

Reid, John

From: Coles, Anthony
Sent: Monday, 24 October 2011 11:04 pm
To: Campbell, Bill, Reid, John
Subject: Re: Final version of brief and attachments ~~{SEC=IN-CONFIDENCE}~~

~~Classification: IN-CONFIDENCE~~

Bill,

Diana Williams has the full text and I have indicated to her that she should bring it to Roger's attention

From: Campbell, Bill
To: Reid, John; Coles, Anthony
Cc: Winter, Josephine; Hall, Matt
Sent: Mon Oct 24 21:51:29 2011
Subject: Re: Final version of brief and attachments ~~{SEC=IN-CONFIDENCE}~~

~~Classification: IN-CONFIDENCE~~

Anthony

If it has not happened already I agree with John - OIL's full advice should be passed to the Secretary


Bill

From: Reid, John
To: Coles, Anthony
Cc: Campbell, Bill; Winter, Josephine; Hall, Matt
Sent: Mon Oct 24 21:02:13 2011
Subject: RE: Final version of brief and attachments ~~{SEC=IN-CONFIDENCE}~~

~~IN-CONFIDENCE~~

S42(1)

Anthony,
Thanks for this.



I also wonder whether the WA authorities may want more detail about the source of the immunities. In that case, we'd be happy for our entire advice to be provided

I'm being pressed by DFAT for a copy of this information. If it is going to PMC and the Taskforce, grateful if you could confirm that it can also go to DFAT Canberra. Of course, similarly happy if the answer is no

Cheers,
JR

From: Coles, Anthony
Sent: Monday, 24 October 2011 8:51 PM
To: Wilkins, Roger; Clifton, Jacob; McMullan, Kathryn; Langton, Adele; Williams, Diana; Sheehan, Tony; ramzi.jabbour@afp.gov.au

Cc: Campbell, Bill; Reid, John, Winter, Josephine

Subject: FW: Final version of brief and attachments-~~{SEC=IN-CONFIDENCE}~~

~~IN-CONFIDENCE~~

Colleagues

I attach a brief on the issue of the private prosecution commenced today in the Melbourne Magistrates court against the Sri Lankan President

Diana grateful if you could arrange for circulation of the brief to the Minister and Attorney, taskforce members as appropriate, and ultimately the West Australians.

Thanks to OIL (Bill and John) and AFP (Ramzi) for their assistance in putting this together at short notice

Happy to discuss

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

Reid, John

From: Sheehan, Tony
Sent: Monday, 24 October 2011 11:20 pm
To: Coles, Anthony
Cc: Reid, John, Williams, Diana, Wilkins, Roger
Subject: Fw. CHOGM - President of Sri Lanka - Private & Confidential - URGENT - fyi [SEC=UNCLASSIFIED]

Classification UNCLASSIFIED

Anthony

Para 9 is not covered in our brief For the morning at this stage

Tony

From: Anderson, Iain
To: Coles, Anthony; Sheehan, Tony
Sent: Mon Oct 24 23:11:51 2011
Subject: Fw: CHOGM - President of Sri Lanka - Private & Confidential - URGENT - fyi [SEC=UNCLASSIFIED]

Classification UNCLASSIFIED

From: [REDACTED] S47F(1)
To: Clifton, Jacob; Whelan, John
Cc: Attorney Correspondence; kevin.rudd@dfat.gov.au ; Anderson, Iain; Jennings, Mark; dominic.trindade@dfat.gov.au ; aaron.verlin@chogm2011.org ; Rob McKenzie ; Thisara Samarasinghe
Sent: Mon Oct 24 22:03:03 2011
Subject: CHOGM - President of Sri Lanka - Private & Confidential - URGENT S33(a)(iii), S33(b)
Dear Mr Clifton and Mr Whelan,



S33(a)(iii), S33(b)

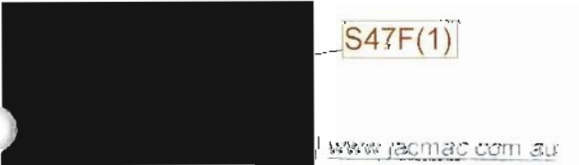


Kind regards

S47F(1)

Senior Consultant
Jackson McDonald

140 St Georges Terrace, Perth



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Partner
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Reid, John

From: Coles, Anthony
Sent: Tuesday, 25 October 2011 7:28 am
To: Reid, John
Cc: Campbell, Bill; Winter, Josephine; Hall, Matt
Subject: RE: Final version of brief and attachments [SEC=IN-CONFIDENCE]

~~IN-CONFIDENCE~~

John,

Thanks. Can you give me a call to discuss when you get in

S42(1)

