IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

NO M 36 OF 2018

BETWEEN: **DANIEL TAYLOR**

Plaintiff

AND: **ATTORNEY-GENERAL OF THE COMMONWEALTH**

Defendant

SUBMISSIONS OF THE DEFENDANT

HIGH COURT OF AUSTRALIA
FILED
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THE REGISTRY CANBERRA

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II BRIEF STATEMENT OF ISSUES

2. The issues are identified in the questions set out in the Revised Special Case (**RSC**).

PART III SECTION 78B NOTICE CERTIFICATION

3. The plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth).

PART IV MATERIAL FACTS

4. The material facts and documents necessary to enable the Court to determine the questions of law before it are set out in the RSC.

PART V ARGUMENT

INTRODUCTION

5. The Plaintiff seeks judicial review of the Defendant's refusal to consent to the prosecution of Ms Aung San Suu Kyi, the serving Foreign Minister of Myanmar, for an offence against s 268.11 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**). Under s 268.121 of the Criminal Code, prosecutions for such offences may only be commenced with the consent of the Attorney-General. In summary, the Plaintiff's challenge should be rejected for the following reasons.

6. ***First***, the decision to refuse consent to a prosecution is not susceptible of review on the grounds advanced by the Plaintiff, having regard both to the long-settled constitutional position concerning the involvement of the judiciary in reviewing decisions relating to criminal prosecutions and to the clear terms of the provisions under which the impugned decision was made.

7. ***Second***, the claim that the Defendant fell into jurisdictional error rests upon incorrect contentions about the content of international law, and on a flawed understanding of the extent to which s 268.121(1) permitted the Defendant to consider international law.

8. ***Third***, the Plaintiff's claim that he was denied procedural fairness overlooks the fact that he had no right to bring a private prosecution (and therefore no right or interest that attracted procedural fairness) and that, in any event, he was accorded ample opportunity to be heard before the decision to refuse consent was made.

9. ***Finally***, no practical consequence would flow from the grant of relief.

QUESTION 1 – REVIEW OF THE DECISION WHETHER TO CONSENT

10. Section 268.121(1) of the Criminal Code provides that proceedings for an offence under Div 268 "must not be commenced without the Attorney-General's written consent". Section 268.122(1) provides that, subject to "any jurisdiction of the High Court under the Constitution", a decision to give or refuse consent under s 268.121 is final, must not be challenged, appealed against, reviewed, quashed or called into question, and is not subject to prohibition, mandamus, injunction, declaration or certiorari.

11. The Plaintiff's argument on Question 1 proceeds from the general propositions that the Defendant's decision to refuse consent to the prosecution of Ms Suu Kyi was made under statute (PS [12]-[13]), and that it is a function of the High Court under Ch III to review statutory decisions (PS [14]-[16]). Both those propositions may be accepted. But that does not assist the Plaintiff, because the issue raised by Question 1 is *not* whether the Defendant's discretion under s 268.121 is "unbridled" or "immune from supervision or restraint" (cf PS [15]), but whether decisions under s 268.121(1) are insusceptible to judicial review *on the grounds alleged by the Plaintiff in this case.*

12. A "constitutional dimension" of the Australian criminal process is that prosecutorial functions are vested in the executive, whereas judicial functions are vested in the judiciary.[1] Despite that separation, the functions of the two branches of government are inextricably linked. Most obviously, the decision whether to prosecute a person directly bears on whether the criminal jurisdiction of a court is engaged. This Court has recognised that one consequence of this connection is that "[t]he integrity of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide *or were to be in any way concerned with* decisions as to who is to be prosecuted and for what".[2] This Court has, accordingly, often emphasised the need to maintain the separation between the judiciary

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1 *Elias v The Queen* (2013) 248 CLR 483 (*Elias*) at 497 [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also *Magaming v The Queen* (2013) 252 CLR 381 (*Magaming*) at 401-402 [68] (Gageler J, dissenting) and the "great constitutional importance" said to attend that division of functions in *Jago v District Court (NSW)* (1989) 168 CLR 23 (*Jago*) at 39 (Brennan J).

2 *Maxwell v The Queen* (1996) 184 CLR 501 (*Maxwell*) at 534 (emphasis added) (Gaudron and Gummow JJ); see also at 512 (Dawson and McHugh JJ), 525 (Toohey J). That observation was approved in *Likiardopoulos v R* (2012) 247 CLR 265 (*Likiardopoulos*) at 280 [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

and the executive in relation to prosecutorial decisions.[3] It has repeatedly held that "certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review".[4] That is the position whether such review is sought by "the accused *or anyone else*".[5]

13. In addition to the separation of powers considerations identified above, this Court has also emphasised that the conclusion that prosecutorial discretions are insusceptible of judicial review is reinforced by the nature and breadth of such discretions, which involve "policy and public interest considerations which are not susceptible to judicial review, as it is neither within the constitutional function nor the practical competence of the courts to assess their merits".[6]

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14. The established limits on judicial review of prosecutorial decisions apply with equal force in the context of statutory discretions. For example, they were applied in *Barton*, where all six Justices held that the Attorney-General's *statutory* power to present an ex officio indictment was immune from judicial review.[7] Similarly, in *Maxwell* the prosecutor's acceptance of a plea of guilty pursuant to a *statutory* discretion was held to be insusceptible of judicial review.

15. Quite plainly, in the many cases just discussed the Court did not overlook its constitutional role in upholding the limits of executive power. The "basal principles" on which the Plaintiff relies therefore do not assist him (cf PS [14]), for the limits on the judicial review of prosecutorial decisions upon which the Defendant relies have been recognised within the framework of those very principles.

