

INTERNATIONAL CRIMINAL COURT		
	<p>Luis Moreno – Ocampo Office of the Prosecutor Maanweg 174, 2516 AB The Hague Netherlands.</p>	

Request submitted by:  
SWISS COUNCIL OF EELAM TAMILS (SCET), and  
TAMILS AGAINST GENOCIDE (TAG)

ICC Prosecutor

v.

PALITHA KOHONA



Swiss Council of Eelam Tamils  
Postfach 311  
3072, Ostermundigen  
Switzerland.

Tamils Against Genocide  
P.O.Box 529  
Glen Echo, Maryland 20812  
USA.

**DATE:** 17 JANUARY 2011  
**FROM:** SWISS COUNCIL OF EELAM TAMILS (SCET)<sup>1</sup>/TAMILS AGAINST GENOCIDE (TAG)<sup>2</sup>  
**TO:** LUIS MORENO-OCAMPO  
PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

**ARTICLE 15 REQUEST TO INITIATE WAR CRIME INVESTIGATIONS LEADING TO THE  
ISSUANCE OF AN ARTICLE 58 WARRANT OF ARREST OF DUAL AUSTRALIAN-SRI  
LANKAN NATIONAL PALITHA KOHONA**

*RE: EXTENDED JOINT CRIMINAL ENTERPRISE LIABILITY OVER DIRECT OR  
INDIRECT PARTICIPATION BY ACT OR OMISSION IN THE EXTRA-JUDICIAL  
KILLING OF 3 LTTE HORS DE COMBAT SURRENDERING UNDER A WHITE FLAG  
TO THE SLA ON OR ABOUT MAY 18 2009 NEAR THE GOSL-DESIGNATED SAFE  
ZONE IN MULLAITHEEVU DISTRICT, EASTERN SRI LANKA*

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<sup>1</sup> SCET is a democratically elected Swiss Tamil civil and political rights advocacy group located at Swiss Council of Eelam Tamils, Postfach 311 3072 Ostermundigen. SCET's web address is [www.scet.ch](http://www.scet.ch).

<sup>2</sup> TAG is a US-based legal advocacy group located at P.O. Box 529 Glen Echo MD 20812-0529 USA. TAG's web address is [www.tamilsagainstagainstgenocide.org](http://www.tamilsagainstagainstgenocide.org)

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## I. EXECUTIVE SUMMARY

SCET/TAG petition the Prosecutor of the International Criminal Court (ICC) to submit a request under Article 13(c) and his Article 15 *proprio motu* powers to the Pre-Trial Chamber to authorize the commencement of investigations leading to the possible issuance of an Article 58 warrant of arrest of dual Australian-Sri Lankan national PALITHA KOHONA. We assert that PALITHA KOHONA is culpable for his direct or indirect participation by act or omission in the extra-judicial killing of Liberation Tigers of Tamil Eelam (LTTE) hors de combat after their surrender into de facto or de jure Sri Lankan Army (SLA) custody by waving a white flag as is customary and as instructed.

The perfidious negotiations in which PALITHA KOHONA was involved which induced the LTTE hors de combat to willfully surrender under presumptive customary international humanitarian law protections applicable in armed conflicts of both an international and non-international character, and the actual extra-judicial killings of these LTTE members despite their lawful combatant immunity arising from their status of either hors de combat or prisoner of war, constitute grave breaches of the 1949 Geneva Conventions, and constitute war crimes as understood within the scope of customary international humanitarian law, and as proscribed by the Rome Statute under Article 8(2)(b)(vi) and Article 8(2)(c)(i).

As to applicable law under the Rome Statute, Eelam War IV, generally considered part of the post-9/11 War on Terror by the Government of Sri Lanka (GoSL) and the international community, occurring in predominantly the Tamil-dominant Vanni Region of the Northeastern provincial territory of the Republic of Sri Lanka between about November 2005 and May 17 2009, was an internationalized internal armed conflict whose character possessed both international and non-international elements.

As such, the bodies of law of international and non-international armed conflict are concurrently or in the alternative selectively applicable for the time period delimited by the general commencement and general cessation of armed hostilities between the GoSL and LTTE during Eelam War IV. Therefore, if the Court considers Eelam War IV as either an internationalized internal armed conflict or an armed conflict of an international character, the post-surrender extra-judicial killing of LTTE hors de combat would violate Article 8(2)(b)(vi). Alternatively, if the Court considers Eelam War IV as an armed conflict of a non-international character, the post-surrender extra-judicial killing of LTTE hors de combat would violate Article 8(2)(c)(i).

The post-surrender extra-judicial killing of Mr. MAHINDRAN BALASINGHAM (LTTE nom de guerre NADESAN), Mr. SEEVARATNAM PULEEDEVAN (LTTE nom de guerre PULIDEVAN), and possibly LTTE nom de guerre RAMESH, the three LTTE hors de combat surrendering by waving a white flag to enter de facto or de jure SLA custody on or about May 18 2009,

was carried out through an extended joint criminal enterprise comprised of (1) a negotiation-related community of co-perpetrators, (2) an execution-related community of co-perpetrators, and (3) an innocent neutral community of intermediary human agents.

The negotiation-related community of co-perpetrators, whose objective was to induce the volitional surrender of the LTTE hors de combat, included Australian national PALITHA KOHONA. PALITHA KOHONA substantially participated in these perfidious negotiations which knowingly misused the promise and presumption of white flag humanitarian law protections in order to induce by deception the volitional surrender of the LTTE hors de combat into the custody of the execution-related community of co-perpetrators, presumably soldiers of the 58th division of the SLA or paramilitants under the military command and control of Ex. Maj. Gen. SHAVENDRA SILVA, currently Sri Lanka's Deputy Permanent Representative to the United Nations.

Noting that while the acts of post-surrender extra-judicial killing of the three LTTE hors de combat were allegedly performed by a community of co-perpetrators of non-Australian nationality, the participation of dual Australian-Sri Lankan national PALITHA KOHONA in the perfidious negotiations which created conditions conducive to the post-surrender extra-judicial killing, the shared objective of the extended joint criminal enterprise, is legally sufficient to render in whole or in part the extended joint criminal enterprise as an Australian situation that falls within the jurisdiction *ratione materiae* and *jurisdiction ratione personae* of the Court.

This Request reiterates that at the pre-admissibility stage of an Article 15 submission to the Prosecutor, the appropriate evidentiary threshold to determine authorization of investigations into crimes within the jurisdiction of the Court is a "reasonable grounds to believe" and not a "beyond reasonable doubt" threshold. The Request notes that at this stage of procedure, the inference of reasonable grounds to believe the crime was committed need not be the only reasonable inference that can be drawn from the available body of direct and circumstantial evidence.

Therefore, from the available body of direct and circumstantial evidence and relevant reasonable inferences which may be drawn concerning the involvement of Australian national PALITHA KOHONA in this extended joint criminal enterprise, SCET/TAG assert that there exist reasonable grounds to believe that PALITHA KOHONA is individually criminally responsible for participation in the commission of a crime within the jurisdiction of the Court.

The Prosecutor on this basis possesses the power to proceed *proprio motu* to request the pre-Trial Chamber to authorize initiation of investigations into the extended joint criminal enterprise.

SCET/TAG note that this investigation may lead to the issuance of a warrant of arrest of PALITHA KOHONA, pursuant to Article 58, thereby triggering Australia's obligation to cooperate with the Court's investigations into the crime, as required by Australia's Rome Statute

signatory status and Australia's domestic implementing legislation of the Rome Statute which entered into force in Australian jurisdiction in 2002.

SCET/TAG also note that PALITHA KOHONA's physical presence in the territory of Sri Lanka or the United Kingdom would not necessarily obstruct or obviate the Court's ability to investigate the crime or enforce the warrant of arrest. If PALITHA KOHONA is present in the territory of Sri Lanka during any time relevant to the Court's consideration of investigation into the crime, Sri Lanka's Rome Statute non-signatory status would not obstruct the Court's investigations or Australia's ability to respect its binding obligation to cooperate with such investigations. If the Pre-Trial Chamber were to authorize investigations, Australia's obligation to cooperate with the Court's investigation would include requesting the extradition of PALITHA KOHONA from Sri Lanka to Australia, an option available to Australia's Attorney-General pursuant to Australia's 1966 London Scheme arrangement with Commonwealth countries - including Sri Lanka - as amended in November 2002, and as implemented by the Extradition (Commonwealth Countries) Regulations Act of 1998 under Australian domestic law. Alternatively, given that the United Kingdom is a signatory to the Rome Statute, under factual circumstances where PALITHA KOHONA is physically present in the territory of the United Kingdom, enforcing the Court's Article 58 warrant of arrest of PALITHA KOHONA would fall within the United Kingdom's general Article 86 obligations to cooperate with the Court's investigation and prosecution of crimes within the jurisdiction of the Court.

## **II. REQUEST**

1. Pursuant to Article 13(c) and Article 15, this submission requests the Prosecutor to submit a request *proprio motu* to the Pre-Trial Chamber to authorize the initiation of an investigation leading to the issuance of an Article 58 warrant of arrest of dual Australian-Sri Lankan national PALITHA KOHONA for his direct or indirect participation by act or omission in an extended joint criminal enterprise to extra-judicially kill 3 LTTE hors de combat, who jointly surrendered by waving a white flag into the de facto or de jure custody of the the SLA on or about 18 May 2009, in Mullaitheevu District in Eastern Sri Lanka, in or nearby the final GoSL-designated Safe Zone in Mullivaiykal.

