

27 September 2023

Senator the Hon Penny Wong
Minister for Foreign Affairs

The Hon Mark Dreyfus KC MP
Attorney-General of Australia

Via email

Dear Minister Wong and Attorney-General,

Re: Australia's support for a Crimes Against Humanity Treaty

The Australian Centre for International Justice is an independent, not-for-profit legal centre dedicated to seeking justice and accountability for victims of serious human rights violations. We work towards developing Australia's role in investigating, prosecuting, and providing remedies for these violations.

We welcome the Australian government's engagement in discussions in relation to the Draft Articles on Prevention and Punishment of Crimes Against Humanity ('**Draft Articles**') at the United Nations General Assembly's Sixth Committee meetings,¹ as well as its expression of support for a Crimes Against Humanity Treaty.² We strongly agree with the government that such a treaty is critical for combatting impunity and closing 'the gap in the current international legal framework for serious international crimes.'³

As you are aware, States can submit written comments on the Draft Articles by December 2023, which will shape the agenda for a 'resumed session' in April 2024.⁴ We therefore provide this correspondence in order to highlight important focus areas and recommendations to assist the Australian government in formulating its written comments and verbal contributions at the Sixth Committee discussions.

We recommend that the Australian government:

- 1) Support the development and adoption of a Crimes Against Humanity Treaty.
- 2) Assume a leadership role in the Asia-Pacific region, encouraging States in the region to participate and express their support for a Crimes Against Humanity Treaty.

¹ See Australian Mission to the United Nations, 'Crimes Against Humanity: Cluster 1' (UNGA Sixth Committee, 77th session, 10 April 2023) ('**Sixth Committee Cluster 1**'); Australian Mission to the United Nations, 'Crimes Against Humanity: Cluster 2' (UNGA Sixth Committee, 77th session, 11 April 2023) ('**Sixth Committee Cluster 2**'); Australian Mission to the United Nations, 'Crimes Against Humanity: Cluster 3' (UNGA Sixth Committee, 77th session, 12 April 2023) ('**Sixth Committee Cluster 3**'); Australian Mission to the United Nations, 'Crimes Against Humanity: Cluster 4' (UNGA Sixth Committee, 77th session, 12 April 2023) ('**Sixth Committee Cluster 4**'); Australian Mission to the United Nations, 'Crimes Against Humanity: Cluster 5' (UNGA Sixth Committee, 77th session, 13 April 2023) ('**Sixth Committee Cluster 5**').

² Sixth Committee Cluster 1.

³ Ibid.

⁴ 'Sixth Committee (Legal) – 77th Session: Crimes Against Humanity (Agenda Item 78)', *United Nations* (Web Page) <<https://www.un.org/en/ga/sixth/77/cah.shtml>>.

- 3) Continue to support the strengthening of particular aspects of the Draft Articles and the inclusion of these Draft Articles within a Crimes Against Humanity Treaty, including those Articles relating to: national jurisdiction and cooperation; First Nations perspectives; gender-related issues and victims' rights.
- 4) Strengthen its domestic legal and institutional capacities to meaningfully provide pathways for accountability for crimes against humanity and other international crimes.

1. The Australian government should support the development and adoption of a Crimes Against Humanity Treaty

We commend the Australian government for expressing support for progress towards a Crimes Against Humanity Treaty.⁵

Currently there is no international treaty prohibiting crimes against humanity, which the Australian government has emphasised is 'a significant gap in the international accountability framework.'⁶ In recent years, crimes against humanity have been widely inflicted on civilian populations across the world, including in our region. A treaty can focus international attention on these atrocities and increase pathways for accountability.

A treaty can address the gap and contribute to the goal of preventing and combatting impunity for crimes against humanity in the following ways:

- obliging States to not engage in crimes against humanity and to take appropriate preventative measures;
- requiring States to establish domestic jurisdiction over crimes against humanity and imposing an obligation on States to investigate and prosecute;
- requiring States to extradite or surrender an alleged offender present in any territory under their jurisdiction to another State or competent international criminal court or tribunal for the purpose of prosecution; and
- establishing a mutual legal assistance framework for investigations, prosecutions, and judicial proceedings concerning crimes against humanity offences.

