

# PROSECUTING INTERNATIONAL CRIMES IN AUSTRALIA: THE CASE OF THE SRI LANKAN PRESIDENT

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*In October 2011 an Australian citizen filed an indictment for war crimes and crimes against humanity against President Mahinda Rajapaksa in the Melbourne Magistrates' Court. Within a day of the indictment being filed, the Commonwealth Attorney-General, Robert McClelland, had intervened and quashed the case claiming that it could not proceed because President Rajapaksa was entitled to head of state immunity. This article examines two issues that arose from this case. The first is whether the Attorney-General should have the broad discretion he or she currently does to determine whether international criminal cases can proceed. The second is whether the Attorney-General was correct to assert that President Rajapaksa was entitled to head of state immunity. It argues that the Attorney-General's broad discretion in international criminal cases should be significantly curtailed and that although it is likely that head of state immunity would have applied to President Rajapaksa, an Australian court should have been given the opportunity to deliberate on the parameters of a customary international exemption to head of state immunity for international crimes.*

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## I INTRODUCTION

On 24 October 2011, an Australian citizen, Arunachalam Jegatheeswaran, filed an indictment against the President of Sri Lanka,<sup>1</sup> Mahinda Rajapaksa, for his actions during the Sri Lankan civil war.<sup>2</sup> Jegatheeswaran alleged that Rajapaksa had deliberately targeted civilians and civilian infrastructure (including hospitals, schools and community centres) in 2007 and 2008<sup>3</sup> and that this conduct amounted to war crimes and crimes against humanity.<sup>4</sup> The charges were laid in the Melbourne Magistrates' Court on the eve of Rajapaksa's arrival in Australia for the Commonwealth Heads of Government Meeting ('CHOGM').<sup>5</sup>

The commencement of proceedings against Rajapaksa was a potentially significant moment for Australia and its domestic engagement with international criminal law. Historically, Australia has had a poor record of prosecuting persons for international crimes.<sup>6</sup> With the exception of the trial of 807 Japanese troops at the conclusion of World War II<sup>7</sup> and the (unsuccessful) trial of three ex-Nazis in the early 1990s,<sup>8</sup> Australia has failed to prosecute individuals suspected of

<sup>1</sup> In Australia (as well as many other common law countries and some civil law countries) citizens are entitled to initiate private prosecutions, that is: 'any prosecution where the informant is a private individual as distinct from a police officer or some other official acting in the course of a public office or duty': Chris Craigie, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (Statement, Commonwealth Director of Public Prosecutions, November 2008) 13 [4.7] <<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>>.

<sup>2</sup> Michael Gordon, 'Sri Lankan President Accused in Australian Court', *The Age* (online), 25 October 2011 <<http://www.theage.com.au/world/sri-lankan-president-accused-in-australian-court-20111024-1mgea.html>>.

<sup>3</sup> *Ibid.*

<sup>4</sup> Jerry Votava, 'Australian Citizen Files War Crimes Charges against Sri Lanka President' on *Jurist* (24 October 2011) <<http://jurist.org/paperchase/2011/10/australia-citizen-files-war-crimes-charges-against-sri-lanka-president.php>>.

<sup>5</sup> Gordon, above n 2.

<sup>6</sup> See, eg, Mark Aarons, *War Criminals Welcome: Australia, A Sanctuary for Fugitive War Criminals since 1945* (Black, 2001); Gideon Boas, 'War Crimes Prosecutions in Australia and Other Common Law Countries: Some Observations' (2010) 21 *Criminal Law Forum* 313, 322.

<sup>7</sup> Michael Carrel, 'Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints' in David Blumenthal and Tim McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Martinus Nijhoff, 2008) 239, 245.

<sup>8</sup> The three defendants were Ivan Polyukovich, Mikolay Berezowsky and Heinrich Wagner. For more information about the trials, see Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked' in Tim McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997) 123, 130-4.

committing international crimes.<sup>9</sup> In 2002, the Commonwealth Parliament passed the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) to amend the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') in order to incorporate international crimes recognised by the International Criminal Court ('ICC') into Australian law (namely war crimes, crimes against humanity and genocide).<sup>10</sup> The instigation of the case against Rajapaksa under this legislation provided some hope that Australia would begin to take more seriously its obligation to prosecute individuals accused of committing international crimes.

Within a day of Jegatheeswaran filing the indictment, however, the case was quashed by the Attorney-General, Robert McClelland.<sup>11</sup> Pursuant to s 268.121(1) of the *Criminal Code*, proceedings concerning genocide, crimes against humanity, war crimes and crimes against the administration of justice of the ICC 'must not be commenced without the Attorney-General's written consent'. In this case, the Attorney-General refused to grant consent because, according to a spokesperson, 'continuation of the proceedings would be in breach of domestic law and Australia's obligations under international law'.<sup>12</sup> Specifically, the spokesperson stated that the prosecution of Rajapaksa would breach Australian and international laws that provide immunity from criminal prosecution for heads of state.<sup>13</sup>

This case, short lived as it was, raised two important issues. The first was whether the Attorney-General should have such broad discretion to determine whether cases concerning international crimes can proceed.<sup>14</sup> The second was whether the Attorney-General's spokesperson was correct to assert that Rajapaksa was entitled to head of state immunity. This article will explore each of these issues in turn. With respect to the need for the Attorney-General's consent in the prosecution of international crimes, it will be argued in Part II that the Attorney-General should maintain a role in determining which international

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<sup>9</sup> Australia also has a poor record of extraditing suspected war criminals to other countries to stand trial. See, eg, Boas, 'War Crimes Prosecutions in Australia and Other Common Law Countries', above n 6, 322–3; Gideon Boas, 'We Have a Duty to Find and Try War Criminals', *Sydney Morning Herald* (online), 9 September 2009 <<http://www.smh.com.au/opinion/we-have-a-duty-to-find-and-try-war-criminals-20090908-ffyf.html>>.

<sup>10</sup> The Australian Government needed to incorporate these crimes into domestic law to fulfil its obligations under the *Rome Statute*, which it ratified on 1 July 2002: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>11</sup> Aja Styles and Michael Gordon, 'Sri Lankan PM Will Not Answer War Crimes Claims', *Sydney Morning Herald* (online), 26 October 2011 <<http://www.smh.com.au/wa-news/sri-lankan-pm-will-not-answer-war-crimes-claims-20111025-1mi4c.html?skin=text-only>>.

<sup>12</sup> The Attorney-General did not provide any written reasons for his decision. The only reasons available are those given by his spokesperson as reported in the media. This failure to provide written reasons for the decision to quash the case is consistent with s 268.121(1) of the *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*'). The reasons provided by the Attorney-General's spokesperson were reported by Styles and Gordon, above n 11.

<sup>13</sup> Styles and Gordon, above n 11.

<sup>14</sup> It should be noted that there are numerous other sections of the *Criminal Code* that require the consent of the Attorney-General before a case can proceed. For example, s 93.1(1) of the Act requires the Attorney-General's consent before espionage proceedings are commenced. There are different policy reasons for affording the Attorney-General power over criminal cases in different circumstances. This article is only concerned with evaluating the reasons behind granting the Attorney-General the power over international crimes cases; the advisability of the Attorney-General having control over other criminal law matters is not considered.

criminal cases can be prosecuted but that his or her role should be subject to specific limitations and conditions. Part III will assess how a case against Rajapaksa might have been dealt with by an Australian court had it been allowed to proceed. Specifically it will examine head of state immunity in Australian and international law, and argue that although Rajapaksa would have been entitled to immunity from jurisdiction for the duration of his term in office, an Australian court should have nonetheless been given the opportunity to deliberate on the parameters of a customary international law exemption to head of state immunity for international crimes.

## II ROLE OF THE ATTORNEY-GENERAL IN PROSECUTING INTERNATIONAL CRIMES IN AUSTRALIA

Under div 268 of the *Criminal Code*, Australia has universal jurisdiction over international crimes; that is, it has the ability to try individuals suspected of committing war crimes, crimes against humanity and genocide regardless of where or by whom the crimes were committed and whether the crimes were committed against Australian citizens or Australian property.<sup>15</sup> As explained in the introduction, however, s 268.121(1) of the *Criminal Code* mandates that proceedings for these offences ‘must not be commenced without the Attorney-General’s written consent’. In determining whether to grant consent in such cases, the Attorney-General has unfettered discretion: he or she does not have to apply any criteria when making the decision, and he or she does not have to provide reasons (written or unwritten) for the decision. Further, under s 268.122 of the *Criminal Code*, the Attorney-General’s decision to grant or not to grant consent in these cases is only subject to a limited form of judicial review. Section 268.122 provides:

- (1) Subject to any jurisdiction of the High Court under the *Constitution*, a decision by the Attorney-General to give, or to refuse to give, a consent under section 268.121:
  - (a) is final; and
  - (b) must not be challenged, appealed against, reviewed, quashed or called in question; and
  - (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari.

The attempted prosecution of Rajapaksa was the first time that the full scope of the Attorney-General’s power over cases concerning international crimes became apparent, and it raised questions about whether the level of control that he or she exercises in such cases is appropriate.

This Part will examine whether the high level of control afforded to the Attorney-General in international criminal law cases is appropriate. It will be contended that while there is a need for the Attorney-General to have some discretion over international criminal law cases, the current level of discretion he or she possesses is too great. The Part will proceed in two sections: the first section will analyse the problems inherent in the Attorney-General’s current role

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<sup>15</sup> For a discussion of the concept of universal jurisdiction, see, eg, Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2004) 3.

in prosecuting international crimes in Australia; the second section will identify the scope of the power that the Attorney-General should have in international crimes cases and what mechanisms should be put in place to ensure that that power is not abused.

#### A *Problems with the Attorney-General's Role in Prosecuting International Crimes in Australia*

The power that the Attorney-General is vested with under the *Criminal Code* to determine whether the prosecution of international crimes can proceed is problematic for two reasons. The first is that the Attorney-General's discretion in international criminal law cases is too broad and the second is that the discretion is subject to insufficient accountability and review mechanisms.

##### 1 *Breadth of the Attorney-General's Discretion*

The Attorney-General's broad discretion under s 268.121(1) of the *Criminal Code* does not require the Attorney-General to consider any specific factors or guidelines when making a decision as to whether cases concerning international crimes can proceed. Rather, it effectively provides him or her with a *carte blanche* to determine whether a prosecution makes it to court.