### **III. THE ACCUSED**

1. For all times relevant to this request, PALITHA KOHONA possessed dual Australian-Sri Lankan nationality. PALITHA KOHONA acquired his Sri Lankan citizenship by his birth in Matale province, Sri Lanka. After living and working in Australia for several years, PALITHA KOHONA became a naturalized Australian citizen.

2. While living and working in Australia for several years, since at least 1983, PALITHA KOHONA was employed by the Department of Foreign Affairs and Trade of Australia.

3. In 1988, PALITHA KOHONA led the Australian delegation to the United Nations Conference on Trade and Development (UNCTAD).

4. In 1989, the Australian government posted PALITHA KOHONA as part of the Australian Permanent mission in Geneva, Switzerland with responsibilities over environmental issues.

5. In 1992, PALITHA KOHONA was attached to the Uruguay Round of Trade Negotiations institutional mechanisms and dispute settlement unit and headed the Trade and Investment Section of the Department in Australia under the General Agreements on Tarrifs and Trade (GATT)/World Trade Organization (WTO).

6. Asserting that in addition to PALITHA KOHONA's Australian naturalized citizenship, through the course of his employment in Australia, PALITHA KOHONA represented the Australian government in the international arena in the areas of trade, development, and environmental issues.

7. PALITHA KOHONA was Sri Lanka's Permanent Representative to the United Nations during the times relevant to his participation in the commission of the crime detailed in this request.

#### **IV. GENERAL LEGAL ALLEGATIONS**

##### **A. AUSTRALIA/SRI LANKA: NULLEM CRIMEN SINE LEGE**

1. Recalling that Australia signed the First, Second, Third, and Fourth 1949 Geneva Conventions on January 4, 1950, and ratified them on October 14, 1958.

2. Recalling that Australia signed the 1977 Protocol I and II to the 1949 Geneva Conventions December 7, 1978, and ratified them on June 21, 1991.

3. Recalling that Australia signed the Rome Statute on December 9, 1998, and ratified it on July 1, 2002.

3.1 Recalling that Australian parliament assented to the 2002 International Criminal Court Act in June 27 2002, the implementing legislation of crimes under the Rome Statute in Australian domestic law to facilitate compliance by Australia with obligations under the Rome Statute.

3.2 Asserting that if an Australian extradition request for an Australian national present in the territory of Sri Lanka is necessary to cooperate with the Court's investigation and prosecutions of crimes falling within the jurisdiction of the Court, Australia may satisfy its general binding Article 86 obligations to cooperate with the Court by initiating Sri Lanka-to-Australia extradition procedures in Australian law provided by Australia's 1966 London Scheme arrangement with Commonwealth countries - including Sri Lanka - as amended in November 2002, and as implemented by the Extradition (Commonwealth Countries) Regulations Act of 1998.

4. Recalling that Sri Lanka signed and ratified and thereby entered in to force by February 28, 1959 the First, Second, Third and Fourth Geneva Conventions of 1949.

5. Recalling that Sri Lanka is a non-signatory to the 1977 Additional Protocol II to the Geneva Conventions which set forth a binding doctrine of the *jus in bello* of armed conflict of a non-international character.

6. Recalling that Sri Lanka is a non-signatory to the 1998 Rome Statute.

##### **B. AUSTRALIA'S ROME STATUTE TREATY OBLIGATIONS**

7. Recalling that the law of armed conflict rests upon a judicious balance between military operational needs and humanitarianism, within which military necessity and humanity are primary concepts.

8. Recalling that on September 11, 2001 (heretofore '9/11'), 19- individuals of international terrorist organization Al Qaeda hijacked 4 American passenger planes and coordinated a series of attacks on several targets in the territorial United States, including the Twin Towers of the World Trade Center in New York city, New York.

9. Recalling that following 9/11 the United States of America launched a global national security policy now commonly referred to as the War on Terror or Global War on Terror which over the past decade has challenged basic fundamental customs and norms of international humanitarian law, including but not limited to: (i) the definition of combatant and non-combatant, (ii) the definition of international and non-international armed conflict (iii) and the enforceability of customary international humanitarian legal principles such as distinction, proportionality, lawful combatant immunity arising from hors de combat or prisoner of war status, and non-combatant immunity applicable generally to civilian populations living under conditions of armed conflict.

10. Asserting that after 9/11, the normative model of military engagement by States collectively and progressively shifted from the customary norm of inter-state warfare to a new model of war of States against armed, globally or transnationally networked, non-State armed actors.

11. Since the November 2005 Sri Lankan Presidential election of Mahinda Rajapakse, the Rajapakse administration progressively reframed the ethnic conflict as a war combatting terrorism within the post-9/11 Global War on Terror framework.

12. Considering that within the hybrid theaters of military operations of post-9/11 counter-terrorism warfare, the creation of and engagement in by States of an elementarily novel paradigm of international warfare against intra-state or transnational networks of non-state armed actors has operated over the past decade to progressively erode the legal force and protections of customary international humanitarian law principles, including distinction, proportionality, and lawful combatant immunity.

13. With deference to the customary international law principle of *pacta sunt servanda* codified in Article 26 of the 1969 Vienna Conventions, asserting that Australia's Rome Statute signatory status establish a binding obligation to exercise its criminal jurisdiction or cooperate with international criminal law proceedings to hold accountable Australian nationals who are individually criminally responsible for Rome Statute violations which fall within the jurisdiction of the Court as set forth in Articles 5, 8, 11, 12, 13, and 25.

**C. EELAM WAR IV: INTERNATIONALIZED INTERNAL ARMED CONFLICT POSSESSING BOTH AN INTERNATIONAL AND NON-INTERNATIONAL CHARACTER**

14. Reaffirming that at least three distinct definitions of internal armed conflict considered customary under general international law are provided by (i) Common Article 3 of the 1949 Geneva Conventions; (ii) 1977 Protocol II Additional to the Geneva Conventions; (iii) 1998 Rome Statute.

15. Noting that under the customary laws of armed conflict, some internal armed conflicts with sufficient international characteristics are considered to be or are legally cognizable as international armed conflicts, triggering the application of the body of law for armed conflicts with an international character.

16. Noting that pursuant to Common Article 2 of the Geneva Conventions, the circumstance that the conduct of armed hostilities in an armed conflict did not take place between two or more States does not necessarily deprive that armed conflict from possessing an international character, or alternatively both an international and non-international character.

17. Asserting that Eelam War IV between the GoSL and LTTE occurred between in or about November 2005 and May 17 2009 in predominantly the Tamil-dominant Vanni Region of the Northeastern provincial territory of the Republic of Sri Lanka.

18. Asserting that the humanitarian consequences of armed confrontations between the GoSL and LTTE, defined by the SLA's systematic use of indiscriminate weapon systems in a theatre of operations where civilian objects and military objectives were temporally indistinguishable, concentrated in the Tamil-dominant Vanni Region including the government-designated Safe Zones in Northeastern Sri Lanka, where by May 17 2009, it has been reported over 40,000 Tamil civilians were killed, and about 30,000 disabled due to serious physical injuries.

19. Asserting that Eelam War IV is legally cognizable as an armed conflict of an international character or an internationalized internal armed conflict.

19.1 Asserting that while Eelam War IV possessed non-international elements, factual bases elaborated upon in paragraph 20 of this section preclude the reasonable and legal categorization of Eelam War IV as an armed conflict with exclusively a non-international character.

19.2 Asserting that Eelam War IV is legally cognizable as a post-9/11 internationalized internal armed conflict, possessing both international and non-international elements, thereby triggering the parallel bodies of humanitarian law applicable to armed conflicts of an international and non-international character.

20. Asserting that the factual bases to support the legal cognizability of Eelam War IV's international character include, but is not limited to: (1) LTTE's National Liberation War for Tamil Self-determination (2) International and National Recognition of Belligerency (3) Post-9/11 War on Terror (4) International Humanitarian Consequences.

**i. LTTE'S NATIONAL LIBERATION WAR FOR TAMIL SELF-DETERMINATION**

20.1 Reaffirming that under general international law, wars of national liberation which exercise the right to internal or external self-determination in a struggle against colonial domination or alien occupation or against racist regimes, are considered or deemed as international armed conflicts within the scope of and for the purposes of Additional Protocol I to the Geneva Conventions.

20.1.1 Reaffirming that Additional Protocol I to the Geneva Conventions explicitly provides that "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination", automatically qualify as international armed conflicts for the purposes of the Protocol.

20.2 Reaffirming that starting in the 1960s during European-sponsored decolonization in Africa and Asia, the United Nations General Assembly held that internal armed conflicts in the form of national liberation wars for self-determination, such as in Southern Rhodesia, Angola, Mozambique, and South Africa or Namibia, or otherwise, were governed by the laws applicable in international armed conflict.

20.3 Asserting that Eelam War IV was a national liberation war for internal or external self-determination, in political and military continuation of the armed struggle waged against subsequent democratically-elected racist majority-Sinhala Buddhist administrations in Sri Lanka during Eelam Wars I-III, seeking Buddhist Sinhalization of the island of Sri Lanka.

