

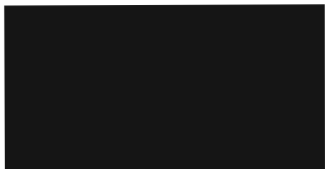


Kind regards

S47F(1)

Senior Consultant
Jackson McDonald

140 St Georges Terrace, Perth



S47F(1)

www.jacmac.com.au

First class legal service

S47F(1)

Partner
Jackson McDonald

140 St Georges Terrace, Perth



S47F(1)

www.jacmac.com.au

First class legal service

Jackson McDonald

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Australian Government

Attorney-General's Department

Time Critical Submission

| | |
|---|---|
| TITLE: | |
| Action Officer | Branko Ananijevski |
| Date due to Office | 25 October 2011 |
| Justification for short deadline Please describe why sub is provided less than 7 days before the deadline, and note which adviser has approved this, and when. | <ul style="list-style-type: none"> • Mr Rajapaksa is due to arrive in Australia shortly. |
| Branch Head approval of Clearance Schedule | Approved |
| Tara Inverarity (a/g) | / / |
| CLEARANCE SCHEDULE Action Officer to enter dates and submit to Branch Head for approval <u>before</u> clearance process commences (and ASAP after the need for the sub has been identified) | |
| Tara Inverarity (a/g) | Clearance required by 25/10/2011 |
| ^First Assistant Secretary delete if not required^ | Clearance required by 25/10/2011 |
| ^Deputy Secretary delete if not required^ | Clearance required by / / [Min 10 days before due date if Secretary's clearance needed, or 7 days if not—unless a short deadline has been agreed as above] |
| ^Secretary delete if not required^ | Clearance required by / / [Min 7 days before due date—unless a short deadline has been agreed as above] |

For assistance please call the MCU Help Desk on x2777 or mcu@ag.gov.au



Sub No:
File No: 11/2319 Min No: ^Ministerial number^

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

Request for consent to prosecute Mr Mahinda Rajapaksa for alleged war crimes

irrelevant (draft)



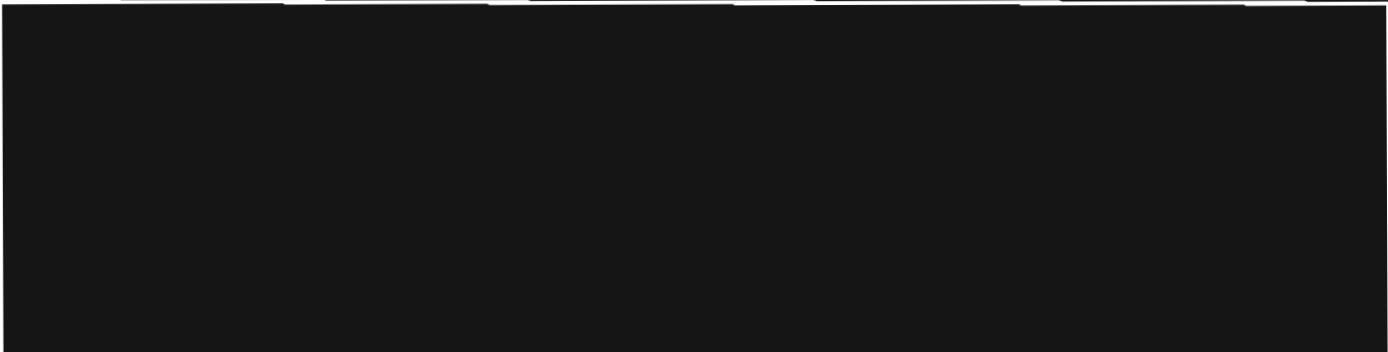
AGD Analysis: Section 268.121 of the Criminal Code provides that prosecutions-proceedings for the offences listed above cannot must not be commenced without the written consent of the Attorney-General. Further, section 268.121 of the Criminal Code provides that these offences may only be prosecuted in the name of the Attorney-General. Under the *Foreign States Immunity Act 1985 (Cth)* and the *Diplomatic Privileges and Immunities Act 1967 (Cth)* as well as relevant international law, Mr President Rajapaksa as Head of State possesses certain statutory immunity from any criminal proceedings. His person is also inviolable and he is immune immunities as a Head of State that would prevent him from being arrested, detained or being served with court proceedings either by a Government agency or a private individual.