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3 Ibid. See also *Barton v Commonwealth* (1980) 147 CLR 75 (*Barton*) at 94-95 (Gibbs ACJ and Mason J; with the agreement of Stephen J at 103 and Aickin J at 109), 109-111 (Wilson J; Murphy J agreeing at 106); *R v Apostilides* (1984) 154 CLR 563 at 575 (Gibbs CJ, Mason, Murphy, Wilson, Dawson JJ); *Jago* at 39 (Brennan J), 58, 61 (Deane J), 77 (Gaudron J); *Ridgeway v The Queen* (1995) 184 CLR 19 (*Ridgeway*) at 32-3 (Mason CJ, Deane and Dawson JJ), 74 (Gaudron J); *Elias* at [35] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Magaming* at [20], [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

4 *Maxwell* at 534 (Gaudron and Gummow JJ), approved in *Likiardopoulos* at [2] (French CJ), [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Magaming* at [20], [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [68] (Gageler J, dissenting). See also statements to like effect in *Barton*, *Jago*, *Ridgeway* and *Elias*, cited in the preceding footnote.

5 *Likiardopoulos* at 280 [37] (emphasis added) (Gummow, Hayne, Crennan, Kiefel and Bell JJ); cf PS [24].

30 6 *Likiardopoulos* at 269 [2] (French CJ). See also *Barton* at 94; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 (*Toohey*) at 219-220 (Mason J); *Jago* at 39, 77; *Maxwell* at 512, cited with approval in *Elias* at [34].

7 See passages in *Barton* identified above at n 3. See further the discussion in *Toohey* at 219-220 (Mason J).

16. The Plaintiff places particular reliance on French CJ's remarks in *Likiardopolous*: PS [17]-[18]. However, these remarks do not assist him because French CJ acknowledged (at [2]) the constitutional and practical limitations on courts considering questions of policy and public interest in prosecutorial decisions. As addressed below, that is of particular significance where a prosecutorial decision may affect Australia's foreign relations. Further, and contrary to the Plaintiff's submissions (eg PS [22], which draw a false distinction between "prosecutorial discretion" and "statutory discretion"), French CJ acknowledged (at [4]) that the statutory character of prosecutorial decision-making in Australia today did not lessen the significance of the impediments to judicial review identified in the authorities. The only matter that French CJ reserved for future consideration was whether it was right to describe prosecutorial decisions as "insusceptible of judicial review" given the availability of review under s 75(v) of the Constitution, "however limited the scope of such review may be in practice": see [4]. That matter does not fall for decision in this case, because Question 1 does not ask whether a decision under s 268.121 of the Criminal Code is insusceptible of judicial review on any grounds. It asks only whether that decision is reviewable on *the grounds raised in the Amended Application*. That question is readily answered in the negative, for the following reasons.

17. ***Consent to prosecution is closely related to the decision to prosecute:*** Under s 268.121(1) the Defendant's consent is made a mandatory precondition to a prosecution. The Plaintiff seeks to distinguish consent decisions from other aspects of the prosecutorial discretion (PS [22]). However, the requirement for consent engages the question whether a person should be prosecuted for a particular offence and is thereby closely related to the various other prosecutorial decisions that form part of the prosecutorial discretion.[8] For these reasons, the authorities recognise that consent requirements are closely related to, and akin to, prosecutorial decisions, and that they are similarly insusceptible of judicial review.[9]

18. The Plaintiff seeks to draw an artificial distinction between the grant and refusal of consent (PS [19], [24]). However, there is no basis in s 268.121 for suggesting that the

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[8] See eg *Maxwell*, 534.

[9] *Oates v Williams* (1998) 84 FCR 348 (*Oates*) at 354D-F (an issue not addressed on appeal to the High Court in *Attorney-General v Oates* (1999) 198 CLR 162); *DPP v Patrick Stevedores Holdings Pty Ltd* (2012) 41 VR 81 (*Patrick Stevedores*) at [27]-[29], [44], [131]-[134].

reviewability of a decision depends on whether the Attorney-General ultimately grants or refuses consent. To the contrary, the separation of powers and the policy considerations identified at [12]-[13] above are engaged by both the grant, and refusal, of consent. Both concern a decision by the executive about whether the judicial process should be engaged in relation to a particular offence, and it is the involvement of the courts in scrutinising such a decision that presents a risk to their institutional independence and integrity, or the public perception thereof. Likewise, questions of policy, international relations and the national interest may inform both categories of decision. These fundamental impediments are not met by pointing to an absence of any fragmentation in cases where consent to a prosecution is refused: cf PS [24].

19. ***The Plaintiff has not identified any relevant limit on the discretion to refuse consent:*** Section 268.121 confers a discretionary power to consent or refuse consent without any express limitations governing the exercise of that power. It does not expressly specify any matters that must, or must not, be considered, or the purpose for which the discretion may permissibly be exercised. The terms of s 268.121(1) therefore leave the Attorney-General free to consider (or not consider) the widest array of matters.[10] These may include the myriad factors which typically attend the decision whether to prosecute, such as the strength of the case, the evidence available, the seriousness of the charges, the public interest, and the implications of a prosecution being brought (or not). However, the matters that may be considered by the Attorney-General are not limited to those matters. Instead, the discretion having been conferred upon a Minister, the widest range of policy and other matters may be considered,[11] including matters of national interest and foreign relations.

20. The statutory context confirms the width of the discretion conferred on the Attorney-General. Two matters are of particular note. *First*, the consent requirement applies to all offences in Div 268. That division was introduced at the time of Australia's ratification of the Rome Statute and its enactment of the *International Criminal Court Act 2002* (Cth) (**ICC Act**) (see RSC [24], [30]). In that context, s 268.121(1) provides a

[10] See the like conclusion based on the provision in issue in *Barton* at 94.

[11] See *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [188] (Hayne J); *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at [50] (Gaudron, Gummow and Hayne JJ); *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231 at [18] (the Court); *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

mechanism to ensure that any prosecution concerning serious international offences of the kind that might be addressed by the International Criminal Court (**ICC**) may take into account any implications for Australia's international relations, and its views concerning its international obligations. Plainly the Court is not well positioned to assess matters of that kind, those being matters it is "neither within the constitutional function nor the practical competence of the courts to assess": see *Likiardopoulos* at [2]. The relevance of such matters to decisions under s 268.121(1) therefore reinforces the confined scope for judicial review of such decisions.

