TO THE PRESIDENT AND MEMBERS OF THE

GENERAL COURT OF THE EUROPEAN UNION

Action for annulment

of the group Liberation Tigers of Tamil Eelam (hereinafter "LTTE") [redacted] applicant, [redacted] represented by Victor Lodewijk Koppe, lawyer at Böhler Advocaten, Keizersgracht 560-562, 1017 EM Amsterdam, The Netherlands,

in this action for annulment, which is brought against

the **COUNCIL OF THE EUROPEAN UNION**

requests the General Court of the European Union to annul Council Implementing Regulation (EU) No 83/2011 in so far as this instrument concerns the LTTE and/or to declare Council Regulation (EC) 2580/2001 inapplicable to the LTTE;

the applicant has authorized her lawyer mr. Victor Lodewijk Koppe, legal practitioner in Amsterdam, Keizersgracht 560-562 (1017 EM), the Netherlands, to submit this application on her behalf and to represent the applicant during the proceedings before the General Court of the European Union.

A copy of mr. Koppe's authorisation to practice is enclosed (Enclosure I). Mr. Koppe declares in accordance with article 44 (2) of the Rules of Procedure to agree to service by (tele)fax: (+31) (0)20 344 62 01.

The authorisation form [redacted] representative of the applicant, to mr. Koppe and a copy of his passport is enclosed (Enclosure II and Enclosure III).

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SUMMARY OF THE PLEAS IN LAW AND MAIN ARGUMENTS

1. The LTTE was involved in an armed conflict with the Sri Lankan government from 1987 until 2009 in the pursuit of the right to self-determination and a separate Tamil Eelam state by the Eelam Tamils. Customary international law prohibits the European Union from interfering with such a conflict. Therefore, listing the LTTE fell outside the scope of Council Regulation (EC) No 2580/2001. This can also be inferred from the exception contained in various instruments in the fight against terrorism, stating that such instruments are not applicable to armed conflicts governed by international humanitarian law. (Plea I)

2. The LTTE cannot be considered a terrorist organisation as defined in Article 1(3) of the Council Common Position 2001/931/CFSP (hereinafter: "Common Position"). First of all, the facts described below do not amount to offences under national criminal law, which does not apply to situations of armed conflict. Moreover, the objectives of the LTTE were not those stated in Article 1(3) of the Common Position. (Plea II)

3. Council Implementing Regulation (EU) No. 83/2011 is not in line with article 1(4) of the Common Position, as no decision by a competent authority has been taken. The decisions referred to in the Statement of Reasons accompanying the decision to maintain the LTTE on the list cannot be considered as such. (Plea III)

4. Regulation 83/2011 is void because the review required by Article 1(6) of the Common Position was never conducted. As the LTTE no longer uses military means to achieve its goals and is no longer directly active in Sri Lanka, such a review would have led to the conclusion that the LTTE must be removed from the list. (Plea IV)

5. It follows from the arguments made in pleas III and IV, which include objections against the lack of motives, that Regulation 83/2011 does not comply with the obligation to state reasons in conformity with Article 296 of the Treaty on the Functioning of the European Union. (Plea V)

6. Finally, because the reasoning contained in the Statement of Reasons is insufficient to permit the LTTE to effectively challenge the assertion that the LTTE is involved in terrorist activities, no meaningful judicial review can take place. Accordingly, the LTTE's rights to an effective defence and judicial protection are infringed. (Plea VI)

FACTS REGARDING THE APPLICANT

6. The LTTE was formed in 1976 in Sri Lanka to further the self-determination of the Eelam Tamils and to achieve a separate Tamil Eelam state.

7. As will be elaborated, the LTTE was involved in an armed conflict with the Sri Lankan government from 1987 until 2009. Despite various attempts at a peace process, no peaceful solution to the conflict was ever reached.

8. The last such process took place from 2002 until 2006 and included a cease-fire agreement.

9. On 2 January 2008, after various incidents, the Sri Lankan government unilaterally terminated the agreement.

10. On 18 May 2009, the LTTE was defeated militarily and the Sri Lankan government officially declared an end to hostilities. Most of the LTTE leaders were killed or arrested during the conflict or in the following months.

11. On 24 May 2009, the LTTE announced that it would no longer engage in military strategies to further its political goals but would instead focus solely on political means.

12. Since the death of most members of the LTTE leadership and all of the senior members of the LTTE military wing, the LTTE as a uniform political-military entity has ceased to exist. The LTTE has instead been reformed into a transnational political network, with no clear hierarchy or overall leadership.

19. Council Implementing Regulation (EU) No 83/2011 is void in as far as it concerns the LTTE since the LTTE cannot be qualified as a terrorist organisation as defined in Article 1(3) of Council Common Position 2001/931/CFSP.

20. Council Implementing Regulation (EU) No 83/2011 is void in as far as it concerns the LTTE because no decision by a competent authority, as required by Article 1(4) of Council Common Position 2001/931/CFSP, has been taken.

21. Council Implementing Regulation (EU) No 83/2011 is void in as far as it concerns the LTTE since the Council did not conduct any review as required by Article 1(6) of Council Common Position 2001/931/CFSP.

22. Council Implementing Regulation (EU) No 83/2011 is void in as far as it concerns the LTTE as it does not comply with the obligation to state reasons in conformity with Article 296 TOFU.

23. Council Implementing Regulation (EU) No 83/2011 is void in as far as it concerns the LTTE because it infringes upon the LTTE's right of defence and the LTTE's right to effective judicial protection.

I. Council Implementing Regulation (EU) No 83/2011 is void in as far as it concerns the LTTE and/or Council Regulation (EC) No 2580/2001 is inapplicable due to a failure to take regard of the law of armed conflict.

24. Council Regulation (EC) No 2580/2001 (hereinafter: "Regulation 2580/2001") cannot be held to be applicable in cases where international humanitarian law applies. In such cases, the European Union and its member states have a duty under customary law to refrain from involvement in the conflict. This established principle is reflected in other anti-terrorism instruments, which each contain a clause stating that armed conflicts fall outside the scope of the particular instrument.

25. The relationship between armed conflict and criminal law is especially important with regard to claims of terrorism. As the special rapporteur on terrorism and human rights to the UN, ms. Kalliopi K. Koufa, notes:

> "Under the law of armed conflict, acts of war are not chargeable as either criminal or terrorist acts."[1]

26. This principle stems from the oft-quoted sentiment that "one man's terrorist is another man's freedom fighter". History has shown that political attitudes regarding the relationships between governments and their people tend to change over time. For example, the African National Congress—once considered a terrorist organisation—is now lauded for its contribution to human rights in South-Africa. Yet the ANC's legitimate political goals would never have been achieved without recourse to certain means now regarded as terrorism.

27. Fighting—even at the risk of civilian casualties or by way of certain unpalatable methods—may at times be necessary in order to ultimately achieve a higher standard of fundamental rights. During a conflict, however, it is often difficult to tell which party is winning and, perhaps even more problematic, which party is *right*. It is for these reasons that third-party states must refrain from interfering in internal armed conflicts.

28. Yet, by listing a party to an armed conflict as a terrorist organisation, the European Union does precisely that—inappropriately interferes with domestic hostilities. Not only is the listing accompanied by restrictive actions at the European level, member states must often take punitive actions at the national level as well. Such interference is contrary to international law, especially if it is not accompanied by sanctions against other actors.

29. The armed conflict which took place in Sri Lanka between the LTTE and the Sri Lankan government was a struggle for the self-determination of the Eelam Tamils. Listing the LTTE as a terrorist group was an unlawful interference with this conflict, especially as no measures were taken against the Sri Lankan government.

30. In this respect, it is important to note that the listing is grounded only on acts which took place during the armed conflict. That hostilities have ceased as of May 2009 is therefore of no relevance to the argument made here.

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[1] "Report of UN Economic and Social Council, Terrorism and human Rights. Progress report", 27 June 2001, Kalliopi K. Koufa, Commission on Human Rights, p. 20 **(Annex A.1, p. 1)**

Interference contrary to international law

31. Because the LTTE fought for the legitimate aim of the Eelam Tamils' right to self-determination, third-party states are duty-bound to support them in this fight or, at the very least, not to oppose them.

32. More generally, international humanitarian law forbids the interference of third parties in the conflict. In its ruling on Nicaragua, the International Court of Justice declared non-interference with the internal affairs of a state to be a rule of customary international law.[2] The principle follows from the concept of sovereignty, a key foundation of public international law.

33. Article 3(5) of the treaty on the European Union requires the EU to adhere to international law, which includes the rule of non-intervention. Due to the incompatibility of listing the LTTE as a terrorist organisation with this article, the listing must be considered void.

Other instruments in combatting terrorism

34. In the 1970s and 1980s, various UN resolutions concerning terrorism condemned the practice, but only insofar as it was directed against legitimately constituted governments,

> "implying that terrorism is not objectionable against *illegitimate* governments, particularly those oppressing self-determination movements."[3]

35. The Common Position, Council Regulation (EC) No 2580/2001, and the Framework Decision on combatting terrorism from 2003 all stem from Resolution 1373 of the UN Security Council.[4]It must be noted that the LTTE has not been placed on the UN list of terrorist organisations. Furthermore, Resolution 1373—which specifically refers to the 1999 UN Convention on financing terrorism—is not applicable to armed conflict. Article 2(1)(b) of the Convention excludes any act directed against persons "taking an active part in the hostilities in a situation of armed conflict." From this, Husabø concludes:

> "This indicates that all acts, whether lawful or unlawful, committed against other combatants in an armed conflict fall outside the scope of the 1999 Convention. The fact

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[2] ICJ, Nicaragua v. United States, Judgment on jurisdiction and admissibility, 1984 ICJ Reports 392, 26 November 1984, para 73: non-interference with the internal affairs of a state is customary law (*http://www.icj-cij.org/docket/files/70/6485.pdf)*

[3] "Book: Defining Terrorism in International Law", 2006, Ben Saul, p. 37 **(Annex A.2, p.5)**

[4] "Book: Fighting terrorism through multilevel criminal legislation: Security Council Resolution 1373, the EU framework decision on combating terrorism and their implementation in Nordic, Dutch and German criminal law", 2009, Erling Husabø p. 6 **(Annex A.3, p.21)**

> that Resolution 1373 explicitly refers to this Convention and has partly copied its rules is an argument in favour of a similar interpretation of Resolution 1373."

36. By analogy, armed conflict must be considered to fall outside the scope of the Common Position and Regulation 2580/2001.

37. Support for this position can also be found in the framework for combatting terrorism, which emerged at the same time as the Common Position but, due to parliamentary review, took longer to come into effect. However, the description of what constitutes a terrorist act according to the Common Position has been taken directly from the Framework Decision.[5] It may therefore be assumed that any restrictions on the applicability of the Framework Decision apply with equal force to the Common Position and Council Regulation (EC) No 2580/2001.

38. Paragraph 11 of the preamble to the Framework Decision reads:

> "Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a state in the exercise of their official duties are not governed by this Framework Decision."

39. The preamble to the Framework Decision speaks of 'armed conflict' in general. Regardless of how the conflict is qualified, international humanitarian law is applicable.[6] For this reason alone, the LTTE must be considered to fall outside the scope of the Framework Decision and, therefore, also outside the scope of the Common Position.