20.4 Asserting that through reasoned consideration of the Sri Lankan Tamil national liberation struggle's totality of historical circumstances, the LTTE's ideology of national liberation and pursuit of external or internal self-determination within the historically-Tamil Northeastern province of Sri Lanka was in nature a liberation

war for national self-determination, reformulated as a War on Terror after 9/11.

20.5 Asserting that the LTTE's commitment to Tamil self-determination and the LTTE's ideology of national liberation are demonstrated through a consistent policy over 30 years of political history since the LTTE's founding in 1976.

20.6 Asserting that the LTTE's commitment and ideology for the establishment of the separate state of Tamil Eelam within the Northeastern province of Sri Lanka, as historically articulated through multiple agreements and resolutions during the first three civil wars (Eelam War I-III) between 1983-2002, did not change during the 2002-2006 CFA or subsequently during Eelam War IV.

20.7 Asserting that the consistent policy and ideology of the LTTE for Tamil self-determination and national liberation is demonstrated through a chronology of agreements to which the LTTE was a member, from at least the 1976 Vaddukoddai Resolutions to the 2006 Oslo Communique.

20.7.1 In May 1976, the Sri Lankan Tamil political party coalition, the Tamil United Liberation Front (TULF), of which the LTTE was a member, issued the Vaddukoddai Resolution formally declaring the intent of the coalition to form a sovereign state of Tamil Eelam within the Northeastern province of territorial Sri Lanka.

20.7.2 In July 1985, during Indian-organized peace talks between the GoSL and several Tamil separatist groups including the LTTE in Thimpu, Bhutan, the Tamil delegation produced the Thimpu Declaration demanding (1) recognition of the Tamils of Ceylon as a nation; (2) recognition of the existence of an identified homeland for the Tamils in Ceylon; (3) recognition of the right of self determination of the Tamil nation; and (4) recognition of the right to citizenship and the fundamental rights of all Tamils in Ceylon.

20.7.3 In October 2003 during the Norwegian-mediated peace process, the LTTE set forth a formal proposal for an Interim Self-Governing Authority (ISGA), which declared in part that the organization was "[d]etermined to establish an interim self-governing authority for the north-east region and to provide for the urgent needs of the people of the north-east by formulating laws and policies and, effectively and expeditiously executing all resettlement, rehabilitation, reconstruction, and development in the north-east, while the process for reaching a final settlement remains ongoing."

20.7.4 In June 2006, as part of the CFA, the LTTE issued the Oslo Communique which reaffirmed the LTTE's "policy of finding a solution

to the Tamil national question based on the realization of its right to self-determination."

20.8 Asserting that recognition of the LTTE by the international community in general and by Norway in particular as a legitimate party to the Sri Lankan peace process which sought a negotiated political compromise to the ethnic conflict, set forth by the 2002 Norwegian-mediated Cease-Fire Agreement within which the LTTE effectively enjoyed parity of status with the GoSL, and as acknowledged by the members of the Tokyo Co-Chair donors committee (U.S, Japan, E.U., Norway), are together dispositive in establishing international recognition of the Tamil self-determination or national liberation aspect of Eelam War I-IV.

**ii. INTERNATIONAL AND NATIONAL RECOGNITION OF BELLIGERENCY**

20.9 Asserting that under customary international law since at least the 18th century, recognition of belligerency is sufficiently satisfied if (i) there exists an armed conflict within the state concerned, of a general, as opposed to a local character (ii) the relevant insurgent group must occupy and administer a substantial part of the state territory (iii) the relevant insurgent group must reasonably conduct their hostilities in accordance with the laws of war through organized armed forces under responsible command (iv) circumstances must exist that make it necessary for a third state to make clear their attitude to those circumstances by recognition of belligerency.

20.9.1 Asserting that an armed conflict existed in Sri Lanka between 1983 and May 17, 2009, interrupted by three peace talks and the 2002 peace process.

20.9.2 Asserting that the LTTE, transitioning from a politico-military organization to a de facto state, occupied and administered a substantial territorial area of Sri Lanka's Tamil-dominant Northeastern province in general, and the Vanni Region in particular, between 1983 and 2009.

20.10 Asserting that in view of the totality of Sri Lankan circumstances, the LTTE reasonably conducted their armed hostilities against the SLA in accordance with the laws of war through organized armed forces under responsible command between 1983 and 2009.

20.11 Asserting that the international community and Sri Lanka have generally and jointly categorized Eelam War IV as a war combating terrorism, and part of the the post-9/11 global war on terror.

20.12 Asserting that international proscriptions, bans, or designations of the LTTE as an international terrorist organization

between 1991 and present by multiple nations in the international community including Australia, Canada, the European Union, India, Malaysia, and the United States of America sufficiently establish international recognition of belligerency.

20.13 Asserting that recognition of the LTTE by the international community in general and by Norway in particular as a legitimate party to the Sri Lankan peace process set forth by the 2002 Norwegian-mediated Cease-Fire Agreement within which the LTTE effectively enjoyed parity of status with the GoSL, and by the members of the Tokyo Co-Chair donors committee (U.S, Japan, E.U., Norway) is dispositive in establishing international recognition of belligerency.

### **iii. POST-9/11 (GLOBAL) WAR ON TERROR**

20.14 Considering the incumbent Rajapakse administration's foreign policy reformulation of the Sinhala-Tamil ethnic conflict in Sri Lanka as a War on Terror or part of a Global War on Terror in the post-9/11 international context substantively internationalized the protracted armed conflict between the GoSL and LTTE.

20.15 Reasserting that proscription of the LTTE as a banned international terrorist organization between 1991 and present by multiple nations in the international community including Australia, Canada, the European Union, India, and the United States of America is a factual circumstance from which the reasonable inference of Eelam War IV's international character can be drawn.

20.16 Asserting that transnational terrorism-related criminal investigations and prosecutions intended to stop the supply of funds and material support from the LTTE's transnational network to the LTTE's former operational base in the Vanni Region, were pursued post-9/11 by multiple national governments including Australia, Canada, the European Union (United Kingdom, France, Germany, Holland), Switzerland, and the United States of America. These investigations and prosecutions included cooperation provided by multiple Southeast Asian countries. The engagement of this aforementioned multinational alliance formed at least during Eelam War IV to support the GoSL in its War on Terror against the LTTE, is legally cognizable as direct or indirect participation in Eelam War IV and supply a factual circumstance from which the reasonable inference of Eelam War IV's international character can be drawn.

20.17 Asserting the rebuttable presumption that the inherent nature and character of a War on Terror or Global War on Terror, with global, and trans- or international characteristics, as conceived in the post-9/11 context, can not be exclusively non-international in character when applied to the LTTE in Sri Lanka, an armed non-state

actor engaged in a 30 year national liberation war for self-determination.

#### **iv. INTERNATIONAL HUMANITARIAN CONSEQUENCES**

20.18 Asserting that the conflict-induced Tamil internally displaced person (IPD) populations and Tamil asylum-seeking refugee flows to countries such as Australia, Canada, Southern India, Malaysia, and Europe, are factual circumstances from which the reasonable inference of Eelam War IV's international character can be drawn.

20.19 Concluding on multiple grounds including reasonable inferences drawn from consideration of factual circumstances, Eelam War IV is legally cognizable as a post-9/11 internationalized internal armed conflict possessing both an international and non-international character.

20.20 Asserting that the co-existence of international and non-international characteristics in Eelam War IV thereby triggers laws and customary humanitarian norms applicable to both international and non-international armed conflict.

20.21 In the case of direct or indirect participation through act or omission of an Australian national in a violation of international humanitarian law perpetrated in territorial Sri Lanka between at least November 2005 and May 17, 2009, Australia's binding obligations to the Rome Statute and the First, Second, Third, and Fourth Geneva Conventions and Additional Protocols I and II, would be applicable.

#### **D. ARTICLE 15 *PROPRIO MOTU* POWERS**

21. Recalling that Article 15 of the Statute regulates the procedure for initiating an investigation upon the Prosecutor's own initiative, subject to authorization by the Chamber.

22. Noting that under Article 15 *proprio motu* powers of the Prosecutor, the Prosecutor is empowered to trigger the jurisdiction of the Court in the absence of referral from a State Party or the Security Council.

23. Recalling that under Article 15(2) and 15(3) of the Rome Statute, the Prosecutor after having analyzed the seriousness of the information received from different sources may conclude that a reasonable basis to proceed with an investigation exists, in view of consideration of factors set out in Article 52, paragraph 1(a) to (c), as stipulated by rule 48 of the Rules of Procedure and Evidence.

24. Asserting that the Statute proscribes progressively higher evidentiary thresholds which must be met at each stage of the

proceedings. The framework established by the Statute provides for three distinct stages at which the Pre-Trial and Trial Chambers examine and review the evidence presented by the Prosecution to determine whether there is sufficient evidence to justify (i) the issuance of a warrant of arrest or summons to appear under Article 58 of the Statute; (ii) the confirmation of the charges and committal of a person for trial under Article 61 of the Statute; and (iii) the conviction of an accused person under Article 66 of the Statute.

25. Restating that the determination of assessing whether there exist reasonable grounds to proceed *proprio motu* is predicated upon determining from available direct and circumstantial evidence whether or not there are reasonable grounds to believe a crime was committed which falls within the jurisdiction of the Court.

