



ATTORNEY-GENERAL  
THE HON ROBERT McCLELLAND MP

11/2319

Mr Robert Stary  
Robert Stary Lawyers  
333 Queen Street  
MELBOURNE VIC 3000

Dear Mr Stary

I refer to your letter of 24 October 2011 in which you seek my consent to commence proceedings against Sri Lankan President. Mr Mahinda Rajapaksa, pursuant to s 268.121 of the *Criminal Code Act 1995* (Cth), for crimes he allegedly committed in contravention of sections 268.8, 268.20 and 268.78 of the Criminal Code.

I do not consent to the commencement of these proceedings. It follows that I do not propose to take carriage of the proceedings as you have requested.

The action officer for this matter in my Department is Anthony Coles who can be contacted on (02) 6141 2800.

Yours sincerely

A handwritten signature in black ink that reads "Robert McClelland".

Robert McClelland

**Roy, Caitlin**

**From:** Ajan Kumar [ajan@pfmpl.com.au]  
**Sent:** Wednesday, 26 October 2011 12:21 PM  
**To:** Attorney Correspondence  
**Cc:** r.mcclelland mp@aph.gov.au  
**Subject:** What a disgrace!!

Dear Attorney- General,

Shame on you! You and the rest of the Government demean this beautiful country by permitting a known war criminal to enter the country.

I query if Slobodan Milošević had visited Australia, the same indifference would have applied? It is **CRIMINAL** that this man is allowed to enter the country!! Notwithstanding that he has diplomatic immunity, he should still **not be allowed** to visit Australia as the **WORLD** knows he is a war criminal and perpetuated the murder, rape, torture and brutalization of hundreds of thousands of **CIVILIANS!!!!** It is no different to Gaddafi or Saddam Hussein visiting!!!!

I state the above to you as someone who has never set foot on Sri Lankan soil. I was born in the UK and have spent the last 28 years here – being educated at Sydney Grammar School and the University of Technology, Sydney. It is apparent to me just as it should be apparent to you that what happened in that country was criminal. What continues to happen there today is criminal. I am amazed that you and the Labor Government are not acutely aware of this.

I will be publishing this email on all of my social media forums and requesting that all of my contacts voice their disapproval to you. I will also be voting for your Liberal counterpart at the next election and publicly vocalise this to my extensive network. I am disgusted at your indifference!

<http://www.smh.com.au/wa-news/sri-lankan-pm-will-not-answer-war-crimes-claims-20111025-1m14c.html>

Ajan Kumar (Computer Lawyer)

**PFM Legal**  
Level 12, 117 York Street  
SYDNEY NSW 2000

Email: [ajan@pfmpl.com.au](mailto:ajan@pfmpl.com.au)  
+612 8115 9803  
+612 9261 0088  
PO Box Q92  
QVB Post Office  
SYDNEY NSW 1230

<input type="checkbox"/> Priority A (date ...)	<input type="checkbox"/> Reply by McClelland
<input type="checkbox"/> Priority B	<input type="checkbox"/> Reply by McClelland
<input checked="" type="checkbox"/> Priority C	<input type="checkbox"/> Reply by GDS
<input checked="" type="checkbox"/> Information	<input type="checkbox"/> Reply by GDS
<input type="checkbox"/> Approp. action	
<b>RECEIVED 27 OCT 2011</b>	
<input type="checkbox"/> Reply by AOE	Action Area
	01L-1675
	Int. JC
	Date 28/10

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**IMPORTANT**

This email and any attachments are confidential and may be subject to legal proceedings. If you have received this message in error, please notify us and delete it from your system. It is your responsibility to protect any confidential information from unauthorized disclosure.



Before you print it, think about your responsibility and commitment to the **ENVIRONMENT**

**Mason, Timothy**

---

**From:** McCosker, Sarah  
**Sent:** Wednesday, 26 October 2011 1 11 PM  
**To:** Ng, Phillip  
**Cc:** Reimers, Katherine, Reid, John  
**Subject:** RE Sri Lanka PPQ [SEC=UNCLASSIFIED]

**Security Classification:**  
UNCLASSIFIED

**UNCLASSIFIED**

Hi Philip,

I've read over the draft PPQ; no comments from the Security section – although I think it would be useful if the third sentence (the one that gives the explanation for the refusal of consent) explicitly referred to foreign state immunity as the reason for the refusal.