As such, we recommend that the Australian government actively supports the treaty-making process and ratifies the Crimes Against Humanity Treaty once developed.

2. The Australian government should assume a leadership role in the Asia-Pacific region, encouraging States in the region to participate and express their support for a Crimes Against Humanity Treaty

⁵ 'Sixth Committee Speakers Argue Over Codifying Crimes against Humanity Draft Texts, with Some Calling for Forming Ad Hoc Committee to Break Impasse', *United Nations* (Web Page, 10 October 2022) <<https://press.un.org/en/2022/gal3660.doc.htm#:~:text=As%20the%20Sixth%20Committee%20%28Legal%29%20commenced%20its%20consideration,could%20facilitate%20a%20constructive%20exchange%20on%20the%20matter>> (Kevin Timothy Mead of Canada also speaking for Australia and New Zealand).

⁶ Ibid; Sixth Committee Cluster 1.

Ensuring that discussion about the Draft Articles proceeds to the development of a Crimes Against Humanity Treaty will require a broad number of States to participate in the negotiation process. The Australian government should take the lead in rallying support for the treaty in our region.

A Crimes Against Humanity Treaty could help bridge the impunity gap in the Asia-Pacific region by creating an additional pathway for accountability. Currently there is limited mechanisms for the prosecution atrocity crimes in our region.⁷ Many Asia-Pacific States are not signatories to the Rome Statute of the International Criminal Court ('ICC'), representing the most underrepresented of all States Parties to the ICC of any regional grouping around the world.⁸ We have raised these issues in detail in our submission to the parliamentary inquiry into supporting democracy in our region.⁹

Thank you for your response to our letter on Australia's support for the Mutual Legal Assistance Treaty ('MLA Treaty').¹⁰ We are pleased to hear that securing wide support from States in our region for the MLA Treaty was a key priority for the Australian government. We urge the government to also actively encourage States in the Asia-Pacific region to engage in ongoing discussions on the Draft Articles and express their support for a Crimes Against Humanity Treaty. Some States, particularly smaller ones, may not be engaging due to a lack of capacity rather than opposition or disinterest.¹¹ The Australian government should help such States, particularly those in our region, to facilitate their engagement, participation and support.¹²

3. The Australian government should continue to support the strengthening of particular aspects of the Draft Articles, and the inclusion of these Draft Articles within a Crimes Against Humanity Treaty, including those Articles relating to national jurisdiction and cooperation, First Nations perspectives, gender-related issues, and victims' rights

The Australian government should use its written comments and subsequent contributions at the resumed sessions to add to the substance of the treaty, with an emphasis on strengthening provisions on specific topics.

a. National jurisdiction and cooperation

It is heartening to see the Australian government's support for provisions in the Draft Articles on national jurisdiction, extradition, and mutual legal assistance, all of which are critical for strengthening national capacities to investigate and prosecute crimes against humanity and

⁷ Asia Justice Coalition, 'It's Time for a Global Convention on Crimes Against Humanity', *Global Centre for the Responsibility to Protect* (Open Letter, 13 April 2023) <<https://www.globalr2p.org/publications/its-time-for-a-global-convention-on-crimes-against-humanity/>>.

⁸ International Criminal Court, 'Joining the ICC: Asia-Pacific States' (Web Page, 2022) <https://www.icc-cpi.int/sites/default/files/2022-09/universality-asia-eng-v.11-web.pdf>.

⁹ Australian Centre for International Justice, Submission No 31 and Supplementary Submission No 31.1 to Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade, Foreign Affairs and Aid Subcommittee – Parliament of Australia, *Inquiry into Supporting Democracy in Our Region* (16 December 2022), also available at, Australian Centre for International Justice, 'Submission: Supporting Democracy in the Region By Addressing Impunity' <<https://acij.org.au/submission-supporting-democracy-in-the-region-by-addressing-impunity/>>.

¹⁰ Letter from Alaina Mitchell to Rawan Arraf, 16 August 2023, MC23-019376.

¹¹ Leila Nadya Sadat and Akila Radhakrishnan, 'Coming Debates to Advance New Treaty on Crimes Against Humanity will Require Skilful Leadership', *Just Security* (online, 20 December 2022) <<https://www.justsecurity.org/84496/coming-debates-to-advance-new-treaty-on-crimes-against-humanity-will-require-skillful-leadership/>>.

