



Foreign States Immunities Act 1985

I, KEVIN MICHAEL RUDD MP, Minister for Foreign Affairs, pursuant to Section 40(1)(a) and Section 40(1)(c) of the *Foreign States Immunities Act 1985* (the Act), certify that:

- a. the Democratic Socialist Republic of Sri Lanka (formerly Ceylon), has been since 4 February 1948, and remains at as of this date, a foreign State; and
- b. MAHINDA RAJAPAKSA (also known as Percy Mahendra Rajapaksa), has been since 19 November 2005, and remains as of this date, the Head of State of a foreign State, namely the Democratic Socialist Republic of Sri Lanka.

DATED this day of October 2011

Kevin Michael Rudd MP
Minister for Foreign Affairs

Mason, Timothy

From: Reid, John
Sent: Tuesday, 25 October 2011 5:21 PM
To: Campbell, Bill
Cc: Ng, Phillip; Fredericks, David; Hall, Matt
Subject: FW: Submission - Sri Lanka war crimes allegations [SEC=UNCLASSIFIED]
Attachments: Attachment C.pdf; Attachment B - Criminal Code Act 1995 - Relevant provisions doc, Attachment A.pdf, Att D -Letter - consent to prosecute Sri Lanka pres doc; ScanDoc_2011_10_25_16_15_58_794.pdf

Security Classification:
UNCLASSIFIED

UNCLASSIFIED

FYI

From: Inverarity, Tara
Sent: Tuesday, 25 October 2011 5:20 pm
To: Clifton, Jacob; McMullan, Kathryn
Cc: Coles, Anthony; Reid, John; Sheehan, Tony; Ananijevski, Branko; Winter, Josephine
Subject: FW: Submission - Sri Lanka war crimes allegations [SEC=UNCLASSIFIED]

UNCLASSIFIED

Jacob and Kathryn

As discussed with Jacob please find attached the submission to the Attorney-General and Minister for Justice regarding the war crimes allegations against the Sri Lankan President and letter to Rob Stary.

If the Attorney has any questions, Tony Sheehan has indicated that he, Anthony Coles (Criminal Justice Division) and John Reid (OIL) can be available for a teleconference.

Feel free to give me a call if you need anything further. We are working to prepare some media talking points and will liaise with DFAT and the relevant CHOGM people on those.

Cheers
Tara

Tara Inverarity
A/g Assistant Secretary
Criminal Law and Law Enforcement Branch
Attorney-General's Department
Phone: (02) 6141 2842
Mobile: [REDACTED] — S47F(1)

The Honourable Robert McClelland
Attorney General
Commonwealth of Australia
BY FACSIMILE: (02) 6273 4102

20.10.2011

Dear Attorney,

Arunachalam Jegatheeswaran v Percy Mahendra Rajapaksa

We act on behalf of Mr Jegatheeswaran. Our client has sought to lay an indictment against Mr Rajapaksa in relation to three counts of crimes against humanity.

Please find enclosed our clients statement in support of that indictment. We note pursuant to section 268.121 (1) of the Commonwealth Criminal Code that those proceedings cannot commence without your written permission. Pursuant to sub section (3), charges can be filed pending that permission and we have sought to do so.

You will note that our client is an Australian Citizen who was working in Tamil Field Hospitals in North East Sri Lanka during that later stages of the Civil War in that country.

Our client remains available to be interviewed by Australian Federal Police and/or officials from your department.

The accused is likely to attend the Commonwealth heads of government meeting on 28 October 2011 in Perth. That may well provide an opportunity for the Australian Federal Police to conduct their enquiries at that time.

Please contact this office should you have any queries in the meantime.

Yours faithfully,



Robert Stary
ROBERT STARY LAWYERS



ALSO AT FOOTSCRAY, SUNSHINE, RINGWOOD AND GEELONG

FOR URGENT AFTER HOURS ASSISTANCE PLEASE CALL 0407 410 821

FOI-23

Australia

Can a private individual initiate a criminal prosecution for international crimes which leads to the arrest of a suspect?

Yes. Section 13 of the Crimes Act 1914 protects the right of a person to bring a private prosecution and is expressly preserved under section 10(2) of the DPP Act.

Are there procedural requirements for prosecuting international crimes?

Yes, section 268.121 of the Criminal Code Act 1995 provides that war crimes, crime against humanity and genocide can only be commenced with the Attorney-General's written consent. However, pursuant to s268.122 a person may be arrested, charged, remanded in custody, or released on bail, in connection with an international crime before the necessary consent has been given.

Jurisdictional requirements for prosecuting international crimes

Absolute universality – ss 268.117 and 15.4 of the Criminal Code Act 1995.

