

POLICY PAPER

# Challenging Impunity

Why Australia Needs a Permanent,  
Specialised International Crimes Unit



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The Australian Centre for International Justice is an independent, not-for-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.

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## Executive summary

In a world marked by conflict, unrest and serious human rights abuses, survivor communities and the civil society organisations that represent them continue to seek avenues for accountability and justice. One such avenue is international criminal justice, which allows for the investigation and prosecution of perpetrators suspected of committing grave international crimes such as genocide, crimes against humanity, war crimes and torture.

Despite the availability of international criminal law as an accountability mechanism, far too often there is an impunity gap in respect of perpetrators who evade justice in the territories in which atrocities have been committed, and are not subject to the jurisdiction of international courts and tribunals.

Is there a way for this impunity gap to be addressed? Yes: through the investigation and prosecution of international crimes, within domestic legal systems, under the principle of universal jurisdiction and other forms of extraterritorial jurisdiction.

This policy paper calls upon the Australian government to demonstrate the political will to address impunity for international crimes. It builds upon the past work of the Australian Centre for International Justice ('ACIJ'),<sup>1</sup> as well as numerous other organisations, lawyers, academics and journalists,<sup>2</sup> to advocate for the establishment of a permanent, specialised international crimes unit in Australia. The establishment and work of such a unit would help to offer a pathway for justice and accountability within Australia and our region for survivor communities of egregious international crimes, namely war crimes, genocide, crimes against humanity and torture. It would also enable Australia to contribute to the growing cooperation between national investigative and prosecutorial units across the world, which have been able to rely on universal jurisdiction – that is, the assertion of jurisdiction over certain criminal offences regardless of the place where they were committed or the nationality of the perpetrator or the victim – and other forms of extraterritorial jurisdiction to bring to trial perpetrators of international crimes.

The paper begins by highlighting the need for domestic investigations of international crimes, given the impunity gap created in situations where atrocities have occurred in places where the State is unwilling or unable to conduct its own investigations. It also notes the limited resources and jurisdiction of the International Criminal Court ('ICC'), and explains that the ICC is built upon the concept of complementarity, a cornerstone of the ICC's system of international justice which recognises the primacy of domestic jurisdiction over international crimes.

The paper then outlines the growth in domestic investigations and prosecutions of international crimes, particularly in the European Union ('EU'). These investigations and prosecutions have proceeded on the basis of universal jurisdiction or other forms of extraterritorial jurisdiction relating to the nationality of the accused or victim. The paper explores how this growth has been accompanied by an increase in the number of countries that have established permanent, specialised units dedicated to investigating and prosecuting international crimes using domestic legal processes. Specialised units are more effective in investigating and prosecuting international crimes because they attract, retain and develop the resources and multidisciplinary expertise to address the complexities inherent in these crimes, and have the ability to benefit from robust cooperation with international networks and organisations.

The paper then examines the international and domestic legal frameworks that provide for Australia's jurisdiction over international crimes. Australia is subject to a number of international obligations which require it, in certain situations, to investigate and prosecute perpetrators of international crimes. Australia has codified these obligations within the *Criminal Code Act 1995* (Cth) Schedule ('*Commonwealth Criminal Code*'), which creates the offences of genocide, crimes against humanity, war crimes and torture under Australian law and allows for Australia to assert jurisdiction regardless of where the offences occurred or whether there is any connection to Australia through the nationality of the accused or victim.

Australia's legal frameworks to address international crimes are robust, but its current institutional capacity is weak. By outlining Australia's chequered history of investigating and prosecuting international crimes – which has involved the use of military tribunals to prosecute Japanese military personnel after World War II, the establishment of ad hoc units to investigate crimes by alleged Nazi war criminals and the conduct of Australia's armed forces in Afghanistan, and investigative failures of generalist units within the Australian Federal Police ('AFP') – this paper highlights how Australia has inconsistently provided accountability mechanisms for international crimes. The challenges associated with ad hoc or generalist units are manifold: they are more susceptible to political whims, must deal with the negative effects of the passage of time, waste resources in their creation and disbandment, are unable to grow and retain expertise, lack institutional networks and cooperation, must compete with other priorities, and ultimately contribute to Australia becoming a safe haven for perpetrators of international crimes.

All of these challenges could be addressed through the establishment of a permanent, specialised international crimes unit in Australia. Thus, the final section of the paper identifies and draws upon best practice approaches and expert reviews of specialised units to put forward recommendations for the Australian government, to aid in its consideration of the essential elements of an effective international crimes unit.

Combatting impunity for international crimes requires concerted efforts by the international community, using a combination of appropriate mechanisms. Australia can and should play a meaningful role in these efforts. The establishment of a permanent, specialised international crimes unit in Australia represents an opportunity to do so.

# Glossary

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**International crimes:** this policy paper refers to ‘international crimes’ and occasionally to ‘egregious international crimes’, ‘serious international crimes’ or ‘atrocities crimes’. For the purposes of this paper, these terms refer to those atrocity crimes which have been criminalised under federal Australian law pursuant to Divisions 268 and 274 of the *Commonwealth Criminal Code*; namely, genocide, crimes against humanity, war crimes and torture.

**Genocide:** certain acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

**Crimes against humanity:** certain acts committed as part of a widespread or systematic attack directed against any civilian population.

**War crimes:** certain acts committed during an international or non-international armed conflict, in violation of the *Geneva Conventions* and other laws and customs applicable to international and non-international armed conflicts.

**Torture:** any acts by which severe pain or suffering is intentionally inflicted on a person, to punish, obtain information, intimidate or coerce or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

**Universal jurisdiction:** a legal concept that allows States to investigate and prosecute certain criminal offences regardless of the place where they were committed and the nationality of the perpetrator or the victim. Universal jurisdiction applies to egregious international crimes, including those listed above. It arises from the idea that certain crimes are so grave that they affect the international community as a whole and that perpetrators of these crimes should not benefit from impunity. This policy paper often refers to universal jurisdiction alongside other forms of extraterritorial jurisdiction, including those dependent on the nationality of the accused or victim, as accountability through international criminal justice may be achieved by utilising these different forms of jurisdiction.

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# Acronyms

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|             |  |
|-------------|--|
| <b>ACIJ</b> | Australian Centre for International Justice  |
| <b>ADF</b>  | Australian Defence Force                     |
| <b>AFP</b>  | Australian Federal Police                    |
| <b>CDPP</b> | Commonwealth Director of Public Prosecutions |
| <b>CTSI</b> | Counter Terrorism and Special Investigations |
| <b>EU</b>   | European Union                               |
| <b>ICC</b>  | International Criminal Court                 |
| <b>OSI</b>  | Office of the Special Investigator           |
| <b>SIU</b>  | Special Investigations Unit                  |

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## Key recommendations

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- 1 The Australian government should establish a permanent, specialised unit to investigate international crimes.
  - 2 The unit should be a stand-alone agency under the auspices of the Attorney-General's Department; as an immediate, interim measure, the creation of a specialised unit within the AFP should also be considered.
  - 3 The unit should have the multidisciplinary expertise necessary to investigate international crimes.
  - 4 The unit should cooperate and collaborate with international agencies, national authorities and civil society organisations.
  - 5 The unit should be independent from government, as far as possible, and be adequately resourced.
  - 6 The unit should adopt strategies to ensure transparency and outreach to affected communities.
  - 7 Personnel within the unit should understand and enable victim and witness rights, participation, protection and support.
  - 8 Personnel within the unit should be appropriately trained in, and practice in, a language, culture, gender and trauma informed manner.
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## Why is a Permanent, Specialised International Crimes Unit Needed?

### Domestic prosecutions for international crimes: an important means to combat impunity

People who are subjected to violence and oppression are in many cases burdened with an additional injury – having to witness the ongoing impunity of their tormentors, who move around the world freely and whose actions appear to have few consequences. Impunity is a common feature in conflict and post-conflict situations across the globe. A gap between existing laws and enforcement of those laws – due in part to national and international power dynamics – means that the majority of perpetrators of international crimes face no legal repercussions for their actions.

In the case of international crimes, it is not always possible for investigations and prosecutions to occur in the country where the acts have occurred. This may be due to the unwillingness of the State apparatus to investigate or prosecute because of State involvement/ acquiescence in the crimes themselves. It might also be due to the absence of a functioning judicial system following conflict, or there being no possibility to extradite suspects.<sup>3</sup> Investigations and prosecutions outside the territory in which international crimes were perpetrated, undertaken on the basis of universal or other forms of extraterritorial jurisdiction, can overcome the difficulties inherent in seeking accountability in States where conflict and human rights violations are ongoing. In such cases, ‘universal jurisdiction may be the only path to justice for victims’.<sup>4</sup>

The ICC has jurisdiction over international crimes in certain circumstances but it is a court of last resort. The *Rome Statute* of the ICC sets out the principle of complementarity, which emphasises the

primacy of domestic investigations and prosecutions.<sup>5</sup> Further, the ICC has both jurisdictional and practical limitations which means it cannot prosecute international crimes in every part of the world. Generally speaking, the Court can only assert jurisdiction over core international crimes where the crimes were committed by a State Party national, or in the territory of a State Party or the State has made a declaration accepting the exercise of jurisdiction, or where the Prosecutor has received a referral from the United Nations Security Council.<sup>6</sup> Even where the ICC could exercise jurisdiction over a certain situation, it may not always do so. To date, the Office of the Prosecutor has received more than 12,000 communications from individuals, groups or States regarding alleged crimes falling under the jurisdiction of the Court,<sup>7</sup> an incredible and overwhelming number that simply cannot be dealt with given the limited financial resources allocated to the Court. Usually, the Court only focuses on a small number of key perpetrators.<sup>8</sup> The ICC relies upon States taking a rigorous approach to the investigation and prosecution of international crimes at the national level. Prosecutions in domestic courts under the principle of universal jurisdiction can provide an important avenue for accountability, instead of or in addition to ICC prosecutions.