[REDACTED]

I'm fine with DFAT Canberra getting a copy

AC

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Happy to discuss

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

Summary of advice – Immunity of Sri Lankan President to prosecution for war crimes under *Criminal Code Act 1995 (Cth)*

- The President possesses statutory immunity under domestic and international law that would prevent the President being arrested, detained or being served with court proceedings either by a Government agency or a private individual.
- The *Foreign States Immunity Act 1985* extends immunities of heads of diplomatic missions applying under the *Diplomatic Privileges and Immunities Act 1967* 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.
- The *Criminal Code Act 1995 (Cth)* provides that prosecutions cannot be commenced without the consent of the Commonwealth Attorney-General.
- No request for consent has been received by the Attorney-General, or the Attorney-General's Department.
- While the Code allows an alleged offender to be arrested and held pending the Attorney's consent, the immunity referred to above overrides the effect these provisions in the case of a Head of State including the President of Sri Lanka.

IN-CONFIDENCE

**ATTORNEY-GENERAL
MINISTER FOR JUSTICE**

BRIEF – War crimes charges against Sri Lankan President

The Department understands that a Sri-Lankan born Australian citizen has brought war crimes charges against the Sri Lankan President, Mahinda Rajapaksa in the Melbourne Magistrates Court. The Department has been contacted by various media outlets seeking comments on the Government's proposed response. The Department understands that the charges will be the subject of a story on tonight's Lateline program and are likely to be the subject of further discussion in tomorrow's media.

Key messages

The Department has received the attached documents purporting to be copies of the Charge Sheet and a letter from Victorian Chief Magistrate Ian Gray confirming the charges (**Attachment A**) from a journalist representing the ABC's Lateline program. The Department has not received official copies of these documents from the Court or lawyers representing the complainant.

The alleged charges have been brought under Division 268 of the *Criminal Code Act 1995* (Cth) (the Code). A list of the alleged offences and relevant provisions is at **Attachment B**. Under section 268.121 of the Code, proceedings under this Division require the consent of Attorney-General. [REDACTED]

S42(1)

[REDACTED] Under section 268.121(3), the alleged offender may also be arrested and held pending the Attorney's consent. The Department is not aware of any formal request for consent having been made to the Attorney-General at this time.

However, the Sri Lankan President possesses several immunities under domestic and international law that would prevent the President being arrested, detained or being served with court proceedings 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*. These immunities override the effect of s268.121(3) in the case of a Head of State including the President of Sri Lanka.

Lawyers acting for the complainant have forwarded a letter to the AFP requesting that the AFP effect service of the charges and summons and assume carriage of the investigation into the allegations (**Attachment C**). The AFP advises that it cannot proceed with charges without sufficient evidence to prove the offences. The AFP is evaluating the matter.

The Department recommends that the substance of this advice be communicated to John O'Sullivan of Western Australia Police (John.O'SULLIVAN@police.wa.gov.au, [REDACTED]) as soon as possible (noting that the President is due to arrive in Australia at 20:00 hrs this evening). A summary suitable for this purpose is included at **Attachment D**. S47F(1)

Mason, Timothy

From: Inverarity, Tara
Sent: Tuesday, 25 October 2011 9:11 AM
To: Reid, John
Cc: Ananijeovski, Branko; Winter, Josephine; Ng, Phillip
Subject: RE: CHOGM - President of Sri Lanka - Private & Confidential - URGENT - fyi [SEC=UNCLASSIFIED]

Security Classification:
UNCLASSIFIED

UNCLASSIFIED

Thanks John.

The documents haven't arrived with us yet – we're just working off the Lateline ones so that the sub is ready to go when the originals arrive in the Department.

Tara

From: Reid, John
Sent: Tuesday, 25 October 2011 9:07 am
To: Inverarity, Tara
Cc: Ananijeovski, Branko; Winter, Josephine; Ng, Phillip
Subject: RE: CHOGM - President of Sri Lanka - Private & Confidential - URGENT - fyi [SEC=UNCLASSIFIED]

UNCLASSIFIED

Thanks Tara.
If you can't get me, the action officer here is Phillip Ng (3254).

Has the request to grant consent arrived?

Cheers,
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

E: john.reid@ag.gov.au

S47F(1)

From: Inverarity, Tara
Sent: Tuesday, 25 October 2011 9:03 am

To: Reid, John
Cc: Ananijevski, Branko; Winter, Josephine
Subject: FW: CHOGM - President of Sri Lanka - Private & Confidential - URGENT - fyi [SEC=UNCLASSIFIED]

UNCLASSIFIED

Hi John

S42(1)

I think we have enough information from OIL to do a first cut of the submission which we will aim to get to you for comment by lunch time today. Grateful if you could let me know if there is an action officer in OIL that we should consult with in the first instance.