Allowing the Attorney-General to make decisions about international criminal law cases on any grounds — or without any grounds at all — makes it very easy for such cases in Australia to be quashed before they begin. This state of affairs undermines the efficacy of the international criminal justice system which is dependent to a significant extent on the will of domestic states to prosecute individuals suspected of perpetrating genocide, crimes against humanity and war crimes.<sup>16</sup> Although the international community has established an array of ad hoc international criminal tribunals as well as the permanent ICC over the last two decades, these tribunals and courts are unable to hold all suspected international criminals to account because of their limited capacity and restricted jurisdiction.<sup>17</sup> It thus falls to states to ensure that the important goals of the international criminal justice system — including ending impunity for international crimes, ensuring justice for victims and deterring people from perpetrating atrocities<sup>18</sup> — are upheld by pursuing the prosecution of suspected war criminals. While there may be reasons why certain international criminal law prosecutions should not be allowed to proceed in Australia,<sup>19</sup> the international criminal justice system and the goals it pursues should not be able to be subjugated for just any motive or whim, as s 268.121(1) of the *Criminal Code* currently allows.

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<sup>16</sup> See, eg, Máximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transitional Prosecution of International Crimes' (2011) 105 *American Journal of International Law* 1, 5; Josef Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Immunity' (2009) 20 *Criminal Law Forum* 1, 10.

<sup>17</sup> See generally Langer, above n 16, 4; Rikhof, above n 16, 10.

<sup>18</sup> *Rome Statute* Preamble [4]–[5]; Mirjan Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 331.

<sup>19</sup> For a discussion of the permissible grounds for dismissing international criminal prosecutions see below Part III(B)(1).

The absence of any guidelines for the Attorney-General to consider when making his or her decision is also problematic because it risks inconsistencies arising in Australian cases dealing with international criminal law. In other areas of criminal law, where the Commonwealth Director of Public Prosecutions ('DPP') has control over whether to initiate cases, he or she has to have regard to a host of prosecutorial guidelines before making a decision about whether to prosecute a particular case.<sup>20</sup> These prosecutorial guidelines ensure that the practice of the DPP is consistent and predictable which in turn helps to engender public confidence in the system.<sup>21</sup> Failing to provide guidelines for the Attorney-General to consider with respect to s 268.121(1) creates the risk that discrepancies will arise in the prosecution of international crimes in Australia and consequently that the public's trust in the system will be undermined.

A final issue with the breadth of the Attorney-General's discretion over the prosecution of international crimes is that it creates the potential for political bias to influence the Attorney-General's decision or the potential for the Attorney-General's decision to *appear* to be influenced by political bias. In Australia, the Attorney-General performs a hybrid role. On the one hand, he or she is a political figure with responsibility in both the legislature (as a Member of Parliament) and the executive (as a Minister of the Crown).<sup>22</sup> On the other hand, he or she has a legal and quasi-judicial function as the Chief Law Officer of the Crown.<sup>23</sup> The Attorney-General's role in providing consent for the prosecution of international crimes falls within the ambit of the second limb of the role.

Traditionally, there has been a belief that when the Attorney-General acts in his or her political capacity he or she can engage in political debates and adopt partisan positions, but when performing legal or quasi-judicial duties he or she must do so independently without regard to party positions.<sup>24</sup> This division is designed to ensure that the legal system and legal decisions are not influenced by, or are not seen to be influenced by, political bias.<sup>25</sup> Thus theoretically the Attorney-General's decision whether to grant consent in cases concerning the prosecution of international crimes is automatically safeguarded from party politics and there is no need for criteria prohibiting regard to party politics to be elucidated in the *Criminal Code*. In recent decades, however, the extent to which the Attorney-General's quasi-judicial decisions are immune from political bias in practice in Australia has been questioned.<sup>26</sup>

In the United Kingdom, where the office of Attorney-General originated, there are a series of measures that ensure that the Attorney-General exercises his or her legal responsibilities with a significant degree of independence. For

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<sup>20</sup> Craigie, above n 1.

<sup>21</sup> Ibid 3.

<sup>22</sup> Gerard Carney, 'Comment — The Role of the Attorney-General' (1997) 9 *Bond Law Review* 1, 2; Rebecca La Forgia, 'Attorney-General, Chief Law Officer of the Crown: But Where is the Law?' (2003) 28 *Alternative Law Journal* 163, 163.

<sup>23</sup> Carney, above n 22, 2.

<sup>24</sup> Daryl R Williams, 'Who Speaks for the Courts?' in Australian Institute of Judicial Administration (ed), *Courts in a Representative Democracy* (Australian Institute of Judicial Administration, 1995) 183, 190–1; Carney, above n 22, 3.

<sup>25</sup> Williams, above n 24, 191.

<sup>26</sup> Ibid; Fiona Hanlon, *An Analysis of the Office of Attorney-General in Australia and Directions for the Future* (PhD Thesis, Faculty of Law, University of Melbourne, 2007) 32.

example, the UK Attorney-General is always a lawyer, does not hold a ministerial position, is not a member of Cabinet and is bound by legal principle to act independently.<sup>27</sup> In contrast, in Australia the Attorney-General holds a ministerial position, is not required to have legal training and is frequently a member of Cabinet.<sup>28</sup> Further, the extent to which he or she is bound by legal principle to act independently is ambiguous.<sup>29</sup> The differences between the role of the UK Attorney-General and the Australian Attorney-General have led numerous commentators, including several Attorneys-General themselves, to argue that contrary to traditional belief, there is a threat of political bias influencing, or appearing to influence, the decisions that the Australian Attorney-General makes in his or her legal capacity.<sup>30</sup>

The concern that political bias will appear to infiltrate the Attorney-General's consent decisions in international criminal law prosecutions was realised in the Sri Lankan case. Despite the Attorney-General's spokesperson asserting that Robert McClelland had reached his decision to deny consent to the prosecution of Rajapaksa on legal grounds, one commentator suggested that the rationale was a smokescreen.<sup>31</sup> He contended that the decision had in fact been driven by the Government's desire to prevent controversy over the prosecution damaging the Labor party's already low approval ratings.<sup>32</sup>

## 2 *Lack of Accountability Measures Surrounding the Attorney-General's Discretion*

A second issue with the Attorney-General's current role in prosecuting genocide, crimes against humanity and war crimes is that his or her decision is subject to very few accountability mechanisms. There are only limited opportunities for the Attorney-General's decision under s 268.121(1) to be subject to review because there is a privative clause embedded in s 268.122 of the *Criminal Code*. As stated in the introduction to this Part, s 268.122 provides:

- (1) Subject to any jurisdiction of the High Court under the *Constitution*, a decision by the Attorney-General to give, or to refuse to give, a consent under section 268.121:
  - (a) is final; and
  - (b) must not be challenged, appealed against, reviewed, quashed or called in question; and
  - (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari.

<sup>27</sup> Williams, above n 24, 191; Carney, above n 22, 3.

<sup>28</sup> Williams, above n 24, 191; Carney, above n 22, 3.

<sup>29</sup> Carney, above n 22, 3; R Plehwe, 'The Attorney-General and Cabinet: Some Australian Precedents' (1980) 11 *Federal Law Review* 1, 1.

<sup>30</sup> Daryl Williams went so far as to say 'it ought to be concluded that the perception that the [A]ttorney-[G]eneral exercises important functions independently of politics and in the public interest is either erroneous, or at least eroded': Williams, above n 24, 192. See also L J King, 'The Attorney-General, Politics and the Judiciary' (Paper presented at the Fourth Annual Colloquium of the Judicial Conference of Australia, Melbourne, 12–14 November 1999) <<http://www.jca.asn.au/attachments/KingPaper.htm>>.

<sup>31</sup> Hamish McDonald, 'See No Evil is Australia's Way on War Crimes', *Sydney Morning Herald* (online), 29 October 2011 <<http://www.smh.com.au/opinion/society-and-culture/see-no-evil-is-australias-way-on-war-crimes-20111028-1mo1q.html>>.

<sup>32</sup> *Ibid.*

This clause restricts review of the Attorney-General's decisions on cases of international criminal law to the narrow form of review available under s 75(v) of the *Australian Constitution*<sup>33</sup> and prevents recourse to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act'). The ADJR Act not only provides broader forms of judicial review than s 75(v) of the *Constitution* but also enables individuals to require members of the executive, such as the Attorney-General, to provide reasons for their decisions.<sup>34</sup> A further limitation on the review of the Attorney-General's decision under s 268.121(1) is that the decisions are not subject to any form of merits review by, for example, the Administrative Appeals Tribunal ('AAT').<sup>35</sup>

Theoretically, the minimal forms of judicial review available under s 268.122 are unproblematic because the Attorney-General is held accountable for his or her decisions by both the electorate (at the ballot box) and the Parliament (in question time).<sup>36</sup> Both of these accountability mechanisms, however, suffer deficiencies. With respect to electoral accountability, it is highly improbable that an Attorney-General's decision to allow or disallow the prosecution of a suspected international criminal will sway voters' decisions at election time given the litany of other issues that voters have to consider.

The possibility of the Attorney-General being held to account through the mechanism of parliamentary question time is only marginally more promising. Research into the effectiveness of question time in Australia's national Parliament reveals that it provides a very low level of accountability for ministerial decisions. A 2008 study by Andrew McGowan found that Australia's question time is less effective at holding the executive to account than the question times of parliaments in Canada, New Zealand and the UK.<sup>37</sup> Indeed, compared with question times in these other jurisdictions, fewer questions were asked in Australian question time and of the questions asked, fewer answers

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<sup>33</sup> Section 75(v) of the *Australian Constitution* provides the High Court of Australia with original jurisdiction 'in all matters in which a writ of Mandamus or prohibition or injunction is sought against an officer of the Commonwealth'.

<sup>34</sup> Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') provides that:

where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Magistrates Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

<sup>35</sup> It should be noted that the privative clause in s 268.122 is not what prevents the Administrative Appeals Tribunal ('AAT') from reviewing the decision on its merits. Rather, it is the failure of s 268 to enliven specifically the jurisdiction of the AAT.

<sup>36</sup> See, eg, Law Commission (UK), 'Consents to Prosecution' (Report No LC255, 1998) vi <[http://lawcommission.justice.gov.uk/Docs/lc255\\_Conseents\\_to\\_Prosecution.pdf](http://lawcommission.justice.gov.uk/Docs/lc255_Conseents_to_Prosecution.pdf)>. Question time is a parliamentary convention that enables Members of Parliament from both the Government and opposition and to ask questions of ministers during parliamentary sittings. It originated in the UK and today is an institution in many Commonwealth countries.

<sup>37</sup> Andrew McGowan, 'Accountability or Inability: To What Extent Does House of Representatives Question Time Deliver Executive Accountability Comparative to Other Parliamentary Chambers? Is there Need for Reform?' (2008) 23(2) *Australasian Parliamentary Review* 66, 75.

were provided.<sup>38</sup> These results are reinforced by Parameswary Rasiah's findings that a high number of questions in Australian question time are evaded and that the Speaker of the House rarely intervenes during question time to require ministers to answer questions directly.<sup>39</sup> In evaluating the (in)effectiveness of question time in holding the Attorney-General to account for his or her decisions, it is relevant to note that in the aftermath of the Sri Lankan case no questions about the Attorney-General's decision to prohibit the prosecution of Rajapaksa were put to Robert McClelland in Parliament.<sup>40</sup>

The low level of accountability that surrounds the Attorney-General's decision-making powers exacerbates the problems that arise from the broad discretion afforded to the Attorney-General under s 268.121(1) and further weakens Australia's ability to contribute effectively to the international criminal justice system.