TRIAL International, in collaboration with other civil society and non-government organisations focused on addressing impunity for international crimes, releases a report each year, tracking the efforts made globally to harness universal and extraterritorial jurisdiction to achieve justice through national criminal investigations and prosecutions. Their 2023 Annual Review<sup>9</sup> highlights the way in which these national investigations and prosecutions have become a powerful and increasingly relied-upon method of accountability. For example, in Germany, there have been multiple convictions of perpetrators from the Syrian regime’s military intelligence service, since an investigation was opened by the German Federal Public Prosecutor in 2011.<sup>10</sup>



The number of universal jurisdiction and extraterritorial cases continues to grow. In 2021, there was a total of 125 international criminal charges before domestic courts, with 17 accused on trial and 15 convictions.<sup>11</sup> In 2022, there was a total of 91 international criminal charges, with 57 individuals awaiting trial and 23 convictions.<sup>12</sup> The EU Genocide Network has identified that in relation to its Member States, there has been a 44% increase in new universal jurisdiction and extraterritorial cases since 2016;<sup>13</sup> each year, EU Member States conduct an increasing number of investigations and prosecutions for core international crimes.<sup>14</sup>

## Specialised units to investigate international crimes: a key requirement for successful investigations and prosecutions

### The increase in specialised units to investigate international crimes

The growth in universal jurisdiction cases in domestic courts has been accompanied and facilitated by an increase in the number of countries that have established specialised units focused on investigating and prosecuting international crimes. In March 2022, the International Center for Transitional Justice released a report which contains an audit of all the specialised international crimes units that had been established globally. The report found that at least 23 countries have some form of a specialised unit or units, whether that be a ‘new-generation’ unit (a unit established to deal with core international crimes), a ‘historical’ unit (a unit focusing on human rights violations committed within a certain territory or in relation to a specific conflict or set of events, having a limited mandate) or a ‘mixed-mandate’ unit (units established to deal with serious international crimes, but also other offences such as organised crime, terrorism, serious corruption and transnational crime).<sup>15</sup>

Within the EU, where the growth in universal jurisdiction cases has been most prominent, Belgium, Germany, France, the Netherlands and Sweden have specialised, independent units in both investigatory and prosecutorial bodies.<sup>16</sup> Outside of the EU, the United States, Canada and the UK all have some form of specialised investigatory unit to deal with serious international crimes.<sup>17</sup>

Some notable, recent examples of universal jurisdiction investigations and prosecutions by States which have specialised investigatory units include:

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In **Sweden**, the investigation, prosecution and conviction of a former Iranian prosecutor involved in the mass execution of prisoners in Iran in 1988.<sup>18</sup>

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In **Germany**, the structural investigation into international crimes committed by Syrian military intelligence services, which has so far resulted in the conviction of two former members of the Syrian intelligence services, the ongoing prosecution of a former doctor who had worked for the Syrian intelligence services, and the issuing of an arrest warrant against the former head of one of the Syrian intelligence services, Jamil Hassan.<sup>19</sup>

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In the **United Kingdom**, the arrest and investigation by the Metropolitan Police War Crimes team of an individual suspected of the war crime of murder of a Sri Lankan Tamil journalist in 2000, 22 years after the crime occurred in Sri Lanka.<sup>20</sup>

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In **France**, the conviction of a former Liberian rebel commander for complicity in crimes against humanity for acts committed during Liberia’s first civil war more than 25 years ago,<sup>21</sup> and the issuing of three international arrest warrants against three senior advisers to Syria’s Bashar al-Assad for complicity in crimes against humanity and war crimes.<sup>22</sup>

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A demonstration outside the courthouse where former Syrian military intelligence officer Anwar R stood on trial in Koblenz, western Germany.  
Credit: Mohamed Badarne.

# Universal jurisdiction and the use of domestic legal systems to address the impunity gap for international crimes in Syria

The ongoing conflict in Syria is complex and longstanding, and has had a devastating impact on Syria's civilian population, including as a result of serious human rights violations, crimes against humanity and war crimes. Accountability within Syria itself is impossible while President Bashar al-Assad, whose regime is responsible for many of these international crimes, remains in power.<sup>23</sup> Similarly, there is little prospect of accountability for these crimes at the international level; Syria is not a State Party to the ICC and a referral to the ICC from the United Nations Security Council was blocked by Russia and China in 2015.<sup>24</sup>

Investigation of these international crimes within domestic legal systems utilising the principle of universal jurisdiction is an important means to address this impunity gap. Investigations into international crimes committed in Syria are taking, or have taken, place in Germany, Norway, Sweden, France, Austria, the Netherlands, Belgium, the United States, Switzerland and Latvia. National authorities have been aided by international mechanisms such as the United Nations Commission of Inquiry for Syria and the International, Impartial and Independent Mechanism for Syria and the shared expertise of investigators and prosecutors in the EU Genocide Network.

The investigation and prosecution of international crimes committed in Syria, within the German legal system, has benefitted greatly from the opening of a structural investigation by German authorities into these crimes, driven by the strong involvement and commitment by Syrian survivors and witnesses of these crimes, supported by civil society organisations, to relentlessly seek justice.<sup>25</sup> To date, this has resulted in the issuing of an arrest warrant for Jamil Hassan, the former head of one of the Syrian intelligence services; convictions of Anwar R and Eyad A for their roles as Syrian military intelligence officers in aiding crimes against humanity and torture; and further ongoing related trials and investigations.<sup>26</sup>

The potential significance and impact of universal jurisdiction cases to the witnesses and survivors of international crimes, is best understood through the words and experiences of witnesses and survivors themselves. Ruham Hawash, who had been subjected to State-sanctioned arbitrary arrest and torture in Syria and gave evidence in the Anwar R trial, offers some compelling reflections:

“

Ten years on since my detention, this trial has been able to add a final seal to the story of my arrest. In the past, I used to say that my incarceration may be over, but my freedom had been imprisoned and my rights had been denied. Today, I complete my story by declaring that I participated in the prosecution of one of those responsible for what happened to me, that **I reclaimed some of my lost dignity**. I wish for the same outcome for every male and female survivor, for every prisoner, for the families of every person who was forcibly disappeared in Assad's prisons, and for everyone who ever struggled for the cause of liberation from this criminal regime.

At the beginning of the trial, I had no idea what to expect from it, but today I can say that **this difficult ordeal has restored my faith that justice is not merely an illusion, but rather a necessity that can be achieved**. Today, I stand proud for knowing well the taste of justice, in the same way that over the past ten years I have come to know the taste of freedom from going out to demonstrate with hundreds of thousands of other Syrians, men and women alike, in the midst of our peaceful revolution.

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Finally, I believe that the ruling from this court is by no means the fullest extent of justice for the Syrian people and cannot serve as a substitute for finding a comprehensive and lasting solution to the problem of prisoners, enforced disappearance and the war in Syria more generally. At the same time, **this ruling must be understood as a wake-up call for the German government and all the governments of the world to do something meaningful in order to save those who can still be saved inside the regime's cells and inside the larger prison that is Assad's Syria.**<sup>27</sup>

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### Benefits of specialised units

The EU Genocide Network has identified that having a specialised unit is one of the key factors for successful investigations and prosecutions of serious international crimes.<sup>28</sup> Countries with dedicated, specialised units are more effective in investigating and prosecuting international crimes using the principle of universal or extraterritorial jurisdiction, for a number of reasons, including that:<sup>29</sup>

- 1 They typically have resources to address the intricacies that are inherent in investigating complex crimes committed by large organisations and involving large numbers of victims and perpetrators.
- 2 They develop, and sustain over time, expertise on international criminal law and the investigation and prosecution of international crimes.
- 3 They have systems in place to deal with challenges of complex international investigations which might involve numerous incidents and complex organisational structures.
- 4 They engage in international cooperation and share information, leads and best practices. This includes through focal points for police-to-police cooperation, fostered through organisations such as the EU Genocide Network.
- 5 They are more likely to have multidisciplinary expertise and to engage in ongoing training.

The successful investigation and prosecution of international crimes requires a significant commitment of resources and the development of expertise, an investigative capacity which is built up over time.<sup>30</sup> The establishment of a permanent, specialised unit by a State thus indicates a 'concrete expression of the States' determination to fight impunity,<sup>31</sup> and a real opportunity for survivors to meaningfully seek accountability through the principle of universal jurisdiction.

