IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M36 OF 2018**

BETWEEN: **DANIEL TAYLOR**
Plaintiff

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

PLAINTIFF'S SUBMISSIONS

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Filed on behalf of the Plaintiff
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PART I PUBLICATION

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

PART II ISSUES ARISING

2. The issues are identified in the questions set out in the revised special case (the **RSC**).

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. On 14 January 2019, the plaintiff issued a notice under s 78B of the *Judiciary Act 1903* (Cth) in relation to Question 1.

PART IV RELEVANT FACTS

4. On 16 March 2018, in accordance with Part 2.2 of the *Criminal Procedure Act 2009* (Vic) (the **CPA (Vic)**), the plaintiff lodged a charge-sheet and summons with a Registrar of the Magistrates Court alleging that Ms Aung San Suu Kyi (**Ms Kyi**) had committed a crime against humanity (deportation or forcible transfer of population) contrary to ss 268.11 and 268.115 of the *Criminal Code Act 1995* (Cth) (the **Criminal Code**). He did so in reliance on s 268.120(3) of the Criminal Code and s 13 of the *Crimes Act 1914* (Cth) [**RSC [8]**].[1]

5. Under s 268.121 of the Criminal Code, proceedings for an offence against s 268.11 must not be commenced or, where s 268.12(3) applies, continued without the consent of the defendant. The plaintiff sought that consent on 16 March 2018 [**RSC [10]**].

6. On or about 19 March 2018, the defendant refused to give his consent [**RSC [12]**]. He refused in accordance with the ministerial submission provided to him, which said that "incumbent heads of state, heads of government and foreign ministers all enjoy full immunity from foreign criminal proceedings under customary international law, including in relation to serious international crimes such as crimes against humanity" [**SC 3 p 23-43**]. It was said that "[t]his immunity renders [Ms Kyi] inviolable and immune from arrest, detention or being served with court proceedings" and that if the defendant were to give his consent then "these immunities would be breached and Australia would be in breach of its international obligations. The department therefore

[1] Section 6(4) of the CPA (Vic) required the Registrar, if satisfied that the charge discloses an offence known to law, to issue a summons to answer the charge.

recommends you refuse to provide your consent to the prosecution of [Ms Kyi]" [**SC 3 p 24-25**].

7. That is, the defendant made his decision on the basis that he was obliged to afford Ms Kyi as an incumbent foreign minister absolute immunity from Australia's domestic criminal jurisdiction in respect of crimes defined in the *Rome Statute of the International Criminal Court* (the **Rome Statute**) and enacted as offences under Australian law in Div 268 of the Criminal Code (the **Rome Statute Crimes**).

8. The defendant's decision was communicated to the Magistrates' Court and to the plaintiff on 19 March 2018 [**RSC [12]-[13]**].

9. By an Originating Application filed on 23 March 2018, the plaintiff challenged the defendant's refusal of consent in the original jurisdiction of this Court, on the basis that, in so refusing, the defendant committed a jurisdictional error.

10. On 27 March 2018, the Magistrates' Court agreed to defer the decision as to whether the proceeding sought to be issued by the plaintiff should be issued, pending resolution of this proceeding [**RSC [14]-[16]**].

PART V SUBMISSIONS

QUESTION ONE - REVIEWABILITY

11. When the defendant refused to consent to the commencement of proceedings against Ms Kyi he was making a decision under s 268.121 of the Criminal Code exercising the power conferred upon him under that section. Section 268.122 of the Criminal Code provides that, subject to any jurisdiction of the High Court under the Constitution, the decision of the defendant under s 268.121 is not otherwise reviewable. Nonetheless, the defendant has claimed that his exercise of statutory power is insusceptible of judicial review in this Court on the grounds advanced by the plaintiff. That contention should be rejected.

12. ***The defendant was exercising statutory power:*** The starting point is to recognise that the decision under challenge was one made in the exercise of statutory power. Section 268.121 of the Criminal Code confers a power to give consent, or to refuse to give consent, by prohibiting the commencement of a proceeding without such a (written) consent. If the section was not taken to confer that power no proceeding for an offence under Div 268 could ever be commenced, because there is no other conferral of such a

power elsewhere. That s 268.121 confers the power (and a concomitant decision-making function upon the defendant as to whether or not to exercise that power) is confirmed by s 268.122, which refers expressly to a decision by the defendant to give, or refuse to give, a consent under s 268.121.

13. The statutory power conferred by s 268.121 on the defendant as an officer of the Commonwealth exercising executive power of the Commonwealth under Ch II of the Constitution is expressly subject to "any" jurisdiction of the High Court under the Constitution.