### B *Recommendations for Reform of Attorney-General's Role in the Prosecution of International Crimes*

In order to address the shortcomings in the processes for prosecuting international crimes in Australia, steps should be taken to narrow the scope of the Attorney-General's discretion under s 268.121(1) and to enhance the forms of accountability to which this discretion is subject. This section will explore how each of these objectives could be achieved.

#### 1 *Narrowing the Ambit of the Attorney-General's Discretion*

The most effective way to remedy the problems that arise from the Attorney-General's broad discretion over international criminal law cases is to introduce specific grounds that he or she must rely on when deciding whether to allow the prosecution of genocide, crimes against humanity or war crimes.<sup>41</sup> In order to determine what those grounds should be, this section will analyse the reasons why the Attorney-General was given power over cases concerning international crimes, as expressed in the second reading speech of the Bill that

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<sup>38</sup> Only 45 per cent of questions asked in Australian question time were answered: see *ibid*.

<sup>39</sup> Parameswary Rasiah, 'Does Question Time Fulfil Its Role of Ensuring Accountability?' (Discussion Paper No 12/06, Australian National University, April 2006) 2.

<sup>40</sup> Based on a review of parliamentary debates in the month following the decision not to prosecute: see Commonwealth, *Parliamentary Debates*, Senate, 31 October 2011 – 25 November 2011; Commonwealth, *Parliamentary Debates*, House of Representatives, 1–24 November 2011. The only reference to war crimes and Sri Lanka following the Attorney-General's decision to quash the case against Rajapaksa was a speech by Senator Rhiannon in the Senate of 1 November which did not refer to the case but rather called for an independent war crimes tribunal to be established to review all conduct during the Sri Lankan civil war: Commonwealth, *Parliamentary Debates*, Senate, 1 November 2011, 98–9 (Lee Rhiannon).

<sup>41</sup> It is common for the discretion of ministers and administrative bodies to be limited by the inclusion of decision-making criteria in legislation: see, eg, *Migration Act 1958* (Cth) s 198A(3). See also *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 280 ALR 18.

introduced s 268.121(1) into the *Criminal Code*,<sup>42</sup> academic literature, discussions surrounding provisions comparable to s 268.121(1) in the UK and media responses to the Sri Lanka case. Those reasons are:

- ensuring the case accords with the state's legal obligations;<sup>43</sup>
- ensuring there is sufficient evidence to bring the case;<sup>44</sup>
- preventing vexatious cases;<sup>45</sup> and
- ensuring the prosecution does not threaten the state's international relations.<sup>46</sup>

It will be argued that the only ground on which the Attorney-General should be able to halt an international criminal prosecution is the final one.

(a) *Ensuring the Case Accords with the State's Legal Obligations*

The first reason that is suggested for giving the Attorney-General power over the prosecution of international crimes is the one that Robert McClelland gave for quashing the case against Rajapaksa. As stated in the introduction, McClelland determined that allowing the prosecution to proceed would contravene Australia's legal obligations.<sup>47</sup> This rationale should not be recognised as a ground upon which the Attorney-General is allowed to make a decision regarding the fate of international criminal law cases because courts, not the executive, are best placed to determine whether prosecutions contravene laws. Determining whether the prosecution of an individual for international crimes is in breach of legal obligations is often a highly complex matter. International law is a constantly evolving field and, as Part III of this article illustrates, it is often unclear precisely what Australia's legal obligations are under international law. Similarly, it can be difficult to determine the precise ambit and content of domestic laws that may be applicable in cases concerning international crimes. In light of these facts it is preferable for judges, who have strong legal reasoning skills and the opportunity to hear a wide range of arguments during a case, and whose decisions are reviewable by appellate courts, to be entrusted with the task of determining whether a prosecution should fail for legal reasons as opposed to allowing the Attorney-General to make such determinations.

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<sup>42</sup> It is worthy of note that neither the Explanatory Memorandum to the amending Act that introduced s 268.121(1) into the *Criminal Code* nor the Joint Standing Committee on Treaties' report on the amending act completed prior to its introduction to Parliament set out any reasons for affording the Attorney-General discretion over international crimes cases: see Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth); House of Representatives Joint Standing Committee on Treaties, Parliament of Australia, *Inquiry into the 1998 Statute of the International Criminal Court* (2002). Further, as will become apparent in Part II(B)(1)(b), there is only one brief reference to the reason for giving the Attorney-General broad powers over international crimes cases in the second reading speech for the amending Act.

<sup>43</sup> Styles and Gordon, above n 11.

<sup>44</sup> Law Commission (UK), above n 36, 47.

<sup>45</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4357 (Andrew Southcott). Ibid 52–3.

<sup>46</sup> Law Commission (UK), above n 36, 59–62.

<sup>47</sup> Styles and Gordon, above n 11.

(b) *Preventing Vexatious Cases*

A second reason that is given for the Attorney-General having a role in the prosecution of international crimes is that it will prevent vexatious litigants from initiating prosecutions. This reason was the only rationale put forward for affording the Australian Attorney-General with discretion over cases concerning international crimes in the second reading speech of the International Criminal Court (Consequential Amendments) Bill 2002 — the legislation that introduced s 268.121(1) into the *Criminal Code*.<sup>48</sup> The primary problem with this rationale is that if there is sufficient evidence to find that an individual has committed genocide, crimes against humanity or war crimes, then the motivation behind the prosecution should be deemed irrelevant and the case should not be prevented from proceeding.<sup>49</sup> Furthermore, mechanisms already exist in the legal system to deter vexatious litigation. For example, vexatious litigants run the risk of being sued in tort for malicious prosecution. It is thus unnecessary to empower the Attorney-General to prevent cases brought by vexatious litigants.

(c) *Ensuring there is Sufficient Evidence for the Case to Proceed*

The third reason that is put forth for the Attorney-General having control over the prosecution of international crimes is that he or she should have the power to stop the prosecution of cases where there is insufficient evidence to achieve a conviction. The rationale behind this idea is that it will prevent a waste of the state's resources and it will help to ensure that innocent individuals do not have their reputations tarred by criminal proceedings.<sup>50</sup> While preventing cases from proceeding where there is insufficient evidence is a commendable goal, it is not necessary to grant the Attorney-General the power to act on this ground. This is because pursuant to s 9(5) of the *Director of Public Prosecutions Act 1983* (Cth), the Commonwealth DPP has the power to take over and end private prosecutions, such as prosecutions under s 268.121(1), where a lack of evidence exists.<sup>51</sup>

(d) *Ensuring the Prosecution Does Not Threaten the State's International Relations*

The final reason advanced for affording the Attorney-General the discretion to consent to or refuse the prosecution of international crimes is that, because such prosecutions can be instigated against any individual for an international crime committed anywhere in the world, they have the potential to raise sensitive international affairs issues and affect a state's foreign relations.<sup>52</sup> This threat has led states such as the UK to assert that a member of the executive branch, with access to information about the diplomatic and political harm that a prosecution

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<sup>48</sup> In the second reading Speech, Dr Andrew Southcott MP stated the Attorney-General's role in international criminal cases 'will prevent vexatious cases such as the 1999 *Buzacott* case [sic], in which Hugh Morgan was accused of genocide' from proceeding: Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4357 (Andrew Southcott). See also *Buzacott v Morgan* [1999] SASC 149 (14 April 1999).

<sup>49</sup> Law Commission (UK), above n 36, 53.

<sup>50</sup> *Ibid* 40.

<sup>51</sup> Craigie, above n 1, 13–15.

<sup>52</sup> Law Commission (UK), above n 36, 59–62.

could cause the state, should have the power to determine whether the prosecution can proceed.<sup>53</sup> In this way it is believed that the foreign relations interests of the state can be safeguarded.

Prima facie, allowing political factors such as international relations to override the pursuit of justice in cases where the most serious crimes have been committed is problematic. In an ideal world, foreign relations concerns would have no place in international criminal law trials and the international rule of law would not be subject to international political currents. At this stage in the development of international criminal law, however, law and politics are deeply entwined and disregarding realpolitik may at times do more harm than good.<sup>54</sup> This has been apparent in states where the executive has not been given a role in the prosecution of international crimes.

In the decade prior to 2003, Belgium had legislation that afforded the executive no role in the prosecution of breaches of the *Geneva Conventions*<sup>55</sup> and between 1999 and 2003 it had legislation that enabled the prosecution of crimes against humanity and genocide without interference from the executive.<sup>56</sup> This very permissive legislation enabled a wide array of cases to be instigated against foreign individuals suspected of perpetrating international crimes including Israeli Prime Minister Ariel Sharon, Democratic Republic of the Congo Minister of Foreign Affairs Abdoulaye Yerodia Ndombasi, President of the United States George H W Bush, Vice-President Dick Cheney, and Secretary of State Colin Powell, General Tommy Franks and Colonel Bryan P McCoy.<sup>57</sup> Similarly, between 1985 and 2009 Spain had legislation that enabled the prosecution of individuals for international crimes without obstruction from the executive.<sup>58</sup> While these provisions were in existence, cases were instigated against officials from Argentina, Guatemala, Rwanda, Morocco, El Salvador, Israel, China and the US.<sup>59</sup>

While these cases were initially hailed as victories for the rule of law and international criminal justice, in numerous instances they quickly began to

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<sup>53</sup> Ibid 59–62; Langer, above n 16, 15–16.

<sup>54</sup> For a discussion on how law and politics are entwined in this area, see generally Steven Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 *American Journal of International Law* 888. It is interesting to note that at the international level provision is at times made for political bodies to intervene in international criminal courts and tribunals when a prosecution would threaten international peace and security. For example, art 16 of the *Rome Statute* empowers the Security Council to halt proceedings before the International Criminal Court for 12 months if the prosecution would pose a threat to the peace, breach of the peace or act of aggression pursuant to Chapter VII of the *Charter of the United Nations*; to date art 16 of the *Rome Statute* has not been used.

<sup>55</sup> *Loi du 16 Juin 1993 relative à la répression des infractions grave aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977 additionnels à ces conventions* [Law of 16 June 1993 relating to the Repression of Grave Breaches of the 1949 *Geneva Conventions* and their 1977 *Additional Protocols*] (Belgium) *Moniteur Belge*, 5 August 1993, 17751; Ratner, above n 54, 889; Langer, above n 16, 26.