## Australia's jurisdiction over international crimes: the legal framework

### Compliance with international law obligations

Under international law, Australia has a responsibility to investigate and prosecute international crimes in certain circumstances. These obligations exist by virtue of the following treaties to which Australia is a party, and in some cases, also under customary international law.<sup>32</sup>

The four *Geneva Conventions* mandate that Australia must enact any legislation necessary to provide effective penal sanctions for persons committing grave breaches of the *Geneva Conventions*, and oblige Australia to search for persons alleged to have committed any grave breaches of the *Geneva Conventions*, and bring those persons, regardless of their nationality, before its own courts, or otherwise extradite them to another State Party who has made out a 'prima facie' case against those persons.<sup>33</sup> The *Convention Against Torture*<sup>34</sup> requires that Australia take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction, as well as take measures to establish jurisdiction when an alleged offender or victim is a national, or where an alleged offender is present in any territory under its jurisdiction.<sup>35</sup> The *Convention on the Prevention and Punishment of the Crime of Genocide* also contains relevant jurisdictional provisions, requiring that persons who have committed genocide be punished, and obliging States Parties to enact legislation to give effect to the Convention's provisions, to provide effective penalties for persons guilty of genocide, and try persons charged with genocide in the territory of which the act was committed or in an international tribunal.<sup>36</sup> The Preamble of the *Rome Statute* recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, and emphasises that the ICC is complementary to national criminal jurisdiction.<sup>37</sup> The *Draft Articles on Prevention and Punishment of Crimes Against Humanity*, which Australia has provided comments on and actively supported during the United Nations Sixth Committee sessions,<sup>38</sup> also includes provisions obliging States to prevent and criminalise under national law crimes against humanity, take necessary measures to establish national jurisdiction, and to ensure prompt, thorough and impartial investigation.<sup>39</sup>

### Australia's domestic legal framework for international crimes

Australia's dualist legal system means that these international obligations will only have effect in Australia's domestic law if specifically incorporated through legislation. Australia codified the crimes of the *Rome Statute* in 2002 and the crimes in the *Convention Against Torture* in 2010. This was achieved through amendments to the *Commonwealth Criminal Code*, in order to insert Divisions 268 and 274, creating the offences of crimes against humanity, genocide, war crimes and torture under Australian law. The creation of the *International Criminal Court Act 2002* (Cth) aimed to facilitate compliance with Australia's obligations under the *Rome Statute* and the inclusion of section 3(2), consistent with the Preamble of the *Rome Statute* and the cornerstone principle of complementarity, emphasises the primacy of domestic jurisdiction over international crimes. These were important steps in implementing Australia's international law obligations.

Prior to this, Australia's domestic legal framework had gaps in terms of criminalising international crimes: the only relevant provisions under Australian law were section 7 of the *Geneva Conventions Act 1957* (Cth), which made it an offence to commit a grave breach of the four *Geneva Conventions* or *Additional Protocol I to the Geneva Conventions* (which have a focus on international rather than non-international armed conflicts) and section 6 of the *Crimes (Torture) Act 1988* (Cth), which created the offence of torture.

The international crimes offences in Divisions 268 and 274 may be investigated and prosecuted regardless of whether there is any specific connection to Australia. Section 15.4 'extended geographical jurisdiction – Category D' applies to genocide, crimes against humanity and war crimes offences in Division 268 and the offence of torture in Division 274.<sup>40</sup> Though it does not use the terminology of universal jurisdiction, section 15.4 of the *Commonwealth Criminal Code* effectively enshrines this principle with respect to these international crimes offences under Australian law.

Yet, the broad jurisdictional scope for international crimes offences under the *Commonwealth Criminal Code* is curtailed by the additional requirements for international crimes prosecution contained within domestic legislation. Proceedings for offences under Division 268 must not be commenced without the Attorney-General's written consent, and may only be prosecuted in the name of the Attorney-General.<sup>41</sup> Similarly, proceedings for offences under Division 274 cannot take place without the Attorney-General's consent, where the conduct constituting the alleged offence occurred wholly outside Australia.<sup>42</sup> However, the consent requirements do not prevent a person being arrested, charged, remanded in custody or released on bail before consent has been given.<sup>43</sup> International crimes investigations thus do not require the Attorney-General's consent.

The application of jurisdictional immunities and their consideration as part of the requirement for the Attorney-General's consent has also played a role in limiting prosecutions for international crimes under Australian law. For example, in 2011, a private prosecution filed against the then-President of Sri Lanka, Mahinda Rajapaska, for his alleged involvement in war crimes and crimes against humanity in Sri Lanka, failed to receive the Attorney-General's consent on the basis that Rajapaska had immunity from criminal prosecution as a Head of State.<sup>44</sup> More recently, in 2018, a private prosecution filed against Aung San Suu Kyi, who was then the Minister of the Office of the President and Foreign Minister and State Counsellor of the Republic of the Union of Myanmar, also failed to receive the consent of the Attorney-General. Then Attorney-General Christian Porter made a public statement that Suu Kyi had complete immunity.<sup>45</sup> A subsequent High Court case ultimately did not need to consider the questions of Attorney-General consent and jurisdictional immunity raised by the matter, instead being decided on the basis that the ability to institute private prosecutions for an offence under Division 268 was precluded by virtue of the requirement in section 268.121(2) that the offence be prosecuted in the name of the Attorney-General.<sup>46</sup>

In addition to taking steps to satisfy its international legal obligations by codifying universal jurisdiction for international crimes within its domestic law, Australia has evinced a clear intention to recognise and uphold the principle of universal jurisdiction. In its statement to the Office of Legal Affairs of the United Nations in May 2016, the Permanent Mission of Australia to the United Nations stated:

“

Australia recognises universal jurisdiction as a well-established principle of international law, and a key element of efforts to ensure accountability for the most serious crimes of international concern. We welcome the opportunity to reaffirm our views on the scope and application of the principle.

Australia believes that, as a general rule, the State in which a crime took place (the territorial State) and the State of nationality of the perpetrator (the national State) have primary jurisdiction and responsibility to hold perpetrators to account. Each State should prohibit serious crimes under their domestic law, and exercise effective jurisdiction over those crimes when they are committed on their territory or by their nationals. In particular, the territorial State is often best placed to obtain evidence, secure witnesses, enforce sentences, and to deliver the ‘justice message’ to perpetrators, victims and affected communities. Nonetheless, it is a fact that many serious crimes of international concern go unpunished in the territorial and national jurisdiction, including because alleged perpetrators are allowed to leave the jurisdiction.

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The Australian Parliament has ensured that serious crimes of international concern, including genocide, war crimes, crimes against humanity, piracy, slavery and torture (and secondary and inchoate offences relating to these crimes such as attempt, incitement, complicity, aiding and abetting), are comprehensively criminalised under Australian law, and that Australia has the legal capacity to investigate and prosecute those crimes in accordance with the principle of universal jurisdiction.<sup>47</sup>

It is clear that Australia has the domestic legislative framework to fulfil its international obligations in respect of the investigation of serious international crimes. One key issue, then, is whether Australia has the institutional framework to conduct these investigations in practice.

## Australia's international crimes investigations in practice: the challenges of not having a permanent, specialised international crimes unit

Australia has an inconsistent record of international crimes investigation and prosecution.<sup>48</sup> This section outlines this chequered history, examining the limited mandates of ad hoc units, the inadequacies and failures of generalist units in the AFP tasked with international crimes investigations, and the challenges Australia faces due to its lack of a permanent, specialised unit to investigate international crimes.

### Australia's first war crimes investigations: Japanese war criminals post World War II

The concept of international crimes investigations – specifically, war crimes investigations – taking place in Australia is not a new one. Such investigations first took place following atrocities committed in Europe and the Pacific during World War II. Chief Justice William Webb of the Supreme Court of Queensland was commissioned to conduct an official inquiry into Japanese war crimes.<sup>49</sup> This resulted in several inquiries and reports, and the creation of the *War Crimes Act 1945* (Cth), although ultimately the investigations and prosecutions were undertaken by the Australian Army using the Australian Military Court system.<sup>50</sup> The Australian Military Courts convened 300 trials in eight locations across Australia and the Pacific – Morotai, Wewak, Labuan, Rabaul, Darwin, Singapore, Hong Kong and Manus Island – with 812 accused tried, 1140 charges laid, 777 convictions, 338 acquittals and 25 instances where no findings were made.<sup>51</sup>

### The search for Nazi war criminals and the establishment of the Special Investigations Unit

In 1987, Australia set up its first specialised war crimes unit, the Special Investigations Unit ('SIU'). The unit was established in response to the Hawke Government's inquiry, known as the Menzies Review, which found that due to gaps in Australia's post World War II immigration screening processes, there was a strong likelihood that large numbers of suspected perpetrators of Nazi crimes were present in Australia.<sup>52</sup> The impetus for the Menzies Review was attributable, at least in part, to the outcry from the Australian public following revelations by journalist Mark Aarons in his 1986 radio documentary *Nazis in Australia* that Australia had become a safe haven for Nazi war criminals. The Australian Jewish community, survivors of the Holocaust and the families of victims had been vocal for years prior, seeking action in relation to the alleged Nazi war criminals.<sup>53</sup>

