

20 December 2023

The Hon Claire O'Neil MP
Minister for Home Affairs

The Hon Mark Dreyfus KC, MP
Attorney-General of Australia

Commissioner Reece Kershaw APM
Australian Federal Police

Via email

Dear Minister, Attorney-General and Commissioner,

We write to seek clarification on the position of, and urge action by, the Department of Home Affairs, the Attorney-General's Department and the Australian Federal Police (**AFP**) with respect to Australian citizens who are currently engaged in hostilities in Israel and the Occupied Palestinian Territory (**OPT**).

Australian nationals' engagement in the conflict

On 10 October 2023, following the Hamas attacks in Israel, which included unlawful direct attacks against Israeli civilians, the Israeli government issued an order to 360,000 military reservists to engage in the ongoing hostilities.¹ Numerous media publications have reported that dual Australian-Israeli citizens returned to Israel to participate in hostilities, with Israeli officials confirming that Australians are among those reservists called up to fight.² Although the Israel Defense Force (**IDF**) does not release official statistics in relation to serving foreign nationals, estimates stated there could be up to 1,000 Australians currently serving in the IDF or being an active reservist.³ Media reporting has noted that those dual Australian citizens include both reservists and active duty soldiers in the IDF and some have indicated they are involved in combat units.⁴ There is information to suggest that Australian citizens may also be volunteering for the IDF in a program for non-Israeli nationals known as Mahal.⁵

Australian nationals' engagement in the conflict is occurring in the context of decades of widespread, serious, documented violations of international law by the IDF.⁶ These international law violations⁷ since 7 October 2023

¹ Jennifer Hassan and Adam Taylor, 'Israel's massive mobilization of 360,000 reservists upends lives', *The Washington Post* (10 October 2023).

² See Jack Quail, 'Australian-Israeli military reservists arrive in Israel as Gaza ground invasion looms', *The Australian* (13 October 2023), Matthew Knott, James Massola and Lucy Cormack, 'Australians fly to Israel to join war as Palestinians urged to flee to southern Gaza', *Sydney Morning Herald* (13 October 2023).

³ Carly Douglas, 'This is a moment in history where the good of everyone ... takes precedence over any individual', *Herald Sun* (21 October 2023).

⁴ See, Stephen Rice, 'Young Australian ready to go to war for her other country', *The Australian* (9 October 2023); Danielle Gusmaroli, 'Israel war: Australian-Israelis join fight against Hamas', *The Daily Telegraph* (16 October 2023); Carly Douglas, 'This is a moment in history where the good of everyone ... takes precedence over any individual', *Herald Sun* (21 October 2023).

⁵ For more see, Angie Fox, 'The Australians who go to war for the Israeli and Greek armies', *Sydney Morning Herald* (11 September 2014)

⁶ Al-Haq, Al Mezan, PCHR, *Initial reporting on the ongoing Israeli retaliatory attacks on Gaza: (Reporting Period, 7-28 October 2023) based on preliminary documentation* (13 November 2023).

⁷ António Guterres, 'Secretary-General's remarks to the Security Council - on the Middle East' *United Nations Secretary General* (Press Release 24 October 2023).

include: widescale indiscriminate bombing targeting civilians⁸ and civilian infrastructure, including health facilities,⁹ churches,¹⁰ and bakeries;¹¹ intentional starvation of a civilian population as a weapon of war;¹² total siege and collective punishment, including through denial of access to water, medicines, aid, fuel and electricity;¹³ forced transfer of the protected civilian population;¹⁴ targeting and shooting at civilians, including journalists;¹⁵ acts of torture or cruel, inhuman or degrading treatment or punishment;¹⁶ and outrages upon human dignity;¹⁷ among other serious violations which amount to international crimes. Most concerning, on 16 November, several UN Special Procedures mandate holders warned of an imminent risk of genocide against the Palestinian population in Gaza,¹⁸ together with a significant and growing body of evidence¹⁹ that Israel either intends to commit, or is in the process of committing the crime of genocide in Gaza.