14. ***It is a function of the Ch III judiciary to review the exercise of statutory power by the Ch II executive:*** In *Graham v Minister for Immigration and Border Protection*,[2] the majority restated some longstanding basal principles that warrant brief repetition in considering the first question reserved in the RSC. The majority observed that "the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process and through the grant, where appropriate, of judicial remedies".[3] The majority quoted Fullagar J's well-known observation in *Australian Communist Party v Commonwealth*[4] that "in our system the principle of *Marbury v Madison* is accepted as axiomatic".[5] And the majority quoted with approval the statement in *Plaintiff S157/2002 v Commonwealth*[6] that "[w]ithin the limits of its legislative capacity, which are themselves set by the Constitution, Parliament may enact the law to which officers of the Commonwealth must conform" but "it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted".[7]

15. These principles describe the inalienable constitutional function of the Ch III judiciary to enforce the limits of statutory power, and they recognise that this function serves as a bulwark against "islands of power immune from supervision and restraint".[8] It is in

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2 (2017) 91 ALJR 890.

3 (2017) 91 ALJR 890 at 901 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

4 (1951) 83 CLR 1 at 262-263.

5 (2017) 91 ALJR 890 at 901 [40] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

6 (2003) 211 CLR 476 at 482-483 [5] (Gleeson CJ). See also at 513-514 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

7 (2017) 91 ALJR 890 at 902 [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

8 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

recognition of this judicial function that it has been said that "the notion of 'unbridled discretion' has no place in the Australian universe of discourse".[9]

16. Contrary to the defendant's attempt to arrogate to himself an unreviewable statutory power, the Criminal Code itself proceeds on the orthodox assumption that a decision whether or not to give consent to the commencement of proceedings pursuant to s 268.121 is susceptible to judicial review in this Court. That assumption underpins the privative clause in s 268.122 of the Criminal Code.

17. ***No useful analogy to the reviewability of prosecutorial discretions:*** It has often been said that decisions by or on behalf of the Crown in the prosecution of private individuals for alleged criminal offences will not usually be subject to judicial review. French CJ explained why this is so in *Likiardopoulos v The Queen*,[10] referring to (i) "the importance of maintaining the reality and perception of the impartiality of the judicial process", (ii) "the importance of maintaining the separation of the executive power in relation to prosecutorial decisions and the judicial power to hear and determine criminal proceedings" and (iii) "the width of prosecutorial discretions generally and, related to that width, the variety of factors which may legitimately inform the exercise of those discretions".

18. However, even where the exercise of discretion by or on behalf of the Crown is concerned, the Court has not entirely vacated the field. In *Likiardopoulos*, French CJ expressly reserved his opinion on "the question whether there is any statutory power or discretion of which it can be said that, as a matter of principle, it is insusceptible of judicial review".[11] This may be because of "the statutory office of Director of Public Prosecutions which now exists in all States and Territories and in the Commonwealth" and "the fact that some discretions are conferred by statute".[12] Being statutory powers, the principles identified at [14] and [15] above are engaged.

19. Even in the United Kingdom, which lacks Australia's written constitution, there remains some scope for judicial review of a decision to institute (or decline to institute) criminal

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9 *Wotton v Queensland* (2012) 246 CLR 1 at 10 [10] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also at 14 [23] where the principle stated by Dixon J in *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 629-630 was cited with approval: "complete freedom from legal control over a statutory discretion cannot be given under the Constitution."

10 (2012) 247 CLR 265 at 269 [2].

11 (2012) 247 CLR 265 at 269-270 [4].

12 *Maxwell v The Queen* (1996) 184 CLR 501 at 534 (Gaudron and Gummow JJ).

proceedings. Courts have set aside decisions not to prosecute on grounds not dissimilar to traditional conceptions of jurisdictional error on the application of persons other than the defendant. In *R v Director of Public Prosecutions; Ex parte C*,[13] for example, a complainant successfully sought judicial review of the decision not to charge her husband with buggery. The complainant argued that the prosecutor who made the decision failed to have regard to the relevant prosecutorial policy. That argument was accepted, the decision was set aside and the matter remitted to the Director for further consideration. There are other examples.[14]

20. But, there is a further reason why any attempt by the defendant to analogise to the judicial reluctance (not abdication of function) to review prosecutorial discretions must be rejected. The policy reasons that sustain judicial reluctance to interfere in prosecutorial discretions do not apply to the present field of discourse, because:

    (a) the defendant is not, when exercising that power, doing so in the role of a prosecutor;[15] and

    (b) the plaintiff is not the putative defendant to the criminal charges.

21. The defendant's decision was made in the exercise of a statutory power and concerned whether or not to consent to charges proposed by the plaintiff. The Commonwealth Director, who has the power to take over or carry on any prosecution instituted by another person (other than the defendant) under s 6(1)(b) of the *Director of Public Prosecutions Act 1983* (Cth) (the **DPP Act**), may take over the prosecution and continue to prosecute, or decline to carry the prosecution further (see ss 6(4) and (5) of the DPP Act).[16] This emphasises the point that the defendant is not, when exercising this statutory power, carrying out any of the traditional functions of a prosecutor.

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13 (1995) 1 Cr App R 136.

14 See, eg, *R v Director of Public Prosecutions; Ex parte Jones* [2000] Crim LR 858; *R v Director of Public Prosecutions; Ex parte Manning* [2001] QB 330; *R v Director of Public Prosecutions; Ex parte Treadaway* (Unreported, Divisional Court, 31 July 1997); *R (on the application of Joseph) v Director of Public Prosecutions* [2001] Crim LR 489; *R (on the application of Dennis) v Director of Public Prosecutions* [2007] All ER 43; *Brady, re Judicial Review* [2018] NICA 20.