Australia's establishment of the SIU also followed the creation of specialised war crimes units in other countries around the world, which had resulted in domestic prosecutions of war criminals.<sup>54</sup> Additionally, the Hawke Government recognised the 'international push towards the creation and implementation of human rights and international criminal justice principles' and that 'Australia's war crimes investigations and prosecutions constituted a part of this international effort to achieve post-conflict justice'.<sup>55</sup>

The objective of the SIU was to 'seek and obtain admissible evidence of the commission of war crimes as defined in the *War Crimes Act 1945* (Cth), as amended, for the purpose of charges being laid and prosecutions being undertaken in the ordinary criminal courts of Australia'.<sup>56</sup> The *War Crimes Act 1945* (Cth) had been amended in 1989, ensuring that the forum for prosecutions would be domestic criminal courts rather than military courts in order to 'achieve the appropriate standards of justice'.<sup>57</sup> Jurisdiction was limited to the prosecution of Australian citizens or residents,<sup>58</sup> the focus being on war criminals who had migrated to Australia. Offences were also limited to war crimes committed on or after 1 September 1939 and on or before 8 May 1945.<sup>59</sup>

In total, the SIU conducted 841 investigations, identified 27 suspected war criminals, and referred four cases to the Commonwealth Director of Public Prosecutions ('CDPP'). Three matters were ultimately prosecuted.<sup>60</sup> None of these resulted in a finding of guilt.<sup>61</sup> One of the key issues faced by investigators and prosecutors was the difficulty in evidence collection and reliability of this evidence given the lengthy time period that had elapsed since the time of the alleged offences.<sup>62</sup> The SIU's final report to Parliament acknowledged that there could have been many more war crimes trials in Australia had action been taken 'years or decades earlier'.<sup>63</sup> The SIU was eventually disbanded in 1992,<sup>64</sup> and in 1994 its successor, the War Crimes Prosecution Support Unit, was likewise shut down.<sup>65</sup>

Although the *War Crimes Act 1945* (Cth) remained in force, its enforceability was severely limited following the abolition of the SIU due to the lack of resources devoted to its operation. Any new accusations of war crimes during the relevant period were referred to the AFP, and though the AFP continued to table an annual war crimes report in Parliament, 'nothing was done to investigate these cases'.<sup>66</sup> As such, no further investigations and prosecutions of Nazi war criminals took place.



A Japanese witness is sworn in during the Japanese War Criminal trials in Darwin, Northern Territory, 1946.  
Credit: John Thomas Harrison, Australian War Memorial Collection.



# AFP investigative failures

1

## The Balibo Five

In 2014, following a five-year investigation, the AFP ceased their investigation into the unlawful killings of the ‘Balibo Five’, Australian, British and New Zealander journalists killed whilst reporting on the conflict in East Timor in 1975. The investigation was abandoned on the basis of insufficiency of evidence, notwithstanding that a 2007 NSW coronial inquiry attributed the deaths to members of the Indonesian forces.<sup>79</sup> Documents released in accordance with a Freedom of Information request indicated issues in establishing jurisdiction (noting that the AFP believed they were unable to prove beyond reasonable doubt that there was a partial occupation of East Timor by Indonesian forces at the time of the journalists’ deaths), and that the AFP did not provide a brief of evidence to the CDPP due to a lack of evidence.<sup>80</sup> The AFP’s decision to drop the investigation was widely criticised, including by the International Federation of Journalists, who suggested that there was ‘little discernible enthusiasm’ to pursue the alleged perpetrators, and a failure by Australian authorities to seek cooperation from any agencies in Indonesia, meaning that impunity had ‘won out over justice.’<sup>81</sup>



Balibo, East Timor. 18 November 1999. A burnt out and destroyed house in the village of Balibo in which five journalists – Australians Greg Shackleton and Tony Stewart, Malcolm Rennie and Brian Peters from Britain, and New Zealander Gary Cunningham – were killed on 16 October 1975.

Credit: Rick Amor, © Australian War Memorial, licensed under [CC BY-NC](https://creativecommons.org/licenses/by-nc/4.0/).

2

## Anvil Mining and complicity in war crimes and crimes against humanity in the Democratic Republic of Congo

From 1996 to 2003, the Democratic Republic of Congo underwent protracted conflict, with bouts of violence continuing following the formation of the Transitional Government in 2003. In October 2004, a group of rebels launched a ‘minor insurrection’ in Kilwa, which was swiftly countered by the Congolese Armed Forces.<sup>82</sup> However, an investigation and report by the United Nations Organization Mission in the Democratic Republic of the Congo found that the response by the Congolese Armed Forces was marked by summary executions, pillage, extortion and arbitrary detention.<sup>83</sup>

Anvil Mining, which was listed on both the Canadian and Australian Stock Exchanges and had a wholly owned subsidiary incorporated in Australia,<sup>84</sup> ran a silver and copper mine near Kilwa. It is alleged that the company was complicit in the human rights violations committed by the Congolese Armed Forces, through the provision of logistics (planes and vehicles) and employees during the Armed Forces operations.<sup>85</sup> Anvil stated that its vehicles had been requisitioned by the military and the company had no choice but to provide them to the Armed Forces,<sup>86</sup> although legitimate questions have been raised as to inconsistencies in the company’s reported statements and actions.<sup>87</sup>

A report by the ABC’s *Four Corners* program broadcast in June 2005 brought international attention to the incident in Kilwa and Anvil’s role in it.<sup>88</sup> Shortly after, Congolese authorities commenced an investigation into the incident, with a number of military personnel and three Anvil employees (but not the company) being charged and tried in a military court for conduct relating to the Kilwa incident.<sup>89</sup> The court acquitted the three employees of Anvil who had been put on trial for complicity in the Kilwa massacre.<sup>90</sup>

However, concerns were raised about the integrity and impartiality of these military court proceedings,<sup>91</sup> including by the United Nations High Commissioner for Human Rights.<sup>92</sup> Despite this, the AFP – who had commenced an investigation into the conduct of the company and its employees in mid-2005 – closed their investigation shortly after the acquittal of the three Anvil employees by the military court.<sup>93</sup> The AFP’s investigation has been described as ‘pitifully inadequate’ due to the AFP’s repeated reassignment of the case to different investigators, apparent unawareness of the military court proceedings in the Congo, failure to make attempts to interview Congolese witnesses and survivors, and their recommendation to close the investigation for lack of evidence prior to the military court proceedings.<sup>94</sup>

In 2017, the Africa Commission on Human and People’s Rights found Congolese soldiers had committed human rights violations, highlighted Anvil’s role in the massacre and urged the Government of the Democratic Republic of Congo to re-open a criminal investigation into the company’s conduct.<sup>95</sup> The AFP has not provided any updates in relation to whether these developments have prompted them to consider re-opening their own investigation.



### **Referrals made to the AFP in relation to allegations of war crimes committed by Australian military personnel in Afghanistan**

Both prior to and following the commencement of the Afghanistan Inquiry, and before the creation of the specialist, ad hoc unit OSI, there were referrals made to the AFP in relation to allegations of war crimes committed by Australian military personnel in Afghanistan. Documents produced under Australia's Freedom of Information laws<sup>96</sup> provide insight into how the AFP dealt with these referrals, by finalising matters, it appears, without commencing proper investigations. While the documents released do not provide a conclusive or exhaustive summary into the assessment of incidents by the AFP, they do indicate that investigators seemed to rely heavily on ADF sources and/or ADF incident inquiries and reports. In relation to the incidents contained in the Freedom of Information documents released by the AFP, there is no record of AFP investigators seeking further information from sources inside Afghanistan or elsewhere. Internal investigations by the ADF suffered from similar investigative flaws, with the Afghanistan Inquiry Report stating that those responsible within the ADF 'did not apply sufficient balance when considering evidence provided by external complainants.'<sup>97</sup> This is concerning, particularly in light of the Afghanistan Inquiry Report finding that 'Operation Summaries and other reports frequently did not truly and accurately report the facts of engagements.'<sup>98</sup>

The AFP's investigations into war crimes have also been reported in the media. Such media reporting indicates that the AFP received a referral in June 2018 to investigate war crimes committed by Australian soldiers in Afghanistan, with investigators travelling to Afghanistan in 2019.<sup>99</sup> Details about these investigations are sparse.<sup>100</sup>

More recently, media reporting has focused on the AFP's mishandling of allegations of war crimes concerning Ben Roberts-Smith. Roberts-Smith unsuccessfully brought defamation proceedings against a number of media outlets and journalists in relation to allegations that he was involved in the commission of war crimes in Afghanistan. While the defamation proceedings substantiated, to a civil standard of proof, that Roberts-Smith was involved in the murders of three Afghan victims during his deployment to Afghanistan, the AFP investigations had to be abandoned due to issues with evidence collection and derivative use immunity arising out of the Afghanistan Inquiry. The investigation has now been handed over to a new taskforce, Operation Emerald, which is a joint AFP/OSI investigation.<sup>101</sup>

# Australia's mishandling of international crimes cases: a case study of retired General Jagath Jayasuriya

The case study of retired Sri Lankan General Jagath Jayasuriya serves as a good illustration of how the lack of a permanent, specialised unit may contribute to the mishandling of international crimes cases within Australia.

