

28 February 2019

The Treasury
Langston Crescent
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Australia

Dear Assistant Minister for Treasury and Finance

2019-2020 Pre-Budget Submission

The Australian Centre for International Justice is pleased to make this submission and proposal to The Treasury's 2019-2020 Pre-Budget Submission process.

Our submission is focused on addressing budget action relevant to developing and enhancing Australia's investigations capacity in atrocity or international crimes. Making resources available in this area could provide an immediate and discernible difference to the lives of Australians, Australian residents and people around the world who have survived atrocity crimes. In addition, it ensures Australia will not be a safe haven for perpetrators of atrocity crimes and would be essential to ensuring Australia meets its international obligations to prosecute and add to Australia's contribution to ending the impunity gap.

To achieve this, we recommend that Australia establish a Specialised Investigations Unit to investigate war crimes, genocide, crimes against humanity and torture.

About the Australian Centre for International Justice

The Australian Centre for International Justice is a newly established legal centre with the objective of developing Australia's universal jurisdiction practice by providing access to justice in Australia to survivors and victims of serious human rights violations.

We are an independent non-profit legal centre dedicated to seeking justice and accountability for victims and survivors of serious human rights violations. We work towards developing Australia's role in investigating, prosecuting, and providing remedies for these violations. We work with affected communities and partners locally and abroad in the global fight to end the impunity of those responsible for these violations. Our work is informed by the values of justice, accountability, human rights, dignity, courage and solidarity.

1. Australia's universal jurisdiction framework

Universal jurisdiction refers to the process by which individuals responsible for atrocity crimes can be the subject of investigations or prosecutions before national domestic processes and courts irrespective of the nationalities of the perpetrator and victim, and irrespective of the territory on which the crime took place.

This extraterritorial application of enforcing egregious violations against human rights and dignity evolved as a result of the international community's horror and resolve to ensure that perpetrators of the worst crimes do not go unpunished, that they are held accountable for their actions, that they will be denied safe haven in third countries and that survivors and the families of the victims are able to seek justice and redress.

Despite Australia's implementation of international crimes offences in the Commonwealth Criminal Code,¹ its general support for the principle of universal jurisdiction arising from its goal of ending impunity² and possessing the legal framework to prosecute these crimes, the practical implementation of investigations and prosecutions in Australia is still in its infancy. There have been only limited allegations, investigations and minimal international coordination of strategy. Further, it is arguable that these investigations have been unsatisfactory and failed to meet minimum international standards.³

In addition to possessing a well-developed and functional legal system, Australia is one of a few countries in the Western world that does not have a specialised investigations unit, or a whole of government approach or policy, that focuses specifically on the investigations of international crimes.

2. Current AFP capacity

Currently the Australian Federal Police (AFP) has the mandate to investigate crimes of an international nature, which include Commonwealth criminal offences of genocide; war crimes; crimes against humanity and torture.

The AFP's Case Categorisation and Prioritisation Model (CCPM) was published in 2016 as a guide to show how the AFP prioritises matters and referrals to investigate. The CCPM states at the outset that whilst the AFP has the primary law enforcement responsibility for investigating criminal offences against Commonwealth laws, the number of such offences identified or reported far exceeds its investigational capacity. It therefore must ensure that its limited resources are directed to the matters of highest priority. This is done through a combination of elements to consider including: the type of incident and its impact on the Australian society; the importance to both the client and the AFP in terms of the roles assigned to them by the Government and Ministerial direction and the resources required by the AFP to undertake the matter.⁴

The CCPM provides no indication that it prioritises investigations of international crimes and AFP personnel have limited training in this area with no specialised investigators whose primary focus is in this area.⁵ In addition, there is nothing on the AFP's website and in the Annual Reports of the last decade to suggest it prioritises international crimes.