15 Cf *Director of Public Prosecutions v Patrick Stevedores Holdings Pty Ltd* (2012) 41 VR 81 at 108 [121] (Maxwell P, Weinberg JA and Ferguson AJA).

16 See also the ministerial submission [**SC-3 at p 25**] where it is stated that the Department is working with the DPP to "explore the earliest point at which the [DPP] could intervene in this matter".

22. By way of comparison, cases where the courts have been reluctant to intervene related to decisions of the prosecutor on behalf of the Crown to institute or commence proceedings in a particular form (that is by the laying of a particular charge against a particular accused),[17] decisions of the prosecutor on behalf of the Crown as to how a proceeding will be conducted[18] and decisions as to the exercise of a "prosecutorial discretion" as opposed to a statutory discretion of the kind conferred under s 268.121.[19]

23. The sensitivity which the courts show to the different roles of the executive and the judiciary in criminal trials tends in favour of judicial review in the present context, because the separation of powers calls for judicial oversight of the exercise of functions conferred upon the executive by the legislature. The reality and perception of judicial independence in the criminal process does not require deference because there is, as yet, no criminal proceeding commenced and it will not be the defendant who conducts any future criminal proceeding although it will formally be in his name (s 268.121(2)).

24. Secondly, it is the plaintiff who seeks review of that decision, not the putative defendant (an accused).[20] An accused has the opportunity to pursue his or her rights within the process of the proceedings as instituted. Permitting an accused to bring collateral proceedings has the potential to fragment those criminal proceedings. By contrast, a person in the position of the plaintiff does not have any opportunity to seek review of the defendant's decision. Unlike an accused, the plaintiff has no other recourse to challenge the defendant's decision other than by judicial review proceedings. By analogy, the unavailability of any other mechanism for persons aggrieved by a decision is a reason why courts in the United Kingdom more readily review decisions not to prosecute compared to decisions to prosecute.[21]

25. The sensitivity which the courts show to not being involved in the decision whether to bring a proceeding (and how it might be brought) (the second factor identified by French CJ, set out at [17] above), and to preside over the resolution of that proceeding (the second factor identified by French CJ, set out at [17] above), do not apply here: the

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17 See, eg, *Brebner v Bruce* (1950) 82 CLR 161; *Barton v The Queen* (1980) 147 CLR 75; *Maxwell v The Queen* (1996) 184 CLR 501; *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566; *Likiardopoulos* (2012) 247 CLR 265.

18 See, eg, *Whitehorn v The Queen* (1983) 152 CLR 657.

19 See, eg, *R v Toohey* (1981) 151 CLR 170 at 217, 220 (Mason J).

20 Cf *Barton v The Queen* (1950) 147 CLR 75 at 107 (Murphy J).

21 *Brady, re Judicial Review* [2018] NICA 20 at [93]-[93]; *R v Killick* [2012] 1 Cr App R 10 at [48].

dispute is as between the plaintiff and the defendant, not an accused and the person bringing the charge against him or her. This Court is not involved in the resolution of any criminal proceeding and would not be if any such proceeding was brought.

QUESTION TWO – CONSTRUCTIVE FAILURE/MISUNDERSTANDING OF LAW

26. The Parliament is presumed to have intended that the defendant would exercise his discretionary power to give, or to refuse to give, consent reasonably and on a correct understanding and application of the applicable law.[22] In proceeding on the basis that he was obliged to afford an incumbent foreign minister absolute immunity from Australia's domestic criminal jurisdiction in respect of Rome Statute Crimes, the defendant misunderstood the law, and therefore committed jurisdictional error. The misunderstanding for which the plaintiff contends is put in three ways.

(a) Australia's domestic law – Question 2(c)

27. The binding law that the defendant was to apply was the domestic law of the Commonwealth. Under that law, foreign ministers have no immunity from criminal prosecution. For the defendant to proceed otherwise was to misunderstand the law he was to apply, and to constructively fail to exercise his statutory power. If this question is answered in the plaintiff's favour it will be unnecessary to answer Questions 2(a) and 2(b).

28. The Rome Statute entered into force on 1 July 2002 [**RSC [21]**]. Paragraph 10 of the preamble and arts 1 and 17(1)(a) and (b) give primacy in respect of Rome Statute Crimes to the complementary national criminal jurisdictions of state parties over the jurisdiction conferred by the Rome Statute on the International Criminal Court (the **ICC**).

29. Australia, when depositing its instrument of ratification on 1 July 2002, made a declaration the terms of which were stated to have "full effect in Australian law". Those terms reaffirmed the primacy of Australia's domestic criminal jurisdiction in respect of Rome Statute Crimes and contained the additional declaration that:

> Australia further declares its understanding that the [Rome Statute Crimes] will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law.[23]

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22 See, eg, *Shrestha v Minister for Immigration and Border Protection* (2018) 92 ALJR 798 at 800 [2]; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 35 [33]; *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319 at 356 [89].

23 **RSC [24]**; **SCB** at pp 754-755.