In addition to Roxane, it would be useful if you could run this past Tara Inverarity in the Criminal Law and Law Enforcement Branch also, copying in Jo Winter. We usually consult both areas on these kinds of PPQs. Happy to help with this if need be.

Regards,

Sarah

**From:** Reid, John  
**Sent:** Wednesday, 26 October 2011 12:58 pm  
**To:** Ng, Phillip  
**Cc:** McCosker, Sarah; Reimers, Katherine  
**Subject:** FW: Sri Lanka PPQ [SEC=UNCLASSIFIED]

**UNCLASSIFIED**

Phil,

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Cheers,  
JR

**From:** McDougall, Carrie [mailto:Carrie.McDougall@dfat.gov.au]  
**Sent:** Wednesday, 26 October 2011 12:54 pm  
**To:** Champion, Linda (Linda.Champion@afp.gov.au); Rendina, Michael (Michael.Rendina@afp.gov.au); Reid, John; Coles, Anthony  
**Cc:** Rose, Andrew; Trindade, Dominic; Day, Elizabeth  
**Subject:** Sri Lanka PPQ [SEC=UNCLASSIFIED]

Dear All,

Please find below the draft text of a PPQ on Sri Lanka for your comment and review (with a view also to synchronising the TPs of different agencies on this matter). We would be grateful for any comments by COB today. Please let me know if you would like to discuss any aspect of the draft.

Kind regards,

Carrie

**F-92**

**FOREIGN AFFAIRS AND TRADE**

## **Sri Lanka - Allegations of crimes: Australian action**

### **Possible Question**

Why is the Australian Government shielding alleged Sri Lankan war criminals?

### **Talking Points**

Let me say in no uncertain terms that the Australian Government does not shield persons accused of being war criminals. We are committed to ending impunity for serious international crimes and take action within the limits of the law to ensure that perpetrators of such crimes are held accountable.

The *Criminal Code Act 1995*(Cth) provides that prosecutions for war crimes and crimes against humanity cannot be commenced without the consent of the Commonwealth Attorney-General.

The Attorney-General refused to grant this consent in relation to the Victorian proceeding initiated against President Rajapaksa as to continue the proceedings would have been in breach of domestic law and Australia's obligations under international law.

Australia continues to call on Sri Lanka to ensure that its Lessons Learnt and Reconciliation Commission conducts a thorough investigation of the allegations made against members of both the Sri Lankan Government and the Liberation Tigers of Tamil Eelam.

I (Mr Rudd) called on the UN Human Rights Council to revisit the matter in light of the UN Panel Report.

**If raised: Report of the Australian section of the International Jurists Commission (ICJA)**

The AFP has stated publicly that it is evaluating the ICJA report, which is consistent with the seriousness with which Australia takes allegations of war crimes and crimes against humanity.

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**If raised: Appointment of Admiral Samarasinghe as High Commissioner**

The Government considered carefully the nomination of Admiral Samarasinghe for the position of High Commissioner.

The process for considering agrément is confidential between the governments concerned.

I can, however, note that the government drew on all relevant sources of information in reaching its decision, including the UN Secretary-General's Panel of Experts Report, which included no reference to Admiral Samarasinghe

The Australian Government has no information that establishes Admiral Samarasinghe was involved in any war crimes or crimes against humanity.

While allegations have been made by the Australian section of the International Commission of Jurists against Admiral Samarasinghe, those allegations have not been substantiated.

**If raised: Has the Government discussed the allegations in the ICJA report with Sri Lanka?**

No. As the matter is before the AFP, it would be inappropriate for us to comment on the ICJA report.