40. Furthermore, the Framework Decision was accompanied by a statement explicitly excluding armed resistance—such as that conducted by the various European resistance movements during World War II—from its scope. At the very least, this exclusion seems to indicate that criminalizing actions during war was not meant to be part of the fight against terrorism.[7]

41. In this regard, the Parliament Recommendation of 5 September 2001 is also relevant, in that it draws a distinction between terrorist acts within the European Union—whose member states can all be considered democratic regimes in which recourse to the rule of

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[5] "Article: EU responses to Terrorism", January 2003, Steve Peers for International and Comparative Law Quarterly p. 238 **(Annex A.4, p.35)**
[6] Husabø 2009 p. 375 **(Annex A.3, p.23)**
[7] Saul 2006, p. 89 **(Annex A.2, p.19)**

law provides redress for wrongs committed by the state—and "acts of resistance in third countries against state structures which themselves employ terrorist methods."[8]

42. Finally, further support for the principle of non-interference with internal armed conflicts can be found in article 6(5) of protocol II to the Geneva Conventions. This article requires the broadest possible amnesty to be granted to those who have participated in the armed conflict once it ends. Listing a party to a conflict as a terrorist organisation and thereby forcing states to take criminal or, at the very least, punitive actions against it would impede the application of article 6(5). In fact, this very scenario has materialized in Sri Lanka since the LTTE has been defeated. Rather than granting amnesty to supporters and members of the LTTE, Tamils in Europe are being prosecuted for supporting a terrorist organisation. It is imperative that the European Union does not lend itself to such expressions of victor's justice.

Conclusion

43. International humanitarian law proscribes intervention of third states with an armed conflict between a non-state actor in the pursuit of self-determination and a state. The principle of non-intervention can in particular be found in various international instruments in the fight against terrorism that hold a clause stating armed conflicts to fall outside the scope of the instrument. Because listing an organisation as a terrorist organisation must be considered to be an intervention with an armed conflict, such a listing is not in accordance with international law.

The right to self-determination

44. Due to the importance of the Sri Lankan conflict to the arguments presented herein, it is necessary to elaborate upon the armed conflict and its origins.

45. Hostilities between the LTTE and the Sri Lankan Army (SLA) existed roughly from 1983 until 2009. This protracted armed conflict can only be described as a war of liberation, fought with the intention to free the Tamil population from a discriminatory and repressive government and to establish and maintain a separate state of Tamil Eelam in the north and northeast territories of the island of Sri Lanka.

[8] Husabø 2009 p. 389 **(Annex A.3, p.35)**

46. The principle of self-determination is part of *jus cogens* and has been enshrined in various legal instruments, the most important of which are the Charter of the United Nations (article 1(2)) and the International Covenant on Civil and Political Rights (article 1(1)).

47. The Covenant speaks of "peoples" having the right to self-determination. Marcinko provides the following definition of that term:

> "Generally, what distinguishes people having the right to self-determination from groups that do not, include a history of independence or self-rule in an identifiable territory, a distinct culture, and a will and capacity to regain self-governance. In other words, the term "peoples" mean those groups which have common political goals, a will to live together, and clear ethnic and/or cultural ties."[9]

48. In order to establish whether the Tamil population of Sri Lanka constitutes a distinct *people,* a brief introduction to its history is required. Of course, such a description can never account for all the complexities of actual life. While the population of the north and east provinces is largely Tamil, this is not to say that no other groups can or do live there, nor that there are no Tamils to be found in other parts of Sri Lanka. Indeed, as a result of the lengthy conflict, many Tamils fled the war-torn regions of Sri Lanka and now reside in different parts of the country or abroad.

49. Yet, with these qualifications in mind, it is clear that the Tamil population of Sri Lanka is a distinct group with its own language and a right to self-determination.[10]The Eelam Tamils form a significant minority in Sri Lanka and are situated in the north and east of Sri Lanka.[11] Over two thousand years old, the Tamil language is a unique one with its own script and body of classic literature.[12] Throughout the centuries, Eelam Tamil has developed separately from its Indian counterpart.

50. In pre-colonial times, a separate Tamil kingdom existed in the north and northeast of Sri Lanka along with two Sinhalese kingdoms on the rest of the island. While Tamils were traditionally Hindu, the Portuguese introduced Christianity, resulting in a significant

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[9] "Book: Terrorisme et droit international/Terrorism and International Law", 2008, Marcin Marcinko, p. 376 **(Annex A.5, p. 39)**

[10] "Book: Ethnic Conflict and Violence in Sri Lanka", august 1983, Virginia Leary for the International Commission of Jurists, p. 69 **(Annex A.6, p. 57)**

[11] "Article: Ethnonationalist networks and transnational opportunities: the Sri Lankan Tamil diaspora", 2004, Sarah Wayland for Review of International Studies vol. 30, p. 412 **(Annex A.7, p. 66)**

[12] http://tamil.berkeley.edu/tamil-chair/letter-on-tamil-as-a-classical-language

group of Roman-Catholic Tamils.[13] The Sinhalese, on the contrary, are in large part Buddhist.[14] While the Portuguese and Dutch colonial powers left existing political structures largely intact, the British colonial administration transformed the island of Ceylon into a unitary state.[15]

51. In 1948, colonial rule of Sri Lanka came to an end. Although some guarantees were initially put in place to protect minority groups, discrimination against the Tamils by Buddhist-oriented Sinhalese majorities became institutionalized from 1956 onward.

52. In 1956, the Sinhalese Sri Lankan Freedom Party made Sinhala the country's official language. Around the same time, a policy was established whereby Sinhalese people were resettled within those districts in the north and northeast of Sri Lanka regarded by Tamils as their homeland. Between 1956 and 1970, 67,000 Sinhalese allottees were given new land within Tamil territory.[16] In some eastern provinces, the percentage of Sinhalese rose from 56% in 1946 to 91% in 1981.[17] The Sinhalese colonization not only radically altered the demographics of historically Tamil areas, it was accompanied by grand schemes to further the development of Sinhalese parts of the country while neglecting Tamil regions:

> "Perhaps even more significant for its ethnic implications, the development of the northern and eastern Dry Zone appears to be designed to exclude the development of adjacent coasts.[...] Even though most of the settlement was to be in the Tamil-speaking Eastern Province, the government neglected the integration of colonization schemes with Tamil urban centers."[18]

53. Moreover, these schemes were accompanied by the glorification of the Sinhalese kingdoms and Buddhist predominance.[19] And while the government encouraged settlement by private Sinhalese groups, it forcibly removed similar initiatives from Tamil communities.[20]

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[13] According to Fuglerud, 12 % of the Tamils is Roman-Catholic, "Book: Life on the Outside. The Tamil Diaspora and Long Distance Nationalism", 1999, Øivind Fuglerud, p. 26 **(Annex A.8, p. 82)**. There is also a small group of Muslim Tamils.
[14] Buddhism is also the official state religion, as laid down in article 9 of the Sri Lankan constitution.
[15] "Article: The Tamil people's right to self-determination", March 2008, Deirdre McConnell for Cambridge review of International Affairs vol. 21, p. 60 **(Annex A.9, p. 90)**
[16] "Article: *Colonization and ethnic Conflict in the Dry Zone of Sri Lanka*", February 1990, Patrick Peebles for *The journal of Asian Studies* vol. 49, p. 37 **(Annex A.10, p. 115)**
[17] Peebles 1990, p. 37 **(Annex A.10, p. 115)**
[18] Peebles 1990, p. 37 **(Annex A.10, p.115)**
[19] Peebles 1990, p. 44 **(Annex A.10, p. 122)**
[20] Peebles 1990, p. 45 **(Annex A.10, p. 123)**

54. These resettlement and language issues led to the country's first riots in 1958, when a peaceful Tamil protest was violently broken up by Sinhalese colonists.[21] As a result, Tamil leaders began lobbying for the creation of an autonomous Tamil state within a republic; however, the government failed to respond to such initiatives.[22]

55. In the early 1970s, a new admission system for the universities was set up, which "explicitly discriminated against Tamil entrants."[23] Before this, Tamils constituted a relatively large part of university students and civil service members. Under the new district quota system, Tamils who had expected to gain entrance based on merit suddenly found themselves without education and corresponding employment opportunities. In the period of 1969–1975, the percentage of Tamil students in fields such as medicine, engineering, and agriculture dropped from approximately 50% to just 17%.[24] Tamils were also systematically eliminated from governmental service.[25] Today, Tamils are virtually non-existent in the military and police forces, an issue UN rapporteurs have consistently highlighted as a contributing factor to human rights violations in Sri Lanka.[26]

56. Discriminatory policies against the Tamils were enshrined in the 1972 Constitution, in which Sinhala was reaffirmed to be the only official language (and the country's name was changed from Ceylon to the Sinhala name of Sri Lanka),[27] Buddhism became the state religion, and various formal safeguards for minorities were abolished.[28]

57. Throughout the 1970s, peaceful demonstrations against these forms of discrimination took place. In 1974, police killed eight people during protests at the World Tamil Conference.[29] Anti-Tamil riots again broke out in 1977,

> "taking 128 lives and opening the way for secession which was now perceived by Tamils as a precondition for physical security."[30]

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[21] Fuglerud 1990, p. 32 **(Annex A.8, p. 85)**
[22] Wayland 2004, p. 412 **(Annex A.7, p. 66)**
[23] "Article: *Control Democracy, institutional Decay, and the Quest for Eelam: Explaining Ethnic Conflict in Sri Lanka*", March 1999, Neil DeVotta for *Pacific Affairs* vol. 73, p. 61 **(Annex A.11, p.140)**
[24] Tamils against genocide, *proposed indictment of GOTABAYA RAJAPAKSA and SARATH FONSEKA*, under 39, http://www.tamilsagainstgenocide.org/Docs/Final800pIndictmentDocument.pdf
[25] DeVotta (1999) p. 60 **(Annex A.11, p. 139)**
[26] "Report of the special rapporteur of the UN Economic and Social Council, on extrajudicial, summary and arbitrary executions", 12 March 1998, Bacre Waly Ndiaye, Commission on Human Rights, p. 38 **(Annex A.12, p. 193)**
[27] McConnell 2008, p. 63 **(Annex A.9, p. 93)**
[28] Wayland 2004, p. 412 **(Annex A.7, p. 66)** This constitution is still in place, although it has been amended to include Tamil as an official language.
[29] Fuglerud 1999, p. 32 **(Annex A.8, p. 85)**
[30] Fuglerud 1999, p. 32 **(Annex A.8, p. 85)**

58. In 1976, the Vaddukkoaddai Resolution was accepted during the first National Convention of the Tamil United Liberation Front (TULF, in which the various Tamil political parties were united).[31] During the elections of 1977, TULF won the majority of votes with this resolution in the north and east provinces of Sri Lanka. The Vaddukkoaddai Resolution also laid down various constitutional requirements for a future Tamil Eelam state, including among other things:

> "that the constitution of TAMIL EELAM shall be based on the principle of democratic decentralization so as to ensure the non-domination of any religious or territorial community of TAMIL EELAM by any other section."