26. Asserting that at the arrest warrant/summons stage, the Pre-Trial Chamber need only be satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.

27. Recalling that in view of the appropriate evidentiary threshold applicable at the arrest warrant/summons stage, the reasonable inference of reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court need not necessarily be the only reasonable inference available from the body of direct and circumstantial evidence.

28. Recalling that the "reasonable grounds" standard under Article 58 of the Statute is comparable to the "reasonable suspicion" standard applied by the European Court of Human Rights, which has elaborated on that standard as follows. With regard to the level of "suspicion", the Court would note firstly that sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) of the European Convention of Human Rights does not presuppose that the [investigating authorities] should have obtained sufficient evidence to bring charges, either at the point of arrest or while [the arrested person is] in custody. Such evidence may have been unobtainable or, in view of the nature of the suspected offenses, impossible to produce in court without endangering the lives of others" (loc. cit., p. 29, para. 53). The object of questioning during detention under sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation.

29. Asserting that the Prosecution is not required to meet an evidentiary threshold which would be sufficient to support a

conclusion beyond a reasonable doubt at a trial when presented with evidence to support the issuance of warrant of arrest which by its occurrence during the first stage of international criminal procedure, requires satisfaction of a "reasonable suspicion" or "reasonable grounds to believe" threshold.

30. Reaffirming that the Prosecutor's conclusion to request an investigation *proprio motu* is subjected to the review of the Pre-Trial Chamber at a very early stage of the proceedings, and adheres to a "reasonable basis to proceed" evidentiary threshold, as exercised in the March 2010 Pre-Trial Chamber decision pursuant Article 15 of the Rome Statute on the authorization of an investigation into the situation of 2007-2008 post-election violence in the Republic of Kenya.

## **V. STATEMENT OF FACTS**

### **A. GENERAL FACTUAL ALLEGATIONS**

1. During all times relevant to this request, MAHINDRAN BALASINGHAM, LTTE nom de guerre NADESAN (heretofore NADESAN), was appointed Head of LTTE's political division after the assassination of S.P. Tamilselvin in a Sri Lankan Air Force strike on November 2 2007<sup>3</sup>.

2. During all times relevant to this request, SEEVARATNAM PULIDEVAN, LTTE nom de guerre PULIDEVAN (heretofore PULIDEVAN), was the Director of LTTE's Peace Secretariat based in Kilinochchi<sup>4</sup>.

3. During all times relevant to this request, LTTE nom de guerre RAMESH was the LTTE's Chief of Tamil Eelam Police for LTTE-controlled territories in the Northeast province. See Appendix C.

3.1 Noting that LTTE member RAMESH, Chief of the Tamil Eelam Police, referenced in paragraph 3, is not Col. RAMESH of the LTTE's Batticaloa division, who had been identified to appear in separate possible SLA extra-judicial killing/torture videos, also possibly violations of international humanitarian law. See Appendix C.

4. The extra-judicial killing of NADESAN, PULIDEVAN, and possibly RAMESH was carried out through an extended joint criminal enterprise comprised of (1) a negotiation-related community of co-perpetrators, (2) an execution-related community of co-perpetrators, and (3) an innocent neutral community of intermediary human agents. See Appendix B.

5. The negotiation-related community of co-perpetrators, including PALITHA KOHONA, participated in the perfidious negotiation which misused the promise and presumption of white flag humanitarian law protections in order to induce by deception the volitional surrender of the LTTE hors de combat into the custody of the execution-related community of co-perpetrators. See Appendix B.

6. The negotiation-related community of co-perpetrators communicated with the surrendering LTTE members NADESAN, PULIDEVAN, and RAMESH by an innocent neutral community of intermediary human agents who were in active phone communication with at least NADESAN AND PULIDEVAN and had contact with members within the negotiation-related community of co-perpetrators. See Appendix B.

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<sup>3</sup> [http://www.defence.lk/new.asp?fname=20090518\\_11](http://www.defence.lk/new.asp?fname=20090518_11) accessed on 01/08/11

<sup>4</sup> Ibid.

7. The execution-related community of co-perpetrators, including soldiers within the 58th division of the SLA under the military command and control of SHAVENDRA SILVA, carried out the extra-judicial killing of NADESAN, PULIDEVAN, possibly RAMESH, on or about May 18 2009 at some point after the group had hoisted white flag in order to exercise their right to surrender under international humanitarian law. See Appendix B.

8. The negotiation-related community of co-perpetrators included: PALITHA KOHONA (Foreign Secretary of Sri Lanka, Permanent Representative of Sri Lanka to the United Nations), MAHINDA RAJAPAKSE (President of Sri Lanka), BASIL RAJAPAKSE (Cabinet Minister of Economic Development under the RAJAPAKSE II administration, former Special Advisor to the President of Sri Lanka under the Rajapakse I administration), GOTABAYA RAJAPAKSE (Secretary of Defense of Sri Lanka).

9. Reasonable inferences from the factual circumstances create a reasonable suspicion to believe that the negotiation-related community of co-perpetrators may have included: VIJAY NAMBIAR (Chief of Staff to United Nations Secretary-General Ban Ki-Moon)<sup>5</sup>.

10. The execution-related community of co-perpetrators included: SHAVENDRA SILVA (Ex. Maj. Gen. of 58 Division of SLA, Sri Lanka's Deputy Permanent Representative to the United Nations), SLA soldiers in 58th Division under SHAVENDRA SILVA's command and control.

11. Reasonable inferences from the factual circumstances create a reasonable suspicion to believe that the execution-related community of co-perpetrators may have included: Eelam People's Democratic Party (EPDP) or Karuna-Pillaiyan Tamil paramilitary cadres or soldiers of other SLA divisions under SHAVENDRA SILVA's effective and military command and control during all times relevant to the extra-judicial killing of NADESAN, PULIDEVAN, and possibly RAMESH.

12. The innocent neutral community of intermediary human agents included: MARY COLVIN (British Journalist for the British newspaper Sunday Times), ROHAN CHANDRA NEHRU (Tamil National Alliance Minister of Parliament in Sri Lanka), naturalized Norwegian citizen Tamil Adult Male alias XXXXXX (former employee in Sri Lankan civil service, former member of Tamil paramilitary group Eelam Revolutionary Organisation of Students (EROS), contacts with senior LTTE political leadership), naturalized French citizen Tamil Adult Male Alias ILANGO (contacts

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<sup>5</sup> Russell Lee, Matthew. "On Murders after Surrender, UN's Nambiar Muses on Crossfire, Speaking With Kohona." *Inner-City Press*. 25 May 2010. <http://www.innercitypress.com/sriinambiar052510.html> accessed on 01/22/2011. See also Appendix C.

with senior LTTE political leadership), Members of the ICRC, Members of the UN.

13. Reasonable inferences from the factual circumstances create a reasonable suspicion to believe that the innocent neutral community of intermediary human agents may have included: VIJAY NAMBIAR, ERIK SOLHEIM (former Norwegian Peace Envoy to the 2002 Norwegian mediated Sri Lankan peace process).

14. Noting that the conflict of interest created by the SLA advisory role of VIJAY NAMBIAR's brother retired Indian army general SATISH NAMBIAR, and VIJAY NAMBIAR's participation in negotiating the white flag surrender of NADESAN, PULIDEVAN, and RAMESH, provide a basis to question whether VIJAY NAMBIAR was in fact an innocent neutral intermediary or in fact a co-perpetrator within the negotiation-related community. The grounds of reasonable suspicion to establish VIJAY NAMBIAR's possible participation in the negotiation-related community of co-perpetrators include VIJAY NAMBIAR brotherly relation to SATISH NAMBIAR, and VIJAY NAMBIAR's subjective knowledge of the SLA's widely (or routinely) adhered to policy of executing surrendering LTTE combatants, after generally blindfolding and stripping them naked.<sup>6</sup>

## **B. CHRONOLOGY OF EVENTS: NEGOTIATION/EXECUTION**

15. By about May 16 2009 and up until about May 18 2009, the SLA and Sri Lankan Navy had boxed in about 5,000 LTTE combatants in addition to an unknown number of Tamil non-combatants into a territory no larger than approximately 300m by 500m in Vellumulliviakyal, a territory inside the GoSL-designated Safe Zone in Mullaitheevu District, Eastern Sri Lanka.<sup>7</sup>

16. On about May 17 2009, NADESAN, PULIDEVAN, AND RAMESH were inside the 300m by 500m territory in Vellumullivaikaal referenced in paragraph 15. See Appendix C.

17. On about May 17, 2009 around 2:00 p.m. Sri Lanka Time (SLT), Selvarasa Pathmanathan alias K.P, then the temporarily recognized sitting head of the LTTE's International Diplomatic Relations division, stated the LTTE would "silence" their "guns," ending the

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<sup>6</sup> SLA commander Dep. 29-32. See Appendix D.

<sup>7</sup> Ferdinando, Shamindra. "Some of those escaping LTTE came without clothes on: Maj. Gen. Shavendra Silva 'White Flag' Trial-at-Bar" *The Island*. 10 Nov. 2010. Accessed January 16, 2011. [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=11337](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=11337)

most recent phase of armed hostilities between the SLA and LTTE inside GoSL-designated Safe Zones in Mullaitheevu District.<sup>8</sup>

18. During May 17 2009 and May 18 2009, PULIDEVAN, accessed by phone communication through XXXXXX, was the main point of contact with the negotiation-related community of co-perpetrators. See Appendix C.