<sup>56</sup> *Loi du 10 fevrier 1999 relative à la répression des violations graves du droit international humanitaire* [Law of 10 February 1999 relating to the Repression of Grave Breaches of International Humanitarian Law] (Belgium) *Moniteur Belge*, 23 March 1999, 9286; Ratner, above n 54, 889; Langer, above n 16, 26–7.

<sup>57</sup> Ratner, above n 54, 889–90; Langer, above n 16, 29–30.

<sup>58</sup> *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial* [Law No 6 of 1985 on Judicial Power] (Spain) art 23(4); Langer, above n 16, 33.

<sup>59</sup> Langer, above n 16, 34–40.

generate significant problems for the Belgian and Spanish governments. When Bush, Cheney and Powell were charged in Belgium in 2003, the US Government threatened to remove NATO's headquarters from Brussels,<sup>60</sup> and when General Franks and Colonel McCoy were charged, it announced that it would not fund the new NATO building in Brussels.<sup>61</sup> The attempted prosecution of Sharon in Belgium resulted in an escalation in diplomatic tensions between Israel and Belgium and Israel withdrawing its ambassador from Belgium.<sup>62</sup> In Spain, an attempt in 2005 to prosecute Chinese officials (including former President Li Peng) for genocide in Tibet sparked sharp rebukes from the Chinese embassy in Spain<sup>63</sup> and a 2008 case against other Chinese officials for allegedly committing crimes against humanity in Tibet generated threats from the Chinese embassy of 'damages to the bilateral relations between China and Spain'.<sup>64</sup>

It is thus apparent that international criminal law cases in foreign domestic courts can generate international instability and threaten states' diplomatic relations, security interests and economic ties — consequences that could outweigh the benefits that can be gained from holding suspected international criminals to account. The question that arises from this situation is whether the best way for Australia to address this issue is to grant the Attorney-General the power to intervene in international criminal law cases only when its foreign relations are threatened or whether it would be preferable to implement some other mechanism, such as limiting the ambit of a state's universal jurisdiction provisions. Belgium and Spain elected to resolve the issue by restricting the scope of their international crimes legislation. Following the response of the US Government to the attempted prosecution of General Franks and Colonel McCoy, the Belgian Government amended the relevant legislative provisions so that international criminal prosecutions could only be instigated by a federal prosecutor and individuals could only be prosecuted for international crimes if they were Belgian residents or citizens.<sup>65</sup> In Spain, the ambit of the legislative provisions was narrowed so that an individual could only be prosecuted if he or she were physically in Spanish territory or had a link to Spain, and prosecutions

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<sup>60</sup> Craig S Smith, 'NATO Agrees to US Proposals to Revamp Alliance', *The New York Times* (online), 13 June 2003 <<http://www.nytimes.com/2003/06/13/world/nato-agrees-to-us-proposals-to-revamp-alliance.html?pagewanted=all&src=pm>>; Ratner, above n 54, 890; Langer, above n 16, 31.

<sup>61</sup> 'US Attacks Belgium War Crimes Law', *BBC News* (online), 12 June 2003 <<http://news.bbc.co.uk/2/hi/europe/2985744.stm>>; Ratner, above n 54, 891.

<sup>62</sup> 'Belgium Rules Sharon Can Be Tried', *BBC News* (online), 12 February 2003 <[http://news.bbc.co.uk/2/hi/middle\\_east/2754877.stm](http://news.bbc.co.uk/2/hi/middle_east/2754877.stm)>; Ratner, above n 54, 890.

<sup>63</sup> Langer, above n 16, 37.

<sup>64</sup> 'China pide "medidas efectivas" para que la Audiencia abandone el caso sobre Tíbet', *El País* (online), 7 May 2009 <[http://elpais.com/elpais/2009/05/07/actualidad/1241684227\\_850215.html](http://elpais.com/elpais/2009/05/07/actualidad/1241684227_850215.html)>, quoted in *ibid* 38.

<sup>65</sup> *Loi du 23 avril 2003 modifiant la loi du 16 juin 1993 relative à la repression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire* [Law of 23 April 2003 Modifying the Law of 16 June 1993 relating to the Repression of Grave Breaches of International Law and Art 144 of the Judiciary Code] (Belgium) *Moniteur Belge*, 7 May 2003, 9412; Ratner, above n 54, 890–1; Langer, above n 16, 31–2.

could not be commenced if the individual was being tried in another jurisdiction.<sup>66</sup>

Determining whether it is better to resolve the problem by restricting a state's universal jurisdiction to prevent private prosecutions and make cases dependent on territorial and nationality tests or by enabling the Attorney-General to quash particular cases is not clear cut. Neither solution is perfect, but empowering the Attorney-General has slightly more to recommend it.<sup>67</sup> Restricting the ambit of a state's universal jurisdiction on territorial or nationality grounds weakens the world's ability to hold the perpetrators of international crimes to account. Additionally, restricting jurisdiction to cases where a nexus exists between the crime and the prosecuting state does not guarantee that international stability will be preserved.

In contrast, empowering the Attorney-General to intervene when international stability is threatened in particular cases provides a greater guarantee that international tension will in fact be avoided when international criminal law cases are instigated. Further, if the test for when the Attorney-General is allowed to intervene is formulated strictly, the ideals of universal jurisdiction and the international criminal justice system are more likely to be upheld. All prosecutions of suspected international criminals will, to a certain extent, create tensions with the suspects' states of nationality. Many of those tensions, however, will not merit abandoning the prosecution of an individual suspected of committing serious international crimes. For example, while many of the prosecutions instigated in Belgium and Spain posed a serious threat to those countries' foreign relations, there have been some cases — such as the prosecution in Belgium of Rwandans for war crimes committed during the Rwandan genocide — that have not created significant international tension.<sup>68</sup> A further example of a disruption to international relations that would not warrant quashing the prosecution of international crimes is the Sri Lankan case in Australia. One commentator suggested at the time of the case that the real reason that Attorney-General Robert McClelland quashed the case against Rajapaksa was not Australia's legal obligations but rather concerns about the impact the prosecution would have on CHOGM and on cooperation between Australia and Sri Lanka to stem the flow of Sri Lankan asylum seekers travelling to Australia by boat.<sup>69</sup> While such effects would have created headaches for the Australian Government they would not have justified abandoning efforts to determine whether the leader of a state had committed crimes against humanity and war crimes.

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<sup>66</sup> *Ley Orgánica 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial* [Law Modifying Law No 6 of 1985 on Judicial Power] (Spain); Langer, above n 16, 40.

<sup>67</sup> It should be noted that the Attorney-General having a role in international criminal law cases is not incompatible with the Spanish idea that prosecutions be prevented where the individual is being tried in another jurisdiction. It would also be advisable for Australia to have a provision that enables the state where the crime was committed or the state where the victims were from to have the first opportunity to pursue prosecutions.

<sup>68</sup> Langer, above n 16, 32. Langer suggests that geopolitical tensions are less likely to arise in cases where there is broad agreement in the international community about the reprehensibility of the crimes committed.

<sup>69</sup> McDonald, above n 31.

If the Attorney-General were entitled to intervene whenever any level of international tension arose in a case, then international criminal justice would be better served by limiting national jurisdiction over international crimes. If, however, a test were developed that ensured the Attorney-General's power to stop the prosecution of international crimes on foreign policy grounds was only exercised when international criminal law cases posed a grave threat to a state's foreign relations, the ideals of universal jurisdiction and the goals of international criminal justice would have a greater chance of being realised. It is beyond the scope of this article to construct and elucidate a precise test that could be inserted into s 268.121(1) of the *Criminal Code* to restrict the scope of the Attorney-General's discretion in international criminal law matters in times when serious foreign affairs concerns arise. It is, however, helpful to provide examples of the sorts of tests that could be considered. One possible formulation of a test would be: the Attorney-General may prevent the prosecution of genocide, crimes against humanity and war crimes when such prosecutions would pose a grave threat to Australia's foreign relations, economic stability or strategic interests. An alternative would be to require the Attorney-General to balance the detriment to Australia's international relations that could result from a prosecution of international crimes against the benefits that the prosecution could achieve for international criminal justice. The precise ambit of both tests would need further consideration and testing before being incorporated into the *Criminal Code*. For example, it would be necessary to determine what a 'grave threat' in the first test incorporates. It is hoped, however, that spelling out these two possible tests will provide a platform for further debate and discussion.

One problem with allowing the Attorney-General to quash international criminal prosecutions when they pose a serious threat to Australia's foreign relations is that it is likely to grant the leaders of Australia's allies (predominantly western states) de facto immunity from prosecution. This is because the cases that would be most likely to threaten Australia's international relations under the proposed test would be those involving states with which Australia has strong alliances and relationships. Not only would this be problematic because it would create the potential for a class of individuals to evade criminal prosecution in Australia, but also because it would enhance an existing perception that the international criminal justice system is a hegemonic tool of the West to prosecute the leaders of developing states.<sup>70</sup>

This problem is a serious one that cannot be easily dismissed. As the international criminal justice system matures, however, and the international rule of law strengthens, the prosecution of state leaders for international crimes will hopefully generate fewer problems and the need for the Attorney-General to wield a level of control in international criminal law cases will diminish. In the interim period, inserting a test into s 268.121(1) of the *Criminal Code*, as suggested in this section, would at least ensure that some prosecutions can proceed regardless of where the crime is committed or what the defendant's nationality is.

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<sup>70</sup> Antony Anghie and B S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77, 88–92; Richard Goldstone, 'Does the ICC Target Africa?' (2009) 2 *Equality of Arms Review* 1, 1–4.

## 2 *Enhancing the Forms of Accountability to which the Attorney-General's Decision is Subject*

In addition to alleviating concerns about the extent of the control that the Attorney-General currently wields over the prosecution of international crimes, narrowing the ambit of the Attorney-General's power under s 268.121(1) would also provide more scope for judicial review of the Attorney-General's decision under s 75(v) of the *Constitution*, as the Australian High Court would have a greater basis for determining whether the Attorney-General's decision in a particular case constituted a jurisdictional error. There would still, however, be a need to take further steps to enhance the accountability mechanisms surrounding the Attorney-General's discretion under s 268.121(1). Two possible steps that could be taken would be to allow the Attorney-General's decision to be subject to judicial review under the *ADJR Act* and subject to merits review pursuant to the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*').

Removing the privative clause in s 268.122 and enabling the Attorney-General's decision to be subject to review under the *ADJR Act* would broaden the grounds of review to which the Attorney-General's decision would be subject. Admittedly, since its ruling in *Plaintiff S157/2002 v Commonwealth*<sup>71</sup> the High Court has refused to allow privative clauses to severely restrict the scope of the review that is possible under s 75(v) of the *Constitution*. Nonetheless the extent of review that privative clauses permit is still uncertain and allowing recourse to the *ADJR Act* would eliminate this uncertainty.