59. In 1979, the Prevention of Terrorism Act was introduced, which—in the name of the struggle against terrorism—provided measures used primarily to target Tamils in particular. Among other things, this law made it possible to arrest and hold persons for long periods of time without warrants[32] and to admit in criminal proceedings confessions made under duress.[33] Furthermore, the terrorism prevention act was applied retroactively and provided for offences such as:

> "words or signs which cause or are intended to cause religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups".[34]

60. The Prevention Act led to the torture and abuse of many Tamils, especially young men.[35] With the exception of short periods when it was lifted to encourage peace talks, this act was in force for almost three decades. Significantly, a report of the International Committee of Jurists stated in 1983 that the Prevention Act was comparable to the infamous South-African 1967 Terrorism Act.[36]

61. By 1980, it was clear that politics in Sri Lanka were blatantly discriminatory[37] against the Tamil population while favouring Sinhala superiority:

> "That the large parliamentary majorities allowed the SLFP in 1972 and the UNP in 1978 to ratify two constitutions and that they both did so without input or participation by the

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[31] "Vaddukoddai Resolution", 14 May 1976, Tamil United Liberation Front **(Annex A.13, p. 199)**
[32] DeVotta 1999, p. 63 **(Annex A.11, p. 142)**
[33] Leary 1983, p. 45 **(Annex A.6, p. 53)**
[34] Leary 1983, p. 44 **(Annex A.6, p. 53)**
[35] DeVotta 1999, p. 60 **(Annex A.11, p. 139)**
[36] Leary 1983, p. 47 **(Annex A.6, p. 54)** MacDermot claimed the Terrorism Prevention Act was a violation of the International Covenant on Civil and Political Rights, "Book: *The review of the international commission of jurist,* Chapter: *Sri Lanka"*, December 1983, Niall MacDermot for ICJ, p. 26 **(Annex A.14, p. 205)**
[37] Wayland 2004, p. 413 **(Annex A. 7, p. 67)**

> elected Tamil representatives highlighted the extent to which the Tamils were marginalized in Sri Lanka's control democracy."[38]

62. Tamil political parties proved incapable of reaching a federal state by peaceful means. From 1980 onwards, the situation escalated, with two incidents standing out. In 1981, the library of Jaffna, containing thousands of ancient Tamil texts, was burned down.[39] Although never officially confirmed, it is generally accepted that this was the work of Sri Lankan police forces on instigation of ultra-nationalistic Sinhala politicians.

63. However, the events that signalled the final breakdown between the Tamil and Sinhala populations were the anti-Tamil riots of 1983, now collectively remembered as 'Black July'.

64. After an attack on an armed convoy, Sinhalese soldiers killed 41 civilians in Jaffna and anti-Tamil riots broke out in Colombo and other parts of the country. During these riots, an estimated 2000–3000 Tamils were killed, often by being doused with petrol and lit on fire. Thousands of shops and houses were destroyed.[40] The importance of this event to the conflict cannot be overestimated. As DeVotta states:

> "If Sri Lanka's post-independence politics on language, religion, education, employment, colonization and resource allocation contributed to institutional decadence, the 1983 riots market the climactic moment in institutional breakdown. Indeed, the systematic and virulent violence unleashed during the 1983 riots made it a veritable pogrom."[41]

65. For many, these attacks amount to genocide. The International Committee of Jurists in 1983 stated:

> "The evidence points clearly to the conclusion that the violence of the Sinhala rioters on the Tamils amounted to acts of genocide."[42]

Over the years, more claims of genocide have been made. For example, in 2009, a proposed indictment for genocide was presented to the United States government by the NGO Tamils against Genocide.[43]

66. Following these violent events, armed resistance seemed to be the only way to protect the Tamil people and their culture. Various groups were formed, some of which were

[38] DeVotta 1999, p. 62 **(Annex A.11, p. 141)**
[39] Fuglerud 1999, p. 33 **(Annex A.8, p. 85)**
[40] Fuglerud 1999, p. 33 **(Annex A.8, p. 85)**
[41] DeVotta 1999, p. 64 **(Annex A.11, p. 143)**
[42] MacDermot 1983, p. 24 **(Annex A.14, p. 204)**
[43] Tamils against genocide, *proposed indictment of GOTABAYA RAJAPAKSA and SARATH FONSEKA*, http://www.tamilsagainstgenocide.org/Docs/Final800pIndictmentDocument.pdf

supported and trained by the Indian government.[44] Eventually, in 1987, the LTTE emerged as the only group independent of both the Sri Lankan and Indian governments. It was from this time onward that an armed conflict ensued in Sri Lanka.[45]

67. Although a distinction is sometimes made among three or four *Eelam* wars, they in fact form a continuous armed conflict interspersed with periodic intervals where peace talks were held pursuant to ceasefire agreements. For purposes of this complaint, the period of hostilities ranging from 1987 until 2009 will be considered as a single conflict. Of course, different tactics developed during the various phases of the conflict. For example, while the Sri Lankan government used indiscriminate air bombings[46] during the entire period, its use of starvation through the blockade of Jaffna took place in 1987 alone.[47] At the same time, while the LTTE started out as a typical guerrilla group, it eventually became a full-fledged armed force, capable of engaging in conventional warfare.

68. During the 1990s, the LTTE gained control of the north and northeast of Sri Lanka. Here, they formed a *de facto* state, with their own banks, judiciary, police force, and border control.[48] Although the stronghold of Jaffna was recaptured by Sri Lankan military in 1995, the LTTE essentially ruled the north and northeast alone when it implemented a unilateral ceasefire in 2001.[49] It had its own Tamil Eelam Penal Code and Tamil Eelam Civil Code,[50] as well as a judicial system with both district and high courts.[51] Relief organisations worked in the area, especially after the tsunami of 2004,[52] and schools and medical posts were set up by the political wing of the LTTE. As part of the peace process in the 2000s, the LTTE also established a North-East Secretariat on Human Rights.[53] This *de facto* state was recognized by various international organisations and officials. For example, the Special Rapporteur on Freedom of Religion and Belief Asma Jahangir made

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[44] Fuglerud 1999, p. 36 **(Annex A.8, p. 87)**
[45] Fuglerud 1999, p. 36 **(Annex A.8, p. 87)**
[46] Ndiaye 1998, p. 10 **(Annex A.12, p. 165)**
[47] Fuglerud 1999, p. 36 **(Annex A.8, p. 87)**
[48] "Article: *Building the Tamil Eelam State: Emerging State Institutions and Forms of Governance in LTTE-controlled Areas in Sri Lanka*", 2006, Kristian Stokke **(Annex A.15, p. 206)**
[49] Wayland 2004, p. 413 **(Annex A.7, p. 67)**
[50] Stokke 2006, p. 8 **(Annex A.15, p. 213)** "Report: Meeting Commission on Human Rights", 9 August 2005, Economic and Social Council **(Annex A.16, p. 234)**
[51] Stokke 2006, p. 9 **(Annex A.15, p. 214)**
[52] "Press Release: Council of the European Union, *Meeting f the Co-chairs of the Tokyo Conference on Reconstruction and Development of Sri Lanka*", 5 January 2005 **(Annex A.17, p. 251)**, where the LTTE is recognized as a party and international donor and aid organisations are called to cooperate with all relevant parties.
[53] "Report of the special rapporteur of the Commission on Human Rights on extrajudicial, summary and arbitrary executions", 27 March 2006, Philip Alston, UN Economic and Social Council, p. 10 **(Annex A.18, p. 263)**

a specific recommendation to the LTTE regarding the territories they controlled.[54] Even the Sri Lankan government had no choice but to recognize the LTTE as the voice of the Tamil people.[55]

69. Furthermore, during the peace talks that took place between 2002 and 2005, the application of international humanitarian law was almost agreed upon by Sri Lanka and the LTTE.[56] In the Ceasefire Agreement that took effect in 2002, it was agreed that both parties would act "in accordance with international law".[57] The Ceasefire Agreement also states that the LTTE has "armed forces", can engage in "offensive military operations", and has "individual combatants"—factors indicating the recognition of the LTTE as a full party to the conflict. Since both parties agreed to "establish checkpoints on their line of control" (art. 2.7), it can be concluded that the LTTE held absolute control over part of the island and the Sri Lankan government acknowledged this fact.

70. During the peace process, the LTTE recognized the need for a peaceful solution and indicated its willingness to discuss a federal Sri Lankan state with regional autonomy for the Tamils, rather than their own fully independent Tamil Eelam.[58] However, by this time, both Sri Lankan politics and the global war on terror were against them politically.

71. The Sinhalese government of Sri Lanka rejected the proposal for autonomy.[59] The negotiators for the Sri Lankan government faced grave criticism at home, as some parties did not believe in the peace negotiations. The JVP and the JHU were especially critical.[60] After the tsunami, the LTTE and the Sri Lankan government initially created a joint Post-Tsunami Operational Management Structure to deal with the aftereffects of the disaster and distribute aid.[61] However, the Sinhala opposition—with the aid of the Sri Lankan Supreme Court—prevented the management structure form taking effect.[62]

72. In essence, the situation was the same as in 2000, when DeVotta stated:

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[54] "Report submitted by the Special rapporteur of the Commission on human rights on freedom of religion or belief", 12 December 2005, Asma Jahangir, UN Economic and Social Council, p. 23-24 **(Annex A.19, p. 309-310)**
[55] Wayland 2004, p. 416 **(Annex A.7, p. 70)**
[56] "Article: Binding armed opposition groups", 2006, Sandesh Sivakumaran for *International and Comparative law Quarterly* vol. 55, p. 392 **(Annex A.20, p. 314)**
[57] "Ceasefire-agreement between Sri Lanka and the Liberation Tigers of Tamil Eelam", February 2002 **(Annex A.21, p. 316)**
[58] Mentioned by, amongst others, Wayland 2004, p. 414 **(Annex A.7, p. 68)** and "Article: *Challenges to peace Negotiations: The Sri Lankan Experience*", July/September 2006, Sukanya Podder for *Strategic Analysis* vol. 30, p. 588 **(Annex A.22, p. 325)**
[59] Podder 2006, p. 588 **(Annex A.22, p. 325)**
[60] Podder 2006, p. 590 **(Annex A.22, p. 327)**
[61] Podder 2006, p. 588 **(Annex A.22, p. 325)**
[62] Stokke 2006, p. 16 **(Annex A.15, p. 221)**

> "Yet, despite being portrayed as an organization brainwashed into blindly fulfilling its leader's dictates, it may be hard to fault the LTTE's determination to fight on, given that even moderate Tamils feel frustrated and betrayed by successive Sri Lankan government's numerous broken promises and the inability of the country's dominant political parties to reach a consensus on a credible devolution proposal."[63]

73. At the same time,[64] the LTTE had been listed a terrorist group by the United States of America and the United Kingdom. This led to difficulties within the peace progress. The LTTE could not be expected to fully cooperate with negotiations from which they were essentially barred: for example, due to its listing, the LTTE could not travel to the US when talks were held in New York.[65] The same was true for the listing in the EU.[66] Although officially, this listing was part of an attempt to restore the peace process, it was a way to appease the Sri Lankan government and protect European interests therein. For the Tamil diaspora living in the European Union in large numbers as European citizens, the listing was a slap in the face. Simply put, it left the LTTE without the option of discussing the peace process in good faith.

74. The situation ultimately deteriorated. In May 2009, after heavy incursions by government forces, the LTTE was militarily defeated in Sri Lanka. Most of its leaders were either killed or imprisoned. During the final months of hostilities, the situation of the Tamil people—who faced constant bombing and displacement—was dire. Following the defeat of their liberation movement, thousands of Tamils were interned in camps, abused, and killed.[67] Many simply disappeared.