Jayasuriya was the Security Force Commander of operations in the Vanni region of Sri Lanka, which was the main scene of hostilities during the final phase of the civil war in Sri Lanka between September 2008 and May 2009. As the Commander, Jayasuriya had overall command of the offensives in the final stages of the conflict in Vanni and was responsible for coordinating the attacks on Vanni. The offensives and attacks were marked by widespread and systematic human rights abuses, including torture and summary executions.

In May and June 2019, Jayasuriya visited Australia and was photographed at a 'war hero' commemoration event in Melbourne where he was the guest of honour, and at Melbourne International Airport. On 24 June 2019, the International Truth and Justice Project and ACIJ wrote to the AFP requesting an urgent meeting, advising that Jayasuriya, whose responsibility for war crimes is well-documented, may have been in Australia and was likely to return. The request for an urgent meeting was not granted.

On 1 October 2019, the International Truth and Justice Project, ACIJ and the Human Rights Law Centre submitted a formal request to the AFP to investigate Jayasuriya for serious allegations of torture, war crimes and crimes against humanity committed under his command. The formal request consisted of a 55-page draft indictment with over 4000 pages of exhibits, including testimony from 40 witnesses and survivors. The request notified police that there were more witnesses available in Australia, and that Jayasuriya was likely to be in the country again later in the month. On 17 October 2019, the AFP advised that the matter was being progressed to the Attorney-General's office; but on 5 February 2020, the Attorney-General advised that it was the responsibility of the AFP to investigate. As foreshadowed, Jayasuriya was present in Australia in October and November 2019, but due to the AFP's failure to take the formal request to investigate seriously, no action was taken against him.

ACIJ and the International Truth and Justice Project made multiple requests to the AFP for an update in relation to the matter. On 1 September 2021 – almost two years after the formal request had been submitted – the AFP stated that due to an 'administrative oversight', the matter had not been allocated to an investigations team for review. Finally, on 31 January 2022, the AFP provided a written response in which they stated that they would not commence an investigation into Jayasuriya's conduct.

The AFP provided five reasons:<sup>102</sup>

- 1 The alleged conduct occurred between 2007 and 2009 wholly within the sovereign State of Sri Lanka under the recognised government. The Sri Lankan government has established several internal enquiries in this matter which are ongoing.
- 2 Any unilateral investigation or resulting prosecution in the Australian judicial system would be counter to previous public statements by the Australian government endorsing a Sri Lankan determined enquiry process.
- 3 Sri Lanka's 'Domestic Commission of Inquiry into War Crimes Allegations' announced in January 2021 is the most appropriate mechanism for such matters in the first instance.
- 4 The AFP is aware there is current legal action before the ICC in respect to these matters.
- 5 General Jagath Jayasuriya is not in Australia.

All of the AFP's stated reasons for their refusal to investigate are unsatisfactory. Reasons 1, 2 and 3 rely heavily on the idea that Sri Lanka's domestic determined inquiry processes should have priority over an Australian investigation. These reasons are not compatible with the fact that Sri Lanka's domestic accountability processes lack credibility and have been seriously criticised by civil society organisations and the United Nations. A 2021 Report from Human Rights Watch detailed the history of failed domestic accountability mechanisms in Sri Lanka, describing claims by the Sri Lankan government to achieve accountability through a domestic Commission of Inquiry as 'not plausible' and a 'hollow promise'.<sup>103</sup> Similarly, the Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka found that 'domestic initiatives for accountability and reconciliation have repeatedly failed to produce results, more deeply entrenching impunity and exacerbating victims' distrust of the system'.<sup>104</sup> Both of these reports pre-dated the AFP's decision not to investigate Jayasuriya, and thereby undermine the AFP's stated reasons for not investigating Jayasuriya. Furthermore, an examination of the serious limitations and credibility of Sri Lanka's domestic processes had been provided to the AFP in detailed submissions by the International Truth and Justice Project and ACIJ.

Reason 4 refers to legal action before the ICC. However, Sri Lanka is not a party to the *Rome Statute* and as such, the ability for the ICC to assert jurisdiction over international crimes that occurred within Sri Lanka is severely limited.<sup>105</sup> The AFP's reliance on the prospect of action by the ICC calls into question their understanding of international legal processes.

Reason 5 notes that Jayasuriya was not in Australia. This overlooks the fact that it was only due to the AFP's mishandling of the case which led to the allegations not being considered until well after Jayasuriya's multiple visits to Australia in 2019. Moreover, Jayasuriya's absence from the jurisdiction does not preclude the commencement of an investigation: Australia has universal jurisdiction over the relevant conduct and Jayasuriya's presence in Australia is not a legal requirement. Questions as to the likelihood of a successful apprehension of Jayasuriya, during a future visit or through an extradition process, could be considered at a later stage.

The complete description of events, illustrated by an infographic, can be found on the ACIJ website.<sup>106</sup> The mishandling of the Jayasuriya matter highlights some of the obstacles to the effective investigation of international crimes in Australia and emphasises the need for a permanent, specialised unit to investigate these crimes. Had such a unit been in place in 2019, the AFP's 'administrative oversight' and unconscionable delay in reviewing the evidence against Jayasuriya may have been avoided, leading to a real chance of his apprehension while present in Australia. Furthermore, a specialised unit with some capacity to conduct country-specific research would presumably have known it could not credibly rely on Sri Lanka's domestic accountability processes to deal with the matters raised. Instead, a specialised unit might have relied upon its relationships with institutions currently in possession of evidence – such as the Office of the United Nations High Commissioner for Human Rights Investigation on Sri Lanka and focal points of other countries through the EU Genocide Network – to make a more substantial and evidence-based decision about whether to commence an investigation into Jayasuriya.

## Federal police blame 'oversight' for delay in Australian review of Sri Lankan war crime allegations

AFP not aware of 'administrative oversight' until letter from justice groups seeking update on 2019 complaint about Jagath Jayasuriya



Retired Sri Lankan general Jagath Jayasuriya is accused in multiple lawsuits of overseeing war crimes against separatist Tamils in the country's civil war. Photograph: Ishara S Kodikara/AFP/Getty Images

Federal police blamed an "administrative oversight" for huge delays in reviewing war crime allegations against a Sri Lankan man as he travelled to and from Australia, documents show.

In 2019, human rights groups wrote to the **Australian federal police** warning that Jagath Jayasuriya, a retired Sri Lankan general, "has entered Australia and may still be in the jurisdiction".

Media reporting regarding the AFP's 'administrative oversight' in relation to considering the referral for investigation of retired Sri Lankan General Jagath Jayasuriya. Credit: The Guardian Australia website, [www.theguardian.com](http://www.theguardian.com).

## Challenges associated with not having a permanent, specialised investigative unit for international crimes in Australia

Australia's use of ad hoc war crimes units raises the question of whether such units, combined with the AFP's general remit to investigate federal offences, remove the need for a permanent, specialised unit. Both research and experience suggest that Australia's use of ad hoc or generalist units is not sufficient to comply with its ongoing obligation to investigate and prosecute international crimes, nor to provide a meaningful, robust and consistent source of redress for survivor communities. In particular, the repeated failures by the AFP to conduct successful investigations of international crimes within the AFP's generalist investigations units, as set out above, highlights the deficiencies of relying on these units to undertake this complex task. This is due to a number of challenges associated with not having a permanent, specialised investigatory unit.

**1 More susceptible to political whims.** Ad hoc units may be more susceptible to the vagaries of political decision-making. This can potentially lead to their abolition as a result of changes in political leadership and/or priorities.<sup>107</sup> The SIU was a prime example of this, particularly after it experienced heavy criticism for its high cost and failure to secure convictions,<sup>108</sup> which undoubtedly contributed to its eventual closure in 1992. A permanent unit has the ability to become more entrenched within Australia's legal institutional framework and thereby more likely to survive changes in government.

**2 Negative effects of the passage of time.** Ad hoc units are more likely to conduct investigations that suffer as a result of the deleterious effects of the passage of time. These investigations are reactive, rather than proactive. The difficulties encountered by the SIU due to the lengthy period of time between the alleged incidents and the investigations – including that alleged perpetrators had died or were in such ill-health that they were unfit to stand trial – are more likely to be avoided by a permanent unit. This is because permanence allows for the investigation of international crimes closer to their time of commission, rather than waiting for the conclusion of various administrative, defence, and governmental inquiries.

**3 Wasted time and resources.** Ad hoc units like the SIU and OSI are 'handed an enormous undertaking requiring multidisciplinary and cross-jurisdictional work, in the absence of existing infrastructure or protocols'.<sup>109</sup> This means that valuable time and resources are wasted each time that a new unit is created, in setting up mechanisms of practice that would otherwise exist in a permanent unit.