30. Australia implemented the Rome Statute into domestic law by enacting the *International Criminal Court Act 2002* (Cth) (the **ICC Act**), which commenced on 28 June 2002, and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) (the **ICC Consequential Act**), which amended the Criminal Code from 26 September 2002 by adding Ch 8, which contained the new Div 268 **[RSC [30]]**.

31. The ICC Act affirmed the primacy of Australian law and Australia's right to exercise its jurisdiction with respect to the Rome Statute Crimes, which were enacted in Div 268 of the Criminal Code.[24] The Explanatory Memorandum for the Bill which became the ICC Consequential Act stated that Div 268 was being enacted in accordance with the principle of complementarity in the Rome Statute, to ensure that the Rome Statute Crimes were offences under Australian law.[25]

32. Section 268.120 of the Criminal Code provides that Div 268 is not intended to exclude or limit any other law of the Commonwealth.

33. Relevantly, the *Diplomatic Privileges and Immunities Act 1967* (Cth) (the **Diplomatic Immunities Act**) confers immunity from criminal prosecution and process on diplomatic agents (head of the mission and a member of diplomatic staff of the mission) *inter alia* under arts 29 and 31 of the *Vienna Convention on Diplomatic Relations*. Those immunities apply to Rome Statute Crimes by reason of s 268.120 of the Criminal Code and s 7 of the Diplomatic Immunities Act.

34. Further, s 36 of the *Foreign State Immunities Act 1985* (Cth) extends the immunities granted to the head of a diplomatic mission under the Diplomatic Immunities Act to the head of a foreign state and to the spouse of that person. However, for the purposes of this proceeding the defendant does not contend that Ms Kyi is entitled to any immunity of a head of state or otherwise under the Diplomatic Immunities Act [**RSC [18]**].

35. Finally, s 6 of the Diplomatic Immunities Act provides that the Act shall operate to the exclusion of any other Imperial, Commonwealth or State law, or any rule of the common law that deals with a matter dealt with by that Act. The effect of s 6 is that any rule of customary international law is excluded.

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[24] See Explanatory Memorandum, International Criminal Court Bill 2002 (Cth) at 2-4; ICC Act, s 3.

[25] See Explanatory Memorandum, International Criminal Code (Consequential Amendments) Bill 2002 (Cth) at 1-3.

36. ***Dualism:*** The "dualism of international law and Australian domestic law" is "long accepted".[26] Quoting Sir William Holdsworth, Dixon J observed in *Chow Hung Ching v The King* that "[i]n each case in which the question arises the court must consider whether the particular rule of international law has been received into, and so become a source of, English law".[27] It is well established that "[t]he provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into Australian municipal law".[28]

37. The difficult issue as to when customary international law might become part of the common law of Australia[29] by transformation or incorporation does not arise where the customary international law is inconsistent with Australian statutory law.[30] The general immunity of a Foreign Minister from domestic criminal prosecution in Australia asserted to exist under customary international law, based on the *Arrest Warrant Case* (see [43] below and following), is inconsistent with the more limited and carefully prescribed immunities granted under the Commonwealth legislation referred to in [33] and [35] above and, in any event, is excluded by s 6 of the Diplomatic Immunities Act.

38. The relevant terms of the ministerial submission acted upon by the defendant are set out at [6] above. The submission erroneously treats the asserted customary international law immunity as an immunity the defendant is under a duty to give effect to when exercising the power conferred under s 268.121. The statement in the submission that the giving of consent would breach the asserted immunity was erroneous: not only was there no such duty under Australian law, but s 6 of the Diplomatic Privileges Act operated to specifically exclude the immunity the submission asserted the defendant was obliged to observe. Consequently, no consideration was given whatsoever to the statutory exclusion of the very immunity asserted in the ministerial submission.

39. The Rome Statute was entered into by Australia without reservation and in its declaration and legislation Australia confirmed the "primacy" of Australia's criminal jurisdiction in respect of the Rome Statute Crimes In these circumstances, the defendant cannot, as he

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26 *Tajjour v New South Wales* (2014) 254 CLR 508 at 554 [48] (French CJ).

27 (1948) 77 CLR 449 at 477.

28 *Tajjour v New South Wales* (2014) 254 CLR 508 at 567 [96] (Hayne J).

29 See *Chow Chi Cheung v R* (1948) 77 CLR 449 at 477-8 per Dixon J.

30 *Chung Chi Cheung v The King* [1939] AC 160 at 167-168, *Polites v Commonwealth* (1945) 70 CLR 60 at 80-81; *Keyn v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 at [151] (Lord Mance).

purported to do, bypass or ignore the exclusion under domestic law of the immunity asserted in the submission. Further, the defendant cannot dispense with the applicable law and act as if he was obliged to accord some other immunity to Ms Kyi. To do so is akin to executive dispensation with the limits of statutory law enacted by the Parliament.

40. The error of law set out above resulted in the discretion conferred by s 268.121 miscarrying and in the defendant not exercising the discretion conferred upon him in accordance with law.