¹² Asia Justice Coalition (n 7).

facilitating international cooperation on the prevention and punishment of such crimes. The Australian government should continue to voice support for these issues in its written statement and verbal comments before the Sixth Committee.

The Australian government has frequently emphasised territorial jurisdiction at Sixth Committee meetings.¹³ The government has, however, stated its full support for Article 7, which also recognises jurisdiction on other grounds (active personality, passive personality, and perpetrator's territorial presence), which is significant. This approach is consistent with Australia's existing laws. Divisions 268 and 274 of the Commonwealth Criminal Code, which creates the offences of crimes against humanity, genocide, war crimes and torture under Australian law, allow 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.¹⁴

In its written statement, the Australian government should consider highlighting the importance of Draft Article 7(2) which allows States to investigate and prosecute an alleged offender present in any of its territory where extradition or surrender is not possible. This would align with the Australian government's previously stated support for the principle of universal jurisdiction.¹⁵ The ability to exercise jurisdiction in such cases is vital to ensuring that Australia does not become a safe haven for perpetrators of crimes against humanity, as well as ensuring accountability, especially in instances where no other domestic or international courts are willing or able to exercise jurisdiction.

b. First Nations perspectives

The Australian government has noted the need for integrating Indigenous perspectives into the Draft Articles.¹⁶ Many delegations at the Sixth Committee have showed a willingness to consider adding indigenous groups to the list of groups specifically protected under the crime of persecution.¹⁷ To widen and deepen its grasp of this subject, the government should consult with First Nations rights organisations in Australia. This could help the government to make informed contributions on this topic.

c. Gender-related issues

The Australian government has expressed support for gender justice and is considering how gender justice can be better integrated as a cross-cutting issue throughout the Draft Articles.¹⁸ In its written statements and verbal contributions at the Sixth Committee, the Australian government should continue to promote and advance progressive provisions on gender-related aspects of the Draft Articles.

We urge the Australian government to address the following topics in its written comments, in order to ensure that the treaty provisions are gender-sensitive and based on a progressive understanding of gender:

¹³ Sixth Committee Cluster 2; Sixth Committee Cluster 4.

¹⁴ *Commonwealth Criminal Code* s 15.4.

¹⁵ 'Australian Views on the Scope and Application of the Principle of Universal Jurisdiction', *Permanent Mission of Australia to the United Nations* (Note, 3 May 2016) <http://www.un.org/en/ga/sixth/71/universal_jurisdiction/australia_e.pdf>.

¹⁶ Sixth Committee Cluster 5.

¹⁷ Leila Nadya Sadat and Akila Radhakrishnan, 'Differences "Getting Narrower" on Proposed Crimes Against Humanity', *Just Security* (online, 15 May 2023) <<https://www.justsecurity.org/86582/differences-getting-narrower-on-proposed-crimes-against-humanity-treaty/>>.

¹⁸ Sixth Committee Cluster 2.

- *Definition of 'gender'*: Whether to define the term 'gender' in the treaty is a key issue that has come up during deliberations at the Sixth Committee. Some States prefer to include a regressive definition of 'gender' referring to 'the two sexes, male and female'.¹⁹ The Australian government has agreed with the ILC's decision to omit this definition,²⁰ explaining that a binary definition of the concept does not reflect how gender is understood today.²¹ A narrow interpretation excludes LGBTQ+ people, depriving them of legal protections against gender-based crime. Therefore, the Australian government should continue to support an inclusive and progressive approach to gender-based issues.
- *Definition of 'persecution'*: Some States including Canada and Colombia have expressed interest in considering a wider definition of the term 'persecution'.²² Australia should support this wider definition. The Draft Articles restrict the scope of persecution by requiring a nexus with other crimes against humanity (for example, torture and murder). This reduces the types of mistreatment that are prohibited under the treaty by, for example, excluding systematic oppression that does not entail other independent acts of crimes against humanity.²³ This omission fails to protect populations against other forms of oppression, such as restriction of their rights to education, employment, and healthcare and freedoms of expression, assembly and association,²⁴ which is currently unfolding under the Taliban in Afghanistan where women and girls are systematically denied of their basic rights and freedoms.²⁵
- *Forced marriage as crimes against humanity*: The Australian government should support the proposal from Canada, the United Kingdom, and Sierra Leone to add forced marriage as a crime under Draft Article 2.²⁶
- *Definition of 'forced pregnancy'*: Australia should support a proposal from Canada, the United Kingdom, and Cuba to amend the constrained definition of forced pregnancy in Draft Article 2(2)(f) to bring it in line with international standards on reproductive rights especially by removing the unnecessary caveat on domestic abortion laws.²⁷
- *Definition of 'apartheid'*: Australia should consider encouraging States to add gender to the definition of 'apartheid' as a crime against humanity in Draft Article 2(2)(h), which at the moment only applies to hierarchies based on race, and does not include gender. The discussion on codification of 'gender apartheid' has attracted public attention in response to