Of course, more generally, the Australian Government has made no secret of its concerns about civilian casualties during the final stages of the conflict in Sri Lanka (December 2008-May 2009). Australia's view is that accountability and reconciliation will be a crucial part of long-term peace in Sri Lanka and we have made such views known to Sri Lanka.

## **Background**

On 20 October 2011, the Chief Magistrate of the Victorian Magistrates' Court authorised issue of a charge and summons against Sri Lankan President Rajapaksa for alleged war crimes and crimes against humanity (Division 268 of the *Criminal Code Act 1995*). ABC's Lateline reported the story on 24 October, the night of the President's arrival in Perth. The Charge Sheet and Summons were issued purportedly in accordance with Victorian criminal law procedures (although there are questions about the legal validity of this). The prosecution of these offences requires the consent of the Commonwealth Attorney-General. On 25 October, the Attorney-General announced that he was not providing such consent on the basis of Australia's obligations in relation to the immunities enjoyed by President Rajapaksa as Head of State. The *Foreign States Immunity Act 1985* (Cth) extends immunities of heads of diplomatic missions applying under the *Diplomatic Privileges and Immunities Act 1967* (Cth) to Heads of States. Those immunities include personal inviolability including from any form of arrest or detention and immunity from the criminal jurisdiction of the receiving State. This derives from Australia's obligations under international law and the principles of State immunity.

On 17 October 2011 *The Age* and the *Sydney Morning Herald* published a story entitled 'Sri Lanka diplomat accused of war crimes', referring to a report prepared by the Australian section of the International Commission of Jurists (the ICJA report). Follow-up stories appeared in a range of media publications on 18 October. The report, a copy of which was provided to the Foreign Minister, asserts that President Rajapaksa, Sri Lanka's High Commissioner to Australia, Admiral Thisara Samarasinghe and Dr Palitha Kohona, Sri Lanka's Permanent Representative to the UN (dual Australian national and former DFAT employee) should be held individually criminally responsible for war crimes and crimes against humanity. The AFP is currently evaluating the ICJA brief. An evaluation is distinct from an investigation – it is a preliminary inquiry directed towards establishing whether an investigation is warranted.

Prior to the receipt of the ICJA report, the AFP had already publicly confirmed that it was evaluating allegations made in a number of international reports (including the UN Panel Report and the May 2010 International Crisis

Group report) and related media that suggest Dr Palitha Kohona, as Secretary of Sri Lanka's External Affairs Ministry, was involved in surrender negotiations with the Liberation Tigers of Tamil Eelam (LTTE) in May 2009. It is alleged that after surrendering a number of LTTE leaders and their families were killed. There has been no suggestion that Dr Kohona was involved in the deaths.

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On 15 May 2010, President Mahinda Rajapaksa appointed eight prominent Sri Lankans – five Sinhalese, two Tamil and one Muslim – to form the Lessons Learnt and Reconciliation Commission (LLRC) to investigate events between February 2002 and May 2009 and report whether any person, group or institution bore responsibility in relation to those events and to make recommendations to prevent a recurrence and regarding restitution. The LLRC's final report is due in November 2011.

**Prepared By:**

Carrie McDougall

Legal Specialist

ILD/ILB/INT

Phone: 2244

Edit Date: 26 October 2011 12:41:52 PM

Greg French

Assistant Secretary

ILD/ILB/

Phone: 1188

**Dr Carrie McDougall**

Legal Specialist

International Law Section

Department of Foreign Affairs and Trade

Tel: +612 6261 2244

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**Ng, Phillip**

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**From:** Ng, Phillip  
**Sent:** Wednesday, 26 October 2011 1:26 PM  
**To:** McCosker, Sarah  
**Subject:** RE: Sri Lanka PPQ [SEC=UNCLASSIFIED]

**UNCLASSIFIED**

Hi Sarah

Thanks. I have contacted Tara and Jo regarding this PPQ.