**4 Inability to develop and retain expertise.** The absence of a permanent unit means that it is unlikely that investigators are able to receive adequate training in international crimes investigations required to perform this specialised task. Expertise must be developed not only in evidence collection but also in understanding the contextual elements of the crimes, concepts such as command responsibility, and how these may be proved in an Australian court. It is unclear how international crimes expertise is being meaningfully built, retained and utilised within the AFP. The mandate of CTSI Command might be so broad that it is difficult to build up particular expertise in international crimes investigation. Further, any expertise gained during the term of an ad hoc unit is likely to be dispersed following the conclusion of the mandate for that unit, as occurred following the abolition of the SIU,<sup>110</sup> and which will presumably occur once the OSI completes its Afghanistan war crimes investigations. Human Rights Watch notes that a key benefit of specialised units is that they deliver depth of experience and over time the quality of investigations improves and the time it takes to carry out investigations decreases.<sup>111</sup> By relying on ad hoc units and the AFP's generalist investigations mandate, Australia does not have the opportunity to build this investigatory experience and thereby the institutional knowledge to undertake investigations effectively.

**5 Lack of institutional networks and cooperation.** Reliance on ad hoc or generalist units reduces the ability for a robust 'institutional nexus'<sup>112</sup> whereby officials in Australia across the AFP, CDPP, Attorney-General's Department, Department of Foreign Affairs and Trade, Defence, Department of Home Affairs, the Australian Security Intelligence Organisation and other departments would be able to share information to contribute to each other's focus areas. For transnational crimes in AFP focus areas of terrorism, child exploitation, organised crime and cybercrime,<sup>113</sup> it appears that this kind of institutional cooperation has been deliberately devised, publicised and implemented,<sup>114</sup> suggesting that an 'institutional nexus' has the ability to be created in respect of international crimes, should these crimes become the priority of a specialised unit.

**6 Competing priorities.** Within generalist units, there may not be sufficient dedicated attention to atrocity crimes because of competing priorities. This may be so where other kinds of crimes, for example, terrorism are seen as more harmful to Australian citizens. The negative impact of competing priorities is highlighted in a report by Human Rights Watch, which states that without specialised units, authorities often find the challenges involved in investigating and prosecuting crimes committed extraterritorially daunting, and consequently choose not to prioritise these cases.<sup>115</sup>

## Australia as a safe haven for perpetrators

The outcome of Australia's reliance on ad hoc and generalist units to investigate complex international crimes cases is an inadequate and ineffective institutional framework for proactively managing and undertaking international crimes investigations.

In Australia, international war crimes experts have consistently criticised the federal government and AFP's "scandalous, do nothing approach" to investigating war crimes.<sup>116</sup> This approach has contributed to Australia becoming a safe haven for perpetrators of serious international crimes, as highlighted in the media and by civil society since the closure of the SIU.<sup>117</sup> This occurred, for example, in relation to the extradition and subsequent conviction and sentencing for war crimes in Croatia of dual Australian-Serbian citizen Dragan Vasiljkovic,<sup>118</sup> and the absconding of Zoran Tadic from Australia to Serbia, to escape extradition from Croatia in relation to his alleged participation and involvement in the murder and torture of 43 villagers in 1991.<sup>119</sup> As recently as 2022, there were reports that the AFP knew of 70 suspected Balkan war criminals present in Australia.<sup>120</sup>

Australia's historical reliance on ad hoc or generalist units to investigate international crimes ignores the reality that efforts to combat impunity require a sustained and consistent commitment over many years. If such a commitment is made, then national investigations and prosecutions for international crimes have the opportunity to provide access to justice for survivor communities, including those within Australia-based diaspora communities who otherwise have an extremely limited ability to make complaints about serious international crimes that they have experienced.

The making of such a commitment requires strong political will to take meaningful action to combat the impunity of perpetrators of international crimes, in order to remedy what Boas and Chifflet have described as the 'persistent lack of resourcing or policy interest'<sup>121</sup> in investigating and prosecuting international crimes. In light of the ongoing investigations and upcoming prosecutions of Australian military personnel for alleged war crimes in Afghanistan, it is an opportune time for Australia to ensure that a commitment to accountability for international crimes becomes entrenched within its domestic legal and institutional framework. This commitment can be demonstrated through the creation and resourcing of a permanent, specialised international crimes unit.

**AUSTRALIA'S HISTORICAL RELIANCE ON AD HOC OR GENERALIST UNITS TO INVESTIGATE INTERNATIONAL CRIMES IGNORES THE REALITY THAT EFFORTS TO COMBAT IMPUNITY REQUIRE A SUSTAINED AND CONSISTENT COMMITMENT OVER MANY YEARS.**

**IF SUCH A COMMITMENT IS MADE, THEN NATIONAL INVESTIGATIONS AND PROSECUTIONS FOR INTERNATIONAL CRIMES HAVE THE OPPORTUNITY TO PROVIDE ACCESS TO JUSTICE FOR SURVIVOR COMMUNITIES, INCLUDING THOSE WITHIN AUSTRALIA-BASED DIASPORA COMMUNITIES WHO OTHERWISE HAVE AN EXTREMELY LIMITED ABILITY TO MAKE COMPLAINTS ABOUT SERIOUS INTERNATIONAL CRIMES THAT THEY HAVE EXPERIENCED.**



## Essential Elements of an Effective International Crimes Unit

This part outlines a number of recommendations regarding the essential elements of a permanent, specialised international crimes unit in Australia and identifies best practice approaches, drawing on existing expert reviews of specialised units in other jurisdictions.<sup>122</sup>

### Structure and composition

International crimes units around the world differ in their structure and composition. Some States have dedicated units within existing police and prosecutorial departments while others have established stand-alone agencies.<sup>123</sup> For example, the United States has a Human Rights Violators and War Crimes Center, composed of special agents, attorneys, criminal research specialists and historians, which can initiate investigations into gross human rights violations; the UK has a War Crimes Team located within the Metropolitan Police Counter Terrorism Command to investigate serious international crimes; Canada has a War Crimes Program implemented jointly by Immigration, Refugees and Citizenship Canada, the Canada Border Services Agency, the Royal Canadian Mounted Police and the Department of Justice; and Germany has a Central Unit for the Fight against War Crimes within its Federal Criminal Police Office and an international crimes specialised unit within the Office of the Federal Prosecutor.<sup>124</sup>

Broadly, then, there are two possible models that Australia could consider in establishing a permanent, specialised, international crimes unit.

The first is to have the unit located within the AFP, under the auspices of the Attorney-General's Department. International crimes offences are located in Australia's *Commonwealth Criminal Code*, which is federal legislation. Given that the AFP has responsibility for investigating federal offences by providing police services in relation to the laws of the Commonwealth,<sup>125</sup> it might be logical for the AFP to also retain responsibility for international crimes investigations within a discrete team. Since the AFP Commissioner has the general administration of, and the control of the operations of, the AFP,<sup>126</sup> it would be the responsibility of the AFP Commissioner to set up a specialised international crimes unit, subject to any written directions of the Minister.<sup>127</sup> The most recent Ministerial Direction, dated 16 December 2020, and the AFP Commissioner's Statement of Intent in response, sets out the focus areas for the AFP, within which the investigation of war crimes, genocide, crimes against humanity and torture are not mentioned.<sup>128</sup>

Having a discrete, international crimes unit within the AFP would differ from the current arrangement in Australia, whereby the CTSI Command of the AFP currently has the mandate for investigating crimes against humanity and related offences. The problems with the current structure of a generalist unit for international crimes are addressed in Part II of this paper. The merging of an international crimes unit into a broader team leads to the risk of deprioritisation of complex international crimes cases,<sup>129</sup> including in circumstances where terrorism and international crimes offences are dealt with 'under the same portfolio'.<sup>130</sup> Having a discrete unit within the AFP would allow for an increase in institutional knowledge, experience and training that is otherwise lost in a more generalist team.

The second is to have the unit established as a stand-alone agency, similar to the SIU or OSI but with a permanent rather than limited mandate. The SIU was established by the Attorney-General and was located within the Attorney-General's Department, staffed through a consultancy contract with its Director, secondments from the AFP and NSW Police, and the employment of an analyst and historian.<sup>131</sup> The staff gradually grew in size and scope to include lawyers, archaeologists, translators, investigators and historians.<sup>132</sup> The SIU had a close working relationship with the CDPP, which nominated officers to liaise with the SIU on high priority cases.<sup>133</sup>

The OSI was established by Executive Order, under the auspices of the Home Affairs portfolio and was later transferred to the Attorney-General's portfolio along with the AFP. Investigators and analysts have been drawn from the AFP and state police services, and there is a Memorandum of Understanding between the OSI and the AFP.<sup>134</sup> While the AFP Commissioner maintains operational oversight of OSI investigations, these are led by the OSI's Director of Investigations and the AFP does not form part of the OSI's organisational structure.<sup>135</sup> Somewhat confusingly, however, OSI has stated in their most recent Annual Report that it is 'inextricably linked with the AFP under [their] joint operation framework', including through the involvement of the AFP's Sensitive Investigations Oversight Board.<sup>136</sup>

Benefits to having a permanent, specialised unit outside the institutional remit of the AFP may include more flexibility in terms of how the unit is structured as well as the types of personnel it employs; a separate unit might be better placed to utilise multidisciplinary expertise. Nonetheless, the experience in Australia suggests that a separate unit would still have very close linkages with the AFP through its processes and use of investigators drawn from AFP's ranks. A unit separate to the AFP would not suffer in the competition for resources or from a lack of prioritisation of atrocity crimes cases as compared to the AFP's other operational and investigative priorities.