S42(1)

Formatted: Cell text, Space After: 3 pt

S42(1)

If you were to give your consent to this prosecution proceeding, these immunities would likely be breached and Australia would potentially be in breach of its international obligations. Moreover, it would also be contrary to the domestic law mentioned above. We therefore recommend that you refuse to provide your consent to the prosecution of Mr President Rajapaksa.



irrelevant (draft)

^INSTRUCTIONS FOR MCU;
[EG 'CONTACT ACTION OFFICER BEFORE DISPATCH'] delete if not
required^



Sub No:
File No: 'File number' Min No: 'Ministerial number'

Noted / Discuss

.....
Yara Inverarity
A/g Assistant Secretary, Criminal Law
and Law Enforcement Branch
(02) 6141 2842
/ / 2011

.....
Minister for Justice
/ / 2011

.....
Attorney-General
/ / 2011

Cleared by:

.....
Anthony Coles (a/g)
/ 2011

.....
Tony Sleehan
/ 2011

Action Officer Branko Ananjevski, (02) 6141 3108, 25/10/2011

'Subject Footer'
3 of 4

Mason, Timothy

From: Ng, Phillip
Sent: Tuesday, 25 October 2011 4:00 PM
To: Ananijevski, Branko
Subject: FW: Arunachalam Jegatheeswaran v Percy Mahendra Rajapaksa [SEC=UNCLASSIFIED]
Attachments: DOC251011 pdf, DOC251011.pdf

Importance: High

Security Classification:
UNCLASSIFIED

UNCLASSIFIED

Branko,

I assume you have already seen this – but am forwarding it to you just in case.

If you need anything else, just let me know.

Kind regards

Phillip

From: Reid, John
Sent: Tuesday, 25 October 2011 3:36 PM
To: Ng, Phillip; Campbell, Bill
Subject: FW: Arunachalam Jegatheeswaran v Percy Mahendra Rajapaksa [SEC=UNCLASSIFIED]
Importance: High

UNCLASSIFIED

From: Coles, Anthony
Sent: Tuesday, 25 October 2011 3:34 pm
To: Inverarity, Tara; Winter, Josephine
Cc: Reid, John
Subject: FW: Arunachalam Jegatheeswaran v Percy Mahendra Rajapaksa [SEC=UNCLASSIFIED]
Importance: High

UNCLASSIFIED

Colleagues – as discussed

Anthony Coles
A/g First Assistant Secretary
Criminal Justice Division
02 6141 2770

From: Marco Man [mailto:marcom@robertstary.com.au]
Sent: Tuesday, 25 October 2011 3:25 PM
To: Coles, Anthony
Cc: Robert Stary; Lucien Richter

Subject: Arunachalam Jegatheeswaran v Percy Mahendra Rajapaksa
Importance: High

Dear Sir,

We refer to our conversation on even date and now attach for you again letters faxed to your office previously dated 20 October 2011 and letter dated 24 October 2011.

The original of the charge and statement along with cover letter dated 24 October 2011 will be posted to you by express registered post today.

Should you have any queries, please do not hesitate to contact me on 86228200.

Kind regards,

S47F(1)

Personal Assistant to Principal

ROBERT STARY

Ph: 03 8622 8200 Fax: 03 9670 8923
Ground Floor
333 Queen St, Melbourne, 3000

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S47F(1)

Personal Assistant to Principal
Ph: 03 8622 8200 Fax: 03 9670 8923
Ground Floor
333 Queen St, Melbourne, 3000

ExchangeDefender Message Security: [Check Authenticity](#)

Mason, Timothy

From: Reid, John
Sent: Monday, 24 October 2011 6:39 PM
To: Trahanas, Christina; Ng, Phillip; Reimers, Katherine
Subject: FW: Sri Lanka - relevant privileges and immunities {~~SEC=IN-CONFIDENCE~~}

Security Classification: ~~IN-CONFIDENCE~~

~~IN-CONFIDENCE~~

FYI

From: Reid, John
Sent: Monday, 24 October 2011 6:29 pm
To: Coles, Anthony
Cc: Campbell, Bill; Hall, Matt; Jennings, Mark; Sheehan, Tony
Subject: Sri Lanka - relevant privileges and immunities {~~SEC=IN-CONFIDENCE~~}

~~IN-CONFIDENCE~~

Anthony,

S47F(1)

Further to your conversation with Bill Campbell QC, we consider that the following information needs to be passed to John O'Sullivan of WAPol (John.O'SULLIVAN@police.wa.gov.au) [REDACTED] as a matter of urgency (bearing in mind that the President arrives this evening). It should also be passed to any other relevant people who may be involved in this matter.