Conclusion

75. As demonstrated by this brief historical overview, the LTTE fought a liberation struggle for self-determination in order to protect the Tamil people against the oppression of the Sri Lankan government.

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[63] DeVotta 1999, p. 75 **(Annex A.11, p. 154)**

[64] The International Educational Development (NGO) has stated before the UN Economic and Social council, Commission on Human Rights 7 March 2006, that the United States has an interest in Trincomalee harbour among other things. However it is unclear where this information is based upon. "Statement of the The International Educational Development before the UN Economic and Social council", 7 March 2006 **(Annex A.24, p. 336)**

[65] Podder 2006, p. 585 **(Annex A.22, p. 323)**

[66] "Article: *Blacklisted: targeted sanctions, preemptive security and fundamental rights*", November 2010, Gavin Sullivan and Ben Hayes for ECCHR, p. 90-91 **(Annex A.23, p. 333-334)**

[67] See for example the Council conclusions on Sri Lanka during the 2971st external relations council meeting in Luxembourg, 27 October 2009: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/110803.pdf

LTTE forces

76. From the foregoing it follows that the Tamil people had a legitimate right to self-determination and the LTTE was their legitimate representative in this endeavour, at least until its military defeat in 2009.

77. However, in order to determine whether or not an armed conflict took place, it is important to discuss the organisation of the LTTE military. In order to apply international humanitarian law, a party or individual combatant must fulfil certain requirements. In this section, the applicant will demonstrate that the LTTE and its members were 'combatants' under customary law (article 1 of the Hague convention of 1907), leaving aside for now the question of how to define the conflict.

78. Under customary law, combatant status is given to members of armies or organized resistance groups who:[68]

- are commanded by a person responsible for his subordinates;
- wear a fixed distinctive emblem recognizable at a distance;
- carry arms openly; and
- conduct their operations in accordance with the laws and customs of war.

79. The armed forces of the LTTE fulfilled all these requirements.

80. A highly structured organization, [69] the LTTE military included several army divisions (Charles Anthony, Imran Pandiya, Jejantha, Malathi, and Sothiya Brigades, Leopard commando unit, Kutti Shirri Mortier Regiment and Victor Anti Armor Unit), an intelligence unit, the Air Tigers, the Sea Tigers, and a special operation unit known as the Black Tigers. The various divisions wore distinctive uniforms and emblems. The first commander of the LTTE was Velupillai Prebahkaran, who maintained distinctive lines of command for every division of the military. Although much focus has always been on special actions, the main fighting force was used to conduct conventional military operations.[70] According to the influential military intelligence organisation Jane's:

> "The group earned a reputation for its mastery of conventional land-based warfighting, regularly deploying the battle-hardened cadres against heavily fortified military targets.

[68] See for example article 13 of the Geneva Convention I
[69] "Article: Jane's World Insurgency and terrorism, *Liberation Tigers of Tamil Eelam (LTTE)*", 25 August 2009, Jane's Intelligence **(Annex A.25, p. 339)**
[70] "Article: Jane's World Insurgency and terrorism, *Liberation Tigers of Tamil Eelam (LTTE)*", 25 August 2009, Jane's Intelligence **(Annex A.25, p. 339)**

> Such operations frequently showcased LTTE's ability to coordinate direct and indirect fire, and on occasion LTTE ground forces even mounted combined arms operations together with the group's naval and air wings."[71]

81. As with regard to the final demand, it should be noted that the LTTE has stated its adherence to the Geneva Conventions and protocols.[72] It has also strongly denounced an attack on civilians in a bus,[73] as well as other attacks on civilians.

82. The LTTE recognizes that, during the various phases of the conflict, grave mistakes were made on both sides as well as by independent actors. It should be noted though that many such mistakes were the direct consequence of indiscriminate actions of the part of the Sri Lankan military. The applicant does not dispute the LTTE's responsibility under international humanitarian law, should it become clear that breaches of this law have taken place. However, even if incidental violations of international humanitarian law have occurred, this in itself is not sufficient to deprive forces of combatant status, nor is the list of terrorist organisations the proper mechanism with which to address such violations.

Conclusion

83. The armed conflict between the LTTE and the Sri Lankan government was a struggle for self-determination between two armed forces. Such an armed conflict is governed by international humanitarian law. The European Union is obliged by international law not to interfere with this conflict and to refrain from listing the LTTE as a terrorist organisation.

84. Council Implementing Regulation (EU) No 83/2011 (hereinafter: "Regulation 83/2011") must therefore be considered void in so far as it concerns the LTTE and/or Council Regulation (EC) No 2580/2001 is not applicable.

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[71] "Article: Jane's World Insurgency and terrorism, *Liberation Tigers of Tamil Eelam (LTTE)*", 25 August 2009, Jane's Intelligence **(Annex A.25, p. 339)**

[72] Although the declaration itself is not available, the LTTE confirmed their declaration in a 1997 letter to the United State Court of Appeals, District of Columbia. "LTTE Declaration regarding Geneva Conventions, in: Judgment of the US State Court of Appeal, District of Columbia", 7 May 2010 **(Annex A.26, p. 389)** United Nation officials have also referred to the declaration of 1988 (for example Ndiaye 1998, p. 11 **(Annex A.12, p. 166)** and "Report of the special rapporteur of the worldwide human rights situation", 5 September 2006, Philip Alston, General Assembly of the United Nations **(Annex A.27, p. 446)**

[73] Alston 2006, p. 7 **(Annex A.27, p. 444)**

II. Council Implementing Regulation (EU) No 83/2011 is void in as far as it concerns the LTTE since the LTTE cannot be qualified as a terrorist organisation as defined in Article 1(3) of Council Common Position 2001/931/CFSP.

85. Should the Court decide that an armed conflict as such does not prevent the applicability of the Common Position, then the applicant maintains that the LTTE does not fall within the definition of a terrorist organisation provided in Article 1(3) of the Council Common Position.

86. Especially since 1995, the LTTE has largely relied on the use of conventional warfare to achieve its means. However, like any other army, the LTTE has made occasional use of its special forces—in this case, the Black Tigers. These forces have, for example, been active in sabotage actions against military airfields and missions against the Sri Lankan navy. Such actions are lawful acts of war.

87. In those cases in which, sadly, civilians lost their lives, the goal and military necessity of the particular action will determine whether or not such actions were lawful under international humanitarian law. For example, when bombing a military airfield, it is possible for civilian engineers to be killed. While an unfortunate by-product of legitimate military action, such loss of civilian life does not render the action itself unlawful.

88. Furthermore, it is often unclear which party is responsible for certain attacks. The Sri Lankan government has routinely attributed the most atrocious attacks to the LTTE, without independent corroboration. The institutions of the European Union must disregard such information as partial and untrustworthy.

89. Even if certain actions of the LTTE are suspected of being aimed at protected persons, discussion of these actions must take place within the framework of international humanitarian law. The Common Position, however, is not equipped to facilitate such discussions, but rather aims at the prevention of peacetime terrorist attacks against the stable and legitimate governments of Europe. Other avenues of recourse, at both the international and national levels, exist with regard to persons suspected of war crimes.

90. It is partly for this reason that article 1(3) of the Common Position not only describes those acts which could be considered as terrorism, such as killing a person, but also requires that such acts be illegal under national law. Legitimate acts of war, such as the

attack upon a navy ship, cannot be considered illegal under national law. This notion has been expressed by the concept of combatant immunity.

Combatant immunity

91. It is a general rule that combatants in an international armed conflict enjoy immunity for all lawful acts of war:[74]

> "Those who are entitled to the juridical status of 'privileged combatants' are immune from criminal prosecution for those warlike acts that do not violate the laws and customs of war but that might otherwise be common crimes under municipal law."[75]

92. Simple examples include the fact that a combatant cannot be prosecuted for killing a combatant of the adversary nor for bearing arms. Only grave breaches of international humanitarian law can be prosecuted as war crimes or crimes against humanity.

93. Combatant immunity is also available to the parties to the conflict themselves, although in most cases of international armed conflict, immunity follows separately from the fact that the parties are states which, as such, can never be prosecuted. However, in those cases in which an entity other than a state is a party to the conflict, it must be given the same immunity its soldiers enjoy.

94. The applicant submits primarily that the conflict must be considered a war for self-determination as defined in Article 1(4) of Protocol I to the Geneva Conventions and, therefore, an international armed conflict in which the LTTE enjoys immunity for all lawful acts of war.[76] At the same time, it must be understood that should the LTTE have breached the laws of war, it could only be prosecuted under international humanitarian law.

95. The applicant is aware, however, that very few liberation wars have been considered to fall under the definition of this article. Therefore, should the Court consider Protocol I to be inapplicable, the applicant submits that Protocol II to the Geneva Conventions applies instead: at the very least, the hostilities amounted to a non-international conflict.

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[74] "Article: *The Legal status of the Opposition Fighter in Internal Armed Conflict*", 2004, Arne Willy Dahl for the *Revue de droit militaire et de droit de la guerre,* vol. 43, p. 139 **(Annex A.28, p. 449)**, Marcinko 2008, p. 387 **(Annex A.5, p. 43)**

[75] Marcinko 2008, p. 392 **(Annex A.5, p. 45)**

[76] Marcinko 2008, p. 385 **(Annex A.5, p. 42)**

Application of the protocols?

96. Before presenting further pleas, a preliminary submission on the applicability of the protocols to the Geneva Conventions is warranted, as Sri Lanka has not ratified them.

97. As to the application of Protocol I, in 1988[77] the LTTE made a declaration as described in Article 96 of that protocol, pledging to uphold the laws of war and the Geneva Conventions and protocols. This declaration was again confirmed by the LTTE in a letter to the United States District Court for the District of Columbia in 1997.[78] Article 96(3) of the protocol states that when such a declaration has been made, the protocol is binding upon all parties to the conflict, even if the other party has not recognized the claim. As discussed in greater detail below, the LTTE must be considered a party to which Protocol I applies—at least in the organization's relations with the European Union.

98. Furthermore, it has been argued that Article 1(4) of Protocol I is part of customary law, in which case it would be applicable regardless of whether states are party to the protocol.[79]

99. Regarding Protocol II, the applicant submits that, at the very least, the European Union must apply the protocol in its relations with the LTTE.

100. The main argument in support of this proposition is that all member states of the European Union have ratified these protocols. The European Union prides itself on its position at the forefront of international humanitarian and human rights law. With the adoption of strict guidelines for the promotion of, and compliance with, these important norms,[80] the EU has underscored its commitment to the application of international humanitarian law and, in particular, the protocols to the Geneva Conventions. In fact, the EU has explicitly stated that it considers most of the provisions of the Geneva Conventions and its protocols to amount to customary law (Article 8).

101. Furthermore, regarding the combatant status provided to certain groups under these protocols, it is generally accepted in academic literature that third states must provide such status if they have ratified the protocols, even if the state within whose territory the conflict falls has not. This means, for example, that:

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[77] Ndiaye 1998, p. 11 **(Annex A.12, p. 166)**

[78] Although the declaration itself is not available, the LTTE confirmed their declaration in a 1997 letter to the United State Court of Appeals, District of Columbia. United Nation officials have also referred to the declaration of 1988 (for example Ndiaye 1998, p. 11 **(Annex A.12, p.))** and 1997 (Alston 2006, p. 12 **(Annex A.27, p. 446)**

[79] Saul 2006, p. 76-77 **(Annex A.2, p. 6-7)**

[80] "EU Guidelines on promoting compliance with International Humanitarian Law", 1 December 2009, Political and Security Council, Coreper/Council **(Annex A.29, p. 459)**

"a third party which has ratified the Protocol I would be obliged to treat them [non-state combatants, VK] as combatants."[81]

102. Therefore, the European Union and its member states must make their own evaluation of the conflict and treat the LTTE as a combatant party if the requirements of either Protocol I or Protocol II are deemed to be fulfilled.