Happy to discuss. I'm on x2842 and the action officer is Branko Ananijevski on x3108 if you can't get me on the phone.

Cheers
Tara

From: Coles, Anthony
Sent: Tuesday, 25 October 2011 8:23 am
To: Sheehan, Tony; Williams, Diana; Wilkins, Roger
Cc: Reid, John; Campbell, Bill; Barnes, Jennifer; Clifton, Jacob; McMullan, Kathryn; Inverarity, Tara; Winter, Josephine
Subject: FW: CHOGM - President of Sri Lanka - Private & Confidential - URGENT - fyi [SEC=UNCLASSIFIED]

UNCLASSIFIED

Colleagues,

OIL (John Reid) is considering points 8 & 9 below. We will provide further advice asap.

Jacob – I assume you still have not seen the request for consent under 268.121 that Mr Stary purports to have made?

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

From: Anderson, Iain
Sent: Monday, 24 October 2011 11:12 PM
To: Coles, Anthony; Sheehan, Tony
Subject: Fw: CHOGM - President of Sri Lanka - Private & Confidential - URGENT - fyi [SEC=UNCLASSIFIED]

Classification: UNCLASSIFIED

From: [REDACTED] S47F(1)

To: Clifton, Jacob; Whelan, John

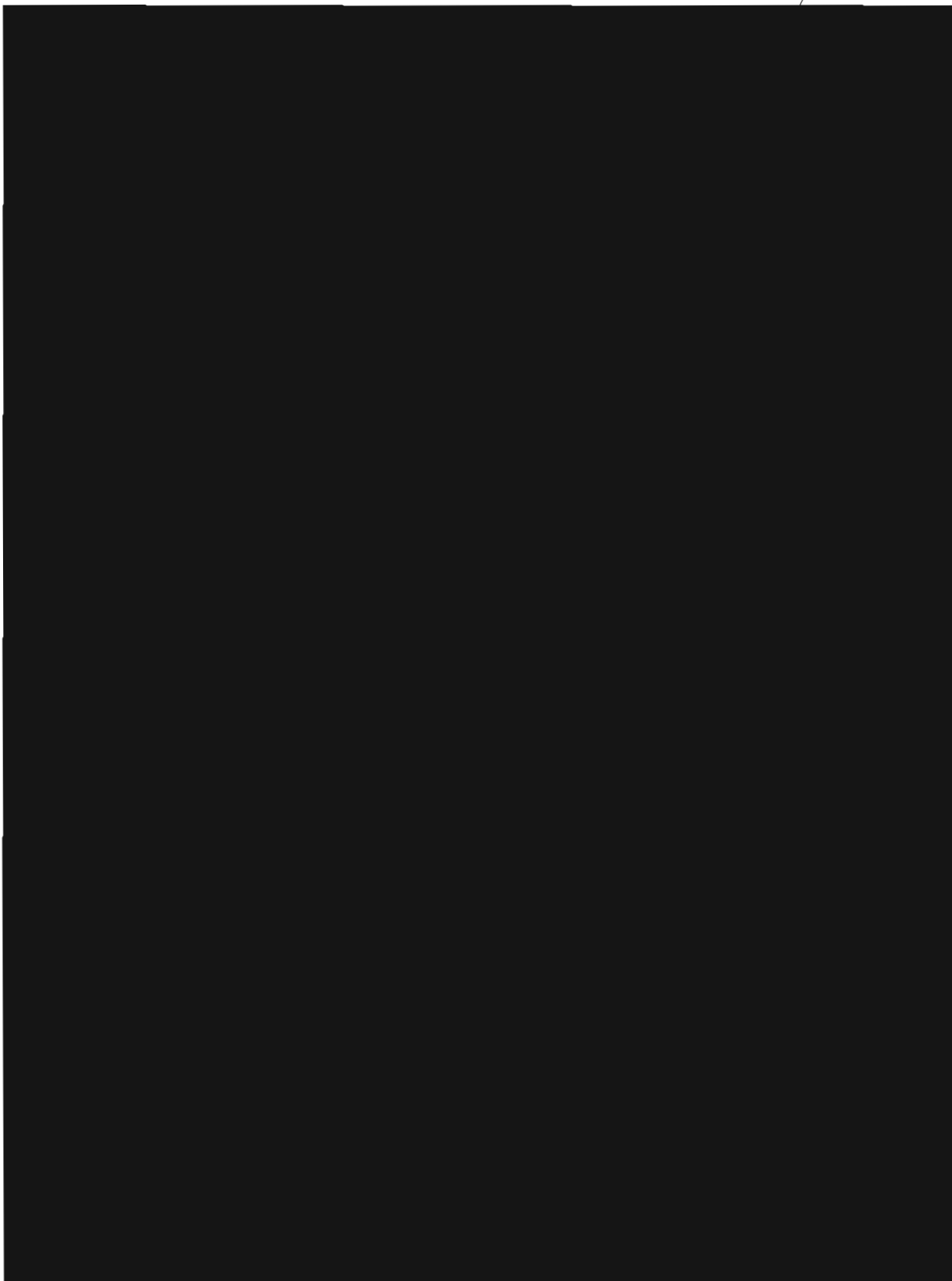
Cc: Attorney Correspondence; kevin.rudd@dfat.gov.au ; Anderson, Iain; Jennings, Mark; dominic.trindade@dfat.gov.au ; aaron.verlin@chogm2011.org ; Rob McKenzie ; Thisara Samarasinghe