4 pages removed under s33(a)(iii)
7 pages removed under s47F

REDACTED



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 has arrived in Australia.
Branch Head approval of Clearance Schedule Tara Inverarity (a/g)	Approved <i>(Signature)</i> 25/10/11
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)	<i>(Signature)</i> Clearance required by 25/10/2011
Anthony Coles (a/g)	<i>(Signature)</i> Clearance required by 25/10/2011
Tony Sheehan	<i>(Signature)</i> Clearance required by 25 /10/2011

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

Sub No:
File No: 11/2319

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

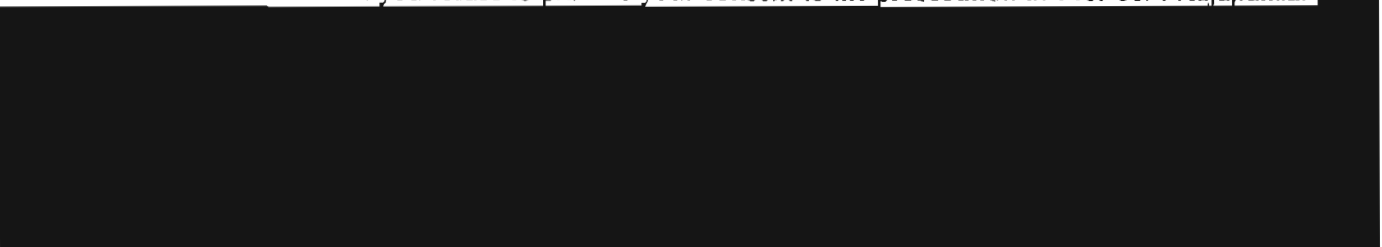
Request for consent to prosecute Mr Mahinda Rajapaksa for alleged war crimes

Deadline: ASAP –Mr Rajapaksa has arrived for the Commonwealth Heads of Government Meeting.

Key Issues: Robert Stary Lawyers, on behalf of Mr Arumachalam Jegatheeswaran, a Sri Lankan born Australian citizen, has sought your written consent, pursuant to s 268.121 of the *Criminal Code Act 1995* (Cth) to commence proceedings against the Sri Lankan President, Mr Mahinda Rajapaksa, for war crimes and crimes against humanity he allegedly committed during the civil war in Sri Lanka between 1 July 2008 and 30 May 2009 (**Attachment A**). Mr Stary also asks you to take carriage of the prosecution. It is alleged that President Rajapaksa breached sections 268.8, 268.20 and 268.78 of the Criminal Code (**Attachment B**). The Melbourne Magistrates Court authorised the issue of charges for those offences on 20 October 2011 (**Attachment C**).

AGD Analysis: Under section 268.121 of the Criminal Code, proceedings for the offences listed above 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), President Rajapaksa as Head of State has statutory immunity from any criminal proceedings. His person is also inviolable and he is immune from being arrested, detained or being served with court proceedings either by a Government agency or a private individual. These immunities derive from Australia's obligations under international law and the principles of State immunity.

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



Financial Implications: None.

S42(1)

Sensitivities and Communications Plan: Discussions with Strategic Communications Branch are ongoing.

Recommendation (Attorney-General): I recommend that you:

- (i) refuse consent to prosecute Mr Rajapaksa pursuant to section 268.121 of the Criminal Code

S42(1)

Approved / Not Approved / Discuss



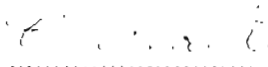
Approved / Not Approved / Discuss

- (iii) sign the attached letter to Robert Stary Lawyers advising of your refusal (**Attachment D**).

Signed / Not Signed / Discuss

Recommendation (Minister for Justice): I recommend that you note this submission.

Noted /Discuss



Tara Inverarity
A/g Assistant Secretary, Criminal Law
and Law Enforcement Branch

(02) 6141 2842

25/10/2011

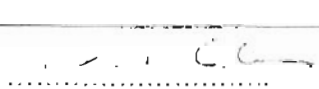
.....
Minister for Justice

/ / 2011

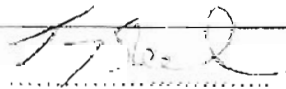
.....
Attorney-General

/ / 2011

Cleared by:



Anthony Coles (a/g)
25/10/2011



Tony Sheehan
25/10/2011

FOI-27

REDACTED

Criminal Code Act 1995 (Cth) Division 268—Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court

...

268.8 Crime against humanity—murder

A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator causes the death of one or more persons; and
- (b) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for life.

...