International armed conflict under Protocol I

103. Primarily, the applicant submits thatthe liberation struggle of the LTTE was an armed conflict in the exercise of its right to self-determination as described in Article 1(4) of the first protocol to the Geneva Conventions (GC P I). Therefore, the armed struggle against Sri Lanka must be considered an international armed conflict to which protocol I is applicable.

104. Although Article 1(4) GC P I narrowly confines the right to self-determination to those oppressed by a colonist, a racist regime, or an occupation, the right has since been extended to those people who use force in modes of self-defence or self-preservation as well as those who have a specific claim to a certain territory and may be within their rights to secede.[82] A distinction is often made between internal and external self-determination. The Supreme Court of Canada has used this distinction to define a fourth category next to those mentioned in Article 1(4) GC P I, namely: where "'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part."[83] Although the Canadian Supreme Court described this category as a possibility, subsequent developments have clarified its concrete existence under international law.

105. In fact, some scholars have argued, based on recent practice, that groups seeking internal self-determination now fall within the scope of Protocol I.[84]

106. It is in this regard important to consider the situation of Kosovo, where member states of the European Union have played a vital role in ensuring the success of the Kosovar cause. The unilateral declaration of independence has been recognized by several member states, including the Netherlands. In 2008, the International Court of Justice was asked to give an advisory opinion on the question:

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[81] Marcinko 2008, p. 398 **(Annex A.5, p. 46)**. See also Dahl 2004, p. 140 **(Annex A.28, p. 450)**
[82] Marcinko 2008, p. 376 **(Annex A.5, p. 39)**. See also "Article: *Terrorism, proscription and the right to resist in the age of conflict*", 2008, Mark Muller for *The Denning Law Journal* vol. 20, p. 116 **(Annex A.30, p. 474)**
[83] "Judgment of the Supreme court of Canada in Re Secession of Quebec, 2 S.C.R. 217", 20 August 1998 **(Annex A.31, p. 479)**
[84] Saul 2006, p. 77 **(Annex A.2, p. 7)**

> "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

107. In its written statement presented by the Netherlands to the Court, the Dutch government stated that a right to external self-determination:

> "arises in the event of a "serious breach" of (a) the obligation to respect and promote the right to self-determination or (b) the obligation to refrain from any forcible action which deprives peoples of this right (substantive condition). [...]
>
> 3.10 It is submitted that there is a breach of the obligation to respect and promote the right to self-determination in the event of (i) a denial of fundamental human rights or (ii) the existence of a government that does not represent the whole people belonging to the territory. [...]
>
> 3.11 Furthermore, all effective remedies must have been exhausted to achieve a settlement (procedural condition) [...]"[85]

108. These conditions apply to the Eelam Tamils. The obligation to respect and promote the right to self-determination was seriously breached with the denial of fundamental human rights of the Eelam Tamils. Grave violations of the Tamils' human rights have occurred with impunity. Demonstrations have been violently suppressed under the cover of the fight against terrorism; arbitrary arrests, extrajudicial killings, and disappearances of Tamils have been rife. Countless humanrights violations in Sri Lankan government internment camps following the LTTE's defeat reveal the continued infringement of the Tamils' right to self-determination.

109. Furthermore, as discussed, the Tamil people have been discriminated against since shortly after the Sri Lanka's independence in 1948 and were ultimately unable to realise their internal right of self-determination. The last proposal by the LTTE to form a federal state was rejected by the Sri Lankan government in 2006. No effective remedies were therefore available to them to achieve a settlement.

110. Thus, the Tamils and the LTTE must be considered to have fought an armed conflict as described in Article 1(4) GC PI.

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[85] "Written statement of the Kingdom of the Netherlands to the International Court of Justice, *accordance with international law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo (Request for an advisory opinion)*", 17 April 2009, Kingdom of Netherlands, ICJ **(Annex A.32, p. 485)**

111. Finally, India's significant involvement in the conflict, as will be discussed in more detail in paragraph 163, lent an international dimension to hostilities in Sri Lanka and should be considered as an additional reason to apply international humanitarian law.

Conclusion

112. For the reasons stated above, the armed conflict in Sri Lanka should be considered an international one, providing both parties with combatant immunity. It follows that the LTTE cannot be prosecuted under national law for lawful acts of war and, therefore, cannot be considered to have committed the terrorist acts described in Article 1(3) of the Common Position.

Combatant immunity in a non-international conflict

113. Should the Court decide that the LTTE has not met the requirements of Article 1(4) GC P I, it is claimed—in the alternative—that the LTTE was a party to a non-international armed conflict to which the second protocol of the Geneva Conventions applies. In this respect, the comments of Marchinko, discussing Protocol II, are instructive:

> "Whenever it is beyond dispute that the insurgents meet the objective requirements laid down in Article 1 the Government cannot refuse to apply the Protocol."[86]

114. These requirements of Article 1 are the same as those necessary for combatant status, with the additional requirement that the armed group:

> "exercises such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." (Article 1 GC P II).

115. Unlike almost any other liberation movement, the LTTE has fulfilled these requirements during its prolonged struggle for self-determination, as described in the preceding section. This has been widely recognized by both EU and UN officials, without taking a stand on the question of whether the LTTE has in fact fought a war of liberation.[87]

116. At the very least, one must conclude that the conflict has taken the form of a non-international conflict, to which Protocol II is applicable.

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[86] Marcinko 2008, p. 401 **(Annex A.5, p. 47)**
[87] Ndiaye 1998, p. 15 **(Annex A.12, p. 170)**

117. Regarding the status of combatants in non-international conflicts, the situation is not fully crystallized in international law, as most states deny combatant immunity to armed opposition groups. However, it will be argued here that an armed group such as the LTTE should still enjoy combatant immunity, even if the conflict was non-international. As a subsidiary position, the applicant submits that such immunity appears in relation to external states such as the members of the European Union.

118. Although there is much debate over the status of fighters in non-international conflicts under criminal law, the applicant maintains that, at least with regard to the possibility of prosecution under criminal law, soldiers in a non-international conflict should be treated in the same way as those who fight in international conflicts. This follows from the following arguments.

119. First of all, the distinction between *jus ad bellum* and *jus in bello* suggests that whether or not the conflict can be defined as a liberation war is immaterial to the status of the LTTE and its soldiers during the conflict. After all, *jus in bello* (the law of war) is applicable regardless of whether *jus ad bellum* has been respected.[88]

120. The importance of this distinction is all too clear in a conflict such as the one which took place in Sri Lanka. Whether or not a people is oppressed and has the right to use violence in the course of its attempt at succession is essentially a question of *jus ad bellum* and, more importantly, a highly political issue. At the same time, it is a clear to all observers that the LTTE had formed a *de facto* state with its own military and that the Sri Lankan government was unable to effectively exercise its powers in Tamil-controlled areas. That both militaries regularly fought each other, on land and at sea, is also undisputed. The rules applicable to those battles—including the legal status of combatants on both sides—are clear issues of *jus in bello*. Should the question of status be dependent on the motives for starting the conflict in the first place, the very objective of *jus in bello* would be undermined.[89] Or as Cherif Bassiouni has stated:

> "Experts agree that there is no valid conceptual basis to distinguish between the same rights and protections extended to persons and targets because of how the conflict is legally characterized."[90]

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[88] Marcinko 2008, p. 400 **(Annex A.5, p. 47)**, Saul 2006, p. 84 **(Annex A.2, p. 14)**
[89] Marcinko 2008, p. 418 **(Annex A.5, p. 49)**
[90] "Article: *Criminal law. The new wars and the crisis of compliance with the law of armed conflict by non-state actors*", 2008, Mahmoud Cherif Bassiouni for *The journal of criminal law and criminology* vol. 98, p. 731 **(Annex A.33, p. 500)**

121. Secondly, with regard to war crimes, the issue has been settled by the International Criminal Tribunal for the Former Yugoslavia. Regardless of whether an armed conflict is an international or non-international one, those who participate may be prosecuted and convicted for war crimes and crimes against humanity. It can hardly be considered just if such criminal liability is incapable of being alleviated by way of any corresponding immunities or defences. For example, it should not be possible for a state to prosecute a combatant under its domestic criminal law for murder if that individual has already been acquitted of the same conduct as a war crime due to a defence of military necessity.

122. Thirdly, the human rights of those fighting an armed conflict against oppression would be severely compromised if they were not given combatant status. It would be unclear which law was applicable, as the determination would depend on factors such as the political evaluation of the conflict, its eventual victor, and whether or not the conflict was considered a war of liberation.[91] In such cases, the possibility for abuse would be much greater than situations where individual fighters were simply afforded combatant status. Or, as Saul has stated:

> "Regardless of its justifiability, where a rebellion generates an armed conflict, it would thwart the realization of human rights to criminalize the conduct of hostilities (such as violent resistance against military or official targets, which complies with IHL), and even to forcibly repress rebellions. There is a powerful argument that rebel violence against an oppressive State, while respecting IHL constrains, should be lawfully *justified* in international law—by conferring combatant immunity—rather than merely excused at the level of mitigation in sentencing."[92]

123. From a human rights perspective, it is crucial that parties to an armed conflict who exhibit all the trappings of lawful combatants are treated the same as military parties to an interstate conflict.

124. Combatant immunity on behalf of the LTTE can be inferred from various international instruments. Reference has already been made to the Ceasefire Agreement of 2002, which speaks of individual combatants. Another example is the 2006 report of the UN Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions, Philip Alston, which provides the following recommendation:

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[91] Cherif Bassiouni 2008, p. 794 **(Annex A.33, p. 501)**
[92] Saul 2006, p. 87-88 **(Annex A.2, p. 17-18)**

> "All parties to the conflict, including the government, the LTTE and the Karuna group, must comply with their legal obligations under common article 3 of the Geneva Conventions of 12 August 1949 and customary international humanitarian law. In particular, humanitarian law requires respect in the conduct of hostilities for the distinction between civilians and combatants. *The killing of anyone not taking an active part in hostilities (regardless of civilian status) is prohibited.*[italics inserted, VK]"[93]

From this, it follows that the killing of those engaged in hostilities is not prohibited. This is the essence of combatant immunity.

125. Even if Sri Lanka would be permitted to bring criminal proceedings against the LTTE for acts of war pursuant to international humanitarian law, the European Union or any of its member states could not take a similar course of action. The EU and its member states cannot be considered a party to the conflict. Rather, they have always presented themselves as neutral arbiters willing to broker peace. Accordingly, they have a duty to refrain from taking actions that would benefit one side over the other.

126. Dahl lends support to this position:

> "Armed opposition fighters who abide with the Law cannot be prosecuted before the ICC or other international courts or tribunals, and should not be prosecuted by third states or extradited to the country where the armed activity has taken place."[94]

Conclusion

127. Should the Court consider the armed conflict in Sri Lanka to be of a non-international nature, combatant immunity still applies—at least within the European Union. Arguments for this can be found in the distinction between *jus ad bellum* and *jus in bello,* as well as in the approach of international criminal tribunals in the prosecution of crimes of war. As in cases of international armed conflict, the lawful acts of war conducted by the LTTE do not amount to offences under national law as described in article 1(3) of the Common Position.