21. *Second*, s 268.122 contains a privative clause. Applying a conventional approach to the effect of clauses of that kind, it is necessary to reconcile any legal limits apparent from the text or context of s 268.121(1) with the apparent intention reflected in the privative clause that any such limits not be enforceable.[12] Here, that reconciliation process is straightforward because s 268.121(1) does not contain any express limits that might be thought to be in tension with the privative clause. In that context, s 268.122(1) strongly reinforces the breadth of the discretion that is apparent on the face of s 268.121(1), by manifesting Parliament's intention that all aspects of a consent decision be as free as is legally possible from administrative law constraint. Judicial review may, of course, still be available on narrow grounds (such as absence of a bona fide attempt to exercise the power).[13] However, the Plaintiff does not allege errors of any such kind and so the outer boundaries of any permissible review need not be decided.

22. In light of: (i) the ordinary separation of powers considerations that limit judicial review of prosecutorial decisions; (ii) the breadth of the discretion conferred by s 268.121(1), being a discretion that is particularly likely to be exercised in a context that has international ramifications for Australia; and (iii) the privative clause in s 268.122(1); the Court should readily conclude that the Attorney-General's decision to refuse consent under s 268.121(1) is insusceptible to judicial review on the grounds alleged in the Amended Application. Question 1 should therefore be answered "Yes".

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[12] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (*Plaintiff S157*) at [17]-[19], [33] (Gleeson CJ), [58]-[70], [77]-[78] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 (*Hickman*) at 616 (Dixon J).

[13] See eg *Plaintiff S157* at [82] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Bodradazza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [28] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [55]-[57], [66]-[68] (Gummow, Hayne, Heydon and Crennan JJ).

QUESTION 2 – CUSTOMARY INTERNATIONAL LAW

23. The Plaintiff's submissions concerning Question 2 proceed from a fundamental misstatement of the basis for the Defendant's decision. The Defendant did not proceed on the premise that he was *bound*, as a matter of Australian law, to refuse consent to the prosecution: cf PS [26], [37]-[39]. Instead, as the ministerial submission makes clear,[14] the Defendant proceeded on the basis that he had a choice whether or not to consent, but that if he *did* consent that would place Australia in breach of its obligations under customary international law to afford immunity to an incumbent foreign minister.

24. The decision did not involve reviewable error for two fundamental reasons. *First*, the Defendant's understanding of customary international law was correct. It was supported by a substantial body of material, including decisions of the International Court of Justice (**ICJ**). By contrast, the Plaintiff's argument invites this Court to conclude that each of the ICJ, the International Law Commission (**ILC**)[15] and the ICC have misunderstood the content of customary international law, including by failing to recognise the asserted effect of the Rome Statute on customary international law. *Secondly*, even if the Defendant was wrong with respect to that international law issue, the error was not jurisdictional. It is convenient to begin with this second point.

Jurisdictional error

25. The Plaintiff argues that the Defendant erred in his understanding of the content of customary international law. If, for the sake of argument, such an error *was* made, that would establish only that the Defendant had erred in his understanding of an international obligation that has not been incorporated into Australian law. Such obligations are not mandatory relevant considerations.[16] As such, an error in interpreting an unincorporated international obligation does not constitute a jurisdictional error,[17]

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[14] See SC-3 at 24-5: "If you were to give your consent to this prosecution proceeding, these immunities would be breached and *Australia would be in breach of its international obligations*" (emphasis added).

[15] The ILC was established by the United Nations General Assembly in 1947 to give effect to the Assembly's mandate "to initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification": United Nations Charter, Art 13(1)(a).

[16] *Re MIMIA; Ex parte Lam* (2003) 214 CLR 1 at 33 [101] (McHugh and Gummow JJ).

[17] *Snedden v Minister for Justice and Another* (2014) 230 FCR 82 (*Snedden*) at 108 [147] (Middleton and Wigney JJ); *AB v Minister for Immigration and Citizenship* [2007] FCA 910; (2007) 96 ALD 53 at [20]-[23] (Tracey J).

because a decision-maker cannot exceed his or her jurisdiction by failing *properly* to consider a matter that the decision-maker was entitled not to consider *at all*.

26. In those circumstances, the Plaintiff can establish the jurisdictional error alleged only if he satisfies the Court, as a matter of Australian domestic law, that the Defendant was not *entitled* to take into consideration his understanding of Australia's customary international law obligations when making a decision under s 268.121(1). That means that he must discharge the "heavy burden" of establishing that those obligations are a *mandatory irrelevant consideration*.[18] Otherwise, there was nothing to prevent the Defendant making the decision he did, even if it could be shown that he erred in his understanding of Australia's international obligations (which is, of course, denied).

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27. For reasons developed in relation to Question 1, there is no basis in the statutory text, context or purpose for concluding that the Defendant was bound not to consider whether a decision to consent to a prosecution under s 268.121(1) would place Australia in breach of its obligations under customary international law. On that basis alone, Question 2 should be answered "No".

The Rome Statute

28. At the heart of the Plaintiff's claim lies the contention that Australia's obligations under the Rome Statute of the International Criminal Court (**Rome Statute**[19]) entitle (or perhaps even oblige) it to prosecute, in its domestic courts, an incumbent foreign

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minister for crimes against humanity. That contention is without foundation.

29. *International Criminal Court*: The Rome Statute establishes the ICC, which has jurisdiction over "the most serious crimes of concern to the international community", including crimes against humanity.[20] States Parties to the Rome Statute accept the jurisdiction of the ICC over crimes within the scope of the Statute (Arts 5(1), 12(1)). They assume a series of obligations, central among which is the obligation to cooperate with the ICC in its investigation and prosecution of crimes falling within the ICC's

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[18] *R v Australian Broadcasting Tribunal; ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49-50 (Stephen, Mason, Murphy, Aickin and Wilson JJ); and see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).