19. During May 17 2009 and May 18 2009, PALITHA KOHONA, who communicated to PULIDEVAN and RAMESH through XXXXXX, was the main point of contact with regards to negotiation the white flag surrender of NADESAN, PULIDEVAN, and RAMESH. See Appendix C.

20. On about May 17 2009 in the evening or night, PALITHA KOHONA was in active communication with XXXXXX who was in active communication with PULIDEVAN and RAMESH with regard to negotiating the logistics and conditions of the surrender of NADESAN, PULIDEVAN, and RAMESH. See Appendix C.

21. On about May 17 2009 and May 18 2009, PALITHA KOHONA and NAMBIAR were in active communication with regard to discussion of the logistics and conditions of the surrender of NADESAN, PULIDEVAN, and RAMESH. See Appendix C.

22. On about May 17 2009 in the evening or night, PALITHA KOHONA communicated to XXXXXX that the surrendering LTTE members would be safe if they surrendered with a white flag raised. XXXXXX communicated PALITHA KOHONA'S statement to RAMESH or PULIDEVAN. See Appendix C.

23. On about May 17 2009 during the night, PULIDEVAN contacted ILANGO informing ILANGO to contact the International Committee of the Red Cross (ICRC) to attempt to secure safe conditions of surrender. ILANGO attempted multiple times but was ultimately unable to contact the ICRC and passed the contact information to PULIDEVAN. PULIDEVAN subsequently attempted to contact the ICRC multiple times. See Appendix C.

24. On about May 18 2009, between 12:00 a.m. and 5:30 a.m. SLT, NADESAN using his satellite phone called MARY COLVIN. In the phone call NADESAN stated "we are putting down our arms" and asked COLVIN "We are looking for a guarantee of security from the Obama administration and the British government. Is there a guarantee of security?" NADESAN also asked COLVIN to convey three points to the UN: the LTTE (1) would lay down their arms; (2) wanted a guarantee of safety from the Americans or the British; and (3) wanted an assurance

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<sup>8</sup> <http://www.tamilnet.com/art.html?catid=13&artid=29389> accessed on 01/08/11

that the Sri Lankan government would agree to a political process that would guarantee the rights of the Tamil minority<sup>9</sup>.

25. On about May 18 2009, at some time after the NADESAN-COLVIN conversation referenced in paragraph 24, COLVIN contacted NAMBIAR through British and American officials and communicated LTTE's three points, referenced in paragraph 24. NAMBIAR replied to COLVIN that NAMBIAR would communicate LTTE's three points to the GoSL<sup>10</sup>.

26. On about May 18 2009 at some time after the COLVIN-NAMBIAR conversation referenced in paragraph 25, PULIDEVAN sent COLVIN a text message of "a smiling photo of himself in a bunker."<sup>11</sup>

26.1 With regard to the PULIDEVAN-COLVIN text message of "a smiling photo of himself in a bunker," it is reasonably inferable from these circumstances that the message of possibly securing a safe surrender under white flag humanitarian law protections for the LTTE members, and the message of genuine negotiation dialogue free of perfidy on the issue of surrender, between the LTTE members and the negotiation-related community of co-perpetrators as defined in paragraphs 8-9, had been adequately communicated.

27. On May 18 2009 in the early morning at some time before 6:00 a.m. SLT, NADESAN using his satellite phone contacted NEHRU, informed NEHRU of his intention to surrender, and informed NEHRU that he was with around 300 combatants and non-combatants, some of whom injured.<sup>12</sup>

28. On about May 18 2009 in the early morning, at some point after the NADESAN-NEHRU conversation referenced in paragraph 27, NEHRU made contact with MAHINDA RAJAPAKSE regarding the white flag surrender of NADESAN, PULIDEVAN, AND RAMESH. MAHINDA RAJAPAKSE communicated to NEHRU that full security would be given to NADESAN and his family.<sup>13</sup>

29. On about May 18 2009 in the early morning at some time before 6:00 a.m. SLT, and at some point after the NEHRU-RAJAPAKSE conversation referenced in paragraph 28, BASIL RAJAPAKSE called NEHRU and informed NADESAN, referring to the issue of surrender of NADESAN, PULIDEVAN,

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<sup>9</sup> Colvin, Marie. "Tigers begged me to broker surrender" *The Sunday Times*. 24 May 2009. Accessed January 16, 2011. <http://www.timesonline.co.uk/tol/news/world/asia/article6350563.ece>

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

AND RAMESH, that "they will be safe. They have to hoist a white flag" and also provided a land route of surrender.<sup>14</sup>

29.1 Regarding the communication to the LTTE members of the proper procedure and land route for surrender, a Sri Lankan newspaper which had interviewed former Lt. General of the SLA SARATH FONSEKA reported that NADESAN, PULIDEVAN, and RAMESH, may also have been told: "'Get a piece of white cloth, put up your hands and walk towards the other side in a non-threatening manner."<sup>15</sup>

30. On about May 18 2009 around 5:30 a.m. SLT, COLVIN spoke to NAMBIAR again through the United Nations-24 hour dispatch center in New York. NAMBIAR replied to COLVIN that MAHINDA RAJAPAKSE, GOTABAYA RAJAPAKSE, AND PALITHA KOHONA had assured NAMBIAR that the LTTE members would be safe in surrendering to the SLA and treated like "normal prisoners of war" if they "hoist[ed] a white flag high."<sup>16</sup>

31. On about May 18 2009 around 6:20 a.m. SLT, NEHRU made contact with NADESAN. NADESAN told NEHRU: "We are ready ... I'm going to walk out and hoist the white flag." NEHRU responded to NADESAN: "Hoist it high, brother - they need to see it. I will see you in the evening."<sup>17</sup>

32. On about May 18 2009 around 7:30 a.m. SLT, NADESAN using his satellite phone called his son, PRABATH SURESH MAHENDRAN indicating that he would surrender around 8:15 a.m. SLT.<sup>18</sup>

33. On or about May 18 2009 at some time after 8:15 a.m. SLT, NADESAN, PULIDEVAN, AND RAMESH surrendered by white flag to the SLA in Vellumullivaikaal, accompanied with somewhere between 12-40 combatants and non-combatants, many of whom were seriously physically injured or deprived for months of food or medicine.

33.1 Noting that the territory of Vellumullivaikaal and surrounding areas were exclusively or primarily under the effective control and

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<sup>14</sup> Ibid.

<sup>15</sup> Jansz, Frederica. "Gota Ordered Them To Be Shot - General Sarath Fonseka" *The Sunday Leader*. 13 Dec. 2009. Accessed January 16, 2011. <http://www.thesundayleader.lk/2009/12/13/%E2%80%9Cgot-a-ordered-them-to-be-shot%E2%80%9D-%E2%80%93-general-sarath-fonseka/>

<sup>16</sup> Colvin, Mary. "Tigers begged me to broker surrender" *The Sunday Times*. 24 May 2009. Accessed January 16, 2011. <http://www.timesonline.co.uk/tol/news/world/asia/article6350563.ece>

<sup>17</sup> Ibid.

<sup>18</sup> Transnational Government of Tamil Eelam (TGTE) Interview with son of Mr. Mahindran Balasingham, accessed on 16 Jan 2011, available at <http://www.srilankaguardian.org/2010/12/statement-from-son-of-white-flag-victim.html>.

military command and control of then Col. SHAVENDRA SILVA of the SLA's 58th Division.

33. Noting that based on the rebuttable presumption that NADESAN, PULIDEVAN, and RAMESH surrendered with at maximum 40 combatants and non-combatants, the fate or status of the remaining 260 combatants and non-combatants referenced in paragraph 27 has not as of yet been determined.

34. On about May 18 2009 at some time after 8:15 a.m., in territories near Vellumullivaikaal in Mullaitheevu District or in territories on or near the land route communicated to NADESAN via the BASIL RAJAPAKSE-NEHRU conversation referenced in paragraph 29, as NADESAN AND PULIDEVAN walked towards SLA lines with a white flag, along with 12-40 combatants and non-combatants, some of whom were wounded, and including NADESAN's wife, the SLA attacked by gunfire.<sup>19</sup>

34.1 In the SLA commander deposition included in Appendix D, the SLA commander confirms the post-surrender extra-judicial killing by the SLA of CHARLES ANTHONY, the 12-year old son of LTTE leader VELUPILLAI PIRAPAHARAN, and five surrendering LTTE hors de combat who were CHARLES ANTHONY's bodyguards. In the deposition the SLA commander also states that the burning of LTTE bodies after the extra-judicial killing of surrendering LTTE hors de combat was a de facto policy of the SLA, practiced to "completely kill terrorism"<sup>20</sup> and to "finish" the war crimes "off without any trace."<sup>21</sup>

35. On about May 18 2009 around the evening SLT, the SLA and Defense Ministry positively identified the bodies of 18 LTTE senior leaders, including NADESAN and PULIDEVAN.<sup>22</sup>

36. On about May 18 2009 around the evening SLT, the SLA and Defense Ministry claimed that the body of RAMESH had been positively identified.<sup>23</sup>

36.1 In June or July 2009, RAMESH was identified and seen alive in Polonnaruwa Base Hospital in North-Central Sri Lanka by a witness in contact with WITNESS A. According to other witnesses interviewed in

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<sup>19</sup> Colvin, Marie. "Tigers begged me to broker surrender" *The Sunday Times*. 24 May 2009. Accessed January 16, 2011. <http://www.timesonline.co.uk/tol/news/world/asia/article6350563.ece>

<sup>20</sup> SLA Commander Dep. 32:7. See Appendix D.