No terrorist aim

128. Furthermore, the applicant submits that none of the aims described in Article 1(3) of the Common Position was ever the aim of the LTTE. The LTTE's only goal was to realize

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[93] Alston 2006, p. 23 **(Annex A.18, p. 276)**
[94] Dahl 2004, p. 146 **(Annex A.28, p. 456)**

some measure of political independence for the Tamil people of Sri Lanka. To achieve this end, the LTTE needed to attain a military position superior to that of the government forces. It was never the aim of the LTTE to intimidate either the Singhalese or Tamil population of Sri Lanka. Of course, it cannot be denied that any situation of war is intimidating to all of those forced to endure such trying times.

129. In so far as one of the LTTE's aims was to compel the government of Sri Lanka into accepting a separate state, it is debatable whether this can be considered the Tiger's primary aim—irrespective of Sri Lanka acceptance of the LTTE's position in this regard. However, even if the aim of a separate state and/or the exercise of the Tamil's right to self-determination involved attempts to compel the government of Sri Lanka, such efforts cannot be considered to be undue. The right to self-determination of the Tamils and the fact that they had no other way of compelling the government to treat them fairly and with regard for their minority position in Sri Lanka, strongly suggests that LTTE actions fall well outside the scope of what is meant by the term 'unduly'.

130. Finally, the applicant submits that the aim of seriously destabilising or destroying the fundamental structures of a country is also inapplicable. Although it was indeed one of the LTTE's legitimate political goals to form a separate Tamil state (one fully independent or, at the very least, part of a republic) and although this would have led to a markedly different constitutional structure in Sri Lanka, the terms 'fundamental' and 'constitutional structures', as used in the Common Position, must be read in light of the fundamental values of democracy and the rule of law and their concomitant structures. In so far as the structures in place deny the fundamental right of self-determination, they cannot be considered to be protected by this definition of terrorism. Nor can it be said that the LTTE's aim was to destroy any fundamental structures. Rather, its ultimate goal was the formation of new structures that would coexist along with the Sri Lankan structures already in place, albeit in a different state.

Conclusion

131. According to Article 1 (3) of Council Common Position 2001/931/CFSP, an organisation has to commit acts that are offenses under national law with a certain aim. Since the LTTE enjoys combatant immunity, its acts cannot be considered offenses under national law. Moreover, the aim of the LTTE was not a terrorist aim as defined in Article 1 (3) of Council Common Position 2001/931/CFSP.

132. Council Implementing Regulation (EU) No 83/2011 is therefore void in as far as it concerns the LTTE since the LTTE cannot be qualified as a terrorist organisation as defined in Article 1(3) of Council Common Position 2001/931/CFSP.

III. Council Implementing Regulation (EU) No 83/2011 is void in as far as it concerns the LTTE because no decision by a competent authority, as required by Article 1(4) of Council Common Position 2001/931/CFSP, has been taken.

133. Article 1(4) of the Common Position requires, among other things, that a decision to add a person, group, or entity to the list in the Annex of the Common Position (and subsequently the list in the Annex of Regulation 2580/2001) must be based on precise information or material which indicates that a decision in respect of the person, group, or entity concerned has been taken by a competent authority.

134. Contrary to what is asserted in the Statement of Reasons (Enclosure VI), no competent authority has taken a decision regarding the LTTE within the meaning of Article 1(4) of the Common Position. Therefore, it follows from Article 2(3) of Regulation 2580/2001 that the LTTE does not fall within the scope of that regulation. This, in turn, renders Regulation 83/2011 void in so far as it concerns the LTTE.

135. The Statement of Reasons provides the following grounds for maintaining the LTTE on the European Terrorism List (hereinafter: "List"):

- certain attacks that are attributed to the LTTE;
- the 29 March 2001 decision of the UK Secretary of State to proscribe the LTTE pursuant to the UK Terrorism Act of 2000 ;
- the 6 December 2001 decision of the UK Treasury to freeze the LTTE's assets pursuant to Article 4 of the Terrorism (United Nations Measures) Order of 2001;
- the decision of the Government of India in 1992 to proscribe the LTTE under the Unlawful Activities Act and the same government's subsequent decision to include the LTTE on the list of terrorist organisations in the Schedule to the Unlawful Activities Prevention (Amendment) Act of 2004.

136. None of the aforementioned decisions amount to decisions of a competent authority. For the purposes of Article 1(4), a "decision" is "the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an

act based on serious and credible evidence or clues, or condemnation for such deeds". For the purposes of the same Article, a "competent authority" refers to "a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area".

137. Regarding the list of attacks attributed to the LTTE, it is clear that these determinations do not qualify as decisions of a competent authority, as they are not even decisions, let alone ones from a competent authority.

138. Furthermore, no evidence is given that the LTTE was indeed responsible for these attacks. As stated previously, often the only source linking the LTTE to particular attacks is the Sri Lankan government. Those listed attacks have been insufficiently investigated, and there is little or no concrete basis to link them to the LTTE. This position is supported by the fact that the Dutch prosecutor's office (*Openbaar Ministerie*)—which has been investigating several attacks attributed to the LTTE, including the attack of 6 April 2008 that resulted in the death of Minister Jeyaraj Fernandopulle (mentioned on the list of attacks)—concluded in January 2011 that there was insufficient evidence available to link the LTTE to this particular attack.

139. As the attacks cannot properly be attributed to the LTTE, they cannot serve as grounds to continue to maintain it on the List.

140. Regarding the decision of the UK Secretary of State of 29 March 2001, the decision of the UK Treasury of 6 December 2001, and the decisions of the Indian Government of 1992 and 2004, the applicant submits that none of these determinations qualifies as a "decision" within the meaning of Article 1(4) of the Common Position and that none has been taken by a "competent authority" within the meaning the same article. Each of these determinations will be dealt with in turn.

<u>The decisions of the UK Secretary of State and UK Treasury are not "decisions" within the meaning of Article 1(4) of Council Common Position 2001/931/CFSP</u>

141. As stated above, in order to qualify as a decision within the meaning of Article 1(4) of the Common Position, a decision must concern either the "instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues" or a "condemnation for such deeds".

142. The decisions of the UK Secretary of State and the UK Treasury do not contain a condemnation for acts relevant to the perspective of the Common Position. Thus, such decisions can only serve as a lawful basis for listing the LTTE when they concern "the instigation of investigations or prosecution" and when they are "based on serious and credible evidence or clues" (Article 1(4) Common Position).

143. Settled case-law mandates that the concept of "instigation of investigations or prosecution" should be narrowly interpreted.[96] In this respect, it is clear that the two decisions do not constitute the instigation of investigations or prosecution. The decisions of the UK Secretary of State and the UK Treasury both categorize the LTTE as a terrorist organisation and, accordingly, freeze its funds. Yet these decisions are administrative, rather than criminal, determinations. As a consequence, they cannot be considered as the instigation of criminal investigations or prosecutions and thus cannot be considered decisions within the meaning of Article 1(4) of Common Position.

144. Although this Court has determined in the Al Aqsa II case that the provisions of Article 1(4) of Common Position do not necessarily require that a decision be taken in the context of criminal proceedings *stricto sensu*, it nevertheless confirmed that such course of action is more often the case.[97] In this respect, the applicant would like to submit that the provisions of Article 1(4) of the Common Position do not allow for the possibility of decisions taken outside of a criminal context, except where persons, groups, or entities have been identified by the UN Security Council as being related to terrorism and sanctions have been ordered against them. In the opinion of the applicant, this latter exception is a consequence of the primacy of Security Council Resolutions. Therefore, the use of these 'non-criminal' decisions must be interpreted as the only exception to the general rule of Article 1(4) of the Common Position that only decisions taken in the context of criminal procedures can be used to list a person or entity. In light of the plain language of Article 1(4) of the Common Position, the special, primary status of Security Council Resolutions, and the far-reaching consequences for the persons or entities involved when allowing non-criminal decisions to function as a basis for listing, the phrase "instigation of investigations or prosecution" should be strictly interpreted as referring to investigations or prosecutions in a criminal context.

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[96] cf. General Court 30 September 2009, Case T-341/07, Sison II, para. 111-112
[97] cf. General Court 9 September 2010, Case T-348/07, Al Asqa II, par. 98

145. If the Court nevertheless concludes that the decisions of the UK Secretary of State and of the UK Treasury amount to instigation of investigations or prosecution, or condemnation for a terrorist act or an attempt to perpetrate, participate in, or facilitate such an act, then the applicant submits that the decisions are not based on serious and credible evidence or clues. In this respect, the Statement of Reasons fails to specify the basis for the UK Secretary of State's decision of 29 March 2001 to classify the LTTE as an organisation involved in terrorism under the UK Terrorism Act of 2000. Nor does it specify the grounds for the UK Treasury's decision to freeze the LTTE's funds.

146. This approach is contrary to settled case-law of this Court, which provides that a decision to add a person to the EU sanctions list must be based on serious and credible evidence or clues. This means that there must be "precise information or material in the relevant file which indicates that a decision (...) has been taken with regard to the person concerned", and this Court should ascertain "whether the evidence relied on is factually accurate, reliable, and consistent" and "whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it" (cf. as a recent authority Al Aqsa II, par. 81 and 83).

147. In short, because the UK decisions of 2001 are not based on serious and credible evidence or clues, at least this does not appear from the Statement of Reasons, these determinations do not qualify as decisions within the meaning of Article 1(4) of the Common Position.

148. Furthermore, the applicant draws the Court's attention to the fact that the LTTE was classified as a terrorist organisation by the United Kingdom along with 20 other groups. In this regard, the House of Commons was presented with the choice to either accept or refuse the complete list. It was not possible to address each organisation on an individual basis.[98] This lends further support to the position that the decisions of the UK Secretary of State and the UK Treasury were not based on serious and credible evidence or clues.

Conclusion

149. Consequently, the applicant submits that the decisions of the UK Secretary of State and the UK Treasury cannot be considered decisions within the meaning of Article 1(4) of the Common Position.

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[98] http://www.publications.parliament.uk/pa/cm200001/cmhansrd/vo010313/debtext/10313-36.htm#10313-36_head0

The decision of the Government of India in 1992 to proscribe the LTTE under the Unlawful Activities Act 1967 and the subsequent amendment of this Act in 2004 by which the LTTE was included in the list of terrorist organisations in the Schedule to the Unlawful Activities Prevention (Amendment) Act 2004 are not "decisions" within the meaning of Article 1(4) of Council Common Position 2001/931/CFSP

150. The decision of the Government of India in 1992 to proscribe the LTTE under the Unlawful Activities Act 1967, and the subsequent inclusion in 2004 of the LTTE on the list of terrorist organisations in the schedule to the amendment of this act, do not qualify as decisions within the meaning of Article 1(4) of the Common Position.

151. First of all, it must be noted that the decisions of the Indian Government of 1992 and 2004 do not amount to the instigation of investigations or prosecution. Nor do they rise to the level of condemnation for a terrorist act or the attempt to perpetrate, participate in, or facilitate such act. They are both administrative decisions that do not address any of the aforementioned crucial elements. The applicant refers to the argument set out above with regard to the decisions of the UK Treasury and UK Secretary of State in paragraphs [143-144] and submits that such arguments apply *mutatis mutandis* to the decisions of the Indian Government.