Further, subjecting the Attorney-General's decision to the *ADJR Act* would enable individuals to require the Attorney-General to provide reasons for his or her decision to terminate a case.<sup>72</sup> Obtaining the Attorney-General's reasons for a particular case would not only provide an individual with information to ascertain whether the Attorney-General has made a mistake, which in turn would help determine whether judicial review should be sought,<sup>73</sup> but it would also enable the media and public to scrutinise the result and hold the Attorney-General to account for a poor decision. Finally, permitting the Attorney-General's decision to be reviewed on its merits by the AAT pursuant to the *AAT Act* would provide another layer of accountability and enable decisions under s 268.121(1) to be assessed to ensure they were 'the correct or preferable' decision.<sup>74</sup>

### C Conclusion

If ss 268.121(1) and 268.122 of the *Criminal Code* had resembled the recommendations set out in this Part of the article, the Attorney-General would not have been able to quash the case against Rajapaksa on the ground that the President of Sri Lanka is immune from prosecution. Instead, whether Rajapaksa was entitled to immunity under Australian or international law would have been left to the courts to determine. Part III of this article will consider how an

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<sup>71</sup> (2003) 211 CLR 476.

<sup>72</sup> *ADJR Act* s 13.

<sup>73</sup> N B Lane and Simon Young, *Administrative Law In Australia* (Lawbook, 2007) 100.

<sup>74</sup> This is the general test applied by the AAT in merits review. It was first set down in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68 (Bowen CJ and Deane J).

Australian court would have approached the immunities matter and the various issues that could have arisen.

### III HEAD OF STATE IMMUNITY

As mentioned above, the Attorney-General declared that a prosecution against President Rajapaksa could not go ahead because it would be against Australian law and in breach of Australia's obligations under international law. The laws referred to, both domestic and international, are those that give heads of state immunity from prosecution in foreign courts. Had the case against Rajapaksa been allowed to proceed in an Australian court, a judge would have had to examine these laws to determine whether Rajapaksa was entitled to immunity as a head of state. This Part of the article will explore how a court might have dealt with head of state immunity and argue why a court should have been given a chance to hear this case.

It is almost certain that an Australian court would have found, under both domestic legislation and international law, that Rajapaksa was immune from its jurisdiction for the duration of his term in office. Although such a clear cut conclusion *prima facie* suggests that there would be little need for a court to hear the case against Rajapaksa, this area of law is still developing and in Australia it remains largely untested. This section is not intended to contribute anything new to the broader debate on head of state immunity in international law;<sup>75</sup> its relevance lies in demonstrating the value of allowing an Australian court to hear such cases. By giving an Australian court the opportunity to hold a preliminary hearing into the allegations against Rajapaksa, it would have at the very least provided the judiciary with a chance to test the limits of the Australian head of state immunity law, particularly in the face of war crimes allegations.<sup>76</sup> Furthermore, the court might have chosen to explore the exceptions to head of state immunity in international law and made a contribution to this still-developing area of custom.<sup>77</sup> In particular, the court might have analysed

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<sup>75</sup> There is an abundance of literature that explores head of state immunity in international law in depth: see, eg. Yittha Simbeye, *Immunity and International Criminal Law* (Ashgate, 2004); Sir Arthur Watts, 'The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers' (1994-III) 247 *Recueil des Cours* 9; International Law Commission, *Immunity of State Officials from Foreign Criminal Jurisdiction*, 60<sup>th</sup> sess., UN Doc A/CN.4/596 (1 April 2008) 116-37; Roman Anatolevich Kolodkin, Special Rapporteur, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc A/CN.4/601(29 May 2008).

<sup>76</sup> Prominent Australian international criminal law experts responded to the attempted war crimes charges against Rajapaksa with statements such as 'questioning the international community — and the state of international law — over whether it has matured in the past decade in the debate over immunity versus impunity is not such a bad idea': Gideon Boas, 'War Crimes in Australia's Too-Hard Basket?', *The Drum Opinion* (online), 27 October 2011 <<http://abc.net.au/unleashed/3604294.html>>. See also ANU News, 'Diplomatic Immunity Could be Tested for War Crimes: Expert' (Media Release, 25 October 2011) <<http://news.anu.edu.au/?p=11791>> (which contains an interview with Professor Donald Rothwell).

<sup>77</sup> For further discussion of the uncertainties in this area of international law, see Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 *European Journal of International Law* 853; Michael A Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 *Duke Law Journal* 651; Kerry Creque O'Neill, 'A New Customary Law of Head of State Immunity? *Hirohito and Pinochet*' (2002) 38 *Stanford Journal of International Law* 289, 291.

whether or not Rajapaksa could be prosecuted in Australia after he leaves office on the basis of the customary law exemption to immunity for international crimes, and thus sent a clear message that Australia takes its responsibility to prosecute international crimes seriously. This Part of the article will therefore discuss how the doctrine of immunity in both domestic and international law would have applied to the case of Rajapaksa and will highlight aspects of this law that an Australian court could have explored.

### A Head of State Immunity in Australian Law

There have been very few Australian cases that have considered head of state immunity,<sup>78</sup> and none that have dealt with foreign heads of state facing allegations of international crimes. As such, the question of whether immunities under Australian law extend to individuals accused of committing international crimes 'is a matter that has yet to be fully tested in an Australian court'.<sup>79</sup> This section sets out the provisions in Australian legislation that deal with head of state immunity and discusses the sole Australian case that has examined these immunity laws in any detail.

In Australia, visiting foreign heads of state are inviolable and immune from criminal prosecution under Commonwealth legislation.<sup>80</sup> Had the case against Rajapaksa been allowed to proceed in an Australian court, the judge would have been directed to the *Foreign States Immunities Act 1985* (Cth), s 36(1) of which specifies:

- (1) Subject to the succeeding provisions of this section, the *Diplomatic Privileges and Immunities Act 1967* extends, with such modifications as are necessary, in relation to the person who is for the time being:
  - (a) The head of a foreign State; or
  - (b) The spouse of a head of a foreign State;
 as that Act applies in relation to a person at a time when he or she is the head of a diplomatic mission.

The *Diplomatic Privileges and Immunities Act 1967* (Cth) implements the 1961 *Vienna Convention on Diplomatic Relations*<sup>81</sup> ('*Vienna Convention*') into Australian law:

Section 7 — *Vienna Convention on Diplomatic Relations* to have force of law

- (1) Subject to this section, the provisions of Articles 1, 22 to 24 (inclusive) and 27 to 40 (inclusive) of the Convention have the force of law in Australia and in every external territory.

<sup>78</sup> *Thor Shipping A/S v The Al Duhail* (2008) 173 FCR 524 ('*Thor Shipping*') is the sole Australian case of any substance on this matter, which will be discussed in more detail below. In *Till v Wheeler* [2008] QDC 74 (10 April 2004), the Queensland District Court rejected the appellant's claim of sovereign immunity on the grounds that it could not be proven that he was a sovereign official: at [10].

<sup>79</sup> Donald Rothwell, quoted in ANU News, above n 76.

<sup>80</sup> Inviolability prevents a person from being arrested, detained and subject to any physical investigative procedures.

<sup>81</sup> *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) ('*Vienna Convention*') art 29.

The *Vienna Convention* is set out in full in a schedule to the *Diplomatic Privileges and Immunities Act 1967* (Cth). Of relevance for the proceedings against Rajapaksa are arts 29 and 31 of the *Vienna Convention*. Article 29 states that diplomatic agents are inviolable and art 31 provides that they are immune from the criminal jurisdiction of the host state. The only exception to these provisions in the *Vienna Convention* is found in art 32 which exempts a diplomatic agent from immunity if the sending state waives it. The *Vienna Convention*, and by extension, the *Diplomatic Privileges and Immunities Act 1967* (Cth), provides diplomatic officials with procedural immunity from foreign jurisdictions. The *Foreign States Immunities Act 1985* (Cth) further extends this immunity to heads of state in Australia which is why an Australian court would have found that Rajapaksa was entitled to immunity from prosecution.

It is important to note, however, that the doctrine of immunity for heads of state is not codified in any international treaty; it is solely a rule of customary international law. The *Vienna Convention* only applies to ‘diplomatic agents’ which does not include heads of state. Although states are free to extend the provisions of the *Vienna Convention* to heads of state, which is what Australia has done, the *Convention* itself is not a source of law for head of state immunity. Therefore, if an Australian court wanted to consider the scope of the immunity for heads of state in international law, it would need to look beyond the *Vienna Convention* to customary international law.

To date, the only Australian case to have examined Australia’s head of state immunity provisions in any detail is the 2008 Federal Court decision in *Thor Shipping A/S v The Al Duhail* (‘*Thor Shipping*’).<sup>82</sup> In that case, Dowsett J held that the Amir of Qatar was immune from civil suit in Australia as a sitting head of state. In reaching this conclusion, his Honour noted that there was very little in the way of interpretive materials on s 36 of the *Foreign States Immunities Act 1985* (Cth).<sup>83</sup> As such, the Court looked to the ‘virtually identical’<sup>84</sup> UK legislation, the *State Immunity Act 1978* (UK), on which the Australian act was based, and followed the House of Lords’ interpretation of head of state immunity in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* (‘*Pinochet III*’).<sup>85</sup> Dowsett J quoted Lord Goff in *Pinochet III*:

There seems to be no reason why the immunity of a head of state under the Act should not be construed as far as possible to accord with his immunity at customary international law, which provides the background against which this statute is set ...<sup>86</sup>

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<sup>82</sup> (2008) 173 FCR 524.

<sup>83</sup> The Explanatory Memorandum to the Foreign States Immunities Bill 1985 (Cth) referred to a report by the Australia’s Law Reform Commission on Foreign State Immunity, which contains very little on head of state immunity: Explanatory Memorandum, Foreign States Immunities Bill 1985 (Cth) 2. See also Law Reform Commission, ‘Foreign State Immunity’ (Report No 24, 1984) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/24/ALRC24.pdf>>. The Report recommended that the *Diplomatic Privileges and Immunities Act 1967* (Cth) be extended to heads of state in the same way as the *State Immunity Act 1978* (UK).

<sup>84</sup> *Thor Shipping* (2008) 173 FCR 524, 542.

<sup>85</sup> [2000] 1 AC 147 (‘*Pinochet III*’). This case is discussed in more detail below.

<sup>86</sup> *Thor Shipping* (2008) 173 FCR 524, 36 [57], quoting *ibid* 210.

It follows then, that if an Australian court were to hear the case against Rajapaksa, it could consider the customary international law exemption to head of state immunity for international crimes.<sup>87</sup> The rest of this Part deals with the scope of head of state immunity under customary international law.