¹⁹ Tess Graham, 'Progress, Resistance, and Silence on Gender Justice in the Draft Crimes Against Humanity Treaty', *Just Security* (online, 6 June 2023) <<https://www.justsecurity.org/86803/progress-resistance-and-silence-on-gender-justice-in-the-draft-crimes-against-humanity-treaty/>>.

²⁰ Sixth Committee Cluster 2.

²¹ Ibid.

²² Graham (n 19).

²³ Ibid.

²⁴ Ibid.

²⁵ See, e.g., Amnesty International, *Afghanistan: Death in Slow Motion: Women and Girls Under the Taliban* (Report, 2022).

²⁶ Graham (n 19).

²⁷ Ibid; Akila Radhakrishnan and Danielle Hites, 'Expanding Justice for Gender-Based Crimes With a Treaty on Crimes Against Humanity', *Just Security* (online, 29 September 2021) <<https://www.justsecurity.org/78395/expanding-justice-for-gender-based-crimes-with-a-treaty-on-crimes-against-humanity/>>.

the ongoing, serious violations of the rights of women and girls in Afghanistan and Iran.²⁸ The inclusion of gender apartheid as a crime in a Crimes Against Humanity Treaty is a unique opportunity for Australia and the international community to recognise systematic gender-based discrimination as a distinct crime under international law.

d. Victims' rights

We acknowledge the Australian government's endorsement of Draft Article 12 concerning the rights of victims and witnesses. However, Australia has suggested that the right of victims to make a complaint and the obligation to provide protective measures only apply to crimes against humanity occurring 'within the territory under the State's jurisdiction'.²⁹ To the contrary, these rights and obligations are applicable to all instances where a State has jurisdiction as per Draft Article 7, which is not restricted to territorial jurisdiction. We encourage the Australian government to embrace a wider interpretation of Draft Article 12.

We urge the Australian government consider ways of strengthening the protection of victims' rights in the treaty. It should consider supporting Canada's suggestion to add clauses that address the fair treatment of victims and survivors,³⁰ similar to Draft Article 11 about the fair treatment of the accused. While Draft Article 11 guarantees the right of the accused to 'be informed without delay of his or her rights', there is no equivalent clause protecting the right of victims to information. The Australian government should join efforts with Canada to address this gap.

e. Non-refoulement

Draft Article 5 imposes an obligation on States to not 'expel, return (refouler), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity'. At the Sixth Committee, the Australian government has emphasised the need for greater clarity on the standard 'substantial ground', stating that 'for there to be "substantial grounds" for a person to be in danger of being subjected to the relevant conduct, there must be a *personal, present, foreseeable and real risk* to that person.'³¹

The principle of non-refoulement constitutes an essential protection and is 'characterised by its absolute nature without any exception'.³² The principle is included in several international law instruments including the 1951 Refugee Convention,³³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,³⁴ International Convention for the Protection of All Persons from Enforced Disappearance.³⁵ These instruments do not explicitly define the standard 'substantial ground', an approach adopted by the Draft Articles. This approach should remain, as

²⁸ 'Afghanistan: Systematic Crackdown on Womens' and Girls' Rights, UN Experts Say', *United Nations Office of the High Commissioner for Human Rights* (Web Page, 5 May 2023) <<https://www.ohchr.org/en/statements/2023/05/afghanistan-systematic-crackdown-womens-and-girls-rights-un-experts-say>>.

²⁹ Sixth Committee Cluster 5.