(b) Customary international law – Question 2(a)

41. ***Basic principles:*** It is as well to summarise some basic principles that apply to identifying customary international law. Customary international law is not static.[31] To be a rule of customary international law, there must be (i) widespread and consistent repetition of the act by States (**state practice**) and (ii) that state practice must occur out of a sense of obligation (***opinio juris***).[32] In that way, a rule of customary international law is a reflection of the positive identified actions of states undertaken because they perceive or accept they are under a duty to so act.

42. In the *North Sea Continental Shelf, (W Germany v Denmark, W Germany v. Netherlands)* the International Court of Justice held that the signing of a convention or treaty by a wide group of countries is, in and of itself, evidence of the creation of customary legal norms. The Court stated that a "widespread and representative participation in the convention might suffice of itself" to transform what had been a purely conventional rule binding only upon those states that have signed the relevant convention into a customary rule of international law binding on all.[33] The Court further explained that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule".[34] Thus, according to the International Court of Justice, a treaty provision adopted

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31 See *V872/00A v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 57 at [28] (Hill J). See, also *Fisheries Jurisdiction Case (United Kingdom v Iceland)* [1974] ICJ Reports 3.

32 *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 29 at [27]; *North Sea Continental Shelf, (W Germany v Denmark, W Germany v. Netherlands)* [1969] ICJ Rep 3 p. 44 at [77]. See, most recently, Dugard J, du Plessis M, Mulawa T and Tladi D, *Dugard's International Law: A South African Perspective* (5th ed, 2019, Juta and Company (Pty) Ltd) at 89-95.

33 *North Sea Continental Shelf, (W Germany v. Denmark, W Germany v. Netherlands)* [1969] ICJ Rep 3 p. 42 at [73].

34 *North Sea Continental Shelf, (W Germany v. Denmark, W Germany v. Netherlands)* [1969] ICJ Rep 3 p. 43 at [74].

by a sufficiently representative sample of states can qualify as a norm of customary international law.

43. ***Arrest Warrant case:*** Critical among the materials set out at **RSC [17]** is the decision of the International Court of Justice in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (the **Arrest Warrant case**).[35] The majority in that case[36] held that the existence of legal instruments creating various international criminal tribunals that have removed immunities for persons accused of international crimes (such as war crimes or crimes against humanity)[37] did not enable the Court to conclude that, in respect of those crimes, any exception to the immunity of Ministers for Foreign Affairs exists at customary international law in national courts.

44. The issue before the Court in the *Arrest Warrant Case* was not the same as that which arises here. The issue in that case was whether there was any rule excluding the operation of immunities in relation to a request for judicial assistance received from another jurisdiction. The case concerned Belgium's power to request assistance from other jurisdictions to execute an arrest warrant issued in Belgium against the Minister of Foreign Affairs of the Democratic Republic of the Congo (Mr Yerodia), and to extradite him to Belgium to be tried on charges of crimes against humanity and war crimes. At no time was Mr Yerodia in Belgium. Relevantly, it has been observed that "had the Congolese Minister been on Belgian territory at the time [the arrest warrant was issued], customary international law would not have provided a bar to his arrest or subsequent trial before a Belgian court."[38]

45. The judgment in the Arrest Warrant case was made on 14 February 2002. It does not identify the content of customary international law in relation to the domestic prosecution of Rome Statute Crimes as at 19 March 2018, when the defendant made the decision which is now under challenge. The Arrest Warrant case also pre-dates the Rome Statute coming into force [**RSC [21]**], and pre-dates the majority of ratifications of the Rome

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35 [2002] ICJ 1.

36 Which has been strongly criticised. See, for example: *Dugard's International Law: A South African Perspective*, 5th edition (2019), Juta and Company (Pty) Ltd, Dugard J, du Plessis M, Mulawa T and Tladi D at pp 364 – 367.

37 See *Charter of the International Military Tribunal of Nuremberg*, art 7; *Charter of the International Military Tribunal of Tokyo*, art 6; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, art 7 para 2; *Statute of the International Criminal Tribunal for Rwanda*, art 6, para 2; *Statute of the International Criminal Court*, art 27.

38 Mettraux et al, "Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa" (2018) 18 *International Criminal Law Review* 577 at 595-596.

Statute. Thus, the Arrest Warrant case cannot be relied upon as defining customary international law on immunities to be applied by a state party in a domestic prosecution of Rome Statute Crimes (the primary jurisdiction) as at 19 March 2018.

46. The plaintiff submits that, as at 19 March 2018, the principles set out at [41]-[42] above must be applied to establish whether there is a rule of customary international law consistent with the asserted immunity, ie. that such an immunity applies to Rome Statute Crimes when they are prosecuted in domestic courts.

47. The plaintiff's contention is that the signing and/or ratification of the Rome Statute by 138 States as at 19 March 2018 establishes that there has been an extensive practice of
10 States renouncing their right to invoke the asserted customary international law immunity because, as these submissions go on to explain, art 27 removes all immunities.