## B *Head of State Immunity in Customary International Law*

### 1 *Rationale for Head of State Immunity*

The concept of sovereign immunity originated from the traditional perception that the state and its leader were one and the same.<sup>88</sup> By the middle of the twentieth century, heads of state were travelling outside their sovereign territory with greater frequency, and with the development of individual criminal liability in international law and the expansion of extraterritorial jurisdiction in national courts it became progressively more likely that heads of state travelling abroad might be prosecuted by other states.<sup>89</sup> Although head of state immunity shares characteristics with state sovereign immunity and diplomatic immunity, it has developed into a distinct legal doctrine.<sup>90</sup> Due to the limited scope of this article, this Part is only concerned with the legal parameters of head of state immunity.<sup>91</sup>

The rationale behind conferring certain state officials and diplomats with immunity from the jurisdiction of foreign states is to facilitate stable international relations.<sup>92</sup> Heads of state who travel to foreign countries have unique diplomatic responsibilities, the performance of which is necessarily protected by the principle of head of state immunity. Attendance by heads of state at high-level summits, such as CHOGM, is an important part of international diplomacy which would be hampered if these individuals feared prosecution in foreign courts.<sup>93</sup>

### 2 *Immunity Ratione Personae and Immunity Ratione Materiae*

In international law, the doctrine of head of state immunity comprises two distinct applications: immunity *ratione personae* (personal or private immunity) and immunity *ratione materiae* (functional immunity). These immunities overlap

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<sup>87</sup> This exemption and its applicability to Rajapaksa will be discussed in more detail below in Part III(C).

<sup>88</sup> Shobha Varughese George, 'Head-of-State Immunity in the US Courts: Still Confused after All These Years' (1995) 64 *Fordham Law Review* 1051, 1056.

<sup>89</sup> Mark A Summers, 'Diplomatic Immunity *Ratione Personae*: Did the International Court of Justice Create a New Customary Law Rule in *Congo v Belgium*?' (2007) 16 *Michigan State Journal of International Law* 459, 466–7.

<sup>90</sup> Jerrold L Mallory, 'Resolving the Confusion over Head-of-State Immunity: The Defined Right of Kings' (1986) 86 *Columbia Law Review* 169, 170–1.

<sup>91</sup> For discussion of the differences between state sovereign immunity, diplomatic immunity and head of state immunity, see Tunks, above n 77, 652–7.

<sup>92</sup> Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2010) 380.

<sup>93</sup> See *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 85 [75] (Judges Higgins, Kooijmans, and Buergenthal) ('*Arrest Warrant*'): 'immunities are granted to high State officials to guarantee proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system'.

to some extent while a head of state remains in office, but only one type of immunity needs to apply in order for an individual to be immune from prosecution.<sup>94</sup>

Immunity *ratione personae* can be invoked by a limited group of state officials, including heads of state,<sup>95</sup> whose freedom of action is essential to the functioning of their state. This type of immunity is considered an absolute bar to the exercise of foreign criminal jurisdiction over an individual for acts committed in his or her official capacity, as well as his or her *private* capacity.<sup>96</sup> If, by virtue of his or her official status, an individual is entitled to immunity *ratione personae*, such immunity will protect him or her for the duration of the term of office, even against prosecution for acts undertaken before entry into office.<sup>97</sup> Immunity *ratione personae* is procedural in nature and does not exempt a person from criminal responsibility. It provides a temporary bar from prosecution for the duration of the individual's official status.<sup>98</sup>

Immunity *ratione materiae* attaches to all official acts attributable to the state and it is the state that bears responsibility for them rather than the individual who performed the acts in his or her official capacity.<sup>99</sup> This type of immunity is based on the nature of the conduct rather than the status of the individual who carried out the act. As such, it may be relied on by former officials (including heads of state) for acts undertaken during their tenure in office as well as by individuals who perform acts on behalf of the state even if they are not state officials.<sup>100</sup> This type of immunity provides a substantive defence to any criminal charges, in the sense that immunity *ratione materiae* prevents legal responsibility from attaching to the individual, and instead shifts it to the state itself.<sup>101</sup>

In an Australian court, and indeed all foreign jurisdictions, Rajapaksa would be able to invoke immunity *ratione personae* as a sitting head of state. Whether he would also be able to avail himself of the substantive immunity of *ratione*

<sup>94</sup> Cassese, above n 77, 864.

<sup>95</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment)* [2008] ICJ Rep 177, [170]; *Arrest Warrant* [2002] ICJ Rep 3, 20–1 [51]; Institut de Droit International, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law* (Vancouver Session, 2001) arts 1–2 <[www.idi-iil.org/idiE/resolutionsE/2001\\_van\\_02\\_en.PDF](http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF)>.

<sup>96</sup> *Arrest Warrant* [2002] ICJ Rep 3, 22 [54].

<sup>97</sup> *Ibid* 22 [54]–[55].

<sup>98</sup> Cassese, above n 77, 863–4.

<sup>99</sup> Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *European Journal of International Law* 815, 825–6.

<sup>100</sup> See, eg, Wickremasinghe, above n 92, 383; H F Van Panhuys, 'In the Borderland between the Act of State Doctrine and Questions of Jurisdictional Immunities' (1964) 13 *International Criminal Law Quarterly* 1193, 1201.

<sup>101</sup> See *Prosecutor v Blaškić (Objection to the Issue of Subpoena Duces Tecum)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-AR-108, 18 July 1997) [38]:

[State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.

*materiae* is less certain, because of a customary international law exemption for international crimes. The following section will discuss the scope of this exemption and some of the uncertainties that exist with respect to its application, with a view to highlighting how an Australian court might both have applied and contributed to customary international law in the case of Rajapaksa.

### C *Exceptions to Head of State Immunity in Customary International Law*

While the purpose of head of state immunity is to safeguard diplomatic relations, occasionally heads of state such as Rajapaksa are accused of committing international crimes. This raises the question: how can the need to preserve global diplomatic relations be reconciled with the competing imperative to ensure accountability for genocide, war crimes and crimes against humanity?

The answer to that question can be found in the balance struck between head of state immunity and its exemptions. It must first be acknowledged that, despite some suggestion of a possible erosion of personal immunities in foreign domestic courts,<sup>102</sup> no exemption to immunity *ratione personae* currently exists in customary international law. It is a settled rule of customary international law that heads of state are immune from the jurisdiction of foreign courts while they are in office. There is, however, a customary international law exemption to immunity *ratione materiae* for the commission of international crimes.

This section will first examine the current status of the exemption to immunity *ratione materiae* for international crimes in customary international law. It will look at evidence of state practice including high profile decisions in the national courts of the UK and France to demonstrate the existence of this exemption and its application in domestic courts. The section will then consider some of the uncertainties of this exemption, because questions remain as to whether it applies to sitting heads of state and whether international crimes can be considered official state acts. The International Court of Justice ('ICJ') 2002 decision in the *Arrest Warrant of 11 April 2000* ('*Arrest Warrant*'),<sup>103</sup> which further confused the scope of this exemption, is also discussed. Finally, the suggestion that the practice of international criminal courts and tribunals may be eroding immunity *ratione personae* in domestic courts will be examined and refuted.

#### 1 *Evidence of a Customary International Law Exemption to Head of State Immunity*

As indicated above, there exists in customary international law an exemption to immunity *ratione materiae* for the prosecution of international crimes. In-depth analysis of the rationale for this exemption is beyond the scope of this article, but it should be noted that there is little consensus in the literature as to

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<sup>102</sup> Tunks, above n 77, 659–63; Jan Wouters, 'The Judgement of the International Court of Justice in the *Arrest Warrant Case*: Some Critical Remarks' (2003) 16 *Leiden Journal of International Law* 253, 257; O'Neill, above n 77, 317.

<sup>103</sup> [2002] ICJ Rep 3.

why such an exemption exists.<sup>104</sup> Whatever the purpose of such an exemption, its existence has been recognised by national courts, international tribunals and multilateral treaties and it has been applied to heads of state. Its existence means that in theory incumbent high level officials who perpetrate international crimes could be extraterritorially prosecuted even while in office, *but for* the existence of immunity *ratione personae*.

Perhaps the most well known case dealing with the immunity of a foreign head of state in a domestic court is the UK House of Lords' consideration of a Spanish extradition request for Chile's former president Augusto Pinochet to face trial for various international crimes allegedly committed during his presidency. It was this case that the Australian Federal Court followed in its interpretation of the *Foreign States Immunities Act 1985* (Cth) in *Thor Shipping*<sup>105</sup> and it is likely that an Australian court would have again looked to the House of Lords in determining its approach to a case against Rajapaksa.

In *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* ('*Pinochet I*'),<sup>106</sup> the House of Lords upheld the extradition request on the grounds that immunity *ratione personae* does not apply to former heads of state, and that Pinochet could not invoke immunity *ratione materiae* due to the exemption for international crimes.<sup>107</sup> In reaching this decision, the House of Lords had regard to the domestic *State Immunity Act 1978* (UK), which, like the Australian *Foreign States Immunities Act 1985* (Cth), extends to heads of state the privileges and immunities enjoyed by diplomatic agents under the *Vienna Convention*. The Law Lords agreed that, had Pinochet been an incumbent head of state at the time the arrest warrant was issued, he would have been able to invoke immunity *ratione personae*. To answer the question of whether Pinochet, as a former head of state, retained immunity *ratione materiae*, the House of Lords turned to customary international law to determine whether the commission of an international crime could be considered an official state act. The Law Lords split 3:2 on the final decision, but the majority held that an exemption to immunity *ratione materiae* existed for international crimes and that Pinochet could be extradited to stand trial.

After the House of Lords set aside its decision in *Pinochet I*,<sup>108</sup> the appeal came before the House of Lords again in *Pinochet III*. This time, the House of

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<sup>104</sup> Some commentators argue that it is because *jus cogens* crimes fall outside the scope of what can be considered sovereign acts: see Tunks, above n 77, 659–60; *Pinochet III* [2000] 1 AC 147 (Lords Browne-Wilkinson and Hutton); *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1998] All ER 897, 939–40, 945–6 (Lords Nicholls and Steyn) ('*Pinochet I*'). Others point out that this does not accord with the fact that international crimes are by their very nature systemic, and cannot be committed by a head of state in his or her personal capacity: see, eg, Cassese, above n 77, 868. See also Akande and Shah, above n 99, 840, who posit that the older principle of functional immunities is necessarily superseded by newer developments in international law governing individual criminal liability.

<sup>105</sup> As discussed above, the Federal Court considered this case in some detail in *Thor Shipping* (2008) 173 FCR 524. See above nn 82–5 and accompanying text.

<sup>106</sup> [1998] All ER 897.