³⁰ Sadat and Radhakrishnan (n 17).

³¹ Sixth Committee Cluster 5 (emphasis added).

³² 'Principle of Non-Refoulement Under International Human Rights Law', *United Nations Office of the High Commissioner for Human Rights* (Web Page) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>>.

³³ Art 33.

³⁴ Art 3.

³⁵ Art 16.

defining the standard may risk restricting the scope of the provision and undermining its purpose. The Australian government is therefore recommended to support the existing or a more progressive version of Draft Article 5.

4. The Australian government should strengthen its domestic legal and institutional capacities to meaningfully provide pathways for accountability for crimes against humanity and other international crimes

The Australian government must not only commit to the creation and ratification of a Crimes Against Humanity Treaty, but also take steps to ensure that the obligations within this treaty are meaningfully followed at the domestic level. We recommend that the Australian government consider critically the legal and institutional shortcomings that Australia has in both investigating atrocity crimes, including crimes against humanity, and providing avenues for victims' rights and remedies.

a. Permanent, specialised international crimes unit

At the Sixth Committee meetings, the Australian government has frequently stressed the primary responsibility of States to investigate and prosecute crimes against humanity.³⁶ In addition, it has stated that 'Australia strongly supports the requirement that investigation should be "prompt, thorough and impartial"'.³⁷

While Australia has adequate legislative mechanisms to prosecute atrocity crimes including crimes against humanity, through Division 264 of the Commonwealth Criminal Code, its institutional framework is lacking. This is because Australia does not have a permanent, specialised international crimes unit dedicated to investigating these crimes. The absence of a unit has meant that investigations into international crimes have been inadequate and ineffective. We have persistently advocated for the creation of such a unit to ensure that its investigations involve the requisite level of expertise and resourcing. Only then will Australia be fully capable of complying with its primary obligation to investigate and prosecute international crimes.

In your recent correspondence to the ACIJ regarding the MLA Treaty, it was stated that there is "currently no intention to establish a specialised international crimes unit" because the mandate for investigating alleged war crimes, crimes against humanity and genocide falls within the remit of the Australian Federal Police's (AFP) Special Investigations Command. However, both practice and research has shown that such a generalist unit within the AFP is ineffective in conducting complex international crimes investigations. Practice and research also demonstrate that specialised international crimes units are far more effective for successful investigations and prosecutions of serious international crimes. This is addressed in detail in the ACIJ's policy paper titled 'Challenging Impunity: Why Australia Needs a Permanent, Specialised International Unit', attached as **Enclosure 1**.

b. Mechanisms for implementing victims' rights

The rights of victims of international crimes are currently overlooked in Australia's legal and institutional frameworks. There are extremely limited mechanisms in place in Australia for victims of international crimes to obtain reparation, access information, and support services. We have

³⁶ Sixth Committee Cluster 1; Sixth Committee Cluster 2; Sixth Committee Cluster 4.

³⁷ Sixth Committee Cluster 3.

highlighted these gaps in our submission to the parliamentary inquiry on Australia's human rights framework.³⁸

There is a need for the Australian government to determine what legal and institutional mechanisms will best ensure the creation, protection and advancement of these rights. In our submission we have recommended that the government establish a public inquiry to consider what programmes and mechanisms need to be developed for victims to claim and receive remedy, access to information, participate in proceedings and access support services. A public inquiry would be best placed to explore these matters.

We welcome any opportunity to meet and discuss these issues further. If you have any questions, please contact me at rawan.arraf@acij.org.au.

Sincerely,



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Executive Director
Australian Centre for International Justice

Cc:

Alaina Mitchell
Acting Assistant Secretary
International Cooperation Unit
Attorney-General's Department

Marie-Charlotte Mckenna
Assistant Secretary
International Law Division
Department of Foreign Affairs and Trade

³⁸ Australian Centre for International Justice, Submission No 271 to Parliamentary Committee on Human Rights – Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (6 July 2023), also available at, Australian Centre for International Justice, 'Submission: International Criminal Justice and Victims' Rights – Missing Pieces in Australia's Human Rights Framework' <<https://acij.org.au/submission-intl-criminal-justice-victims-rights-missing-pieces-aus-human-rights-framework/>>.