48. ***The Rome Statute:*** Since the Arrest Warrant case was decided, the Rome Statute has come into force. As at 19 March 2018, there were 123 states party to the statute [**RSC [22]**]. A further 31 States had signed but not ratified the statute.[39] Australia is a party to the Rome Statute, having signed the Rome Statute on 9 December 1998 and deposited its instrument of ratification on 1 July 2002 [**RSC-23; SCB** at **pp 754-755**].

49. Pursuant to art 120, no reservations are permitted to the Rome Statute. The result is that each of the 154 ratifying or signing States accepts every article in the Rome Statute, including art 27.

20 50. Like any other international treaty, the Rome Statute falls to be interpreted by applying the *Vienna Convention on the Law of Treaties*. "[M]eaning is ascertained by reference to the ordinary meaning of the words in their context and in the light of the object and purpose of the Convention, and by reference to the materials comprising context and referred to in art 31(2) and (3) of the Vienna Convention".[40] Relevantly, that context includes that the charges were sought to be brought in an Australian court pursuant to Australian legislation; this is not a case of a request for assistance from a foreign state.

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39 Table of Signatories: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en

40 *Maloney v Queensland* (2013) 252 CLR 168 at 255-256 [235] (Bell J). See also *Macoun v Federal Commissioner of Taxation* (2015) 257 CLR 519 at 539 [69] (French CJ, Bell, Gageler, Nettle and Gordon JJ).

51. ***Article 27:*** The relevant provisions for present purposes are to be found in art 27, which provides:

> **Irrelevance of official capacity**
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> (1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

52. In terms, art 27(2) removes immunity for foreign ministers (and other officials) in proceedings before the ICC. But, as explained at [28] above, the Rome Statute also provides for the complementary criminal jurisdictions of domestic courts of state parties in respect of Rome Statute Crimes. Under the Rome Statute, the primary forum for prosecuting Rome Statute Crimes is within the domestic courts of state parties. The manner in which the primary domestic jurisdiction of the state parties may be facilitated and exercised can be seen from how that was achieved by Australia as set out in [29]-[31] above.

53. Article 27 is set out in Pt III of the Rome Statute under the heading "General Principles of criminal law", which are be applied in respect of Rome Statute Crimes. When an article in Pt III refers to a principle to be applied under the Statute, the principle applies to the jurisdiction of the ICC and to the complementary jurisdiction provided for by the Statute (eg. art 27(1)). Where the Statute provides for the principle to be applied by the ICC then it is to operate in respect of the ICC (eg. art 27(2)).

54. Part IX of the Rome Statute concerns international cooperation with, and giving judicial assistance to, the ICC. Article 98, which appears in Pt IX, is as follows:

> **Cooperation with respect to waiver of immunity and consent to surrender**
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> (1) The Court may not proceed with a request for surrender or assistance which 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 or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
>
> (2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations

> under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

55. Article 98 is directed only at the technical aspects of requests made by the ICC to state parties for surrender of individuals or assistance to the ICC. It merely allows third party States, that is non-state parties, to assert an obligation under international law in response to a request by the ICC to a state party for surrender or assistance where the ICC is seeking to investigate or prosecute someone. Article 98 has no application to exercises of domestic jurisdiction in respect of Rome Statute Crimes and it does not undermine art 27, which explicitly removes all immunities attaching to official capacity. The differing operation of arts 27 and 98 reflect the circumstances in which different immunities can operate. Article 27 removes all immunities as a bar or defence to prosecutions, whereas art 98 allows for the assertion of immunities as a bar or defence to the exercise of executive power by way of assistance to another state (for example the execution of an arrest warrant, or the provision of other assistance).[41]

56. In any event, the reference to "State and diplomatic immunity of a person or property of a third State" in art 98(1) does not include immunities "based on official capacity" for government officials (such as a Minister for Foreign Affairs) referred to in art 27. State immunity is directed at and possessed by the state itself, a state entity, or a separate entity acting in the exercise of sovereign authority. This includes entities such as a state owner of an airline or bank. Accordingly, even if art 98 interacted with art 27 in some way, it could have no application to Ms Kyi as a Foreign Minister and would only interact with art 27(2) not art 27(1) (see [53] above).

57. ***The effect of the Rome Statute on customary international law:*** The act of signing and/or ratifying the Rome Statute is evidence of state practice for the purposes of establishing the existence and content of any rule of customary international law. The widespread adoption of the Rome Statute, and in particular art 27 properly construed, establishes that there is a basis for concluding that state practice as at 19 March 2018 does not recognise the asserted immunity as an immunity in respect of Rome Statute

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41 That distinction can also be found in the requirements for mutual assistance in criminal matters. The considerations relating to the provision of such assistance by the receiving state are governed by rules different to those that govern the exercise of domestic criminal jurisdiction in both the requesting and receiving states. See also Mettraux et al, "Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa" (2018) 18 *International Criminal Law Review* 577.