The President possesses statutory immunity from any criminal proceedings. His person is also inviolable and he is immune from any form of arrest or detention. In our view, his statutory inviolability means that he is also immune from service either by a Government agency or a private individual. These immunities arise from section 36(1) of the *Foreign States Immunity Act 1985*, which extends to Heads of State those immunities of a head of a diplomatic mission under the *Diplomatic Privileges and Immunities Act 1967*. Relevantly, those immunities include personal inviolability including from any form of arrest or detention (Art 29 of the *Vienna Convention on Diplomatic Relations*) and immunity from the criminal jurisdiction of the receiving State (Art 31, VCDR). These immunities under the Convention are given the force of law by section 7 of the *Diplomatic Privileges and Immunities Act 1967*.

It follows that, as a matter of law, the President cannot be arrested, detained or served with court proceedings, either by a Government agency or a private individual. To do so would potentially place Australia in breach of its international obligations and would be contrary to the domestic law mentioned above.

The alleged charges have been laid under those parts of the Criminal Code relating to war crimes and crimes against humanity. While such proceedings cannot be commenced without the Attorney-General's consent, s268.121(3) of the Code permits the alleged offender to be arrested and held pending the Attorney's consent. However, the immunity referred to above overrides the effect of s268.121(3) in the case of a Head of State including the President of Sri Lanka.

Bill Campbell QC agrees with this analysis. Please let me know if there's anything further you need from OIL this evening.

Kind regards,
John

John Reid

Assistant Secretary
International Law, Trade and Security Branch
Office of International Law
Attorney-General's Department

T: +61 2 6141 3554

F: +61 2 6141 4096

— S47F(1)

E: john.reid@ag.gov.au

Reid, John

From: Coles, Anthony
Sent: Monday, 24 October 2011 8:04 pm
To: Campbell, Bill; Reid, John
Subject: FW: Sri Lanka - relevant privileges and immunities ~~(SEC - IN CONFIDENCE)~~

~~IN CONFIDENCE~~

Gentleman - see below from Diana

Anthony Coles
A/g First Assistant Secretary
Criminal Justice Division
02 6141 2770

From: Williams, Diana
Sent: Monday, 24 October 2011 7:45 PM
To: Coles, Anthony
Subject: RE: Sri Lanka - relevant privileges and immunities ~~(SEC - IN CONFIDENCE)~~

~~IN CONFIDENCE~~

S33(a)(iii)

Anthony, I have been asked if there might be any issue about [REDACTED] Not being a lawyer, I am presuming that this would go to [REDACTED] I am also presuming that this would already have been taken into consideration. Sorry to plague you with dumb questions. Diana

From: Coles, Anthony
Sent: Monday, 24 October 2011 7:13 PM
To: Sheehan, Tony; Reid, John
Cc: Campbell, Bill; Hall, Matt; Jennings, Mark; Williams, Diana
Subject: RE: Sri Lanka - relevant privileges and immunities ~~(SEC - IN CONFIDENCE)~~

S33(a)(iii)

~~IN CONFIDENCE~~

Tony - working on it now and have checked in with John Reid and Diana.

AC

From: Sheehan, Tony
Sent: Monday, 24 October 2011 7:01 PM
To: Reid, John; Coles, Anthony
Cc: Campbell, Bill; Hall, Matt; Jennings, Mark; Williams, Diana
Subject: Re: Sri Lanka - relevant privileges and immunities ~~(SEC - IN CONFIDENCE)~~

~~Classification: IN CONFIDENCE~~

Anthony

As discussed, a short brief please for AGO explaining the context of the advice below in terms of what we know from WAPOL DPP etc. and saying we are sharing John's advice with WA authorities as a matter of urgency.