Kind regards

Phil

**From:** McCosker, Sarah  
**Sent:** Wednesday, 26 October 2011 1:11 PM  
**To:** Ng, Phillip  
Reimers, Katherine; Reid, John  
**Subject:** RE: Sri Lanka PPQ [SEC=UNCLASSIFIED]

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**From:** McDougall, Carrie [mailto:Carrie.McDougall@dfat.gov.au]  
**Sent:** Wednesday, 26 October 2011 12:54 pm  
**To:** Champlon, Linda (Linda.Champion@afp.gov.au); Rendina, Michael (Michael.Rendina@afp.gov.au); Reid, John; Coles, Anthony  
**Cc:** Rose, Andrew; Trindade, Dominic; Day, Elizabeth  
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### **Possible Question**

Why is the Australian Government shielding alleged Sri Lankan war criminals?

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**Prepared By:**

Carrie McDougall

Legal Specialist

ILD/ILB/INT

Phone: 2244

Edit Date: 26 October 2011 12:41:52 PM

Greg French

Assistant Secretary

ILD/ILB/

Phone: 1188

**Dr Carrie McDougall**

Legal Specialist

International Law Section

Department of Foreign Affairs and Trade

Tel: +612 6261 2244

**Mason, Timothy**

---

**From:** Reid, John  
**Sent:** Wednesday, 26 October 2011 1:32 PM  
**To:** Ng, Phillip  
**Subject:** FW: Timing of Victorian Magistrate's Court Action {SEC=IN-CONFIDENCE:LEGAL}

**Security Classification:** ~~LEGAL-IN-CONFIDENCE~~

~~**LEGAL-IN-CONFIDENCE**~~

**From:** Campbell, Bill  
**Sent:** Wednesday, 26 October 2011 1:07 pm  
**To:** Clifton, Jacob  
**Cc:** Wilkins, Roger; Fredericks, David; Sheehan, Tony; Reid, John; Coles, Anthony; Inverarity, Tara  
**Subject:** RE: Timing of Victorian Magistrate's Court Action {SEC=IN-CONFIDENCE:LEGAL}

~~**LEGAL-IN-CONFIDENCE**~~

Jacob

S42(1)

Bill

*Bill Campbell QC  
General Counsel (International Law)  
Office of International Law  
Ph: (02) 6141 3365  
Fax: (02) 6141 3486*

**From:** Campbell, Bill  
**Sent:** Wednesday, 26 October 2011 1:05 pm  
**To:** Clifton, Jacob  
**Cc:** Wilkins, Roger; Fredericks, David; Sheehan, Tony; Reid, John; Coles, Anthony; Inverarity, Tara  
**Subject:** Timing of Victorian Magistrate's Court Action {SEC=IN-CONFIDENCE:LEGAL}

~~**LEGAL-IN-CONFIDENCE**~~

Jacob

S42(1)

S42(1)

S42(1)

[Redacted]

S42(1)

[Redacted]

[Redacted]

Regards

S42(1)

Bill

*Bill Campbell QC  
General Counsel (International Law)  
Office of International Law  
Ph (02) 6141 3365  
Fax (02) 6141 3486*

**Mason, Timothy**

---

**From:** Telec, Amelia  
**Sent:** Wednesday, 26 October 2011 1:56 PM  
**To:** Ng, Phillip  
**Cc:** Nolan, Roxane, Reid, John; Reimers, Katherine  
**Subject:** RE: Sri Lanka PPQ [SEC=UNCLASSIFIED]

**Security Classification:**  
UNCLASSIFIED

**UNCLASSIFIED**

Hi Phillip,

Thank you for sending through the PPQ on allegations of war crimes by Sri Lankan nationals for our consideration – we don't have any comments.

Kind regards,

Amelia

**From:** Ng, Phillip  
**Sent:** Wednesday, 26 October 2011 1:10 pm  
**To:** Nolan, Roxane  
**Cc:** Reid, John; Reimers, Katherine  
**Subject:** RE: Sri Lanka PPQ [SEC=UNCLASSIFIED]

**UNCLASSIFIED**

Hi Roxanne

We have just received draft text for a PPQ from DFAT (below).

Would you be able to arrange for a person from IHRLS to review and to provide any comments to me by 4 pm today? I will be co-ordinating OIL's response to DFAT, which they have requested by COB today.