Crimes. It has been argued that since at least the end of the Second World War the possibility of relying on an immunity as a defence or jurisdictional bar to charges such as the Rome Statute Crimes has been "systematically excluded",[42] for both domestic and international tribunals.[43]

(c) Australia's treaty obligations – Question 2(b)

58. As explained at [52]-[53] above, art 27(1) of the Rome Statute contemplates the removal of the asserted immunity for Rome Statute Crimes in domestic criminal proceedings. Accordingly, whatever the position as a matter of customary international law, as a matter of international law Australia is not obliged to recognise the immunity of foreign ministers such as Ms Kyi for Rome Statute Crimes. Not only was that a necessary consequence of Australia's declaration but it also follows from a proper consideration of the relationship between customary international law and treaties.

59. Article 38.1 of the Statute of the International Court of Justice identifies four sources of international law, the first of which is "international conventions" and the second of which is "international custom". Article 38.1 does not, however, expressly purport to establish a hierarchy between these particular sources of international law and the existence of such a hierarchy has been the subject of much academic debate.

60. Professor Hersch Lauterpacht has explained that issues between states "are determined, in the first instance, by their agreement as expressed in treaties ... treaties must be considered as ranking first in the hierarchical order of the sources of international law".[44] While this is for practical reasons in part, in that "there may be a hierarchy of sources in terms of ease of identification",[45] there is a theoretical or doctrinal foundation for it also. Accepting that "treaties, custom and general principles are all equally capable of generating legal norms of comparable weight",[46] an obligation of a state to abide by treaty obligations voluntarily entered into by it effectively trumps any inconsistent customary

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42 See Mettraux et al, "Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa" (2018) 18 *International Criminal Law Review* 577 at 591, 4.1.

43 See Mettraux et al, "Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa" (2018) 18 *International Criminal Law Review* 577 at 595.

44 *International Law: Volume 1, The General Works* (1970) at 87.

45 Hilary Charlesworth, "Law-making and Sources" in James Crawford and Martti Koskenniemi (eds), *International Law* (2012) 187 at 190.

46 Hilary Charlesworth, "Law-making and Sources" in James Crawford and Martti Koskenniemi (eds), *International Law* (2012) 187 at 190.

international law because states that are parties to a treaty are obliged, by customary international law itself, to conduct themselves in a manner consistent with the treaty.

61. For example, Professor Paul Reuter observed that "treaties are binding by virtue not of a treaty but of customary rules. In that sense, international custom is even more central than the law of treaties since it is the very pillar on which treaties rest".[47] And Hans Kelsen explained that treaties are "valid" because of "the general norm which obligates the States to behave in conformity with the treaties they have concluded, a norm commonly expressed by the phrase *pacta sunt servanda*".[48] Article 26 of the *Vienna Convention on the Law of Treaties* itself, entitled *Pacta sunt servanda*, declares that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

62. The consequence for present purposes is this: by ratifying the Rome Statute without reservation (see art 120) Australia took upon itself, as a matter of international obligation, not to recognise immunity based on official capacity for Rome Statute Crimes in domestic criminal proceedings. Having agreed to do so, to subject a foreign minister to domestic criminal proceedings for a Rome Statute Crime would not result in Australia breaching its obligations sourced in custom, because any such custom has already been subordinated to the custom requiring Australia to abide by its treaty obligations. In failing to recognise this, the defendant misunderstood the law he purported to apply, and committed jurisdictional error.

63. Bangladesh is a party to the Rome Statute and, as is clear from **RSC [27]**, the alleged deportation of Rohingya people from Myanmar to Bangladesh, if established, falls within the Rome Statute as the crime against humanity of deportation.[49] Thus, in respect of obligations owed as between the parties to the Rome Statute, art 27(1) applies to the plaintiff's prosecution and in those circumstances it is not to the point that Myanmar is not a party to the Rome Statute.

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47 *Introduction to the Law of Treaties* (José Mico and Peter Haggenmacher trans, 2012) at 29.

48 *General Theory of Law and State* (1945) at 369.

49 Cf. the crime the subject of the charge-sheet and Summons being "Crime against humanity – deportation or forcible transfer of population" under ss 268.11 and 268.15 of the Criminal Code: see RSC at [8].

QUESTION THREE – PROCEDURAL FAIRNESS

64. The third question is whether the defendant failed to afford the plaintiff procedural fairness in refusing consent on the basis of Ms Kyi's claimed immunity without giving the plaintiff notice of, or any opportunity to respond to, that issue. The plaintiff submits that he was denied procedural fairness.

65. ***The defendant was obliged to afford the plaintiff procedural fairness:*** The starting point is this Court's unanimous judgment in *Minister for Immigration and Border Protection v SZSSJ*,[50] which explained that "a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to that individual" subject to a clear legislative intention to the contrary.

66. The defendant's decision in this case affected the plaintiff's entitlement to bring a private prosecution against Ms Kyi. That entitlement has a long common law history.[51] It now has a statutory foundation in s 13 of the *Crimes Act 1914* (Cth), which provides that:

> Unless the contrary intention appears in the Act or regulation creating the offence, any person may:
>
> (a) institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth; or
>
> (b) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction.[52]

67. The defendant's decision whether or not to grant consent operates as a gateway condition upon the usual entitlement of a person to bring a private prosecution, and that decision affects, in a direct and substantive manner, that entitlement: see [4] above. The plaintiff had sought to exercise his right to institute a private prosecution. That right was extinguished by the defendant's refusal to consent, purportedly in the exercise of a statutory discretion.