152. Moreover, Section 4 of the Unlawful Activities Act (on the basis of which the LTTE was proscribed in 1992) provides that if any association is declared unlawful under Section 3, the Central Government shall within 30 days from the date of publication of the notification refer it to the Tribunal for the purpose of adjudicating whether or not there is sufficient cause for declaring the association unlawful. The Section further states that the Tribunal shall then call upon the association affected by notice to show cause and, after holding an enquiry, either confirm or cancel the said notification. However, the applicant is not aware that the LTTE has ever been summoned by the Tribunal. In its Statement of Reasons, the Council does not refer to the Tribunal, let alone any proceedings pending or conducted before it. In the applicant's view, the mere fact of the Tribunal's existence does not render the determinations by the Indian Government decisions for the purposes of Article 1(4) of the Common Position. In order to satisfy Article 1(4), proof is needed that the Tribunal is formally and substantively an institution empowered to instigate an investigation or prosecution *and* that it actually did so vis-à-vis the LTTE. All of this is lacking in the LTTE's case. In any event, nothing in the

Statement of Reasons substantiates that the determinations by the Indian Government are decisions for the purpose of Article 1(4) of the Common Position.

153. Should the Court fail to accept the foregoing argument, the applicant submits that the decisions are not based on serious and credible evidence or clues. The Statement of Reasons provides no information in this respect.

154. The Statement of Reasons does not specify any reasons for the Indian Government's decision to proscribe the LTTE under the Unlawful Activities Act and subsequently to include it on the list of terrorist organisations in the Schedule to the Unlawful Activities Prevention (Amendment) Act of 2004. According to the settled case-law of this Court, a decision to add an organization to the EU sanctions list must be based on serious and credible evidence or clues. This means that there must be "precise information or material in the relevant file which indicates that a decision (...) has been taken with regard to the person concerned", and this Court should ascertain "whether the evidence relied on is factually accurate, reliable and consistent" and "whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it".[99] As stated above, the Council cannot simply rely on decisions of Member States without fully ensuring that such determinations amount to decisions within the meaning of Article 1(4) of the Common Position. This position has even greater force with respect to a decision taken by a non-EU Member State.

155. In this respect, the applicant is of the opinion that the Council should not be allowed to rely on decisions of non-Member States to underpin its Statement of Reasons. To permit otherwise would require the Council to verify the content of these decisions, as well as the manner in which they were reached. Yet the Council has no such ability with respect to countries with which it has no formal and reciprocal relationship (see further hereafter, paragraphs 162-165). In view of the critique by Amnesty International and Human Rights Watch of the legislation underpinning the determinations of the Indian Government, the Council's mere reference to those decisions on the basis of that legislation is all the more problematic.[100]

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[99] Cf. as a recent authority Al Aqsa II, par. 81 and 83

[100] "Report by Amnesty International", November 2006, Amnesty International **(Annex A.35, p. 504**; "Article Human Rights Watch", 17 July 2010, Human Rights Watch **(Annex A.34, p. 502)**

156. As a consequence, the decisions of the Indian Government to list the LTTE are not based on serious and credible evidence or clues; at least this is not apparent from the Statement of Reasons. Therefore, these determinations do not qualify as decisions within the meaning of Article 1(4) of Common Position.

Conclusion

157. The applicant submits that, contrary to what is asserted in the Statement of Reasons, no decision within the meaning of Article 1(4) of the Common Position was ever taken in respect of the LTTE. It follows from Article 2(3) of Regulation 2580/2001 that the LTTE does not fall within the scope of that regulation, which in turn renders Regulation 83/2011 void in so far as it concerns the LTTE.

Neither the UK Secretary of State nor the UK Treasury can be considered a "competent authority" within the meaning of Article 1(4) Council Common Position 2001/931/CFSP

158. The applicant submits that the decisions of the UK Secretary of State and UK Treasury have not been taken by a competent authority within the meaning of Article 1(4) of the Common Position, as neither the Secretary of State nor the Treasury is a judicial authority. Judicial authorities with competence in the area covered by Article 1(4) of the Common Position exist in the UK. Accordingly, a decision should have been taken by such authority.

159. In the event this Court would not immediately dismiss the UK Secretary of State and the UK Treasury as competent authorities within the meaning of Article 1(4) of the Common Position, the applicant refers to settled case-law of this Court indicating that the context in which the decisions of the relevant authority were taken, as well as the exact content and significance of those decisions, must be considered in order to determine whether a competent authority within the meaning of Article 1(4) of the Common Position has reached the decision.[101] As previously stated, the decision of the UK Secretary of State to proscribe the LTTE was part of a decision in which 20 other organisations were proscribed *en masse*. Furthermore, the decisions were not part of a criminal procedure, whereas Article 1(4) of the Common Position suggests such a requirement. As a result, it cannot be held that the decisions of the UK have been taken by a competent authority within the meaning of Article 1(4) of the Common Position.

[101] Cf. Sison II, par. 106

160. Thus, the decisions of UK Secretary of State and the UK Treasury have not been taken by a competent authority within the meaning of Article 1(4) of the Common Position.

The Indian Government cannot be considered a "competent authority" within the meaning of Article 1(4) Council Common Position 2001/931/CFSP

161. The decisions of the Indian Government cannot be considered decisions of a "competent authority" for the purposes of Article 1(4) of the Common Position.

162. According to settled case-law of this Court, when applying Article 1(4) of the Common Position and Article 2(3) of Council Regulation (EC) No 2580/2001, the Council has an obligation to "defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, in particular in respect of the existence of 'serious and credible evidence' on which its decision is based".[102] This 'duty of deference' follows from the principle enshrined in Article 4(3) of the Treaty on the European Union (Former Article 10 EC-Treaty) that the relations between the Member States and the Community institutions are governed by reciprocal duties to cooperate in good faith.[103]

163. It follows from this settled case-law that the compilation of the Annexes to Council Common Position 2001/931/CFSP and Council Regulation (EC) No 2580/2001 is the shared competence of the EU Member States and the Council, in which the Member States play the leading part. The only exception to this rule can be found in Article 1(4) of the Common Position itself, which states:

> "Persons, groups and entities identified by the Security Council to the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list."

164. Simply put, the decisions of the Indian Government fall outside the scope of this exception. Therefore, the Council cannot rely on these determinations in order to justify the LTTE's placement on the list. For this Court to hold otherwise would thwart the European system of financial sanctions. First and foremost, it would undermine the leading role of the EU Member States in this respect. Moreover, it would mean that the EU sanctions list is, at least regarding the LTTE, (partly) based on the opinion of and information from a foreign government, with which the Council has no relationship and

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[102] See for example Al Aqsa II, par. 80
[103] cf. amongst other authorities Al Aqsa II, par. 79

which is not bound by a reciprocal duty to cooperate in good faith. In the opinion of the applicant, the absence of such relationship prevents the Council from deferring to the opinion of the Indian Government—not only because the Council lacks the possibility to cooperate with that government as it can with the authorities of EU Member States, but also because the Council cannot simply assume that decisions of the Indian Government meet EU standards when it comes to the LTTE's rights to defence and effective judicial protection (see below, plea VI).

165. Furthermore, the Indian Government cannot be considered an objective source of information as it has taken a partisan position regarding the conflict between the LTTE and the Sri Lankan Government. India has a large Tamil minority and has therefore always had an interest in the conflict. In 1987, it sent a peace force to Sri Lanka. This force sided with the Sri Lankan Government and waged a campaign against Tamil guerrilla fighters until the force's withdrawal in 1990.[104] Since then, India has continued to support the Sri Lankan Government in its fight against the LTTE through more circumspect means. During the final war, it became clear that India not only shipped weapons to Sri Lanka, but also sent military personnel to train Sri Lankan forces. Some of these soldiers were present during a counter-attack of the LTTE against a military base.[105]

166. If this Court were nevertheless to determine that the Council could also rely without any further investigation on the decisions of the Indian Government, the applicant submits that these determinations have not been taken by a competent authority within the meaning of Article 1(4) of the Common Position, which requires such decisions to be made by a *judicial* authority. Although authorities exist in India with the competence in the area covered by Article 1(4) of the Common Position, the decisions of the Indian Government of 1992 and 2004 were taken by non-judicial—and therefore incompetent—authorities.

Conclusion

167. The applicant submits that, contrary to what is asserted in the Statement of Reasons, no competent authority has taken a decision in respect of the LTTE within the meaning of Article 1(4) of the Common Position. It follows from Article 2(3) of Regulation

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[104] Fuglerud 1999, p. 37 **(Annex A.8, p. 87)**

[105] "Working papers of the German Institute of Global and Area Studies: *India and the Civil War in Sri Lanka: On the failures of regional conflict management in South Asia*", December 2010, Sandra Destradi, GIGA, p. 12 **(Annex A.36, p.523)**

(2580/2001 that the regulation is not applicable to the LTTE, which in turn renders Regulation 83/2011 void in as far as it concerns the LTTE.

IV. Council Implementing Regulation (EU) No 83/2011 is void in as far as it concerns the LTTE since the Council did not conduct any review as required by Article 1(6) of Council Common Position 2001/931/CFSP.

168. Article 1(6) of the Common Position requires that the lists in the Annexes to the Common Position, as well as to Regulation 2580/2001, shall be reviewed at regular intervals and at least once every six months. In particular, this Article requires an active position of the Council to decide whether the reasons to continue to list the LTTE are still relevant and whether grounds still exist to keep the LTTE on the List. Although the Council has broad discretion in this respect, such discretion is based on important premises, which are not fulfilled in the LTTE's case. Moreover, the Council's discretion is not unlimited. In the instant case, the manner in which the Council reached its decision amounts to an abuse of its discretion.

Premises underpinning the judicial protection in the European Sanctions Regime

169. This Court has set out a series of principles relating to fund-freezing measures. The first principle is the aforementioned broad discretion afforded to the Council in adopting or maintaining fund-freezing measures under Council Regulation (EC) No 2580/2001. An important second principle is:

> "the precedence that should be afforded, in the exercise of that discretion, to matters of national procedure in the context of which the decision of the competent authority referred to in Article 1(4) of Common Position 2001/931 is adopted which provides the basis for the Community fund-freezing decision."[106]

When adopting or maintaining fund-freezing measures on the basis of Regulation 2580/2001, the Council is obliged to defer as far as possible to the competent national authority, "at least where the latter is a judicial authority" and "in particular in respect of the existence of 'serious and credible evidence' on which its decision is based."[107] Underpinning this latter principle is the important premise that the competent national

[106] Cf. Al Aqsa II, par. 162
[107] Cf. Al Aqsa II, par. 163

authorities involved must assure themselves at regular intervals of the continued justness of their decisions that gave rise to the listing of persons, groups, or entities at the European level.

National authorities' duty to assure of the continued justness of their decisions

170. As to the decisions of the UK, it does not appear from the Statement of Reasons that any national review of the decisions has taken place. Referral is made in the Statement of Reasons to the fact that the decision of the UK of 29 March 2001 is regularly reviewed by an internal government committee. However, it is not further substantiated when this review takes place and what it consists of. With regard to the decision of the UK Treasury, no reference to any review has been made in the Statement of Reasons.

171. In regard to the decisions of the Indian Government, this premise cannot be fulfilled, as there is no reciprocal relationship between the Council and the Indian Government as argued above.

