Tamil Eelam's sovereignty over its territory and to end Sri Lanka's military occupation of that territory. Individual UN personnel might be brought to justice through

alternative dispute resolution methods, as the ICJ might determine their eligibility for these types of justice.

In the spirit of *Kural* 772, it is 'better to bear the spear that missed the elephant, than the arrow that hit the rabbit.'

London, 19 February 2022