<sup>107</sup> *Ibid.*

<sup>108</sup> The decision was set aside on the basis that one of the Law Lords from the original bench had not revealed his connections to Amnesty International, who was an intervener in the case: see *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 2]* [1999] 1 All ER 577.

Lords again allowed the extradition request by a margin of 6:1 on the grounds that as a former head of state, Pinochet could not invoke immunity *ratione personae*, and that he could not invoke immunity *ratione materiae* for some of the crimes of which he was accused.<sup>109</sup>

Another widely cited example of an attempted prosecution of a foreign head of state in a domestic court is the French Court of Cassation case of *Gaddafi*.<sup>110</sup> The Libyan head of state was sued in France for his Government's involvement in terrorist acts that caused the crash of a French aeroplane in 1989. The Court held that under customary international law, national courts were not permitted to exercise extraterritorial jurisdiction to prosecute sitting heads of state for terrorism. Specifically, it stated:

at this stage of development in international customary law, the crime in question [terrorism], serious as it may be, does not fall within the exceptions to the principle of immunity from jurisdiction of foreign heads of state in office.<sup>111</sup>

This has been interpreted as an implicit acknowledgment of the existence of at least some exceptions to immunity, despite the fact that the parameters of such exceptions were not spelled out in the judgment.<sup>112</sup>

The *Pinochet* and *Gaddafi* cases constitute two of the few examples of a customary international law exemption to immunity *ratione materiae* that directly relate to the prosecution of foreign heads of state for international crimes in national courts. There is, however, a significant amount of state practice to confirm the existence of such an exemption in cases where international crimes have been committed by lower level individuals in their official capacity.<sup>113</sup>

Similarly, international criminal tribunals have also recognised the existence of a customary international law exemption to immunity *ratione materiae* for heads of state. In *Prosecutor v Blaškić*, for example, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') stated:

The general rule under discussion [that an individual is not liable for acts performed in his or her official capacity] is well established in international law ... The few exceptions ... arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from their

<sup>109</sup> Reasoning for this varied among the Law Lords, each of whom provided a separate opinion. Of note, Lord Browne-Wilkinson considered whether the fact that the *State Immunity Act 1978* (UK) was silent on exemptions to immunity for international crimes meant that any exemption in international law could not be applied in UK courts. His Lordship concluded that 'Parliament cannot have intended to give heads of state and former heads of state greater rights than they already enjoyed under international law': *Pinochet III* [2000] 1 AC 147, 203. An Australian court might come to a comparable conclusion given the similarity between Australian and UK immunity legislation.

<sup>110</sup> Cour de Cassation [French Court of Cassation], 00-87215, 13 March 2001 reported in (2001) Bull crim n° 64, 218.

<sup>111</sup> Ibid 218 [author trans]. See also Salvatore Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Gaddafi* Case before the French *Cour de Cassation*' (2001) 12 *European Journal of International Law* 595, 600–1.

<sup>112</sup> Zappalà, above n 111, 601.

<sup>113</sup> See, eg, *A-G (Israel) v Eichmann* [1962] 36 ILR 277 (Israeli Supreme Court); *Fédération Nationale des Déportés et Internés Résistants et Patriotes v Barbie*, Cour de Cassation [French Court of Cassation], 85-95166, 20 December 1985 reported in (1985) Bull crim n° 407, 1053; *In re Yamashita*, 327 US 1 (1946).

national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.<sup>114</sup>

## 2 *Uncertainty of the Scope of the Exemption to Immunity Ratione Materiae*

As mentioned above, there are aspects of the exemption to immunity *ratione materiae* for international crimes that are not yet settled in customary international law. For example, there is some question as to whether international crimes can ever be committed in a head of state's private capacity, or whether they are official acts of state. Related to this is the issue of whether the exemption applies to sitting heads of state (even though they would remain procedurally immune while in office under immunity *ratione personae*). Both of these questions are discussed extensively in the literature, and in-depth analysis of such uncertainties is beyond the limited scope of this article.<sup>115</sup> Instead, this section focuses on the ICJ decision in the *Arrest Warrant* case, which made a significant contribution to the legal parameters of immunity for state officials in international law, but also muddied the jurisprudential waters on exceptions to immunity for heads of state in national courts. As a result, there would have been scope for an Australian court dealing with the Rajapaksa case to contribute to the clarification of custom on this point.

In 2002, the ICJ considered for the first time the question of whether there exists a rule of customary international law to exempt state officials from prosecution in another state's courts, and appeared to significantly limit the scope of the exemption that had been developing in national courts. The *Arrest Warrant* case came before the ICJ after a Belgian judge issued an arrest warrant for the Congolese Foreign Minister, indicting him for grave breaches of the *Geneva Conventions* that took place in 1998 during the civil war in the Democratic Republic of the Congo. The ICJ decided the case in favour of the DRC, maintaining that foreign ministers are immune from prosecution in national courts for private and official acts undertaken while in office.<sup>116</sup>

In reaching this conclusion, the ICJ rejected the claim that there was evidence of state practice to support a customary exemption to head of state immunity. It dismissed Belgium's contention that the *Pinochet* and *Gaddafi* cases were examples of such practice, and instead accepted the Congo's assertion that those cases '[confirm] the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs'.<sup>117</sup> Similarly, the Court refused to consider the statutes of the various international criminal tribunals as evidence of a customary rule of exemption because they were not applicable to prosecutions in national courts.<sup>118</sup> The Court concluded that it was

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<sup>114</sup> *Prosecutor v Blaškić (Judgement on the Request for the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-AR108, 29 October 1997) [41].

<sup>115</sup> See, eg, International Law Commission, *Immunity of State Officials from Foreign Criminal Jurisdiction*, 60<sup>th</sup> sess, UN Doc A/CN.4/596 (1 April 2008) 116–37; Roman Anatolevich Kolodkin, Special Rapporteur, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc A/CN.4/631 (10 June 2010).

<sup>116</sup> *Arrest Warrant* [2002] ICJ Rep 3, 22 [54]–[55].

<sup>117</sup> *Ibid* 23–4 [57].

<sup>118</sup> *Ibid*.

unable to deduce ... that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.<sup>119</sup>

The position taken by the ICJ has been 'widely criticized'<sup>120</sup> and subject to varied interpretation. For example, Antonio Cassese posits that the Court did not intend to deny the existence of an exemption in customary law to immunity *ratione materiae* for state officials who are accused of international crimes.<sup>121</sup> Instead, he argues that the Court seems to imply that the exemption to immunity *ratione materiae* is just not applicable to incumbent officials. Cassese concludes that such an implication is untenable, however, given the significant evidence of state practice to suggest that such an exemption applies to both former and sitting state officials.<sup>122</sup>

The ICJ went on to explain the importance of immunity *ratione personae* and emphasised that it does not mean that an incumbent foreign minister or head of state has impunity for crimes committed, merely temporary immunity while in office. In an important obiter dictum the Court then listed four exceptions to immunity for incumbent state officials:

- 1 A sitting head of state or foreign minister does not enjoy immunity from prosecution in his or her own country;
- 2 his or her own state may decide to waive immunity with respect to another state's extraterritorial jurisdiction;
- 3 a former foreign minister may be prosecuted by another state for acts committed before or after his or her tenure, as well as for acts committed during the term of office if done so in his or her private capacity; and
- 4 sitting heads of state or foreign ministers are not immune from prosecution in international criminal courts where they have jurisdiction.<sup>123</sup>

The first, second and fourth scenarios represent a clear delineation of the customary exceptions to immunity *ratione personae* applicable to former and incumbent heads of state. The third situation, however, appears to blur the line between immunity *ratione materiae* and immunity *ratione personae*. By specifying that a former state official may be tried for acts committed in an official capacity before or after his or her tenure in office and in a private capacity during his or her term of office, the ICJ appears to exclude any liability for international crimes committed during a head of state's tenure. The other interpretation is that a head of state would be liable for international crimes committed during his or her tenure in a private capacity, despite the fact that this

<sup>119</sup> Ibid 24 [58]. This is applicable to heads of state.

<sup>120</sup> Micaela Frulli, 'Immunities of Persons from Jurisdiction' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 368, 368. See generally Wouters, above n 102; Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v Belgium Case*' (2002) 13 *European Journal of International Law* 877; Cassese, above n 77.

<sup>121</sup> Cassese, above n 77, 865.

<sup>122</sup> Ibid.

<sup>123</sup> See *Arrest Warrant* [2002] ICJ Rep 3, 25 [61].

goes against the fundamental nature of international crimes as systemic crimes, committed through the use and abuse of state apparatus.<sup>124</sup>

Applying the ICJ's reasoning to the case of the Sri Lankan president, even after Rajapaksa left office (and immunity *ratione personae* no longer applied) it would not be possible to prosecute him for international crimes committed during his tenure as head of state, unless it could be proven that those crimes were committed in his private capacity. The ICJ appears to have overlooked the customary exemption to immunity *ratione materiae* for international crimes, and further confused the scope of immunity *ratione materiae*.<sup>125</sup> Had an Australian court been able to consider the Rajapaksa case, it might have been able to contribute to the clarification of some of these issues.

### 3 *Does the Practice of International Tribunals also Signify the Possible Erosion of Immunity Ratione Personae in National Courts?*

The statutes of every international criminal tribunal since Nuremberg have specifically eliminated the head of state immunity defence against prosecution. The *Charter of the International Military Tribunal* itself expressed that 'the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'.<sup>126</sup> Some commentators have raised the question of whether this practice of international criminal tribunals to remove all immunities for heads of state might also impact upon head of state immunity in national courts — particularly as it relates to the ostensibly 'absolute' immunity *ratione personae*.<sup>127</sup>

Since the late 1990s, there have been an increasing number of instances in which proceedings have been initiated against both former and incumbent heads of state by international criminal tribunals. In 1999, for example, Slobodan Milošević was indicted by ICTY for crimes committed during the Kosovo war.<sup>128</sup> As the president of the Federal Republic of Yugoslavia, Milošević was the first ever sitting head of state to be indicted and he was eventually arrested by Yugoslav authorities in 2001 and transferred to The Hague for trial.<sup>129</sup> In 2003, the Special Court for Sierra Leone ('SCSL') issued an arrest warrant for incumbent Liberian President Charles Taylor. Two months after the indictment was made public, Taylor fled Liberia, and although he was granted asylum in Nigeria, Taylor was eventually turned over to the SCSL where he was found guilty of aiding and abetting war crimes and crimes against humanity.<sup>130</sup> The

<sup>124</sup> Cassese, above n 77, 868; *Pinochet III* [2000] 1 AC 147, 277 (Lord Millett).

<sup>125</sup> Cassese, above n 77, 870–1; Summers, 'Diplomatic Immunity *Ratione Personae*', above n 89, 470–2.