268.20 Crime against humanity—persecution

(1) A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator severely deprives one or more persons of any of the rights referred to in paragraph (b); and
- (b) the rights are those guaranteed in articles 6, 7, 8 and 9, paragraph 2 of article 14, article 18, paragraph 2 of article 20, paragraph 2 of article 23 and article 27 of the Covenant; and
- (c) the perpetrator targets the person or persons by reason of the identity of a group or collectivity or targets the group or collectivity as such; and
- (d) the grounds on which the targeting is based are political, racial, national, ethnic, cultural, religious, gender or other grounds that are recognised in paragraph 1 of article 2 of the Covenant; and
- (e) the perpetrator's conduct is committed in connection with another act that is:
 - (i) a proscribed inhumane act; or
 - (ii) genocide; or
 - (iii) a war crime; and
- (f) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 17 years.

(2) Strict liability applies to:

- (a) the physical element of the offence referred to in paragraph (1)(a) that the rights are those referred to in paragraph (1)(b); and
- (b) paragraphs (1)(b) and (d).

...

268.78 War crime—attacking persons or objects using the distinctive emblems of the Geneva Conventions

(1) A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator attacks one or more persons; and
- (b) the person or persons are using, in conformity with the Geneva Conventions or the Protocols to the Geneva Conventions, any of the distinctive emblems of the Geneva Conventions; and

- (c) the perpetrator intends the persons so using such an emblem to be the object of the attack; and
- (d) the perpetrator's conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for life.

- (2) A person (the *perpetrator*) commits an offence if:
 - (a) the perpetrator attacks one or more buildings, medical units or transports or other objects; and
 - (b) the buildings, units or transports or other objects are using, in conformity with the Geneva Conventions or the Protocols to the Geneva Conventions, any of the distinctive emblems of the Geneva Conventions; and
 - (c) the perpetrator intends the buildings, units or transports or other objects so using such an emblem to be the object of the attack; and
 - (d) the perpetrator's conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for 20 years.

- (3) Strict liability applies to paragraphs (1)(b) and (2)(b).

268.121 Bringing proceedings under this Division

- (1) Proceedings for an offence under this Division must not be commenced without the Attorney-General's written consent.
- (2) An offence against this Division may only be prosecuted in the name of the Attorney-General.
- (3) However, a person may be arrested, charged, remanded in custody, or released on bail, in connection with an offence under this Division before the necessary consent has been given.

Mason, Timothy

From: Ng, Phillip
Sent: Tuesday, 25 October 2011 5:27 PM
To: 'stephanie.hillman@pmc.gov.au'
Cc: Reid, John
Subject: Talking point - Sri Lankan President Rajapaksa [SEC=UNCLASSIFIED]

Security Classification: UNCLASSIFIED

UNCLASSIFIED

Dear Stephanie

Thank you for your call earlier today

As discussed, please see a single talking point below:

- **Australia takes seriously its responsibilities to protect the dignity of foreign Heads of State. Proceedings for the offences in question cannot be commenced without the Attorney-General's consent, and may only be prosecuted in the name of the Attorney-General.**

It is likely that this talking point will need to be revised following developments later today, as the Attorney-General's consent has now been sought.

If you wish to discuss please telephone me on 6141 3254 or John Reid on 6141 3554

Kind regards

Phillip Ng
Legal Officer
Office of International Law
Attorney-General's Department

Tel + 61 2 6141 3254 | Fax + 61 2 6141 3486
Phillip.Ng@ag.gov.au | www.ag.gov.au

Mason, Timothy

From: Media AGD
Sent: Tuesday, 25 October 2011 5:29 PM
To: Liddell, Ryan; Media AGD
Cc: Coles, Anthony; Ananijevski, Branko; Williams, Diana
Subject: RE: War crime allegations against Sri Lankan PM [SEC=UNCLASSIFIED]

Security Classification:
UNCLASSIFIED

UNCLASSIFIED

Thanks Ryan.

As with yesterday, it would be great if we could get a copy of any updated responses on this issue so that it can be circulated (for information) to the security agencies we're working with for during CHOGM.