Many thanks - happy to discuss on x 3254.

Phillip

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On 17 October 2011 *The Age* and the *Sydney Morning Herald* published a story entitled 'Sri Lanka diplomat accused of war crimes', referring to a report prepared by the Australian section of the International Commission of Jurists (the ICJA report). Follow-up stories appeared in a range of media publications on 18 October. The report, a copy of which was provided to the Foreign Minister, asserts that President Rajapaksa, Sri Lanka's High Commission to Australia, Admiral Thisara Samarasinghe and Dr Palitha Kohona, Sri Lanka's Permanent Representative to the UN (dual Australian national and former DFAT employee) should be held individually criminally responsible for war crimes and crimes against humanity. The AFP is currently evaluating the ICJA brief. An evaluation is distinct from an investigation – it is a preliminary inquiry directed towards establishing whether an investigation is warranted.

Prior to the receipt of the ICJA report, the AFP had already publicly confirmed that it was evaluating allegations made in a number of international reports (including the UN Panel Report and the May 2010 International Crisis Group report) and related media that suggest Dr Palitha Kohona, as Secretary of Sri Lanka's External Affairs Ministry, was involved in surrender negotiations with the Liberation Tigers of Tamil Eelam (LTTE) in May 2009. It is alleged that after surrendering a number of LTTE leaders and their families were killed. There has been no suggestion that Dr Kohona was involved in the deaths.

In June 2010, UN Secretary General (UNSG) Ban Ki Moon appointed a Panel of Experts to advise him on the issue of accountability with regard to any alleged violations of international human rights and humanitarian law during the final stages of the conflict in Sri Lanka. The panel submitted its final report on 25 April 2011. The panel "found credible allegations that comprise five core categories of potential serious violations committed by the government of Sri Lanka". Allegations of six core categories of potential violations by the Liberation Tigers of Tamil Eelam (LTTE) were also found to be credible. The Panel made a significant number of recommendations, including that an independent international mechanism might be required, both to monitor and assess Sri Lanka's own accountability mechanisms, and – possibly – to conduct investigations of its own. An entity with the power to conduct criminal investigations and prosecutions would require either Sri Lankan consent or a UN Security Council mandate. Sri Lanka opposed the Panel from its inception. On 27 April 2011, the Government of Sri Lanka issued a statement saying that the report is fundamentally flawed and based on biased material.

On 15 May 2010, President Mahinda Rajapaksa appointed eight prominent Sri Lankans – five Sinhalese, two Tamil and one Muslim – to form the Lessons Learnt and Reconciliation Commission (LLRC) to investigate events between February 2002 and May 2009 and report whether any person, group or institution bore responsibility in relation to those events and to make recommendations to prevent a recurrence and regarding restitution. The LLRC's final report is due in November 2011.

**Prepared By:**

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Edit Date: 26 October 2011 12:41:52 PM

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**Ng, Phillip**

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**From:** Reid, John  
**Sent:** Tuesday, 25 October 2011 2:26 PM  
**To:** Campbell, Bill, Ng, Phillip  
**Subject:** FW: AAP: Govt must OK Sri Lanka president's case:PM [SEC=UNCLASSIFIED]

**UNCLASSIFIED**

**From:** Little, Matthew  
**Sent:** Tuesday, 25 October 2011 2:24 pm  
**To:** Reid, John  
**Subject:** FW: AAP: Govt must OK Sri Lanka president's case:PM [SEC=UNCLASSIFIED]

**UNCLASSIFIED**

yt FYI – latest article I think.

## Govt must OK Sri Lanka president's case:PM

A war crimes case filed against the Sri Lankan president in an Australian court cannot proceed without the federal government's consent, Prime Minister Julia Gillard says.

Sri Lankan-born Australian citizen Arunachalam Jegatheeswaran has lodged a war crimes indictment against President Mahinda Rajapaksa in the Melbourne Magistrates Court.

The move comes as Mr Rajapaksa is due to arrive in Perth for the Commonwealth Heads of Government Meeting (CHOGM).