Taking into consideration the benefits and challenges of these different models, we recommend that a permanent, specialised international crimes unit be established as a stand-alone agency, under the auspices of the Attorney-General's Department, and separate to the AFP. This model appears to have the greatest scope for creating a multidisciplinary, expert team with a clear, focused mandate. The agency should be staffed by a team of expert investigators, open source information specialists, data analysts, lawyers, anthropologists, historians, interpreters, and other specialists in international crimes investigations.

As an immediate, interim measure, the creation of a specialised unit within the AFP should also be considered, to fill the gap in effective international crimes investigation, whilst the institutional framework of the stand-alone agency is devised and implemented.

## Scope of investigations

In determining the scope of investigations of a permanent, specialised international crimes unit, regard should be had to the two broad approaches to the practice of extraterritorial international crimes investigations and prosecutions: the ‘no safe haven’ and the ‘global enforcer’ approaches. A permanent international crimes unit should not only focus its investigations on perpetrators who happen to be present within Australia’s jurisdiction – the ‘no safe haven’ approach to universal jurisdiction.<sup>137</sup> Ideally, in addition to ensuring perpetrators are not seeking haven here, Australia should pursue a ‘global enforcer’ model, focusing on securing evidence available within its jurisdiction – such as from witnesses or victims residing in Australia – while cooperating closely with other domestic and international agencies and Joint Investigation Teams to strategically pursue cases against those bearing the greatest responsibility for international crimes.<sup>138</sup>

It is proposed that the unit have the capacity to undertake ‘structural investigations’ – by investigating the complete background to crimes, the modus operandi of perpetrators, the chains of command and connections between cases, perpetrators and victims,<sup>139</sup> the unit would be better able to ‘ultimately identify perpetrators or groups of perpetrators for specific criminal investigation and prosecution.’<sup>140</sup> Such an investigation could involve the gathering of witness statements from refugees and asylum seekers in Australia, and other affected members of diaspora groups, in order to build a case record which could complement and be shared with other war crimes units or international investigators as part of a coordinated attempt to achieve justice and accountability for international crimes.

### What is a structural investigation?

A structural investigation gathers and examines evidence of international crimes, without focusing on pursuing a specific perpetrator. The investigation instead maps out the command and responsibility structures related to the international crimes, with a view to identifying specific suspects once all relevant and available information has been gathered.

This type of investigation has been described as ‘a very efficient method of investigating international crimes in large-scale and/or lengthy conflicts.’<sup>141</sup> It also better allows for the collection and preservation of evidence ‘in preparation for future proceedings in respect to both identified and unidentified perpetrators.’<sup>142</sup> Such investigations have been successful in Germany and Sweden.<sup>143</sup> For example, as outlined in Part II of this paper, a structural investigation by the German Federal Public Prosecutor culminated in the trial and convictions of two former members of the Syrian intelligence services, as well as the arrest and ongoing trial of a former doctor and an arrest warrant against the former head of Syrian Air Force Intelligence.<sup>144</sup> Survivors and civil society groups have had a significant impact in urging these investigations to take place, such as through filing dossiers containing detailed evidence and investigative leads.<sup>145</sup>

In addition to investigating individual perpetrators of egregious international crimes, the permanent unit would also have scope to investigate corporations responsible for these crimes. Section 12.1 of the *Commonwealth Criminal Code* explains that the Code applies to bodies corporate in the same way as it applies to individuals, with such modifications as set out in Part 2.5 of the Code. As proposed by the Human Rights Law Centre and ACIJ, and recommended by the Australian Law Reform Commission, a permanent, specialised international crimes unit could address and overcome the complex challenges of investigating extraterritorial corporate crimes.<sup>146</sup>



## Cooperation and collaboration

The complexity of international crimes investigations and the fact that evidence may be located in various jurisdictions means that a permanent, specialised international crimes unit in Australia must cooperate and collaborate as part of its evidence collection and information sharing. It should do this with international agencies, national authorities and civil society organisations.

Australian authorities can obtain evidence located overseas through Mutual Legal Assistance. Mutual Legal Assistance takes two broad forms. The first form is informal, through police to police or agency to agency assistance. There does not appear to be any legislation that relates specifically to police to police mutual assistance. Such arrangements are not limited by the existence of the *Mutual Assistance in Criminal Matters Act 1987* (Cth), since section 6 states, '[t]his Act does not prevent the provision or obtaining of international assistance in criminal matters other than assistance of a kind that may be provided or obtained under this Act'.

The second form is State to State assistance. This is governed by the *Mutual Assistance in Criminal Matters Act 1987* (Cth). Under section 7, this Act applies to all foreign countries, although its application can be modified by virtue of any treaties. These treaties are implemented by regulations. Australia has bilateral mutual assistance treaties with Argentina, Austria, Canada, China, Ecuador, Finland, France, Greece, Hong Kong, Hungary, India, Indonesia, Israel, Italy, Republic of Korea, Luxembourg, Malaysia, Mexico, Monaco, Netherlands, Philippines, Portugal, Spain, Sweden, Switzerland, Thailand, UAE, UK, USA and Vietnam.<sup>147</sup> Pursuant to section 10, 'a request for international assistance in a criminal matter that Australia is authorised to make under this Act may be made only by the Attorney-General'.

The chances of a successful request from Australia to another country may be higher where there is an international obligation (through international treaties) compelling cooperation. This is why it is important that Australia commit to signing and ratifying the *Ljubljana-Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes*, otherwise known as the Mutual Legal Assistance Treaty. The *Ljubljana-Hague Convention*, which Australia has publicly supported through a Permanent Declaration,<sup>148</sup> will make it easier for States to cooperate during their domestic investigations of atrocity crimes, which will ideally make the investigations of a permanent international crimes unit more straightforward.

A permanent, specialised international crimes unit in Australia would be well-placed to form strong partnerships with international and national organisations, groups and authorities who have had direct experience in investigating and collating evidence of international crimes, such as the EU Genocide Network,<sup>149</sup> the Independent Investigative Mechanism for Myanmar,<sup>150</sup> the International, Impartial and Independent Mechanism for Syria,<sup>151</sup> the Office of the United Nations High Commissioner for Human Rights Sri Lanka accountability project<sup>152</sup> and the United Nations Investigative Team to Promote Accountability for Crimes Committed by Daesh/ISIL.<sup>153</sup> In doing so, they will have an opportunity to learn from the challenges and opportunities of other authorities, utilise existing evidence collections and help reduce issues like witness fatigue.<sup>154</sup> In particular, collaborating with the EU Genocide Network would enable investigators in a permanent unit to link into 'facilities, contacts, resources and trainings',<sup>155</sup> and encourage them to interact with main accountability stakeholders 'to support each other and share knowledge and best practices'.<sup>156</sup> In recent times, this has proven to be effective in managing the response to atrocities committed by Russia following their invasion of Ukraine, with the EU Genocide Network convening an ad hoc meeting in November 2022 to explore methods of cooperation amongst national authorities.<sup>157</sup>

In terms of domestic agencies, a key stakeholder will be the CDPP, which can provide pre-brief and other legal advice on international crimes investigations. The unit will need to work closely and collaboratively with the CDPP, as well as other government departments noted in Part II of this paper, to ensure effective cooperation with all relevant stakeholders.

A permanent international crimes unit in Australia should ensure that it cooperates and collaborates closely with civil society organisations. Such collaboration can assist in the identification of sources of admissible evidence and possible perpetrators, because civil society organisations can help to fill the knowledge gap by documenting, collecting and collating information when operating 'on the ground'.<sup>158</sup> Civil society organisations can also assist investigators to better understand the needs and priorities of affected persons: witnesses, victims' family members and survivor communities. Methods by which units overseas have collaborated with civil society include through signing cooperation agreements with civil society organisations, providing a policy framework to 'clearly delineate responsibilities and to regulate their relationship', and having regular meetings or roundtables to share information and knowledge.<sup>159</sup>

## Independence and resourcing

A permanent, specialised international crimes unit must be independent to allow it to undertake investigations impartially and without political interference or direction from the government of the day.

Independence requires appropriate funding. Specialised units must be provided with 'sufficient resources to allow them to perform their functions effectively and without prejudice to their independence'.<sup>160</sup> The EU Genocide Network has stated that 'underfunding and a lack of sufficient staffing in combination with the rapidly increasing caseload remain a major concern in most Member States,' which has the ability to hamper 'the timely conduct of trials'.<sup>161</sup> Providing appropriate resourcing through long-term funding and independence from government in investigation decisions will help minimise the risk that the work of the unit is susceptible to fluctuating levels of political will, or suffer the fate of premature closure like the SIU. Where there is political will and government prioritisation of international crimes investigations, adequate resourcing appears to be possible.

Enshrining an effective funding model not subject to political interference has been an ongoing issue for anti-corruption agencies, such as the Independent Commission Against Corruption in New South Wales. One possibility to ensure effective funding levels, as posited by this Commission in its 2020 special report, would be the appointment of an independent and qualified person to assess funding requirements.<sup>162</sup> This model could also be explored in respect of the proposed international crimes unit.