3. Historical background – Special Investigations Unit

In the past, Australia did have a Special Investigations Unit (SIU). It was established in 1987 following a review by the Menzies government into the presence of alleged World War II Nazi war criminals living in Australia and was placed within the Attorney-General's Department. These allegations were largely thrust into the public spotlight because of the work of

investigative journalist Mark Aarons. The work of the SIU lasted until 1992 and it conducted 871 investigations.⁶ It resulted in three prosecutions but no convictions and cost approximately \$15.4 million. Following the SIU's disbandment it was succeeded by the War Crimes Prosecution Support Unit which was staffed by former SIU personnel and provided further support to the Commonwealth Director of Public Prosecutions in the prosecutions that were eventually launched as a result of the investigations. This Unit was shut down in January 1994.⁷

In 2002 the Department of Immigration established the War Crimes Screening Unit, however no referrals from this Unit have led to any criminal prosecutions for international crimes, because since 2002 there have not been any prosecutions conducted in atrocity crimes in Australia.⁸ Rather investigations by this unit result in visa refusals on character grounds which can ultimately end up being reviewed at the Administrative Appeals Tribunal, a body not adept or experienced in dealing with underlying criminal matters and where the rules of evidence do not apply.⁹

It is unclear why the appetite for continuing the work of the SIU faded, where abroad in similar countries like Canada, it intensified. Canada also established a special inquiry in 1987 following similar allegations of Nazi war criminals resident there and it continued until the early 1990s and resulted in four charges and no convictions. Canada's response following the conclusion of the inquiry led to broadening its approach.¹⁰ Canada now has a dedicated cross-government approach and resources to investigate international crimes, discussed briefly below.

4. Lessons from the SIU and other units abroad

Australia can effectively break from the legacy of the disbandment of the SIU. Any challenges the SIU had are due to plausible explanations relating to the difficulty of obtaining evidence so many decades after the event of the crime. It is asserted by Mark Ierace SC, former NSW Senior Public Defender and former Prosecutor of the International Criminal Tribunal for the former Yugoslavia, in his policy proposal for an Australian War Crimes Unit, that "had there been a unit established in the 1950s to proactively investigate credible information of WWII war crimes suspects residing in Australia, there would be little doubt that it would have been successful."¹¹ These barriers and reasons should not prevent a new unit from being created. In fact, it is time that Australia establish a unit so that these barriers cannot be used as a reason to prevent investigations in the future.

Australian experts and practitioners in international criminal law have written extensively in the past in relation to the requirements of a committed and concerted policy approach from Australia, specifically because of the notion that Australia is a safe haven for war crimes suspects. The consistent policy approaches they have called for include: looking into the significant gaps in Federal criminal legislation and policy for crimes occurring before Australia's ratification of the Rome Statute of the International Criminal Court (ICC),¹² and for a specialised investigations unit. Gideon Boas and Pascale Chifflet have stated that any approach can only be realised through systematic and ongoing responses, and that "one of the most pertinent lessons from the post-1980s war crimes prosecutions is the requirement to act promptly in the face of such allegations."¹³ Professor Tim McCormack, Dean of the

University of Tasmania's Faculty of Law and Special Advisor to the Prosecutor of the ICC, has stated that it would be his priority to rectify the indifference of "successive Australian Governments to the presence of alleged war criminals in our nation" and reinstate the SIU and ensure it is allocated with financial resources to rebuild the impressive investigatory expertise that the SIU had developed.¹⁴

Australia lags behind the rest of the developed Western world in dedicating special resources to international crimes units. The United States set up the Office of Special Investigations in 1979.¹⁵ Other specialised units were set up in the Netherlands in 1998,¹⁶ Germany in 2009,¹⁷ France in 2010,¹⁸ and in Sweden in 2008.¹⁹ Norway, Belgium and Denmark also have dedicated units.