Sent: Mon Oct 24 22:03:03 2011

Subject: CHOGM - President of Sri Lanka - Private & Confidential - URGENT

Dear Mr Clifton and Mr Whelan,

S33(a)(iii), S33(b)



[Redacted]

Kind regards

S47F(1)

[Redacted] Senior Consultant
Jackson McDonald
140 St Georges Terrace, Perth

S33(a)(iii), S33(b)

[Redacted]

S47F(1)

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Reid, John

From: Campbell, Bill
Sent: Tuesday, 25 October 2011 9:48 am
To: Daley, Simon (AGS)
Cc: Reid, John
Subject: FW: CHOGM - President of Sri Lanka - Private & Confidential - URGENT - fyi [SEC=UNCLASSIFIED]

UNCLASSIFIED

Simon

S42(1)



Regards

Bill

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

From: Coles, Anthony
Sent: Tuesday, 25 October 2011 8:23 am
To: Sheehan, Tony; Williams, Diana; Wilkins, Roger
Cc: Reid, John; Campbell, Bill; Barnes, Jennifer; Clifton, Jacob; McMullan, Kathryn; Inverarity, Tara; Winter, Josephine
Subject: FW: CHOGM - President of Sri Lanka - Private & Confidential - URGENT - fyi [SEC=UNCLASSIFIED]

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Criminal Justice Division
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Sent: Monday, 24 October 2011 11:12 PM

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Subject: Fw: CHOGM - President of Sri Lanka - Private & Confidential - URGENT - fyi [SEC=UNCLASSIFIED]

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From: [REDACTED]

S47F(1)

To: Clifton, Jacob; Whelan, John

Cc: Attorney Correspondence; kevin.rudd@dfat.gov.au ; Anderson, Iain; Jennings, Mark;
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S33(a)(iii), S33(b)





Kind regards

[S47F(1)]

[S42(1), S33(a)(iii)]

[Redacted] Senior Consultant
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[Redacted] [S47F(1)]

[Redacted] | www.jacmac.com.au

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Mason, Timothy

From: Reid, John
Sent: Tuesday, 25 October 2011 10:04 AM
To: Williams, Diana
Cc: Campbell, Bill; Ng, Phillip; Coles, Anthony; Sheehan, Tony; Winter, Josephine
Subject: Talking points - issue of charge sheet [SEC=IN-CONFIDENCE]

Security Classification:
~~IN-CONFIDENCE~~

IN-CONFIDENCE

Diana,

As discussed, here are some talking points for your use in briefing this morning. These are our initial views in the time available and should not be used in public.

S42(1)



Of course, happy to discuss.

Cheers,
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: john.reid@ag.gov.au

Mason, Timothy

From: Ananijevski, Branko
Sent: Tuesday, 25 October 2011 11:30 AM
To: Reid, John; Ng, Phillip
Cc: Winter, Josephine, Inverarity, Tara
Subject: RE: CHOGM - President of Sri Lanka - Private & Confidential - URGENT - fyi [SEC=~~IN-CONFIDENCE~~]
Attachments: Sub - consent to prosecute Sri Lanka pres.doc
Importance: High
Security Classification: ~~IN-CONFIDENCE~~

IN-CONFIDENCE

Hi John and Phillip

As per below, please find attached a draft submission recommending the AG refuse consent to prosecute for your comment.

Feel free to give me a call if you wish to discuss.

Thanks
Branko

Branko Ananijevski
Legal Officer
Criminal Law Reform Section
Criminal Law & Law Enforcement Branch
Attorney-General's Department
3 - 5 National Circuit | Barton ACT 2600
T: 02 6141 3108 | E: branko.ananijevski@ag.gov.au | W: www.ag.gov.au

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