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[19] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) [SC-20 at 665].

[20] Rome Statute, Art 5(1).

jurisdiction (Art 86). Those obligations have no present relevance, as the ICC has not asked Australia to arrest, surrender or otherwise provide assistance in relation to any investigation or prosecution of Ms Suu Kyi: RSC [29].

30. The Rome Statute is concerned with the jurisdiction of the *ICC* itself. Nothing in the Rome Statute either obliges States to undertake domestic prosecutions of any crimes, or regulates the conduct of domestic prosecutions. Specifically, nowhere in the Rome Statute does one find an "obligation not to recognise immunity based on official capacity for Rome Statute crimes in domestic criminal proceedings": cf PS [62].

31. ***Complementarity***: The Plaintiff's submissions concerning the "primacy" of the jurisdiction of State Parties over crimes covered by the Rome Statute are misleading: eg PS [28]-[31], [39], [52]. The practical relevance of domestic proceedings under the Rome Statute arises from Art 17(1), which is an expression of the principle of complementarity. That article requires the ICC to rule inadmissible certain cases that are being, or have been, investigated or prosecuted by a State Party. It follows from that principle that, if a State Party *chooses* to enact domestic equivalents of the international crimes listed in Art 5(1) of the Rome Statute, then it may choose to investigate or prosecute certain matters itself, and if it does so the same matters could not be dealt with before the ICC. In that sense, the ICC operates complementarily to national criminal jurisdictions.[21] Australia's interpretive declaration to the Rome Statute does nothing more than affirm the complementarity principle, in that it "reaffirms the primacy of its criminal jurisdiction" by preserving for Australia the fullest "opportunity" to investigate or prosecute alleged crimes itself: SC-23 at 755. Critically, however, the principle of complementarity does not suggest that a State is entitled to bring a prosecution in its domestic courts that it is not otherwise entitled to bring, including by prosecuting an incumbent Head of State or foreign minister, notwithstanding that such a person is entitled to immunity under customary international law. To the contrary, the Rome Statute addresses the prosecution of such a person by specifying that he or she may be prosecuted *in the ICC itself* notwithstanding any such immunity (Art 27(2)): see [42] below.

[21] See Art 1 of the Rome Statute and also the Preamble, which states that "the International Criminal Court ... shall be complementary to national criminal jurisdictions".

32. ***Domestic implementation***: The ICC Act established the statutory framework necessary to enable Australia to give effect to its obligations under the Rome Statute to cooperate with the ICC following a request by the ICC for assistance.[22] The *International Criminal Court (Consequential Amendments) Act 2002* (Cth) inserted Div 268 into the Criminal Code. It was plainly directed at enabling Australia to invoke the benefit of Art 17 in circumstances where Australia chose to investigate or prosecute an offence domestically.[23] However, nothing in either Act purports to override any immunity that would otherwise prevent Australia from bringing such a prosecution. Both Acts are entirely silent on that topic.

Question 2(a) – Customary international law immunity of incumbent foreign ministers

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33. **The *Arrest Warrant Case*:** Customary international law confers on serving heads of State, heads of government and foreign ministers a personal immunity from prosecution in foreign courts (referred to as immunity *ratione personae*).[24] As explained by the ICJ in the *Arrest Warrant Case*, "in international law it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal": at [51] (SC-8 at 78). The immunity promotes diplomatic relations by enabling such persons to travel freely, without fear of prosecution in foreign courts: at [54] (SC-8 at 80). It is granted to ensure the effective performance of an official's functions on behalf of their State, not for their personal benefit: at [53] (SC-8 at 79). As such, the ICJ held that the "mere issue" of an arrest

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22 Explanatory Memorandum to the International Criminal Court Bill 2002 (Cth), 25 June 2002 at 1.

23 The Explanatory Memorandum to the International Criminal Court (Consequential Amendments) Bill 2002 states at pg 1 that Div 268 was enacted "so that Australia retains the *right* and *power* to prosecute any person accused of a crime under the Statute in Australia rather than surrender that person for trial" (emphasis added).

24 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ 1 (the *Arrest Warrant Case*) at 20-21 [51], 22 [54], 24 [58] [SC-8 at 78-79, 80, 82]; *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 176 at 236-237 [170] [SC-9 at 309-310]; *Jones v United Kingdom* (nos 34356/06 and 40528/06), ECHR 2014 at 334 [83] [SC-11 at 381]; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 at 288 [24] [SC-12 at 444] (Lord Bingham of Cornhill) and 294 [48] [SC-12 at 450] (Lord Hoffman); *Tachiona v United States*, 386 F.3d 205 (2nd Cir 2004) at 220-221 [10] [SC-13 at 479-80]; *Tachiona v Mugabe*, 169 F Supp 2d (2001) 259 at 297 [5]-[6]; Escobar Hernández, Special Rapporteur, *Sixth report on immunity of State officials from foreign criminal jurisdiction* (*Escobar Hernández*), UN Doc A/CN.4/722 (12 June 2018) at 6 [12] [SC-16 at 531]; Fox and Webb, *The Law of State Immunity* (Revised and updated 3rd ed, 2015) (*Fox and Webb*) 546, 564-565 [SC-14 at 490-492].

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warrant with respect to the Congolese foreign minister that would have been enforceable within Belgium violated customary international law: at [70] (SC-8 at 87).

34. In the *Arrest Warrant Case* the ICJ considered and rejected an argument that there is an exception to the above immunity with respect to prosecutions for war crimes or crimes against humanity in national courts. In so holding, the Court took account of Art 27 of the Rome Statute (which had not yet entered into force), together with equivalent rules concerning the immunity of high-ranking officials before other international criminal tribunals. The Court held that such provisions did *not* evidence an exception to the customary immunity enabling a prosecution in a domestic court: at [58]-[61] (SC-8 at 82-83). The Plaintiff's argument is directly contrary to that holding of the ICJ.