International coordination efforts with other international crimes units abroad will be key. For example, the United States' OSI and Canada's Crimes Against Humanity and War Crimes Section located within its Department of Justice, are both Observer States of the European Union's Genocide Network, a branch of the European Union's Judicial Cooperation Unit (Eurojust), which was created to ensure close cooperation between national authorities in investigating and prosecuting war crimes cases.

Canada's War Crimes Program for example receives an estimated annual budget of \$15.4million.²⁰

Australia is already successful in its cooperation with other types of international crimes abroad, whether its relevant for terrorism offences, drug offences, other organised crimes, human trafficking and slavery offences and child exploitation offences. For example, the AFP is providing significant personnel and resources to the international MH17 investigation efforts.

5. Challenges and complexities of investigations

The investigation of international crimes presents numerous difficulties and challenges. Including that:

- the crimes were usually committed many years ago and outside Australia's territory;
- the crime scenes may no longer exist or are different to the scene at the time of the crime;
- the individuals required to be interviewed are usually in the countries where the crimes took place or have sought refuge in other countries meaning that major parts of the investigation must be conducted abroad;
- the crimes are usually committed in the context of an armed conflict (though not always for crimes against humanity) and the conflict may still be ongoing; and
- a contextual analysis of the crime requires complex evaluation of a set of facts and legal analysis.

However, none of the above should dissuade investigators where there is specialist expertise and that expertise is connected to other international cooperation and coordination efforts and strategies. More significantly, it has not dissuaded other countries from establishing specialist units.

6. The imperative and opportunity

Australia's commitment to international justice in terms of its general support and financial support to international criminal courts and tribunals is to be commended. For example, it provided AUD\$9.1 million to the International Criminal Court in the 2018-2019 financial year.²¹ However Australia is consistently absent on the global stage in actively investigating and prosecuting atrocity crimes.

There are many reasons why Australia should seriously consider creating a specialised investigations unit, some of these include:

- Australia has international obligations to investigate and prosecute;²²
- the current investigative structure is unsatisfactory and poorly resourced and trained;
- Australia is a migrant country and despite rigorous immigration and border security screening policies, these are not foolproof methods of ensuring perpetrators are denied safe haven in Australia;²³
- Australia is home to recently arrived refugee communities who are survivors of atrocity crimes. Most recently they include: Syrian, Yazidi, Rohingya, South Sudanese, and Tamils from Sri Lanka among others. There are no current practical avenues for persons to seek justice and redress;
- there is a growing awareness that the challenges of atrocity crimes cannot be addressed by the creation of *ad hoc* tribunals or the International Criminal Court alone and there is a shared responsibility and obligations on countries to prosecute; and
- universal jurisdiction litigation is increasing around the world and is widely seen as the only recourse for cases where political, legal and practical reasons prevent access to justice at the ICC or in other such *ad hoc* tribunals.²⁴

7. The need for a specialised focus

It is widely accepted that investigations of this nature for universal jurisdiction cases require specialised focus and expertise with well-trained investigators and committed resources. The investigations of international crimes differ from ordinary domestic criminal cases and “require skilled police investigators and prosecutors to handle the myriad practical and legal challenges.”²⁵ In addition, *ad hoc* approaches as is currently attended to by the AFP are unlikely to be successful, because police investigators might find the challenges daunting,²⁶ in addition to the important fact that any investigation that is conducted in this current approach is unlikely to meet minimum standards on the duty to investigate.

Further the German unit's investigations and prosecutorial policy has pursued cases even where there is no immediate prospect that a suspect will be in Germany through the concept of “structural investigations” where investigations can begin on specific situations without the need at the outset to identify perpetrators. Recently this model has led to successful

arrests of senior members of the Syrian intelligence apparatus involved in the systematic use of torture in Syrian prisons and the issuing of an arrest warrant for the head of the navy intelligence.²⁷ We would encourage any Australian unit to include scope of this type of investigative and prosecutorial policy.²⁸

Human Rights Watch has stated that a key benefit of specialised units is that they deliver depth of experience and over time show that the quality of investigations improves and the time it takes to carry out investigations decreases. Most importantly it also reflects the political will of the country of combating impunity for atrocity crimes. It also states that “[i]n addition to having motivated and experienced staff and specifically earmarked budgets, the decision to create specialised war crimes units often reflects heightened political will within the countries in question to fight impunity for the gravest international crimes.”²⁹

Another useful function of a specialised investigations unit would be to support, and coordinate with, the various international and non-governmental organisations who work on collection of evidence, documentation, and analysis, including the recently established UN International, Impartial and Independent Mechanisms on Syria and Myanmar.