Crimes against humanity, genocide, war crimes and torture require the consent of the Attorney-General for the initiation of proceedings.<sup>163</sup> While it might be expected that the Attorney-General would act on the advice of the CDPP, the consent requirement injects an element of politicisation into the process, and could thereby undermine it. Importantly, however, the requirement to obtain the consent of the Attorney-General does not apply to the decision to investigate,<sup>164</sup> and thereby, a permanent specialised unit can still operate independently notwithstanding the problematic nature of the consent requirement within the *Commonwealth Criminal Code*, as outlined in Part II of this paper.

## Transparency and outreach

Transparency and outreach in international crimes investigations can help ensure that these investigations and subsequent prosecutions are meaningful for victims and affected communities, as well as providing an important means of oversight. Adopting transparency measures also improves public trust in the proceedings and enables scrutiny of the decision-making processes and outcomes by victims, civil society, and academic commentators. Access to information is critical to evaluating ongoing investigative processes and the extent to which they comply with international human rights standards and with Australia's obligations under the *Rome Statute* to carry out genuine investigations.<sup>165</sup>

A permanent, specialised international crimes unit in Australia should embed transparency into its operations and processes, through regularly publishing information about its investigations on its website and in its annual reports,<sup>166</sup> regularly reporting to Parliament and providing accurate translations and audio recordings of this information in languages relevant to affected communities. To date, the AFP has been markedly opaque in its approach to war crimes investigations, particularly when compared to jurisdictions like Sweden and the Netherlands who have released resources translated in multiple languages explaining their international crimes work.<sup>167</sup> For cases that result in prosecutions and trials, the unit should work closely with the CDPP to ensure the livestreaming and recording of trial hearings, video footage, transcripts, submissions and outcomes of each case, also appropriately translated. For those cases that do not result in prosecutions, information should also be released so that survivor communities can reckon with the reasons why justice through criminal mechanisms was not viable.

Going hand in hand with these transparency principles is the need for a permanent, specialised international crimes unit in Australia to conduct effective and early outreach, tailored to the local situation and target audiences. Effective outreach unfortunately represents a shortcoming in many domestic prosecutions under the principle of universal jurisdiction as authorities continue to neglect to translate judgments and media releases.<sup>168</sup> An Australian unit can learn from such experiences. The unit could follow the lead of the Public Prosecutor's Office for Crimes Against Humanity of the Republic of Argentina which 'employs a comprehensive communication and media strategy' involving meetings with affected communities and a detailed website, which aids in managing expectations.<sup>169</sup>

The unit should have a specific outreach department, much like those established at the ICC and other hybrid international courts, tasked with establishing sustainable, two-way communication, promoting understanding and support for the judicial process and clarifying misperceptions and misunderstandings to enable affected communities to follow trials.<sup>170</sup>

## Victim and witness participation, rights, protection and support

Victims and survivors are at the heart of international crimes investigations and prosecutions, and ‘it is often the victims’ determination to pursue justice that leads to successful war crimes investigations and prosecutions.’<sup>171</sup> As such, it is vital that a permanent, specialised international crimes unit creates processes that ensure victim participation and protective measures.

Successful victim participation depends largely on victims being informed of their rights as early as possible.<sup>172</sup> Victims should be kept informed of the progress of investigations and any charges laid against the accused or any modification of charges.<sup>173</sup>

This right to information should continue once a matter has reached the prosecution stage, and should be facilitated by the international crimes unit in collaboration with the CDPP.<sup>174</sup> Currently, the CDPP Victims of Crime Policy stipulates that victims should be treated with courtesy, compassion, cultural sensitivity and respect for their dignity and entitlements. The focus on the dignity of victims is echoed in the *Rome Statute*<sup>175</sup> and in the *UN’s Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.<sup>176</sup> Civil society organisations have also consistently advocated for increased rights, participation and protections for victims of international crimes.<sup>177</sup>

In Australia, victims of crime are entitled to be advised on and kept informed of the progress of the prosecution in a timely manner.<sup>178</sup> They should also be consulted where appropriate by prosecutors when deciding whether it is in the public interest to discontinue or commence a prosecution, to agree to a plea negotiation or decline to proceed with prosecution after a committal.<sup>179</sup> Victims should also be borne in mind when identifying the most appropriate charges to bring in order to minimise distress to victims through the downgrading or withdrawal of charges.<sup>180</sup> Victims (and in the case of deceased victims, their family members) should be consulted on a decision not-to-charge for alleged offences resulting in death or very serious physical or psychological harm.<sup>181</sup> These are all matters that personnel within a permanent, specialised international crimes unit should ensure victims are kept informed of during the course of an investigation and prosecution; the unit needs dedicated staff, training and procedures to ensure victim participation is meaningful and effective.

Furthermore, a permanent international crimes unit in Australia should utilise various tools to ensure the safety of victims and witnesses participating in international crimes investigations and prosecutions, which may include the ‘possibility of video-testimony, reading out of written statements, the relocation of witnesses and, in most serious cases, a change of identity’.<sup>182</sup>

Such protections would be consistent with article 82(1) of the recently adopted Mutual Legal Assistance Treaty, referenced above, which states that ‘each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation, including ill-treatment, to victims and witnesses and, as appropriate, their relatives or representatives, experts as well as any other persons participating in or cooperating with any investigation, prosecution, or any other proceedings within the scope of this Convention.’<sup>183</sup>

In addition, the unit should be responsible for providing or sourcing support services for witnesses and survivors. International crimes, by their nature, are of the utmost gravity and seriousness, which is why ‘psychological support for victims or witnesses who may be severely traumatised is also important.’<sup>184</sup>

## Language, cultural, gender and trauma informed practice

Personnel working in a permanent international crimes unit must be appropriately trained in order to most effectively and sensitively deal with the survivor communities and witnesses that they will be working with. Such training is offered by numerous organisations, such as the Institute for International Criminal Investigations in The Hague<sup>185</sup> or the International Nuremberg Principles Academy.<sup>186</sup> This training should take into account a number of different factors.

Language can be a barrier to justice, in both domestic and international courts.<sup>187</sup> Investigators should be trained in working effectively with interpreters, who are appropriately trained and qualified. Furthermore, there needs to be an awareness of the potential divisions within communities and the way that this may impact on the suitability of certain interpreters for individual witnesses, alongside awareness of the political and conflict contexts generally.

There is sometimes a ‘cultural dissonance’ between international criminal tribunals and the witnesses at the heart of them,<sup>188</sup> with certain behaviours accounted for due to differing discourse styles or cultural taboos. Yet, research into the impact of cultural background on the investigative interview process has been largely ignored.<sup>189</sup> Investigators working in a permanent international crimes unit would need to be trained to better understand the culture of their witnesses and victims so as to accurately understand their perspectives and act sensitively and appropriately in response.

Investigators must have appropriate training and expertise in the impact of gender in international criminal law, and how gender may play out in their interactions with witnesses and victims. There has been increased attention on the need to properly respond to conflict-related sexual violence – a type of violence that has in many past conflicts been overlooked and under-prosecuted. In recent years, detailed guidelines have been developed by survivors, experienced investigators and prosecutors and civil society to assist legal practitioners in ensuring sexual violence is meaningfully addressed.<sup>190</sup> These guidelines are aimed at making investigations more effective in terms of collecting reliable, timely and relevant evidence, and ensuring that the whole investigation and prosecution process is empowering and sensitive to survivors of conflict-related sexual violence. Key topics include the need to develop trust with survivors of sexual violence; appropriate ways of questioning them in investigations and at trial; the importance of recognising both male and female victims of sexual violence; strategies for establishing the individual criminal responsibility of senior military and political leaders for sexual crimes committed by their subordinates; and ways to engage sensitively with LGBTQI+ survivors. It is critical that the unit’s investigators, prosecutors, victim support officers and interpreters are well versed in these guidelines, and are provided with sufficient time and resources to implement them. It is also imperative that the unit has specialised gender advisors who can provide expert advice at every stage of the process – a role that was first pioneered at the International Criminal Tribunal for the former Yugoslavia, and then mandated in the *Rome Statute*.<sup>191</sup>

Finally, staff engaged with witnesses and survivors need to be adequately trained in trauma informed practice and dealing with victims suffering from post-traumatic stress disorder,<sup>192</sup> given the serious nature of the crimes being investigated. This will assist in avoiding re-traumatisation of victims and limit the negative impacts of any investigation.



## Conclusion

Impunity for international crimes affects the international community as a whole. The impact of this impunity is most keenly felt by survivors, relatives of victims and affected communities.

For many years, new opportunities to seek justice have been opening up around the world within countries which have made sincere efforts to comply with their international obligations to investigate and prosecute perpetrators of international crimes. We have seen how domestic proceedings concerning international crimes can challenge impunity and offer meaningful participation to survivor communities. We have seen how State authorities can coordinate with other national and international jurisdictions in an effort to close the impunity gap.

Australia has the legal framework to play a role in these developments but to date, survivors of international crimes seeking recourse in the Australian legal system have been let down by a lack of institutional will and capacity to investigate. The time has come to rectify this. The Australian government must establish a permanent, specialised international crimes unit as part of its commitment to international criminal justice.

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