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35. The Plaintiff's attempt to distinguish the *Arrest Warrant Case* by submitting that, had the foreign minister been within Belgian territory, "customary international law would not have provided a bar to his arrest or subsequent trial before a Belgian court" (PS [44]) wrongly elides the position under Belgian domestic law (under which the foreign minister's status was no bar to issuing the warrant) and international law (under which the issue of the warrant violated customary international law): at [70] (SC-8 at 87).[25]

36. **The continued existence of the customary rule**: The Plaintiff contends that, whatever the position in 2002, the content of customary international law has evolved since the *Arrest Warrant Case* was decided: PS [45]. That proposition can be immediately answered by the fact that the law stated in the *Arrest Warrant Case* has been affirmed on many occasions since 2002 by international and foreign courts.[26] Of particular note, it was also accepted in 2013 when the ILC provisionally adopted Art 3 of the *Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction*, which states: "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction". The ILC observed that Art 3 was "not subject to dispute, given that this is established in existing

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[25] See also the opinions of Judges Koroma at 61 [7] [SC-8 at 119] and Bula-Bula at 114 [41] [SC-8 at 172].

[26] See above n 24; see also the cases cited in *Report of the International Law Commission*, 68th sess (6 May-7 Jun and 8 Jul-9 Aug 2013) (*Report of the ILC 2013*), UN Doc A/68/10 at 62, fn 279 [SC-10 at 349].

rules of customary international law."[27] As recently as 2018, the ILC confirmed that Art 3 remains an accurate reflection of customary international law.[28]

37. The Plaintiff's contention that customary international law has evolved since the *Arrest Warrant Case* by reason of the commencement of the Rome Statute is further denied by decisions of the ICC, being decisions given in the exercise of jurisdiction under the very treaty upon which the Plaintiff relies. For example, in *Prosecutor v Al Bashir*, the ICC observed: "the Chamber wishes to make clear that it is not disputed that under international law a sitting Head of State enjoys … *inviolability before national courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court*".[29]

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38. Not only is the Plaintiff's argument contrary to the authoritative materials identified above, it also reflects a flawed understanding of how customary international law is formed and changes. For the Plaintiff's argument to be correct, he would need to demonstrate that since 2002 there has been widespread and consistent practice (State practice), accepted as law (*opinio juris*), such as to establish a change to the content of customary law: PS [45]. In practical terms, he would need evidence of widespread and consistent practice revealing that States no longer consider themselves bound to recognise the customary immunity of certain high-ranking officials (heads of State, heads of government or foreign ministers) in their domestic courts (at least with respect to crimes against humanity). Such evidence would involve instances of States

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prosecuting such officials over the objection of the State of nationality, and absent any other lawful basis to do so (such as a decision of the Security Council).[30] Plainly, the Plaintiff does not point to *any* evidence of such practice (let alone to widespread

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[27] *Report of the ILC 2013* at 58 [SC-10 at 345]. See also *Report of the International Law Commission*, 72nd sess, UN Doc A/72/10 (2017) (*Report of the ILC 2017*) at 166 [83] [SC-15 at 499] (referring to the 5th report of the Special Rapporteur).

[28] Escobar Hernández at 6 [11]-[12] [SC-16 at 531].

[29] *Prosecutor v Al Bashir* (*Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*) (ICC, Pre-Trial Chamber II, Case No ICC-02/05-01/09-195, 9 Apr 2014) (*Al Bashir-DRC*) 11-12 [25] [SC-17 at 580-581] (emphasis added). See also *Prosecutor v Al Bashir* (*Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*) (ICC, Pre-Trial Chamber II, Case No ICC-02/05-01/09-302, 6 Jul 2017) (*Al Bashir-South Africa*) at 26 [68] [SC-18 at 614] and *Prosecutor v Al*

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Bashir (*Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir*) (ICC, Pre-Trial Chamber II, Case No. ICC-02/05-01/09-309, 11 Dec 2017) (*Al Bashir-Jordan*) at 11 [27] [SC-19 at 653].

[30] See Charter of the United Nations, Arts 25 and 39.

practice). Instead, he relies solely on the fact that since 2002 a large number of States have become parties to the Rome Statute.[31] That reliance is misplaced, for two reasons.

39. ***The effect of the Rome Statute on customary law:*** *First*, contrary to PS [42], the statements selected from *North Sea Continental Shelf* do not support the proposition that participation in the Rome Statute evidences a new rule of customary international law. Given the significant number of States that have *not* become parties to the Rome Statute (including those that signed but have opted not to ratify, which include the United States, China, Russia and India) (see SC-22 at 751), the necessary "very widespread and representative participation in the convention" including by "States whose interests were specially affected" does not exist.[32] The Plaintiff cannot establish the "indispensable requirement" that "within the period in question ... State practice ... should have been both extensive and virtually uniform".[33]

40. It is not surprising that the ratification of the Rome Statute by *some* States has not altered the content of customary international law, which is binding on *all* States (save for persistent objectors[34]). That is to be expected, because it is a fundamental premise of treaty law that a treaty is binding only between the parties.[35] Myanmar is not a party to the Rome Statute: RSC [25]. While the Plaintiff dismisses that fact (PS [21]), he is unable to explain how Australia's decision to accept treaty obligations owed to the other States parties to the Rome Statute can have any effect on the obligations that Australia owes *to Myanmar*. The implication of the submission appears to be that the immunity previously enjoyed by the Heads of State and foreign ministers of Myanmar (and the many other non-parties) were lost simply because *other* States ratified the Rome Statute. That is inconsistent with the consensual foundation of international law.[36]

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[31] The Rome Statute provides that States may consent to be bound by the treaty by ratification, acceptance or approval: Art 125. Signature alone does not make the State a party to the Rome Statute: cf PS [49].