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50 (2016) 259 CLR 180 at 205 [75].

51 *Grant v Thompson* (1895) 72 LT 264 at 265 (Wills J); *Gouriet v Union of Post Office Workers* [1978] AC 735 at 477 (Lord Wilberforce); *Phelps v Western Mining Corporation Ltd* (1978) 20 ALR 183 at 189-190 (Deane J); *Truth About Motorways v Macquarie* (2000) 200 CLR 591 at [2] (Gleeson CJ and McHugh J).

52 See also *Brebner v Bruce* (1950) 82 CLR 161 at 169 (McTiernan J).

68. Section 268.121 of the Criminal Code does not evince the contrary intention necessary to displace s 13 of the *Crimes Act 1914* (Cth). Although s 268.121(1) requires consent to commence proceedings, s 268.121(3) specifically contemplates certain preliminary steps being taken (including the laying of a charge) without any such consent. Nor does s 268.121 evince any intention to exclude procedural fairness altogether. Such an intention must be clear, in accordance with the principle of legality.[53] Lower court decisions[54] holding that an accused need not be afforded procedural fairness before consent to prosecution is given are distinguishable because the plaintiff is the person who sought consent, not the person at risk of prosecution should consent be given. Unlike an accused, the plaintiff is seeking the exercise of statutory power in his favour, and the plaintiff, unlike an accused, does not otherwise have recourse to the judicial process (in the course of an ensuing criminal proceeding) to safeguard his interest in the defendant's decision.

69. In accordance with the principle stated in *SZSSJ*, the defendant was thus obliged to afford the plaintiff procedural fairness.

70. ***The plaintiff was denied procedural fairness:*** In seeking the defendant's consent, the plaintiff provided him with a detailed paper headed "Request for consent to prosecution".[55] That document addressed not only the factual basis for the charge, but also the relevant legal issues, including that head of state immunity is not a bar to the prosecution.[56] There is no dispute that, despite his request to be given an opportunity to any materials or matters that the defendant regarded as adverse to the request,[57] the plaintiff was not provided with any opportunity to address the basis on which the defendant refused consent.

71. Moreover, as explained above, the defendant's decision departed from the position that applies under Australian domestic law and reflected in the declaration made by Australia upon ratifying the Rome Statute. The legal and practical effect of the defendant's decision was not to give primacy to Australia's domestic judicial system, because the decision stalled the domestic criminal proceeding which the plaintiff had sought to set in train.

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53 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [14]-[15].

54 *Commissioner of Police v Reid* (1989) 16 NSWLR 453; *DPP v Patrick Stevedores Holdings Pty Ltd; Victorian WorkCover Authority v Patrick Stevedores Holdings Pty Ltd* (2012) 41 VR 81.

55 **RSC-2**.

56 **RSC-2** at [13]-[17], p7.

57 **RSC-2** at [97], p20.

The plaintiff was not provided with any opportunity to comment on that departure from the previously stated position. Had that opportunity been provided the plaintiff would have been able to put to the defendant the matters relied upon in these submissions.

QUESTION FOUR - RELIEF

72. If jurisdictional error is shown, the plaintiff submits that there is no reason why the constitutional writs should not issue so as to quash the defendant's decision, prohibit him from acting upon it and requiring him to make a new decision according to law.

73. If the defendant's decision is quashed then the Attorney-General at the relevant time,, acting upon a correct understanding of the law and according procedural fairness, may or may not give consent. There is no agreed fact, and no basis to infer, that the person acting as Attorney-General at the relevant time would not in any circumstance give her or his consent. The situation in *Plaintiff M68 v Commonwealth* is instructive.[58] Declaratory relief was available because it was possible that the plaintiff would be detained in the future, albeit there was no agreed fact that the plaintiff would be so detained. Declaratory relief had continued utility because of the existence of that possibility. Likewise here. Relief from this Court will have an immediate consequence for the plaintiff's application to have a charge and summons issued by the Magistrates' Court of Victoria. The possibility that the proceeding may result in the actual prosecution of Ms Kyi cannot be excluded.

74. Whether Ms Kyi could be extradited to Australia from Myanmar goes to the utility of the criminal process against her, not the utility of the present relief sought in this Court. In any event, the possibility of extradition is not far-fetched, even though Australia has no extradition treaty with Myanmar it can nonetheless request extradition. In any event, Australia does have extradition relationships with 137 countries, a large number of whom have also ratified the Rome Statute. Australia may make a request for extradition to one of those countries should Ms Kyi enter any one of them.

PART VI ORDERS SOUGHT

75. The questions reserved in the RSC should be answered as follows:

(1) No.

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58 (2016) 257 CLR 42.

(2) Yes.

(3) Unnecessary to answer (but otherwise, yes).

(4) Certiorari should issue to quash the decision of the defendant, prohibition should issue to prohibit any effect being given to it, and mandamus should issue to require him to consider whether to give his consent in accordance with law.

(5) The defendant.

PART VII ESTIMATE

76. The plaintiff estimates that he will require three hours, inclusive of submissions in reply.

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