172. Should this Court nevertheless take the position that the relationship between the Council and the Indian Government sufficiently fulfils the threshold of reciprocity, it is submitted that no review has been conducted by the Indian Government as to whether the reasons for its decisions are still valid—at least this is not apparent from the Statement of Reasons.

173. In this respect, the applicant notes that it should not be required to initiate proceedings in the UK and India. Obliging the applicant to start proceedings in the UK and India would burden the applicant with three, rather than one, costly and time-consuming actions.

174. Consequently, the applicant submits that the premise underpinning the principle of deference to the competent national authority—namely, the obligation of the national competent authority to assure itself of the continued justness of its decision—is not fulfilled in this case.

Council's own duty to review

175. Even if this Court were to conclude that the UK and India have sufficiently acquitted themselves of their reviewing obligations, the Council still has its own responsibility when it comes to imposing fund-freezing sanctions under Regulation 2580/2001. An

important limitation to the Council's discretion with regard to anti-terrorism fund freezing measures is made explicit in Al Aqsa II, par. 164:

> "(...) the Council, when contemplating adopting or maintaining in force after review, a fund-freezing measure pursuant to Regulation No 2580/2001, on the basis of a national decision for the 'instigation of investigations or prosecution' for an act of terrorism, may not disregard subsequent developments arising out of those investigations or that prosecution (...)."

176. In light of this Court's case-law, the Council has not complied with its obligations under Article 1(6) of the Common Position.

177. First of all, the Statement of Reasons does not contain any information from which it can be concluded that the Council has assured itself that the reasons and grounds to keep the LTTE on the list are still valid. Second, there is sufficient contrary evidence or clues confirming that there are no reasons/grounds to justify the decision to continue to keep the LTTE on the list. These arguments will be dealt with in turn.

178. The Statement of Reasons does not contain any indication as to why the Council has decided that there are still sufficient grounds and valid reasons to keep the LTTE on the list. It only states that the decisions of the UK Secretary of State, the UK Treasury, and the Indian Government remain in force and that, as a consequence, the Council is satisfied that the reasons for including the LTTE on the list are still valid. This Statement of Reasons does not fulfil the requirements of Article 1(6) of the Common Position.

179. First of all, it appears from the Statement of Reasons that the Council has not reassured itself that the UK Secretary of State and the UK Treasury have conducted any review of the initial decisions of 29 March 2001 and 6 December 2001. These decision are nearly ten years old and, even if they would have provided sufficient justification to list the LTTE in 2001, it cannot now be argued—without further review and accompanying statement of sufficient reasons—that these decisions still fulfil the requirements of Article 1(6) of the Common Position. This holds *mutatis mutandis* for the decisions of the Indian Government of 1992 and 2004.

180. Second, the decisions of the UK and Indian Governments have not been followed-up by any instigation of investigations or prosecution during the last decade—at least such is not stated in the Statement of Reasons. The Council seems not to have taken any subsequent developments into account before deciding to keep the LTTE on the list; at

least the Statement of Reasons does not refer to such analysis. It is settled case-law of this Court that subsequent developments should be taken into account:

> "In Sison II (paragraph 116) the Court also envisaged a situation in which police or security enquiries are closed without giving rise to any judicial consequences, because it proved impossible to gather sufficient evidence, or measures of investigation ordered by the investigating judge do not lead to proceedings going to judgment for the same reasons. Similarly, a decision to prosecute may end in the abandoning of the prosecution or in acquittal in the criminal proceedings. The Court held that it would be unacceptable for the Council not to take account of such matters, which form part of the body of information having to be taken into account in order to assess the situation (see paragraph 83 above). To decide otherwise would be tantamount to giving the Council and the Member States excessive power to freeze a person's funds indefinitely, beyond review by any court and whatever the result of any judicial proceedings taken"[108]

181. Furthermore, it appears from the Statement of Reasons that the Council has not taken into account the specific developments regarding the LTTE from 2009 until the present. Yet such events are crucial to a proper understanding of the LTTE's current incarnation as a legitimate and peaceful political organization.

182. On 18 May 2009, the LTTE was military defeated by Sri Lankan government forces, and most of its commanders were killed.[109] Others were arrested and detained in the following months. Military supplies belonging to the LTTE were confiscated. On 24 May 2009, the LTTE publicly announced that, going forward, it would resort only to non-violent, political means in order to protect the right of self-determination of the Tamil people.[110] Since then, no reports of any LTTE attacks have been made.

183. The LTTE—in the form described by Regulation 83/2011—no longer exists in Sri Lanka. Rather, the LTTE has transformed itself into a transnational political network.[111] As Jane's has noted:

> "While a return to low-level guerrilla warfare, supplemented by terrorist operations, cannot be ruled out, the capture of all LTTE-held territory, the death of its inspirational

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[108] Cf. Al-Aqsa II, paragraph 168

[109] "Article", 18 May 2009, Sri Lanlan Ministry of Defence: http://www.defence.lk/new.asp?fname=20090518_17 **(Annex A.37, p. 537)** ; "Article", 20 May 2009, Sri Lanlan Ministry of Defence: http://www.defence.lk/new.asp?fname=*20090520*_02 **(Annex A.38, p. 539)**

[110] "Newsarticle", 17 May 2009, TamilNet: http://www.tamilnet.com/art.html?catid=13&artid=29389 **(Annex A.39, p. 540)** ; "Newsarticle", 24 May 2009, BBC **(Annex A.41, p. 576)**

[111] "Report: International Crisis Group, The Sri Lankan Tamil diaspora after the LTTE", 23 February 2010, International Crisis Group **(Annex A.40, p. 542)**

leader and most of his senior commanders, and the seizure of the majority of its vast and varied arsenal of weapons means that the threat posed by the LTTE is currently at its lowest for many years, and it remains to be seen whether the group will be able to reconstitute itself in any meaningful way."[112]

184. Accordingly, the applicant submits that the Council has not complied with the requirements of Article 1(6) of the Common Position. It follows from Article 2(3) of Regulation 2580/2001 that the regulation is not applicable to the LTTE, which in turn renders Regulation 83/2011 void in as far as it concerns the LTTE.

V. Council Implementing Regulation (EU) No 83/2011 is void in as far as it concerns the LTTE as it does not comply with the obligation to state reasons in conformity with Article 296 TOFU.

185. The applicant submits that the Regulation 83/2011 is void in as far as it concerns the LTTE, as the Council has not complied with the obligation to state reasons in conformity with Article 296 Treaty on the Functioning of the European Union (hereinafter: "TOFU"). It is settled case-law of this Court that the Statement of Reasons of a (subsequent) decision to freeze funds must not only refer to the legal conditions of application of Regulation 2580/2001, but also to the actual and specific reasons why the Council considers, in the exercise of its discretion, that the person or organisation concerned must be made subject to freezing of funds.[113] It is clear from the Statement of Reasons that the Council has failed to fulfil the obligation imposed by this Court's case-law.

186. First of all, the Council fails to specify why the determinations of the UK and Indian Governments amount to decisions within the meaning of Article 1(4) of the Common Position and why the Council believes such determinations have been made by competent authorities. The applicant refers in this respect to what has been set out above.

187. Secondly, the Statement of Reasons contains a mere reference to the decisions of the UK and Indian Governments without stating the actual and specific reasons on which those decisions are based. In this respect, the Court's judgment in the Kadi case of 30 September 2010, Case T-85/09, is particularly instructive. According to this judgment, a Statement of Reasons should provide sufficient information to enable the LTTE to launch

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[112] "Article: Jane's World Insurgency and terrorism, *Liberation Tigers of Tamil Eelam (LTTE)*", 25 August 2009, Jane's Intelligence **(Annex A.25, p. 339)**

[113] Cf. Sison II, par. 60

an effective challenge to the allegations against him so far as his alleged participation in terrorist activities is concerned.[114] The mere referral to the decisions of the UK and India, without further explication and analysis of their underlying rationale, does not satisfy the Council's obligation to state reasons.

188. Thirdly, as set out above in paragraphs [177-181], the Statement of Reasons does not contain any explanation as to why the Council considers the decisions of the UK and Indian Governments as sufficient grounds to keep the LTTE on the list. Although this Court has repeatedly held that when the grounds of a subsequent decision to freeze funds are in essence the same as those already relied on when a previous decision was adopted, a mere statement to that effect may suffice, particularly when the person concerned is a group or entity (PMOI I, par. 82; Sison II, par. 62), Article 1(6) of the Common Position nevertheless requires that the actual and specific reasons why the Council, after review, has decided to keep the LTTE on the list must be mentioned. The single statement that the Council is satisfied that the reasons for including the LTTE on the list remain valid does not meet this requirement.

189. Consequently, the applicant submits that Regulation 83/2011 is void in so far as it concerns the LTTE, as it does not comply with the obligation to state reasons in conformity with Article 296 of TOFU.

VI. Council Implementing Regulation (EU) No 83/2011 is void in as far as it concerns the LTTE because it infringes upon the LTTE's right of defence and the LTTE's right to effective judicial protection.

190. In line with the foregoing, the applicant submits that as a result of the breach of the obligation to state reasons, Regulation 83/2011 is void in so far as it concerns the LTTE, as it infringes on its right of defence and right to effective judicial protection. Again, in the Kadi case of 30 September 2010, this Court clarified the criteria which must be fulfilled by the Statement of Reasons in order to satisfy the principle of the right of defence. Reference was made to the case law of the European Court of Human Rights in its judgment of 19 February 2009 in *A. And Others v. United Kingdom*. The relevant criteria are as follows: (i) if the material and evidence disclosed is sufficiently detailed to permit the applicant to challenge it effectively, no breach of the right to effectively

[114] Cf. Kadi II, par. 171-188

challenge the allegation made against him exists. (ii) However, if the disclosed material only contains general assertions and the national authority based its decision solely or to a decisive degree on undisclosed material, the applicant has not been in a position to mount an effective challenge to the allegations against him.[115]

191. As the Statement of Reasons only contains reference to four decisions without clarifying the bases of these decisions, the LTTE cannot effectively challenge the assertion that it is involved in terrorist activities.

192. By the same token, the LTTE's fundamental right to effective judicial review has not been respected.[116] In this regard, it is important to recall once more that the evidence or clues on which the UK and India have based their decisions have not been assessed by a competent *judicial* authority. It is settled case-law that in such situation—where the information has not been assessed by a competent national authority—such information must be considered as newly-adduced evidence which must, in principle, be the subject of notification and a hearing at Community level.[117]

193. Thus, the applicant submits that the LTTE's right of defence and effective judicial protection are infringed upon since the Statement of Reasons does not contain sufficient reasons in order for the LTTE to effectively challenge the assertion that it is involved in terrorist activities and as a consequence no effective judicial review can take place.

CONCLUSION AND CLAIMS

194. Based on the foregoing arguments, the applicant requests this Court to annul Council Implementing Regulation (EU) No 83/2011 in as far as it concerns the LTTE. Furthermore, the applicant requests this Court to determine that Council Regulation (EC) No 2580/2001 is not applicable to the LTTE.

195. The applicant additionally seeks an award of costs and interest to the applicant, which will be specified at a later stage.

Amsterdam, 11 April 2011

Victor Lodewijk Koppe

[115] cf. Kadi II, para. 176
[116] cf. Kadi II, para. 181-184
[117] cf. OMPI I, par. 124-125