Diana to coordinate with taskforce sharing of information below with WA so we don't have emails going everywhere

Note this should all occur quickly as President arrives at 8pm

Tony

From: Reid, John
To: Coles, Anthony
Cc: Campbell, Bill; Hall, Matt; Jennings, Mark; Sheehan, Tony
Sent: Mon Oct 24 18:29:09 2011
Subject: Sri Lanka - relevant privileges and Immunities ~~{SEC-IN-CONFIDENCE}~~

~~IN-CONFIDENCE~~

Anthony,

S47F(1)

Further to your conversation with Bill Campbell QC, we consider that the following information needs to be passed to John O'Sullivan of WAPol (John.O'SULLIVAN@police.wa.gov.au) [REDACTED] as a matter of urgency (bearing in mind that the President arrives this evening). It should also be passed to any other relevant people who may be involved in this matter.

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Kind regards,
John

John Reid
Assistant Secretary
International Law, Trade and Security Branch

Office of International Law
Attorney-General's Department

T: +61 2 6141 3554

F: +61 2 6141 4096

[REDACTED] S47F(1)

E: [REDACTED]

Released under the Freedom of Information Act 1982 by the Attorney-General's Department

Reid, John

From: Sheehan, Tony
Sent: Monday, 24 October 2011 8:22 pm
To: O'Rourke, Brooke; Coles, Anthony; McMullan, Kathryn; 'terry.crane@pmc.gov.au'; 'margot.mccarthy@pmc.gov.au'; Wilkins, Roger
Cc: Inverarity, Tara; Anderson, Iain; Williams, Diana; Reid, John
Subject: Re: Sri Lankan War Crimes Charges - Media Inquiry ~~[SEC=IN CONFIDENCE]~~

~~Classification: IN CONFIDENCE~~

Brooke

Anthony will provide a brief to you with OIL advice shortly which will also go to PMC, DFAI etc through the taskforce and to WA authorities

Tony

From: O'Rourke, Brooke
To: Sheehan, Tony; Coles, Anthony; McMullan, Kathryn; 'terry.crane@pmc.gov.au'; 'margot.mccarthy@pmc.gov.au'; Wilkins, Roger
Cc: Inverarity, Tara; Anderson, Iain; Williams, Diana; Reid, John
Sent: Mon Oct 24 18:06:51 2011
Subject: Re: Sri Lankan War Crimes Charges - Media Inquiry [SEC=UNCLASSIFIED]

Classification: UNCLASSIFIED

Hi Tony

Ryan provided the following response to Lateline, The Australian and The Age

From a Spokesman: The Attorney General has not been informed of any criminal matter or charges relating to Mr Mahinda Rajapaksa

Background

Generally if an AFP investigation reveals sufficient material to compile a brief of evidence of criminality or a real possibility of criminality the AFP will then refer the case to the Commonwealth Director of Public Prosecutions (CDPP) for consideration. It is then a matter for the CDPP to independently determine whether to prosecute the offence. This decision is made in accordance with the Prosecution Policy of the Commonwealth which can be accessed online at <http://www.cdpp.gov.au>. As a matter of longstanding practice by successive Australian Governments, the Attorney-General's consent is only sought if the CDPP has made a decision to prosecute.

From: Sheehan, Tony
To: Coles, Anthony; McMullan, Kathryn; terry.crane@pmc.gov.au; McCarthy Margot [PMC]; Wilkins, Roger; O'Rourke, Brooke
Cc: Inverarity, Tara; Anderson, Iain; Williams, Diana; Reid, John
Sent: Mon Oct 24 17:11:12 2011
Subject: RE: Sri Lankan War Crimes Charges - Media Inquiry [SEC=UNCLASSIFIED]

UNCLASSIFIED

Colleagues

Chris Dawson (WAPOL Deputy Commissioner) called me a little while ago to tell me he had heard from Jackson McDonald law firm in Perth (who have been hired by the Sri Lankan Government) that an action launched in the Melbourne Magistrates Court against President Rajapaksa in respect of alleged war crimes. We understand there

will be media coverage on Lateline this evening and note the media approach to DPP below. Anthony Coles advises that Jackson McDonald have been in touch with OIL seeking advice.

We are trying to get more facts from DPP and will send out an update email with more detail in due course.