[32] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3 (*North Sea Continental Shelf*) at 42 [72]-[73].

[33] *North Sea Continental Shelf* at 43 [74].

[34] *North Sea Continental Shelf* at 38-39 [63]; *Delimitation of the Maritime Boundary in the Gulf of Maine area, Merits, Judgment (Canada/United States of America)* [1984] ICJ Rep 246 at 292-293 [90].

[35] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*VCLT*), Article 34; *Case Concerning Certain German Interests in Polish Upper Silesia (Merits)* [1926] PCIJ Ser A No 7 at 29.

[36] *Case of the SS Lotus* [1927] PCIJ Ser A No 10 at 18.

41. *Articles 27 and 98: Secondly,* the terms of the Rome Statute are in fact consistent with the customary law immunity identified above, and therefore provide no basis to contend that the Rome Statute has altered customary international law. The Plaintiff's submissions to the contrary proceed upon an erroneous understanding of the meaning and intersection of Arts 27 and 98 of the Rome Statute (the full text of which is set out in PS [51] and PS [54] respectively).

42. Article 27 has two paragraphs, both of which apply only to proceedings before the ICC. By Art 27(1), a defence based on official capacity is expressly denied with respect to "criminal responsibility under the Statute" (meaning criminal responsibility determined by the ICC itself).[37] By Art 27(2), immunities arising from a person's official capacity "shall not bar the Court [ie the ICC itself] from exercising its jurisdiction".

43. The ICC has held that Art 27 *does* prevent States that are party to the Rome Statute from refusing to arrest and surrender a person *to the ICC* on the basis that the person might benefit from an immunity belonging to another State *that is a party to the Statute*.[38] That holding reflects the fact that, by ratifying the Rome Statute, States have agreed to its provisions, including any waiver of their rights under customary international law that may be engaged by a prosecution before the ICC.[39]

44. Importantly, however, the jurisprudence of the ICC denies the further proposition upon which the Plaintiff's argument depends, which is that Art 27 overrides the immunity owed to a State *not party to the Rome Statute*, whether the relevant prosecution is in the ICC or in a domestic court. The ICC has specifically concluded, in a series of decisions concerning Sudan (a non-party), that Art 27 has no effect on the rights of non-party States under international law in the domestic courts of another State (even if that State

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[37] *Prosecutor v Ruto and Sang (Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial)* (International Criminal Court, Trial Chamber, Case No ICC-01/09-01/11, 18 June 2013) at [66]-[69]. See also Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed, 2016) (*Schabas*) at 596; Triffterer and Ambos, *Commentary on the Rome Statute of the International Criminal Court* (3rd ed, 2016) at 1038, 1048 -1049; O'Keefe, *International Criminal Law* (2015) (*O'Keefe*) at 543-544 [14.40]-[14.42].

[38] *Al Bashir-South Africa* at 28-29 [76]-[79] [SC-18 at 616-617].

[39] Ibid at 29 [79]-[80] [SC-18 at 617].

is a party to the Rome Statute).[40] The Plaintiff's argument to the contrary is without support. Indeed, it is denied in the very academic article upon which he relies.[41]

45. Not only do the terms of Art 27 not support the Plaintiff's argument, but the terms of Art 98(1) deny it. Article 98(1) implicitly recognises that customary international law immunities apply even with respect to the serious offences the subject of the Rome Statute. It provides that the ICC "may not proceed" with a request for surrender or assistance if that would require the requested State "to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person ... of a third State", unless the ICC can first obtain the waiver of that immunity. The effect of the provision is to prohibit the ICC from asking a party to the Rome Statute to surrender a person if compliance with that request would place that party in breach of its obligations to afford immunity to the subject of the request.[42]

46. In practice, Art 98(1) means that the ICC cannot request a party to the Rome Statute (eg Australia) to surrender to the ICC the head of State or foreign minister of a State that is not a party to the Rome Statute (eg Myanmar), notwithstanding the fact that if the foreign minister was prosecuted *before the ICC* he or she would not be entitled to any immunity (by reason of Art 27(2)). Primacy is thereby accorded to ensuring that parties to the Rome Statute are not required to breach their customary law obligations. That view of the relationship between Arts 27 and 98 is supported by both the ICC and leading commentators.[43]

47. In circumstances where Art 98(1) expressly acknowledges that the ICC could not have requested Australia to surrender Ms Suu Kyi to the ICC (because this would cause Australia to breach its obligations to Myanmar), it is impossible to read the Rome Statute as authorising Australia to act in breach of those same obligations by

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[40] *Al Bashir-South Africa* at 30 [82]-[83] [SC-18 at 618]; *Al Bashir-Jordan* at 13-14 [33]-[35] [SC-19 at 655-656]; *Al Bashir-DRC* at 12 [26] [SC-17 at 581].

[41] "As a jurisdictional provision, Article 27 only deals with the effect (or, rather, the *absence* of effect) of an official position and related immunities on the jurisdiction of the Court *itself*. It does not regulate, nor purport to regulate, the effect of these immunities on the jurisdiction of any other court": Mettraux et al at 611 (footnotes omitted; emphasis in original). See also *Re Sharon and Yaron* (Belgian Court of Cassation), 12 February 2003 reported in (2003) 127 ILR 110 at 124.

[42] Which would be the case if the request related to officers of a non-*party* to the Rome Statute, but not if it related to officers of a party (by reason of the waiver analysis in [43] above).

[43] *Al Bashir-Jordan* at 13-14 [33]-[35] [SC-19 at 655-56]; *Al Bashir-DRC* at 12-13 [25]-[27] [SC-17 at 581-582]; Cassese, Gaeta, Jones, *The Rome Statute of the International Criminal Court – A Commentary* (OSAIL, 2002) at 996; Schabas at 600-604; O'Keefe at 547-548, [14.47].

prosecuting Ms Suu Kyi in its domestic courts, because that would read the Rome Statute as if it simultaneously both respected and overrode the relevant immunity.