Cheers,

Naomi Hyland | CHOGM 2011 Security Media
Strategic Communication Branch | Australian Government Attorney-General's Department
t. [REDACTED] | e. media@ag.gov.au

S47F(1)

From: Liddell, Ryan
Sent: Tuesday, 25 October 2011 4:54 PM
To: Media AGD
Cc: Coles, Anthony; Ananijevski, Branko; Williams, Diana
Subject: Re: War crime allegations against Sri Lankan PM [SEC=UNCLASSIFIED]

Classification UNCLASSIFIED

Yep got them. We're holding on replying until we get further advice. If any other ABC journo calls tell them to look at the lines already on the ABC system! Tnx

Ryan Liddell
Office of the Attorney-General
M: [REDACTED] S47F(1)

From: Media AGD
To: Liddell, Ryan
Cc: Coles, Anthony; Ananijevski, Branko; Williams, Diana; Media AGD
Sent: Tue Oct 25 16:21:10 2011
Subject: FW: War crime allegations against Sri Lankan PM [SEC=UNCLASSIFIED]

UNCLASSIFIED

Hi Ryan – and again.

Thanks,

Naomi Hyland | CHOGM 2011 Security Media
Strategic Communication Branch | Australian Government Attorney-General's Department
t. [REDACTED] | e. media@ag.gov.au

S47F(1)

From: Media AGD [mailto:media@ag.gov.au]
Sent: Tuesday, 25 October 2011 4:17 PM
To: Heffernan, Tracy; Hyland, Naomi; Ferguson, Simon; Swinbourn, Kaitlyn
Subject: FW: War crime allegations against Sri Lankan PM
Importance: High

From: Aja Styles[SMTP:AJA_STYLES@FAIRFAXDIGITAL.COM.AU]
Sent: Tuesday, October 25, 2011 4:16:52 PM
To: Media AGD
Subject: War crime allegations against Sri Lankan PM
Importance: High
Auto forwarded by a Rule

Can the Attorney General please respond to the following:

Will you treat Jegan Waran's complaint, which has been authorised to go ahead by Victoria's chief magistrate, as a bona fide complaint?
If so will it be investigated?
Would you consider taking Mr Rajapaksa into questioning while he is in the country?
At the very least will consular officials spoken to Mr Rajapaksa as part of due process? If so when?
Do you agree with the Sri Lankan government that Australian proceedings against Mahinda Rajapaksa is "a violation of Australia's obligations under public international law"?
Do you also see this case as being incompetent under Australian law?

Cheers,

Aja Styles
Crime & Court Reporter

WA today
COM 11

[REDACTED] S47F(1)
(08) 9423 8958

Suite A3
435 Roberts Rd
Subiaco
WA 6008

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Mason, Timothy

From: Reid, John
Sent: Tuesday, 25 October 2011 5:32 PM
To: Inverarity, Tara
Cc: Campbell, Bill; Ng, Phillip, Coles, Anthony, Ananijevski, Branko, Winter, Josephine
Subject: RE. Submission - Sri Lanka war crimes allegations [SEC=UNCLASSIFIED]

Security Classification:
UNCLASSIFIED

UNCLASSIFIED

Thanks for sending this through, Tara. Just one thing – I think the wrong letter has been attached as Attachment A. On my reading it should be the letter dated 24 October 2011, which asks the AG to take carriage of the matter. The letter of the 20th (which is attached) is silent in this regard. No great deal, but the letter the AG is asked to sign refers to the letter of the 24th.

Cheers,
JR

From: Inverarity, Tara
Sent: Tuesday, 25 October 2011 5:20 pm
To: Clifton, Jacob; McMullan, Kathryn
Cc: Coles, Anthony; Reid, John; Sheehan, Tony; Ananijevski, Branko; Winter, Josephine
Subject: FW: Submission - Sri Lanka war crimes allegations [SEC=UNCLASSIFIED]

UNCLASSIFIED

Jacob and Kathryn

As discussed with Jacob please find attached the submission to the Attorney-General and Minister for Justice regarding the war crimes allegations against the Sri Lankan President and letter to Rob Stary.

If the Attorney has any questions, Tony Sheehan has indicated that he, Anthony Coles (Criminal Justice Division) and John Reid (OIL) can be available for a teleconference.

Feel free to give me a call if you need anything further. We are working to prepare some media talking points and will liaise with DFAT and the relevant CHOGM people on those.

Cheers
Tara

Tara Inverarity
A/g Assistant Secretary
Criminal Law and Law Enforcement Branch
Attorney-General's Department
Phone: (02) 6141 2842
Mobile: [REDACTED] S47F(1)

REDACTED

Ng, Phillip

From: Reid, John
Sent: Tuesday, 25 October 2011 6:05 PM
To: Campbell, Bill
Cc: Ng, Phillip
Subject: RE: A-G Comment {SEC=UNCLASSIFIED}

UNCLASSIFIED

S42(1)

Sir,



Cheers,
John

From: Clifton, Jacob
Sent: Tuesday, 25 October 2011 6:00 pm
To: Coles, Anthony
Cc: Reid, John; Campbell, Bill; Inverarity, Tara
Subject: FW: A-G Comment [SEC=UNCLASSIFIED]
Importance: High

UNCLASSIFIED

Anthony,

The AG has approved the refusal of consent.