Regards

Tony

From: Anderson, Iain
Sent: Monday, 24 October 2011 4:59 PM
To: Sheehan, Tony
Cc: Coles, Anthony
Subject: Fw: Sri Lankan War Crimes Charges - Media Inquiry [SEC=IN-CONFIDENCE:LEGAL] [SEC=UNCLASSIFIED]

Classification UNCLASSIFIED

Tony
For info

Iain

From: Anderson, Iain
To: 'mark.decrepigny@cdpp.gov.au'
Cc: Coles, Anthony
Sent: Mon Oct 24 16:58:04 2011
Subject: Re: Sri Lankan War Crimes Charges - Media Inquiry [SEC=IN-CONFIDENCE:LEGAL] [SEC=UNCLASSIFIED]

Classification UNCLASSIFIED

Thanks, Mark

I am overseas until Fri 4/11 and Anthony Coles is acting in my position.

He will contact you if he needs any more info on this.

Regards,
Iain

From: mark.decrepigny@cdpp.gov.au
To: Anderson, Iain
Sent: Mon Oct 24 16:21:51 2011
Subject: Sri Lankan War Crimes Charges - Media Inquiry [SEC=IN-CONFIDENCE:LEGAL]
Dear Iain

For your information this Office has had an inquiry from Ms Milanda Rout of *The Australian* asking about our knowledge of war crimes charges laid in the Melbourne Magistrates' Court against President Mahinda Rajapaksa. The person Ms Rout spoke to in our Office understood that the reporter had spoken to the Attorney's Office.

This Office is not aware of any such charges.

Regards

Mark

Mark de Crespigny
Senior Assistant Director
Legal and Practice Management and Policy Branch
Commonwealth Director of Public Prosecutions
tel 02 6206 5646
fax 02 6206 5688

.....
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.....

Mason, Timothy

From: Inverarity, Tara
Sent: Monday, 24 October 2011 8:27 PM
To: Winter, Josephine; Ananijevski, Branko
Subject: Fw: Sri Lankan War Crimes Charges - Media Inquiry [~~SEC=IN-CONFIDENCE~~]

~~Classification: IN-CONFIDENCE~~

FYI

From: Sheehan, Tony
To: O'Rourke, Brooke; Coles, Anthony; McMullan, Kathryn; 'terry.crane@pmc.gov.au' ; 'margot.mccarthy@pmc.gov.au' ; Wilkins, Roger
Cc: Inverarity, Tara; Anderson, Iain; Williams, Diana; Reid, John
Sent: Mon Oct 24 20:21:53 2011
Subject: Re: Sri Lankan War Crimes Charges - Media Inquiry [~~SEC=IN-CONFIDENCE~~]

Classification: ~~IN-CONFIDENCE~~

Brooke

Anthony will provide a brief to you with OIL advice shortly, which will also go to PMC, DFAT etc through the taskforce and to WA authorities.

Tony

From: O'Rourke, Brooke
To: Sheehan, Tony; Coles, Anthony; McMullan, Kathryn; 'terry.crane@pmc.gov.au' ; 'margot.mccarthy@pmc.gov.au' ; Wilkins, Roger
Cc: Inverarity, Tara; Anderson, Iain; Williams, Diana; Reid, John
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To: Coles, Anthony; McMullan, Kathryn; terry.crane@pmc.gov.au ; McCarthy Margot [PMC] ; Wilkins, Roger; O'Rourke, Brooke
Cc: Inverarity, Tara; Anderson, Iain; Williams, Diana; Reid, John
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Classification: UNCLASSIFIED

Tony,
For info

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To: 'mark.decrepigny@cdpp.gov.au'
Cc: Coles, Anthony
Sent: Mon Oct 24 16:58:04 2011
Subject: Re: Sri Lankan War Crimes Charges - Media Inquiry [~~SEC=IN-CONFIDENCE:LEGAL~~] [SEC=UNCLASSIFIED]

Classification: UNCLASSIFIED

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Iain

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This Office is not aware of any such charges.

Regards

Mark

Mark de Crespigny
Senior Assistant Director
Legal and Practice Management and Policy Branch
Commonwealth Director of Public Prosecutions
tel: 02 6206 5646
fax: 02 6206 5688

~~LEGAL IN CONFIDENCE~~

.....
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.....