48. The Plaintiff's contention that Art 98(1) does not apply to a person in the position of a foreign minister (PS [56]) finds no support in the jurisprudence of the ICC or in the leading commentaries, which do not doubt that the term "State or diplomatic immunity" is capable of applying to persons other than diplomats.[44] Nor is the Plaintiff's argument advanced by his reliance on the interpretative declaration made by Australia when ratifying the Rome Statute: nothing in its language supports that argument, and in any case, an interpretative declaration does not alter, let alone enlarge, the obligations assumed under a treaty.[45]

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49. For the above reasons, Question 2(a) must be answered "No".

Question 2(b) – Australia's obligations under the Rome Statute

50. The above submissions answer most of the plaintiff's arguments on Question 2(b). There is no inconsistency between Australia's obligations assumed under the Rome Statute and its obligation under customary international law to afford to Myanmar the benefit of absolute immunity in respect of criminal proceedings against Ms Suu Kyi. In the absence of any such inconsistency, it is unnecessary for the Court to address the Plaintiff's contention that treaty obligations "trump" inconsistent customary international law rules: PS [59]-[63].

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51. In any event, the Plaintiff's reliance (at PS [60]) on the putative hierarchy of sources does not mention the important context for Professor Lauterpacht's statement,[46] which is that the obligations assumed under a treaty that departs from customary international law affect only the legal relations between the *parties to the treaty*.[47] The suggested hierarchy of sources does not mean that it is possible for State A to contract out of its obligations owed to State C under customary international law by entering into a treaty

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[44] See O'Keefe at 568 [14.91]; Gaeta, "Official Capacity and Immunities" in Cassese et al, *The Rome Statute of the International Criminal Court – A Commentary* (2002) at 992. See also Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed, 2016) at 2124-2125 and the cases cited above at n 40.

[45] Unlike a reservation, an interpretive declaration does not purport to exclude or modify the legal effect of the treaty for that State: ILC, Guide to Practice on Reservations to Treaties, *Yearbook of the International Law Commission*, 1999, vol II, Part Two, Draft Guidelines on Reservations to Treaties at 97 [1.2], 107 [1.3].

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[46] Lauterpacht, *International Law: Volume 1, The General Works* (1970) at 87.

[47] Article 34 of the *VCLT*.

with State B. To permit such as result would be to subvert the principle that a treaty is binding only on the parties to it.[48] Yet this is precisely what the Plaintiff asks this Court to find has occurred in submitting that ratification of the Rome Statute has altered the legal obligations owed by Australia under customary international law to Myanmar: see PS [62]. That submission cannot be sustained. Question 2(b) should be answered "No".

Question 2(c) – Domestic law

52. The Plaintiff contends that the Defendant was not entitled, as a matter of Australian law, to refuse consent under s 268.121(1) on the basis of any immunity Ms Suu Kyi enjoyed under customary international law (PS [27]). He asserts that, notwithstanding the breadth of the discretion conferred by s 268.121(1), it was Parliament's intention that the Defendant be *prohibited* from considering Australia's obligations under customary international law. That would be a remarkable intention to ascribe to the Parliament. It would create the obvious prospect that Australia would breach its international obligations, because the Defendant would not be entitled to consider them. It would also deny the premise for the presumption that statutes do not violate international law.[49]

53. The Plaintiff points to nothing in the text or context of s 268.121 to support that result: cf PS [31]. Instead, his argument is based on the *Diplomatic Privileges and Immunities Act 1987* (Cth) (**Diplomatic Immunities Act**). The effect of that Act is to incorporate into Australia's domestic law certain immunities that are recognised under international law. The immunities in question are those accorded to "diplomatic agents" (as defined).[50] The operation of those immunities is also extended to foreign heads of State.[51] There is no equivalent incorporation into domestic law of Australia's obligations with respect to incumbent foreign ministers.

54. Where the above Acts apply, immunities that previously existed only as a matter of international law are enforceable in domestic courts. However, the Plaintiff's argument

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[48] The principle is encapsulated in the maxim *pacta tertiis nec nocent nec prosunt* (treaties neither harm nor benefit third parties): Crawford (ed), *Brownlie's Principles of Public International Law* (8th ed, 2012) at 384. By reason of this principle, the fact that Bangladesh is a party to the Rome Statute does not assist the Plaintiff (cf PS [63]), for Australia and Bangladesh could not agree, by treaty, to alter either of their obligations to Myanmar. See also *North Sea Continental Shelf* at 40 [65].

[49] See, eg, *Jumbunna Coal Mine NL v Victorian Coat Miners' Association* (1908) 6 CLR 309 at 363 (O'Connor J); *Re Maritime Union of Australia; Ex parte CSL Pacific Inc* (2003) 214 CLR 397 at 416 [45] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

[50] *Diplomatic Privileges and Immunities Act 1967* (Cth), s 7(1) and Schedule.

[51] By operation of s 36 of the *Foreign States Immunities Act 1985* (Cth), s 36(1).

appears to be that, by reason of the fact that Australia chose to incorporate only *some* aspects of its international obligations into domestic law, the unincorporated obligations must be disregarded for all purposes. There is no basis for that approach. Australia has many international obligations that have not been incorporated into domestic law. While that means those obligations are not enforceable in domestic courts, they remain binding on Australia as a matter of international law, and decision-makers are entitled to take them into account when making administrative decisions.

55. The Plaintiff's assertion that s 6 of the Diplomatic Immunities Act precludes any reference to customary international law when making a decision under s 268.121(1) of the Code is baseless: cf PS [35], [37]. *First*, s 6 expressly excludes certain statutes and the common law, but makes no mention of international law. *Second*, the operation of s 6 is confined to "matters dealt with by this Act". The Diplomatic Immunities Act says nothing about Australia's customary international law obligation with respect to incumbent foreign ministers. Accordingly, that obligation is not a "matter dealt with by that Act", and s 6 does not purport to exclude such reference to that immunity as may otherwise be appropriate. The appropriateness of interpreting s 6 in that way is confirmed by the Vienna Convention on Diplomatic Relations – large parts of which are incorporated into domestic law by s 7 of the Diplomatic Immunities Act – which recites that "the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention".[52] For the above reasons, Question 2(c) should be answered "No".