Australia's response to Australian nationals' engagement in the conflict appears to be inadequate

Despite the publicly available information about Australian nationals' participation in the Israel/OPT conflict as part of the IDF, and clear evidence of violations of international law by the IDF, it appears that the Australian government has failed to provide any public statements advising of the risks involved, particularly the legal risks, including the risk of individual criminal liability, for those Australians participating in the conflict as members of the IDF.

The only public statements from the Department of Home Affairs we have been able to locate are those referred to in the following excerpts from media reports. One such report included:

The Department of Home Affairs said anyone travelling to fight in the conflict from Australia must be part of a nation's official army, or risk breaking the law, but did not provide a number on those returning.²⁰

⁸ Amnesty International, *Israel/OPT: US-made munitions killed 43 civilians in two documented Israeli air strikes in Gaza – new investigation* (5 December 2023); Amnesty International, *Damning evidence of war crimes as Israeli attacks wipe out entire families in Gaza* (20 October 2023).

⁹ Human Rights Watch, *Gaza: Unlawful Israeli Hospital Strikes Worsen Health Crisis* (14 November 2023); Médecins Sans Frontières, *MSF convoy attacked in Gaza: all elements point to Israeli army responsibility* (1 December 2023).

¹⁰ Amnesty International, *Israel/OPT: 'Nowhere safe in Gaza': Unlawful Israeli strikes illustrate callous disregard for Palestinian lives* (20 November 2023).

¹¹ Kaamil Ahmed, Elena Morresi, 'Airstrikes on Gaza bakeries add to 'catastrophic' food shortages' *The Guardian* (28 October 2023).

¹² Human Rights Watch, *Israel: Starvation Used as Weapon of War in Gaza* (18 December 2023).

¹³ ICRC, 'Evacuation order of Gaza triggers catastrophic humanitarian consequences' (13 October 2023); Amnesty International, *Israel/OPT: Israel must lift illegal and inhumane blockade on Gaza as power plant runs out of fuel* (12 October 2023)

¹⁴ Al-Haq, Al Mezan and PCHR, 'Israel's Last Evacuation Order Requires Urgent International Intervention to Protect Gaza's Civilian Population, Who Have Nowhere Left to Shelter' (29 October 2023); *Protection of civilians and upholding legal and humanitarian obligations, GA Res 10/21, UN Doc A/ES-10/L.25* (26 October 2023);

UN Special Procedures, *Israel must rescind evacuation order for northern Gaza and comply with international law: UN expert* (13 October 2023).

¹⁵ Mohamed Mandour, 'Attacks, arrests, threats, censorship: The high risks of reporting the Israel-Gaza war' *Committee to Protect Journalists* (5 December 2023).

¹⁶ Amnesty International, *Israel/OPT: Horrifying cases of torture and degrading treatment of Palestinian detainees amid spike in arbitrary arrests* (8 November 2023).

¹⁷ Hagar Shezaf, 'Hundreds of Gazans Arrested During War Held Blindfolded and Handcuffed at Israeli Base' *Haaretz* (18 December 2023).

¹⁸ UN Special Procedures, *Gaza: UN experts call on international community to prevent genocide against the Palestinian people* (16 November 2023).

¹⁹ See for example, *Defense for Children International—Palestine, et al. v Joseph Biden, et al.* (D ND Cal, 3:23-cv-05829, 13 November 2023) (Complaint); Center for Constitutional Rights, *Defense for Children International - Palestine v. Biden* (Webpage).

²⁰ Sherryn Groch, 'We are resilient': Australian reservists called up in Israel join fight', *Sydney Morning Herald* (12 October 2023).

Another report stated:

A Home Affairs Department spokesperson told SBS News the Australian Government was alert to the potential for Australians to travel to Israel and the Palestinian territories and engage in hostilities.

"Australians who travel to fight who are not serving in the armed forces of a foreign country may be committing a criminal offence," the spokesperson said.²¹

He reminded Australians that Hamas was a listed terrorist organisation and Australians who travel to fight with a terrorist organisation, or recruit another person to do so, were committing a criminal offence.

Whilst we note that there is no prohibition on Australian citizens from fighting in the armed forces of the government of a foreign country,²² the reported guidance from the Department of Home Affairs does not warn individuals that their actions could constitute criminal offences under Australian law, which could result in the initiation of criminal proceedings against them, in circumstances where: there is mounting evidence the IDF is committing grave crimes in the OPT, and; Australia has obligations under international law to prosecute the commission of such crimes.