Civil society groups in Europe who are most active in critical and constructive engagement with their respective war crimes units and litigate on the basis of universal jurisdiction, state that “War Crimes Units [WCUs] are the concrete expression of the states’ determination to fight impunity. They show that justice is within reach when political actors commit sufficient resources and expertise - and WCUs definitely need both to fulfil their titanic mission.”³⁰ It is imperative that Australia steps up to this challenge and ensures it acts on its goal of ending impunity.

8. Recommendations

- Australia should establish a multi-disciplinary specialist investigations unit; and
- Ensure that this unit is well resourced, trained and be provided with ongoing adequate training.

Thank you for considering our submission. Please contact Rawan Arraf at info@acij.org.au if you have any questions or comments.

Sincerely

AUSTRALIAN CENTRE FOR INTERNATIONAL JUSTICE

Rawan Arraf
Director

Endnotes

- ¹ For the offences of the Rome Statute of the International Criminal Court, codified in Divisions 268 with effect from 28 June 2002; and torture, Division 274, with effect from 13 April 2010.
- ² The Permanent Mission of Australia to the United Nations, *Australian Views on the Scope and Application of the Principle of Universal Jurisdiction*, 3 May 2016. Available at: http://www.un.org/en/ga/sixth/71/universal_jurisdiction/australia_e.pdf.
- ³ See for example, criticism of one such investigation: Rights and Accountability in Development (RAID UK), 'Ten Years On: Still No Justice for Kilwa Victims,' 11 February 2015. Available at: <http://www.raid-uk.org/sites/default/files/kilwa-10-years.pdf>, and in, Human Rights Law Centre, *Nowhere to Turn: Addressing Australian Corporate Abuses Overseas*, 2018. Available at: <https://www.hrlc.org.au/reports/nowhere-to-turn>.
- ⁴ Australian Federal Police, *The Case Categorisation and Prioritisation Model: Guidance for AFP Clients*, 1 July 2016. Available at: <https://www.afp.gov.au/what-we-do/operational-priorities/case-categorisation-and-prioritisation-model>.
- ⁵ The AFP failed to respond in time to an FOI request but earlier indications suggest that this assertion is correct. See for example, Mark Corcoran, 'Lack of War Crimes Investigations 'A Scandal'', *ABC*, 2 April 2012. Available at: <https://www.abc.net.au/news/2012-03-30/experts-slam-lack-of-war-crimes-investigations/3922954>; and Fergus Hanson, 'War Crimes Laws are Flawed and Problematic', *The Sydney Morning Herald*, 8 March 2010. Available at: <https://www.smh.com.au/politics/federal/war-crimes-laws-are-flawed-and-problematic-20100308-ps3w.html>.
- ⁶ See, Gideon Boas and Pascale Chifflet, 'Suspected War Criminals in Australia: Law and Policy,' *Melbourne University Law Review*, 2016, (40:46).
- ⁷ See, Fergus Hanson, *Confronting Reality Responding to War Criminals Living in Australia*, Lowy Institute for International Policy, Policy Brief, February 2009. Available at: <https://archive.lowyinstitute.org/publications/confronting-reality-responding-war-criminals-living-australia>.
- ⁸ Response received from an FOI request, from the Commonwealth Director of Public Prosecutions, April 2018.
- ⁹ Boas and Chifflet, above n 6, from p 63.
- ¹⁰ Hanson, above n 7, from p 10.
- ¹¹ Mark Ierace SC, *Proposal: An Australian War Crimes Unit*, 9 March 2014.