QUESTION 3 – PROCEDURAL FAIRNESS

56. *Procedural fairness not owed:* Section 268.121(2) provides that offences under Div 268 "may only be prosecuted in the name of the Attorney-General". This excludes the bringing of a private prosecution under s 13 of the *Crimes Act 1901* (Cth) (**Crimes Act**), as the Plaintiff purports to do (RSC [8]), because it reveals a contrary intention for the purposes of that section. The Plaintiff treats s 268.121(2) as a mere formality, pursuant to which the prosecution will be conducted by the Plaintiff, but formally in the

[52] Preamble to the *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), as set out in the Schedule to the *Diplomatic Privileges and Immunities Act 1967* (Cth). It also bears noting that the plaintiff's interpretation of Art 27 has the unlikely consequence that, by operation of the Diplomatic Immunities Act and the *FSI Act*, Australia will be incapable, under its domestic law, of complying with its Rome Statute obligations so far as a sitting head of State is concerned.

name of the Defendant (PS [23]). That understates the importance of the provision. Whatever may ordinarily be the position with respect to a private prosecutor, s 268.121(2) operates so that the Plaintiff has no right or interest in the prosecution of Ms Suu Kyi of a kind that can attract an entitlement to procedural fairness. In any event, quite independently of s 268.121(2), the breadth, character, and nature of the decision whether or not to consent to a prosecution are such that the authorities have recognised that no obligation to afford procedural fairness attaches.[53]

57. *No breach of procedural fairness*: Further or alternatively, the Plaintiff was afforded procedural fairness. If procedural fairness was owed, then at most the Plaintiff was entitled to have an opportunity to address the critical issue on which the decision would turn, and to respond to any adverse information that was credible, relevant or significant (that limb being irrelevant in this case).[54] The Plaintiff had that opportunity. His request for consent clearly identified Ms Suu Kyi as Myanmar's Foreign Minister: SC-2 at 8 [19] and 18 [84]. It included a detailed submission and was expressed to be informed by advice from counsel, including senior counsel: SC-2 at 19 [96]. That submission was provided to the defendant: RSC [12]; SC-3. It "addressed not only the factual basis for the charge, but also the relevant legal issues": PS [70]. It identified immunity as an issue that might be raised by Ms Suu Kyi (SC-2 at 7 [13]-[17]), recognising customary international law as a source of law bearing on the question. Had the plaintiff wished to advance the argument he now posits, he had ample opportunity to do so.

58. The fact that the plaintiff expressed a desire to make further submissions (SC-2 at 20 [97]) in the event that his request for consent was to be refused does not enlarge the scope of the procedural fairness he was owed. Procedural fairness does not require a decision-maker to disclose his or her mental processes or provisional views to comment before making the decision in question.[55] Nor does it require a decision-maker to give

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[53] *Oates* at 354; *Patrick Stevedores* (2012) 41 VR 81 at [130], [136]-[138]; *Commissioner of Police v Reid* (1989) 16 NSWLR 453 at 461.

[54] Eg *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, cited in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 161-162 [29] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

[55] *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 599 [9] (French CJ and Kiefel J); *SZBEL v Minister for Immigration* (2006) 228 CLR 152 at 161-162 [29]-[32] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ); *Re Minister for Immigration; Ex parte Palme* (2003) 216 CLR 212 at 219 [22] (Gleeson CJ, Gummow and Heydon JJ).

"forewarning of all possible reasons for failure",[56] or necessarily confer a right of reply.[57] This was all the more so given that the Defendant's decision did not turn on any factual information not available to the Plaintiff,[58] but on a question of law that could and should have been expected to be raised in the original submission in view of its detail and the underpinning legal assistance. For those reasons, there was no breach of procedural fairness, and Question 3 should be answered "No".

QUESTION 4 – RELIEF

59. If the Court were to answer the above questions in the plaintiff's favour it should nonetheless decline to grant the relief sought. The claims for both prohibition and an injunction in prayers 2 and 3 are expressed so as to prevent the Defendant from "*acting upon or giving effect to the decision*". However, once consent to the prosecution was refused, the Defendant's function was exhausted. As there is nothing that the Defendant needs to do to give effect his decision to refuse consent, there is nothing to prohibit or injunct.[59] More broadly, relief should be refused on a discretionary basis.[60] It would have no foreseeable practical consequence, as the prospect of the Plaintiff ever being able to prosecute Ms Suu Kyi in an Australian court is so remote as to be fanciful.

PART VI ESTIMATED TIME FOR ORAL ARGUMENT

60. The defendant estimates that 2.5 hours will be required to present his oral argument.

Dated: 18 February 2019

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[56] *Miah* at 69 (Gleeson and Hayne JJ).

[57] *Snedden* at 122 [222]; *Hala v Minister for Justice* (2015) 145 ALD 552 at 560 [42].

[58] See *Lam* at 19 [58] (McHugh and Gummow JJ).

[59] See eg *R v Spicer; Ex parte Waterside Workers Federation of Australia* (No 2) (1958) 100 CLR 324 at 341 (the Court); *Dimitrov v Supreme Court of Victoria* (2017) 92 ALJR 12; [2017] HCA 51 at [19] (Edelman J).

[60] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [5] (Gleeson CJ), 107 [54]-[58] (Gaudron and Gummow JJ), 136-137 [148]-[149] (Kirby J), 144 [172] (Hayne J); *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1192 [2]; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; *Gardner v Dairy Industry Authority (NSW)* (1977) 138 CLR 646.