<sup>21</sup> SLA Commander Dep. 34:9-10. See Appendix D.

<sup>22</sup> <sup>22</sup> [http://www.defence.lk/new.asp?fname=20090518\\_11](http://www.defence.lk/new.asp?fname=20090518_11) accessed on 01/08/11

<sup>23</sup> Ibid.

Appendix C, RAMESH has not been seen since June or July of 2009, possibly indicating his extra-judicial killing, enforced disappearance, or holding in de facto or de jure SLA custody in one of several post-May 2009 SLA black sites and detention camps for LTTE combatants, including but not limited to camps in: Velikkanthai at the border of Polonnaruwa/Batticaloa districts, Welikande Prison in Colombo, High Security Boosa Detention Camp in Galle province, areas in Vavuniya, areas in Seruvila, areas in Thirukkoa'namadu, a camp in Kanthakkaadu located in a reserve forest in Polonnaruwa district, bordering Trincomalee and Batticaloa districts, and areas in Anuradhapura. See Appendix C.

37. On 13 December 2009, in a published interview to Sri Lankan-based English medium newspaper *The Sunday Leader*, Former Lt. Gen. of the SLA Sarath Fonseka stated he had information and evidence to prove that before the extra-judicial killing of NADESAN, PULIDEVAN, and RAMESH, orders were given to commander of the SLA's 58th division SHIVENDRA SILVA that all LTTE commanders "must be killed."<sup>24</sup>

38. As reported by May 2010 through interviews conducted by news establishment Al Jazeera and internet news website Inner-City Press with regard to the nature of PALITHA KOHONA's participation in the negotiation-related community of co-perpetrators within the extended joint criminal enterprise, PALITHA KOHONA's self-contradictory account in the public record of the occurrence or non-occurrence of a conversation with NAMBIAR prior to the May 18 2009 post-surrender extra-judicial killing provides a prima facie factual basis to reasonably infer PALITHA KOHONA's direct participation in the crime.<sup>25</sup>

38.1 In these interviews, PALITHA KOHONA's admission of conveying assurances to NAMBIAR in a conversation prior to the May 18 2009 post-surrender extra-judicial killing that the surrendering LTTE hors de combat would be treated as "normal prisoners of war," and PALITHA KOHONA's later post-extra-judicial killing denial of the occurrence of this conversation with NAMBIAR, created circumstances which allow the inference of KOHONA's complicity in materially misrepresenting to NAMBIAR the issue of secure surrender of the LTTE hors de combat.<sup>26</sup>

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<sup>24</sup> Jansz, Frederica. "Gota Ordered Them To Be Shot - General Sarath Fonseka" *The Sunday Leader*. 13 Dec. 2009. Accessed January 16, 2011. <http://www.thesundayleader.lk/2009/12/13/%E2%80%9Cgot-a-ordered-them-to-be-shot%E2%80%9D-%E2%80%93-general-sarath-fonseka/>

<sup>25</sup> Russell Lee, Matthew. "On Murders after Surrender, UN's Nambiar Muses on Crossfire, Speaking With Kohona." *Inner-City Press*. 25 May 2010. <http://www.innercitypress.com/srilnambiar052510.html> accessed on 01/22/2011. See also Appendix C.

<sup>26</sup> Russell Lee, Matthew. "On Murders after Surrender, UN's Nambiar Muses on Crossfire, Speaking With Kohona." *Inner-City Press*. 25 May 2010. <http://www.innercitypress.com/srilnambiar052510.html> accessed on 01/22/2011. See also Appendix C.

39. Since about May 18 2009, PALITHA KOHONA's general failure to meaningfully act or speak in a manner which would clarify the nature of his direct or indirect participation in the crime provides a prima facie factual basis to reasonably infer PALITHA KOHONA's participation in the crime.

## **VI. INDIVIDUAL CRIMINAL RESPONSIBILITY**

1. The above facts establish that there are reasonable grounds to believe the PALITHA KOHONA is individually responsible under the Article 25 mode of extended joint criminal enterprise liability for the crime alleged against him in this request under Articles 8(2)(b)(vi) or 8(2)(c)(i) of the Statute.

2. The accused planned, instigated, ordered, committed, or otherwise aided and abetted in or substantially contributed to the planning, preparation, or execution of the crime. For the modes of liability of planning, instigating or ordering the crimes charged, the accused acted with the awareness of the substantial likelihood that the crimes would be committed in the execution of the plan, order or instigation. For the mode of liability of aiding and abetting, the accused acted with the knowledge that the acts performed would assist in the commission of the crimes.

3. The use of the word "committed" does not intend to suggest that the accused physically perpetrated any of the crimes charged, personally. "Committing" in this request, when used in relation to the accused, refers to participation in a joint criminal enterprise as a co-perpetrator, either directly or indirectly.

4. The purpose of this joint criminal enterprise was, inter alia, the extra-judicial killing of three LTTE hors de combat - LTTE political member BALASINGHAM NADESAN, LTTE political member PULIDEVAN, LTTE Chief of Tamil Eelam Police RAMESH - surrendering by waving a white flag on or about May 18 2009 in the surrounding territories near or in the GoSl-Designated Safe Zone in Mullivaiykal, under the effective control of at least SLA Divisions 53, 57, and 58. This purpose was to be achieved by criminal means consisting of the extra-judicial killing of NADESAN and extra-judicial killing or enforced disappearance of PULIDEVAN and RAMESH. To fulfill this purpose, the accused, acting individually and/or in concert with other persons, contributed to the extended joint criminal enterprise using the de jure and de facto powers available to him as reasonably inferable under the circumstances.

5. The post-surrender extra-judicial killing of three LTTE hors de combat was the shared objective of the extended joint criminal enterprise and the accused shared the intent with the other co-perpetrators that these crimes be perpetrated. Alternatively, the post-surrender extra-judicial killing was the natural and foreseeable consequence of the perfidious negotiations, and the accused was aware that such crimes were the possible consequences of the execution of that enterprise.

### **A. JURISDICTION**

6. Asserting that for a crime to fall within the jurisdiction of the Court, it has to satisfy the following conditions: (i) it must fall within the category of crimes referred to in Article 5 and defined in Articles 6, 7, and 8 of the Statute (jurisdiction *ratione materiae*); (ii) it must fulfill the temporal requirements specified under Article 11 of the Statute (jurisdiction *ratione temporis*); and (iii) it must meet one of the two alternative requirements embodied in Article 12 of the Statute (jurisdiction *ratione loci* or *ratione personae*). The latter entails either that the crime occurs on the territory of a State Party to the Statute or a State which has lodged a declaration by virtue of Article 12(3) of the Statute, or be committed by a national of any such State.

#### **B. JURISDICTION RATIONE MATERIAE: WHITE FLAG HORS DE COMBAT KILLING**

7. Recalling that under customary international humanitarian law, an active enemy combatant becomes an hors de combat upon the moment of surrender or the communication of a sign of truce by a parlementaire to enter into communication with the other party to the armed conflict.

8. Recalling that under customary international humanitarian law, an active enemy combatant becomes a prisoner of war upon the moment of capture or moment of entering into the custody of the other party to the armed conflict.

9. Recalling that under the customary norms of international humanitarian law, the hoisting of a white flag under conditions of armed conflict by one party or a subgroup of combatants within that party to that armed conflict generally indicate a clear intention to surrender or indicate a sign of truce to enter into communication with the other party to the armed conflict. Within the framework of international humanitarian law, the hoisting of the white flag creates lawful combatant immunity, which thereby changes the legal status of the combatant from combatant to hors de combat or a prisoner of war depending on reasonable inferences available from the factual circumstances and nature of surrender.

10. Recalling that customary norms of international humanitarian law provide in uncertain factual circumstances the presumption of lawful combatant immunity which thereby creates presumptive protections for an enemy combatant from attack if he expresses an intention to surrender. Customary norms of international humanitarian law also impose a positive obligation on an attacker to respect the right of an enemy combatant to surrender.

11. Asserting that while there is no strict obligation under international humanitarian law to capture a surrendering enemy

combatant and take that enemy combatant as a prisoner of war, there exists an unconditional positive obligation enforcing the rule that a surrendering enemy combatant shall not be made the object of attack.

12. Under customary international humanitarian law, and as explicitly set forth in Article 37(1) to the 1977 Additional Protocol I to the 1949 Geneva Conventions, it is prohibited to kill, injure or capture an adversary by resort to perfidy. Perfidy is defined as acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence. As such, it is prohibited to deliberately misuse in an armed conflict internationally recognized protective emblems, signs or signals, including a flag of truce i.e. a white flag.

### **C. THE HAGUE REGULATIONS**

13. Recalling that Article 23(c) to the Annex of the Hague Conventions IV of 1907 proscribes the extra-judicial killing of a combatant of a party to an armed conflict who has "laid down his arms, or having no longer means of defense, has surrendered at discretion."