But Ms Gillard on Tuesday made it clear no case could proceed without the government's say-so.

"No such legal action can be taken on an issue like this without the consent of the attorney-general," Ms Gillard told ABC Radio in Perth.

"And the attorney-general hasn't received any request in relation to this matter."

Mr Jegatheeswaran's lawyers say they have written to Attorney-General Robert McClelland to alert him to the case.

Mr McClelland's spokesman says he has not received any request for consent in relation to the matter, but federal police are looking into it.

"The AFP has received a request to investigate the matter, which it is evaluating," the spokesman said.

He also noted that Australia has obligations under international law which extends immunity to visiting heads of state.

Ms Gillard reiterated her government was concerned about the persistent war crimes allegations.

"Australia and like-minded countries have been urging and will continue to urge Sri Lanka to address the serious allegations that have been made of human rights violations," she said

The indictment was filed under the Australian criminal code and is now set for hearing on November 29

A series of reports have accused Sri Lanka of committing war crimes during its final 2009 offensive against the Tamil Tiger rebels.

The offensive crushed the Tigers - who have also been accused of atrocities - and brought the decades-old civil war to an end

Mr Rajapaksa also was cited in a separate brief of evidence prepared by the International Commission of Jurists' Australian branch and handed to the Australian Federal Police earlier this month

That brief also reportedly levels allegations against Sri Lankan High Commissioner to Australia Thisara Samarasinghe.

Both men strenuously deny the claims

Australian National University international law expert Donald Rothwell says proponents of the cases face a significant challenge in proving that serious war crimes can overrule diplomatic immunity.

"While there may be sufficient grounds upon which to launch a war crimes prosecution, both High Commissioner Samarasinghe and President Rajapaksa would be able to claim immunity from prosecution which would bar the matter from proceeding in an Australian court," Professor Rothwell said.

Mr Jegatheeswaran's lawyer, Lucien Richter, said he did not believe diplomatic immunity was an issue in this case.

"There is some authority to suggest that where crimes are of a substantial and international nature, such as war crimes or crimes against humanity, then effectively the authority of being head of state doesn't grant him immunity from those things," Mr Richter said.

"Certainly the ICJ (International Commission of Jurists) in their submission have come to a simple conclusion that immunity would not be a barrier to this prosecution "

Ryan Liddell  
Press Secretary  
Office of the Hon Robert McClelland MP  
Attorney-General and Federal Member for Barton

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Australian Government  
Attorney-General's Department

**FILE NOTE**

Office of International Law

11/26705

26 October 2011

**Victorian Magistrates Court Action – Sri Lanka – Discussion with Renée Leon**

Renée Leon rang at 2.50pm on 26 October 2011. I informed her of the course of action recommended to the Attorney-General concerning the proceedings in the Magistrates Court in Victoria. She thought that the proposed course of action was fine. I undertook to send her the e-mail which I had earlier sent to Gillian Bird this morning.



S33(a)(iii)

A handwritten signature in cursive script that reads 'Bill Campbell'.

Bill Campbell QC  
General Counsel (International Law)

~~LEGAL-IN-CONFIDENCE~~

**Mason, Timothy**

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**From:** Reid, John  
**Sent:** Wednesday, 26 October 2011 6:39 PM  
**To:** Ng, Phillip  
**Cc:** Reimers, Katherine  
**Subject:** FW: Letter to Sri Lanka [SEC=UNCLASSIFIED]

**Security Classification:** UNCLASSIFIED

**UNCLASSIFIED**

**From:** Campbell, Bill  
**Sent:** Wednesday, 26 October 2011 6:36 pm  
**To:** Whelan, John; Clifton, Jacob; Bird, Gillian; greg.french@dfat.gov.au; Sheehan, Tony; Fredericks, David; Reid, John; Coles, Anthony; Inverarity, Tara  
**Subject:** Letter to Sri Lanka [SEC=UNCLASSIFIED]

**UNCLASSIFIED**

Dear all

S33(a)(iii)



Regards

Bill