Could you please urgently fact check the media lines below.

Kind regards,

Jacob.

From: Liddell, Ryan
Sent: Tuesday, 25 October 2011 5:47 PM
To: Clifton, Jacob; Little, Matthew
Subject: FW: A-G Comment [SEC=UNCLASSIFIED]
Importance: High

UNCLASSIFIED

Ng, Phillip

From: Ng, Phillip
Sent: Tuesday, 25 October 2011 6:12 PM
To: Reid, John
Subject: TRIM AGD File : 11/26705 : War crimes allegations against Sri Lankan President Rajapaksa - Victoria - Immunities and Privileges - Legal Advice - OIL - Office of International Law - ILHRD - Part 1 (SEC=UNCLASSIFIED)
Attachments: War crimes allegations against Sri Lankan President Rajapaksa - Victoria - Immunities and Privileges - Legal Advice - OIL - Office of ~ Part 1.tr5

UNCLASSIFIED

Hi John

FYI I have created this new TRIM folder and will TRIM all of the emails etc from the past few days.

cheers

Phil

}-----< TRIM Record Information >-----

Record Number : 11/26705
Title : War crimes allegations against Sri Lankan President Rajapaksa - Victoria - Immunities and Privileges - Legal Advice - OIL - Office of International Law - ILHRD - Part 1

}

Mason, Timothy

From: newscentre@aap.com.au
Sent: Tuesday, 25 October 2011 7:42 PM
To: Hyland, Naomi; Heffernan, Tracy; Lewer, Felicity; Ferguson Simon, Swinbourn, Kaitlyn
Subject: Attorney General's Department, AAP Newscentre alert for profile "Broadcast - CHOGM" on 25/10/2011 - 07:41:47 PM

Categories: ..



Attorney General's Department

Alerts

Alert generated for profile "Broadcast - CHOGM"

Broadcast Metro

2GB

Ross Greenwood

News Headlines (Evenings) - 25/10/2011 - 07:01 PM

Duration 0 minute(s) and 59 second(s)

News Headline: A war crimes case filed in an Australian court against Sri Lanka's president has been quashed by the Federal Government. The move coincided with the President's visit to Perth for the Commonwealth Heads of Government Meeting however the Attorney-General has blocked it from proceeding. Also, the Australian teenager facing drugs charges in Bali is said to be traumatised after meeting with prosecutors. The teenager and his family were met with a large media presence and are said to b

Demographics:

All People

Male 16+

Female 16+

ABs

GBs

Phone 02 8570 0000

City Pyrmont

State NSW

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Mason, Timothy

From: Media AGD
Sent: Tuesday, 25 October 2011 7:53 PM
To: Williams, Diana; Bryant, James; Coles, Anthony; Ananijevski, Branko; Media AGD; Edwards, Paul
Subject: FYI - War crimes case media clip [SEC=UNCLASSIFIED]
Attachments: Attorney General's Department, AAP Newscentre alert for profile "Broadcast - CHOGM" on 25/10/2011 - 07:41.47 PM

Security Classification:
UNCLASSIFIED

UNCLASSIFIED

FYI – the first few clips of media coverage resulting from the AGO statement.

Naomi Hyland | CHOGM 2011 Security Media
Strategic Communication Branch | Australian Government Attorney-General's Department
t [REDACTED] | e. media@ag.gov.au

S47F(1)

From: newscentre@aap.com.au [mailto:newscentre@aap.com.au]
Sent: Tuesday, 25 October 2011 7:35 PM
To: Hyland, Naomi; Heffernan, Tracy; Lewer, Felicity; Ferguson, Simon; Swinbourn, Kaitlyn
Subject: Attorney General's Department, AAP Newscentre alert for profile "Broadcast - CHOGM" on 25/10/2011 - 07:35:16 PM



Attorney General's Department

Alerts

Alert generated for profile "Broadcast - CHOGM"

Broadcast Metro

774 ABC Melbourne

7pm News Headlines - 25/10/2011 - 07:01 PM

Duration 0 minute(s) and 43 second(s)

News Headline: Federal Attorney-General Robert McClelland has refused to allow a war crimes case against the Sri Lankan President to proceed in Australia saying he would be breaching international law. A 63 year old Tamil man has filed charges in the Melbourne Magistrates' Court against Mahinda Rajapaksa claiming civilian targets were bombed during the 2009 civil war. The President has arrived in Perth for the Commonwealth Heads of Government Meeting.

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