14. Recalling that under Articles 32-24 of the Hague Regulations, individuals surrendering by white flag, including parlementaires and those who accompany them, are entitled to complete inviolability.

### **D. THE GENEVA CONVENTIONS**

15. Recalling that under the laws of armed conflict of an international character, Article 13 of the Third Geneva Conventions of 1949 prohibits "any unlawful act or omission by the Detaining Power causing death or serious bodily injury" to persons protected by lawful combatant immunity as defined in Article 4(A)(1).

16. Recalling that under the laws of armed conflict of an international character, Article 41(2) of the 1977 Additional Protocol I to the 1949 Geneva Conventions defines an individual as an enemy hors de combat if (a) he is in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself.

17. Recalling that under the laws of armed conflict of an international character, Article 44 of the 1977 Additional Protocol I to the 1949 Geneva Conventions creates lawful combatant immunity for combatants who "fall into the power of an adverse Party" to the armed conflict, through surrender or otherwise, creating the legal right to prisoner of war status and its umbrella of humanitarian protections considered customary in international humanitarian law.

18. Recalling that under the laws of armed conflict of a non-international character, Common Article 3(1) to the Geneva Conventions provides that "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria." For this class of persons, Common Article 3(1)(a) to the Geneva Conventions prohibits acts of "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."

19. As set forth in Article 85(3)(f) to the 1977 Additional Protocol I of the 1949 Geneva Conventions, willful abuse of a white flag in a surrender under conditions of armed conflict that results in death or serious injury of persons protected by lawful combatant or non-combatant immunities considered customary norms under international humanitarian law is a grave breach of the Convention.

#### **E. ARTICLE 5 JURISDICTION**

20. Asserting that the extra-judicial killing of enemy combatants surrendering as hors de combat via white flag is a grave breach of international humanitarian law, falling within the scope of war crimes as defined by Article 5(c) of the Statute and the class of the most serious crimes of concern to the international community as a whole.

#### **F. ARTICLE 8: WHITE FLAG HORS DE COMBAT KILLING UNDER RELEVANT ARTICLES OF LAW APPLICABLE TO ARMED CONFLICTS OF INTERNATIONAL AND NON-INTERNATIONAL CHARACTER**

21. Under the laws applicable for armed conflict of an international character, as set forth in Article 8(2)(b)(vi) of the Statute, reaffirming the statutory language of Geneva Conventions, the act of "killing or wounding a combatant who, having laid down his arms or having no longer means of defen[s]e, has surrendered at discretion" is prohibited.

22. Under the laws applicable for armed conflict of a non-international character, as set forth in Article 8(2)(c) of the Statute, reaffirming the statutory language of the Geneva Conventions, the act of "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" towards combatants who "have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause," is prohibited.

23. Noting that as Eelam War IV is legally cognizable as a post-9/11 internationalized internal armed conflict whose character possesses

both international and non-international elements, the bodies of law of armed conflict with an international and non-international character are applicable.

#### **G. JURISDICTION RATIONE TEMPORIS**

24. Restating that Australia signed the Rome Statute on December 9, 1998, and ratified it on July 1, 2002.

25. Asserting that the extended joint criminal enterprise, including acts relevant to the negotiations leading up to, and the actual extra-judicial killing of 3 LTTE hors de combat surrendering to the SLA via white flag, occurred around May 17 2009.

26. Asserting that the direct or indirect participation by act or omission of Australian national PALITHA KOHONA in the commission of this crime occurred after the entry into force of the Statute with respect to Australian jurisdiction and Australia's binding obligation to enforce the Statute with respect to the ICC.

#### **H. JURISDICTION RATIONE PERSONAE/RATIONE LOCI**

27. In the exercise of Article 13(c) triggered by the Prosecutor's initiation *proprio motu* of an investigation in accordance with Article 15, preconditions to the exercise of jurisdiction are satisfied if pursuant to Article 12(2)(a) the State on the territory of which the conduct in question occurred is a signatory to the Statute, or pursuant to Article 12(2)(b) the State, of which person accused of the crime is a national, is a signatory to the Statute.

28. Asserting that because the prohibited conduct of an extended joint criminal enterprise occurred in the territory of the republic of Sri Lanka, a non-signatory to the Statute, the Article 12(2)(a) *ratione loci* precondition to the exercise of jurisdiction is not satisfied.

29. Asserting that because of Australian national PALITHA KOHONA's direct or indirect participation by act or omission in the extended joint criminal enterprise, the Article 12(2)(b) *ratione personae* precondition to the exercise of jurisdiction is sufficiently met.

30. Noting that even though other co-perpetrators who participated in the joint criminal enterprise possessed Sri Lankan or otherwise non-Australian nationality at the time of the crime and therefore their individual acts do not necessarily fall within Article 12(2)(b) preconditions to the exercise of jurisdiction, the binational Australian-Sri Lankan character of the extended joint criminal enterprise brings either the totality of the enterprise within the jurisdiction of the Court, or at minimum would bring Australian national PALITHA KOHONA's specific conduct of direct or indirect

participation by act or omission in this enterprise within the jurisdiction of the Court.

## **I. ARTICLE 17 COMPLEMENTARITY PRECONDITIONS TO EXERCISE OF JURISDICTION**

### **i. AUSTRALIAN UNWILLINGNESS**

31. Since about May 18 2009, asserting that twenty-one months of Australian failure to investigate into the crime, a grave breach of humanitarian law perpetrated by a joint criminal enterprise of which an Australian national was an alleged member, reasonably satisfy the Article 17(2) "unwillingness" standard to constitute, as set forth in Article 17(2)(b), an "unjustified delay" in the proceedings. In the totality of circumstances, Australia's omission to act during this time period is dispositive of an unwillingness to act and is inconsistent with an Australian intent to bring Australian national PALITHA KOHONA to justice.

### **ii. SRI LANKAN UNWILLINGNESS AND INABILITY**

32. As the extended binational joint criminal enterprise falls in whole or in part within the jurisdiction of the court based on the satisfaction of the jurisdiction *ratione personae* requirement through PALITHA KOHONA'S Australian nationality, Sri Lanka's post-May 2009 Lessons Learned and Reconciliation Commission restorative justice mechanism, Sri Lanka's non-signatory status to the Statute, or Sri Lanka's *prima facie* unwillingness and arguable inability to genuinely investigate and prosecute the community of co-perpetrators criminally responsible for this crime, are factors which are immaterial to the determination of as to the force of binding Australian obligations arising from Australian national PALITHA KOHONA'S conduct which violated either Article 8(2)(b)(vi) or Article 8(2)(c) of the Statute.

## **J. JOINT CRIMINAL ENTERPRISE**

33. Recalling that evolving post-Nuremberg joint criminal enterprise jurisprudence has crystallized as elements of a joint criminal enterprise, the following: (1) plurality of persons; (2) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; (3) participation of the accused in the common design involving the perpetration of one of the crimes provided in the statute.

34. Recalling that a person is deemed to have participated in a joint criminal enterprise either: (i) by participating directly in the commission of the agreed crime itself (as a principal offender); (ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by

intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime; or (iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.; To prove the basic form of joint criminal enterprise, it must be shown that each of the persons charged and (if not one of those charged) the principal offender or offenders had a common state of mind, that which is required for the crime.

35. Recalling that the requisite mens rea for a extended joint criminal enterprise is *intent* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or, in any event, to the commission of a crime by the group.

36. Recalling that the level of participation to incur criminal liability requires that an accused must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise. The culpable participant would not need to know of each crime committed. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability.

37. Asserting that the doctrine of extended joint criminal enterprise is implicitly included as a mode of liability as set forth in Article 25(3)(b,c,d).

**K. PALITHA KOHONA AND THE EXTENDED JOINT CRIMINAL ENTERPRISE TO EXTRA-JUDICIALLY KILL 3 LTTE HORS DE COMBAT SURRENDERING BY WAVING A WHITE FLAG**

38. The extra-judicial killing was enabled by (1) the negotiation-related community of co-perpetrators of the extended criminal enterprise who participated in the perfidious negotiations which misused the presumptive white flag humanitarian law protections to induce volitional surrender of the LTTE hors de combat, and (2) a separate community of co-perpetrators who carried out the extra-judicial killing of the three LTTE hors de combat after the white flag had been hoisted, but possibly before the three LTTE hors de combat had become the SLA's prisoners of war.

39. PALITHA KOHONA's substantial contribution to the negotiation-related community of co-perpetrators to secure by perfidy the trust of

NADESAN, PULIDEVAN, and RAMESH to surrender into the de facto or de jure custody of the SLA, furthered the criminal purpose of the extended joint criminal enterprise of extra-judicially killing at least 3 LTTE hors de combat, including NADESAN and PULIDEVAN.

40. PALITHA KOHONA'S substantial negotiating role in his communications with NAMBIAR, and PALITHA KOHONA'S communications with PULIDEVAN and RAMESH through XXXXXX, when viewed in the totality of circumstances, aided, abetted, assisted, or otherwise contributed through direct or indirect participation by act or omission in the furtherance of this extended joint criminal enterprise, or in the furtherance of the natural and probable consequences of a common design, to extra-judicially kill NADESAN, PULIDEVAN, and RAMESH after inducing their volitional surrender through perfidious negotiations which promised white flag protections arising from lawful combatant immunity considered customary under international humanitarian law.