- ¹² See for example, Mark Ierace SC, above n 11. ACIJ will make further submissions to other relevant Government bodies in relation to these gaps in the near future.
- ¹³ Boas and Chifflet, above n 6, p 86.
- ¹⁴ Tim McCormack, 'If I Were Attorney-General', *Human Rights Law Centre*, Bulletin Number 50, June 2010.
- ¹⁵ Office of Special Investigations official website: <https://www.justice.gov/criminal-hrsp>.
- ¹⁶ International Crimes Units of the National Prosecutor's Office, official website: <https://www.om.nl/algemeen/english/>
- ¹⁷ Central Unit for the Fight Against War Crimes, official website: https://www.bka.de/EN/OurTasks/Remit/CentralAgency/ZBKV/zbkv_node.html. Germany did have two previous war crimes units created in 1958 and again in 1993.
- ¹⁸ The National Office for Investigation of Crimes Against Humanity, official website: <https://www.defense.gouv.fr/fre/actualites/operations/l-office-central-de-lutte-contre-les-crimes-contre-l-humanite-les-genocides-et-les-crimes-de-guerre-oclh>.
- ¹⁹ Swedish Police Authority War Crimes Unit, official website: <https://polisen.se/en/victims-of-crime/war-crime---swedish-police-efforts/>.
- ²⁰ See, Department of Justice Canada, *13th Report Canada's Program on Crimes Against Humanity and War Crimes 2011–2015*, (2016). Available at: <https://www.justice.gc.ca/eng/rp-pr/cj-jp/wc-cdg/wc20112015-cdg20112015/wc20112015-cdg20112015.pdf>.
- ²¹ International Criminal Court, Assembly of States Parties, *Report of the Committee on Budget and Finance on the work of its thirty-first session*, 29 October 2018, Doc. No.: ICC-ASP/17/15. Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-15-ENG.pdf.
- ²² These obligations arise out of Australia's ratification of the Four Geneva Conventions; The Convention Against Torture; the Genocide Convention and others.
- ²³ In the first two months of this year alone, requests for extradition of two suspects arose: one pertaining to a Serbian national alleged to have been involved in serious war crimes in Croatia during the Bosnian war and is the subject of investigations by Croatian police and is likely to face an extradition request in the near future; and second, a woman from Chile who is suspected of being involved in abductions and torture under the Pinochet regime is facing extradition to Chile.
- ²⁴ For example, in Syria, see, Thierry Cruvellier, 'European Justice Strikes on Crimes in Syria' *JusticeInfo.Net*, 21 February 2019. Available at: <https://www.justiceinfo.net/en/tribunals/national-tribunals/40383-european-justice-strikes-on-crimes-in-syria.html>.
- ²⁵ Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, 2014. Available at: <https://www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and>.
- ²⁶ HRW, *The Long Arm of Justice*, above n 25, at p 5.

²⁷ European Centre for Constitutional and Human Rights (ECCHR), Press Release, *Torture in Syria: Another Milestone in the Fight Against Impunity*, 13 February 2019. Available at:

https://www.ecchr.eu/fileadmin/user_upload/PR_Syria_torture_Arrest_FINAL.pdf.

²⁸ See, HRW, *The Long Arm of Justice*, above n 25 at p 5 and also, Wolfgang Kaleck and Patrick Kroker, 'Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?', *Journal of International Criminal Justice*, 16 (2018).

²⁹ HRW, *The Long Arm of Justice*, above n 25, at p 3.

³⁰ TRIAL International, *Make Way for Justice: Universal Jurisdiction Review # 4*, 2018. Available at: <https://trialinternational.org/wp-content/uploads/2018/03/UJAR-Make-way-for-Justice-2018.pdf>