Reid, John

From: McCosker, Sarah
Sent: Monday, 24 October 2011 9:15 pm
To: Reid, John
Subject: RE: Can you please call me {~~SEC-IN-CONFIDENCE~~}
Attachments: image001.gif

~~IN-CONFIDENCE~~

Thanks John; will do – and will be ready to help out tomorrow

Cheers,
Sarah

From: Reid, John
Sent: Monday, 24 October 2011 9:12 PM
To: McCosker, Sarah
Subject: RE: Can you please call me {~~SEC-IN-CONFIDENCE~~}

~~IN-CONFIDENCE~~

Hi Sarah – this is all sorted, for now. We've been working on this this afternoon and have just (as in a minute and half ago) sent a brief to the AG on the matter. It's likely to be on Lateline

We can discuss tomorrow. If she gets in contact again, please ask her to call me – [REDACTED]

S47F(1)

Cheers,
JR

From: McCosker, Sarah
Sent: Monday, 24 October 2011 9:09 PM
To: Reid, John
Subject: FW: Can you please call me {~~SEC-IN-CONFIDENCE~~}
Importance: High

~~IN-CONFIDENCE~~

Hi John,

FYI below – just received this now. If you think we need to ring her tonight, please let me know – otherwise let's discuss first thing tomorrow.

Cheers,
Sarah

From: Champion, Linda (mailto:Linda.Champion@afp.gov.au)
Sent: Monday, 24 October 2011 7:03 PM
To: McCosker, Sarah
Subject: Can you please call me {~~SEC-IN-CONFIDENCE~~}

Sarah

I have tried without success to find a contact number for you - so my apologies for emailing

I have just received news that Solicitor Robert Stary is planning on seeking his own indictment from the Attorney General for the Sri Lankan President. Apparently he has a witness here in Australia that is happy to provide a statement.

I won't go into the obvious issues around that whole statement above, however, would like to discuss with you this matter.

Can you please call me when you can.

regards

Linda

s 47F



LINDA CHAMPION
NATIONAL COORDINATOR SPECIAL REFERENCES
CRIME OPERATIONS
Tel +61(0) 2 61312523 Ext 142523
www.afp.gov.au

s 47F

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AFP Web site: <http://www.afp.gov.au>

Reid, John

From: Sheehan, Tony
Sent: Monday 24 October 2011 10:56 pm
To: Williams, Diana, Media AGD
Cc: Coles, Anthony; Reid, John
Subject: Re: AFP TPs, Sri Lanka ~~{SEC=IN-CONFIDENCE}~~
Attachments: image001.gif

~~Classification: IN-CONFIDENCE~~

Diana

I can't see why it would not be said if asked. Lawyer was on lateline a minute ago saying he'd written to AFP.

Tony

From: Williams, Diana
To: Media AGD
Cc: Sheehan, Tony
Sent: Mon Oct 24 22:51:58 2011
Subject: Re: AFP TPs: Sri Lanka ~~{SEC=IN-CONFIDENCE}~~

~~Classification: IN-CONFIDENCE~~

Hi Tracy

I know it's up to them but do you think that AFP should be indicating that it has received a referral?

Seems to me that statements like that further inflame media (especially given he has immunity) and maybe lead to some diplomatic issues.

This is a really difficult one isn't it?

What do you think?

Best,
Diana Williams
Assistant Secretary
Security Coordination Branch
EMA, Attorney-General's Department

s 47F

From: Media AGD
To: Liddell, Ryan
Cc: Williams, Diana; Coles, Anthony
Sent: Mon Oct 24 22:43:47 2011
Subject: AFP TPs: Sri Lanka ~~{SEC=IN-CONFIDENCE}~~

~~IN-CONFIDENCE~~

Hi Ryan,

Please find below for your information TPs that the AFP have developed in case they receive questions about the war crimes allegations against the Sri Lankan President.

Regards

Tracy

Tracy Heffernan | CHOGM 2011 Security Media
Strategic Communication Branch | Australian Government Attorney-General's Department
[REDACTED] | e. media@ag.gov.au

s 47F

From: Long, Nathan (<mailto:Nathan.Long@afp.gov.au>)
Sent: Monday, 24 October 2011 10:38 PM
To: Heffernan, Tracy
Cc: Ryan, Nigel
Subject: RE: request ~~(SEC-IN CONFIDENCE)~~

Here are the TPs. They will only be used after consultation with Nigel Ryan, and only if we are directly asked

- This is a matter for the Attorney General's Department
- The AFP has received a referral relating to this matter and it is currently being evaluated
- As this matter is currently under evaluation, it is not appropriate for the AFP to comment any further



NATHAN LONG
A/TL AFP NATIONAL MEDIA
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