## VII. AUTHORIZATION OF INVESTIGATIONS/WARRANT OF ARREST

1. This request re-alleges and incorporates paragraphs one through seven of "The Accused" section, paragraphs one through thirty of the "General Legal Allegations" section, paragraphs one through thirty-nine of the "Statement of Facts" section, and paragraphs one through forty of the "Individual Criminal Responsibility" section, by reference hereto.

2. Considering that there are reasonable grounds to believe that PALITHA KOHONA participated, directly or indirectly, by act or omission, in the commission of a crime or criminal behavior which falls within the jurisdiction of the Court.

3. Considering that there is a reasonable basis to proceed with the authorization of investigations for the issuance of a warrant of arrest.

4. Considering that, under Article 58(1) of the Statute, the arrest of PALITHA KOHONA appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger investigations into the crimes for which he is allegedly responsible under the Statute.

5. IN CONSIDERING Sri Lanka's Rome Statute non-signatory status and possible factual circumstances where PALITHA KOHONA is physically present in the territory of Sri Lanka, pursuant to Australia's Article 86 obligations to cooperate with the Court's investigations and prosecutions of crimes within the jurisdiction of the Court, Australia's Attorney-General may enforce an Article 58 warrant of arrest by the initiation of extradition procedures to Australia from Sri Lanka provided by Australia's 1966 London Scheme arrangement with Commonwealth countries - including Sri Lanka - as amended in November 2002, and as implemented by the Extradition (Commonwealth Countries) Regulations Act of 1998 under Australian domestic law.

6. IN CONSIDERING the United Kingdom's Rome Statute signatory status and possible factual circumstances where PALITHA KOHONA is physically present in the territory of United Kingdom, enforcing the Court's Article 58 warrant of arrest of PALITHA KOHONA would fall within the United Kingdom's general Article 86 obligations to cooperate with the Court's investigation and prosecution of crimes within the jurisdiction of the Court.<sup>27</sup>

FOR THESE REASONS,

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<sup>27</sup> Fernando, Manjula. "Lanka's diplomatic moves pays dividends - Dr. Palitha Kohona" Sunday Observer. 16 January 2011. <http://www.sundayobserver.lk/2011/01/16/fea05.asp> accessed 01/22/2011.

SCET/TAG PETITION THE PROSECUTOR OF THE COURT TO HEREBY:

7. UNDER HIS ARTICLE 15 PROPRIO MOTU POWERS, SUBMIT A REQUEST TO THE PRE-TRIAL CHAMBER TO AUTHORIZE AN INVESTIGATION into the extended joint criminal enterprise to extra-judicially kill three LTTE hors de combat after having surrendered into the de facto or de jure custody of the SLA, as instructed, by waving a white flag, on or about May 18 2009, near the GoSL-designated Safe Zone in Mullaitheevu District, Eastern Sri Lanka.

**VIII. APPENDICES**

**APPENDIX A: MAP OF VELLUMULLIVAIKAL**

**APPENDIX B: EXTENDED JOINT CRIMINAL ENTERPRISE CONCEPTUAL DIAGRAM**

**APPENDIX C: INTERVIEW WITH WITNESS A**

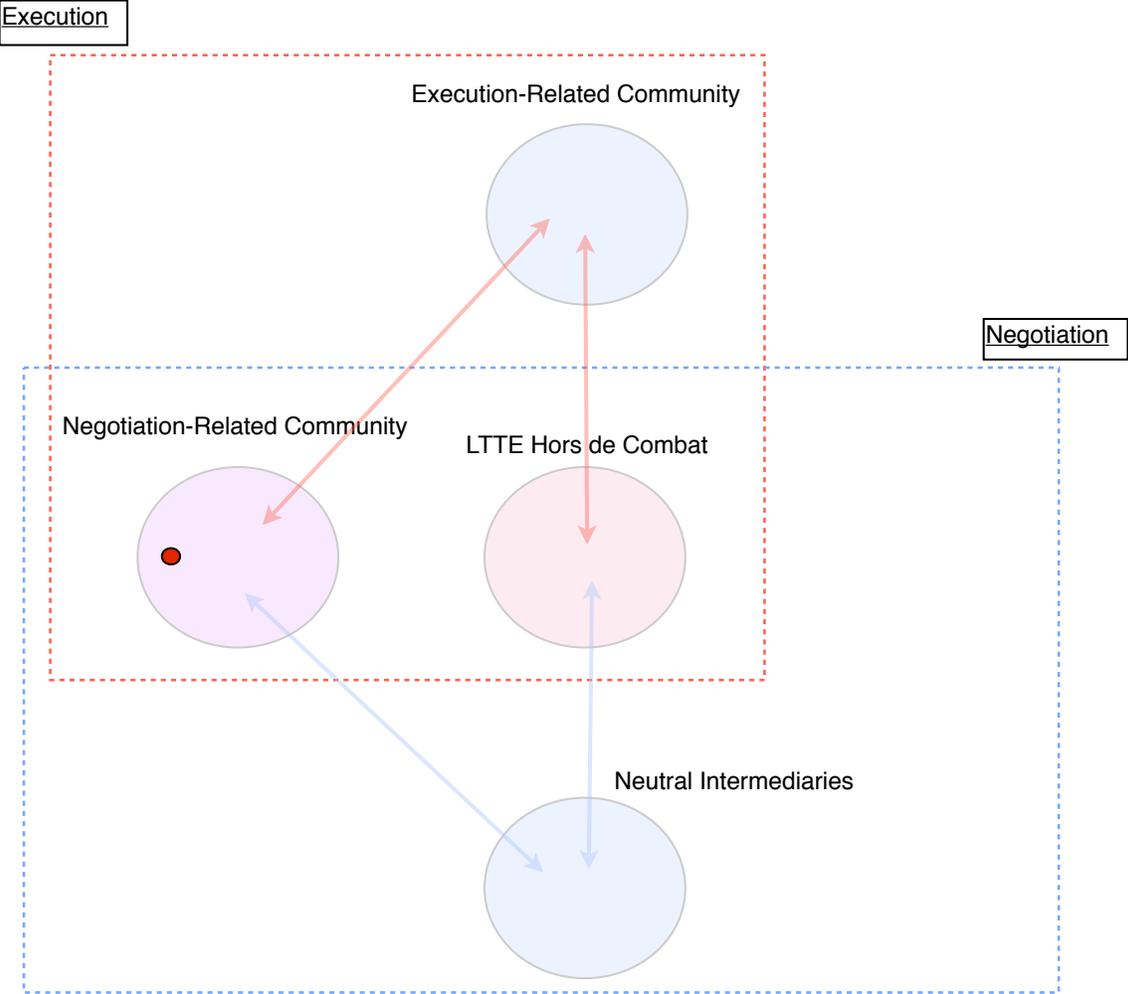
**APPENDIX D: DEPOSITION OF SLA COMMANDER**

**APPENDIX A: MAP OF VELLUMULLIVAICAL**



**APPENDIX B: EXTENDED JOINT CRIMINAL ENTERPRISE CONCEPTUAL DIAGRAM**

**EXTENDED JOINT CRIMINAL ENTERPRISE CONCEPTUAL DIAGRAM**



● Palitha Kohana

### **APPENDIX C: INTERVIEW WITH WITNESS A**

A member of SCET/TAG conducted three separate interviews with WITNESS A during December 2010 as part of its broader fact-finding efforts into the Australian-Sri Lankan extended joint criminal enterprise whose common purpose was to carry out the post-surrender extra-judicial killing of LTTE hors de combat NADESAN, PULIDEVAN, and RAMESH, on or about May 18 2009 near the GoSL-designed Safe Zone in Mullaitheevu District, Eastern Sri Lanka.

A deposition taken after the SCET/TAG December 2010 interviews with WITNESS A can be provided upon request by the Court. WITNESS A possesses direct evidence relevant to the negotiation-related community of co-perpetrators, to which PALITHA KOHONA was a member, direct knowledge of factual circumstances surrounding the perfidious negotiations, and contact information to additional witnesses to the crime who reside inside and outside of Sri Lanka.

SCET/TAG recognize that the ability of victims and witnesses of Sri Lankan war crimes to give testimony in a judicial setting or to cooperate with law enforcement investigations at the national, regional, or international level, without fear of intimidation or reprisal or threat to life or incarceration under terrorism-related domestic laws, inside or outside of Sri Lanka, is essential to enforcing accountability for jus cogens norm violations perpetrated by the Rajapakse administration.

SCET/TAG conducted its interviews with WITNESS A assuring non-disclosure of witness identity. SCET/TAG note that due to the affiliation of PALITHA KOHONA, SHAVENDRA SILVA, and VIJAY NAMBIAR with the UN and their possible direct or indirect participation in the extended joint criminal enterprise, and due to the possibility that the exposure of facts included in the transcript could lead to the identification of WITNESS A, neither the deposition nor the interview transcript of WITNESS A have been included in this submission.

If the Court were to initiate investigations and ensure witness protection as customary and appropriate to the specific circumstances of investigating this crime, SCET/TAG will provide full cooperation with facilitating contact between the Court and WITNESS A.

**APPENDIX D; DEPOSITION OF SLA COMMANDER**