<sup>126</sup> *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis and the Charter of the International Military Tribunal*, 82 UNTS 279 (signed and entered into force 8 August 1945) art 7.

<sup>127</sup> Tunks, above n 77, 659–63; Wouters, above n 102, 257; O'Neill, above n 77, 317.

<sup>128</sup> *Prosecutor v Milošević* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-54). Milošević died in detention in March 2006. The ICTY has since indicted former President of Republika Srpska Radovan Karadžić.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Prosecutor v Taylor (Judgment)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-2003-01-T, 26 April 2012).

SCSL in this case observed that head of state immunity ‘derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community’.<sup>131</sup>

Article 27 of the *Rome Statute* of the ICC clearly states that heads of state will not be exempt from criminal responsibility before the ICC because of their official status,<sup>132</sup> nor can they invoke any procedural immunity barring the Court from jurisdiction.<sup>133</sup> Since 2009, the ICC has indicted two sitting heads of state from nations that are not party to the *Rome Statute*.<sup>134</sup> In March 2009, Pre-Trial Chamber I issued an arrest warrant against the President of Sudan, Omar Al Bashir and confirmed in a press release that ‘Al Bashir’s official capacity as a sitting Head of State does not exclude his criminal responsibility, nor does it grant him immunity against prosecution before the ICC’.<sup>135</sup> In June 2011 the ICC indicted Libyan leader Muammar Gaddafi for crimes against humanity, recognising him as de facto head of state, despite Gaddafi’s own proclamation that he ‘isn’t a president, king or head of state’.<sup>136</sup>

It has been suggested that the ICC’s indictment of two heads of state from nations that are not party to the *Rome Statute* supports the notion that the immunity *ratione personae* doctrine is being eroded under customary international law.<sup>137</sup> Such a hypothesis, however, does not take into account how

<sup>131</sup> *Prosecutor v Taylor (Decision on Immunity from Jurisdiction)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2003-01-I, 31 May 2004) [51].

<sup>132</sup> *Rome Statute* art 27(1).

<sup>133</sup> *Ibid* art 27(2). An equivalent to this article is not found in the statutes of the ad hoc or hybrid tribunals. It appears to abrogate immunity *ratione personae*: Mark A Summers, ‘Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That are Not Parties to the *Statute of the International Criminal Court*’ (2006) 31 *Brooklyn Journal of International Law* 463.

<sup>134</sup> The ICC has also charged the former president of Cote d’Ivoire Laurent Gbagbo with crimes against humanity. Hearings in this case are scheduled to begin mid 2012: see International Criminal Court, ‘Confirmation of Charges Hearing in the Case of the *Prosecutor v Laurent Gbagbo* Scheduled to Start on 18 June 2012’ (Press Release, ICC-CPI-2011205-PR751, 5 May 2011) <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/ICC0211/Related+Cases/ICC02110111/Press+Releases/PR751.htm>>.

<sup>135</sup> Laurence Blairon, ‘ICC Issues Warrant of Arrest for Omar Al Bashir, President of Sudan’ (Press Release, ICC-CPI-20090304-PR394, 4 March 2009) <<http://www.icc-cpi.int>>. See generally Steven Freeland, ‘A Prosecution Too Far? Reflections on the Accountability of Heads of State under International Criminal Law’ (2010) 41 *Victoria University of Wellington Law Review* 179; Sarah Williams and Lena Sherif, ‘The Arrest Warrant for President Al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court’ (2009) 14 *Journal of Conflict and Security Law* 71. For a general discussion on the prosecution of heads of states before international courts, see, eg, *Prosecutor v Al Bashir (Decision pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC/02/05-01/09, 12 December 2011) [22]–[36].

<sup>136</sup> *Situation in the Libyan Arab Jamahiriya (Decision on the ‘Prosecutor’s Application pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al Senussi’)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11, 27 June 2011) [7]. The case against Gaddafi was terminated on 22 November 2011 following his death.

<sup>137</sup> Kaitlin R O’Donnell, ‘Certain Criminal Proceedings in France (*Republic of Congo v France*) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?’ (2008) 26 *Boston University International Law Journal* 375, 392; Tunks, above n 77, 661.

the ICC obtains its jurisdiction.<sup>138</sup> The prevailing theory holds that the ICC derives its jurisdiction from authority delegated by states,<sup>139</sup> and because a head of state is not immune from prosecution in the courts of his or her own country, it follows that state parties to the *Rome Statute* have delegated their jurisdiction to try their heads of state to the ICC. Alternatively, it has been theorised that advance waiver of immunity for a party's own head of state could be implied upon signing up to the *Rome Statute*.<sup>140</sup> In the case of a non-state party, such as Sudan, the ICC gains jurisdiction by referral from the United Nations Security Council<sup>141</sup> whose mandate to maintain international peace and security is derived from the international community as a whole. Whatever way the ICC is said to gain jurisdiction over heads of state, immunity *ratione personae* for heads of state in national courts remains intact.

#### D What This Means for Australia and Rajapaksa

Had the case against President Rajapaksa been allowed to continue, it is possible that an Australian court would have found that the existence of a customary law exemption to immunity *ratione materiae* meant that Rajapaksa could be held criminally liable for crimes attributable to him during the Sri Lankan civil war, despite any claim that such actions were carried out in his official capacity. As an incumbent head of state, however, s 36 of the *Foreign State Immunities Act* and his right to immunity *ratione personae* under customary international law protects him against prosecution in an Australian court for the duration of his tenure as president, unless Sri Lanka waives such immunity.

This does not mean, however, that allowing a court to consider the status of head of state immunity in Australian and international law would have been futile. As evident from state practice and the judicial decisions of international tribunals over the past 15 years, there exists a customary exemption to immunity *ratione materiae* for international crimes, the parameters of which, while narrowed, are not settled. Domestic courts in other countries have taken the initiative to explore the scope of head of state immunity, even when immunity *ratione personae* was still in play. In the US, for example, the Federal District Court of New York was given the chance in 2000 to examine whether the American domestic legal framework on head of state immunity was consistent with that of customary international law.<sup>142</sup> While President of Zimbabwe Robert Mugabe was in New York for a meeting of the UN General Assembly, he was

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<sup>138</sup> The ICC's jurisdiction over individuals depends on where the conduct took place, which state has custody of the accused, and how a situation is referred to the Court: see *Rome Statute* arts 12–13.

<sup>139</sup> For a discussion of delegation of jurisdiction to the ICC, see Diane F Orentlicher, 'The Future of Universal Jurisdiction in the New Architecture of Transnational Justice' in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004) 216–17; Leila Nadya Sadat, 'Redefining Universal Jurisdiction' (2000) 35 *New England Law Review* 241, 247.

<sup>140</sup> Summers, 'Immunity or Impunity?', above n 133, 490.

<sup>141</sup> The ICC can exercise jurisdiction if 'a situation in which one or more of the crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the *Charter of the United Nations*': *Rome Statute* art 13(b).

<sup>142</sup> See *ibid*.

served with a lawsuit for his alleged role in political assassinations, torture, rape and other acts of violence. The US Department of State submitted an official suggestion to the court that Mugabe should be immune from proceedings in US courts due to his status as a head of state, and on the grounds that a trial would destabilise American foreign relations. The District Court in this case recognised that no US court had ever ignored a State Department request for head of state immunity, and consequently acquiesced to the executive's suggestion. Nevertheless, the Court took the opportunity to clarify domestic head of state immunity laws and examine the parameters of immunity in customary international law. It concluded that even without the executive's intervention, Mugabe would have been entitled to immunity from suit in American courts due to his position as a head of state.<sup>143</sup>

Allowing Australian courts to consider such issues in a preliminary hearing of the Sri Lanka case would not have infringed upon Rajapaksa's inviolability, nor would there have been any risk of Australia violating its international obligations with respect to head of state immunity. Instead, like the New York District Court, it would have given Australia the opportunity to contribute to the developing customary international law on head of state immunity, and a chance to test the parameters of its domestic head of state immunity laws. Importantly, it would also have provided an explanation on the public record to Australian citizens such as Jegatheeswaran as to why his application could not proceed, and delivered a warning to Rajapaksa and other heads of state that their immunity in Australian courts is not indefinite.

#### IV CONCLUSION

The Attorney-General's decision to prevent the case against Sri Lankan President Rajapaksa from proceeding highlights some of the inadequacies in Australia's efforts to prosecute international crimes. As a sitting head of state, Rajapaksa's case was rare due to the fact that he is entitled to immunity from prosecution in foreign domestic courts. This does not mean, however, that an Australian court should not have had the opportunity to explore important legal issues such as the ambit of immunity laws under both Australian and international law. The Australian Government should therefore consider amending s 268.121(1) of the *Criminal Code* to limit the discretion that the Attorney-General has to quash cases. It should also enhance the administrative review mechanisms to which the Attorney-General's decisions are subject. Such changes to Australia's legislative framework on international crimes will ensure that, in future, Australia is able to balance its diplomatic and political considerations with its obligation to prosecute and punish individuals accused of war crimes, genocide and crimes against humanity.

As for Rajapaksa, although the Attorney-General quashed the attempted indictment, this should not end Australia's involvement in the matter. To ensure that the serious allegations against the Sri Lankan president are investigated and tested in court, the Australian Government should push for Sri Lanka's referral

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<sup>143</sup> *Tachiona v Mugabe*, 169 F Supp 2d 259 (SD NY, 2001). Note, however, that this case does not contribute to state practice on immunity for international crimes because it was a civil case and the subject matter of the prosecution was political violence.

to the ICC, where head of state immunity clearly does not apply.<sup>144</sup> Sri Lanka is not a party to the ICC, but under the *Rome Statute*, the Court can assume jurisdiction over a situation in a non-state party if the UN Security Council refers it to the prosecutor. It would then be up to the ICC to determine whether there exists sufficient evidence to indict Rajapaksa for war crimes and crimes against humanity and ensure that he does not enjoy either immunity or impunity for international crimes.

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<sup>144</sup> Former Prime Minister Malcolm Fraser called for the Australian Government to support an inquiry into Rajapaksa's alleged commission of war crimes in Sri Lanka and possible indictments by the ICC: Dylan Welch, 'Fraser Supports Call for Sri Lanka War Crimes Inquiry', *The Age* (online), 26 October 2011 <<http://www.theage.com.au/national/fraser-supports-call-for-sri-lanka-war-crimes-inquiry-20111025-1mi3w.html>>. Similarly, former Foreign Minister Kevin Rudd called for a Security Council referral of the situation in Syria to the ICC in June 2011: 'Rudd Demands Syrian Leader Face ICC', *ABC News* (online), 1 June 2011 <<http://www.abc.net.au/news/2011-06-01/rudd-demands-syrian-leader-face-icc/2741124>>. There is no reason why a similar Australian Government campaign could not be waged for Sri Lanka's referral.