We note the South African government publicly released such an advisory on 19 December 2023.²³

Furthermore, failure to consider this issue may raise a national security risk for Australia, in that failing to both warn against involvement in the IDF or to act against alleged perpetrators of crimes could risk "undermining social cohesion and unity by stoking fears and division [which] risks Australia's domestic security".²⁴

Australia's contravention of international legal obligations

A failure to investigate and prosecute Australian nationals for involvement in potential war crimes, crimes against humanity, genocide and torture as codified in Divisions 268 and 274 of the Commonwealth Criminal Code, would be in breach of Australia's obligations under international law to investigate and prosecute these crimes.²⁵

²¹ Aleisha Orr, 'Military conscription is mandatory for most Israelis. Here's how it works', *SBS News* (17 October 2023).

²² *Criminal Code Act 1995* (Cth), sch 1 ('Criminal Code'), ss 119.1(4)(a).

²³ South Africa, Department of International Relations and Cooperation, '*South African nationals to avoid joining foreign armed forces which may contribute to the violation of domestic and international law*' (Media Statement, 18 December 2023).

²⁴ Commonwealth, Hansard, House of Representatives, *Motion – Israel*, 16 October 2023, 52 (Anthony Albanese, Prime Minister of Australia). See also, Natassia Chrysanthos, '*Worsening war in Gaza will heighten risk of violence in Australia: ASIO boss*', *Sydney Morning Herald* (23 October 2023); Commonwealth, *Legal and Constitutional Affairs Legislation Committee, Senate Estimates*, 23 October 2023, (Mike Burgess, Director-General, Australian Security Intelligence Organisation).

²⁵ *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 49; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 50; *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 129; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 146; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) arts 2, 5, 7; *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) Preamble, art 1.

Moreover, and specifically with respect to acts of genocide, the Australian government must uphold its obligation as a State Party to the Genocide Convention to not only punish acts of genocide, but prevent such acts.²⁶ The inadequacy of warnings issued to date by the Department of Home Affairs may constitute a failure by Australia to comply with its obligations under the Convention.

Clarification and action sought from the Australian government

Given the catastrophic situation currently unfolding in the OPT and in particular in Gaza, we seek clarification regarding the Australian government's position, and intended response, to the real risk that Australian nationals may be involved in the commission of international crimes.

We further urge the Australian government, as a matter of public interest, to assess the risks identified above and undertake to:

1. Update its advice to all persons who have travelled to Israel and the OPT to warn that they may be committing offences under Australian and international law for which they may be prosecuted, in Australia or a third state competent to do so. Such warnings should be a routine part of Australian government policy in situations where dual citizens are involved in the service of an armed force of a government of a foreign country.
2. Issue warnings that anyone who travels to Israel and the OPT and participates in hostilities will be investigated and could be prosecuted if there is evidence of their commission of, or complicity in, the commission of international crimes proscribed by the Criminal Code.
3. Coordinate with the AFP to monitor Australian citizens, including dual nationals, who travel to Israel and the OPT to fight in the IDF, and provide specific guidance to the AFP and the Commonwealth Director of Public Prosecutions to investigate these individuals and prosecute them if there is evidence that they have participated in the commission of international crimes proscribed by the Criminal Code.

We request that the Australian Federal Police:

1. Fulfils its mandate and responsibility to make enquiries and investigate allegations concerning the commission of international crimes by Australian citizens abroad, including upon the return of such persons to Australia.
2. Take steps to assist the International Criminal Court's (ICC) investigation in the Situation in Palestine, including by gathering evidence, for example, by interviewing witnesses who have recently returned from Israel and the OPT. The ICC's jurisdiction covers allegations of crimes committed by all parties to the conflict, including members of the IDF, members of the Israeli authorities, and members of Palestinian armed groups including Hamas. The UK's Metropolitan Police has commenced such an initiative.²⁷

We look forward to receiving your prompt response and clarification of steps taken by the Australian government in relation to the urgent and serious matters raised above.

²⁶ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951), arts I, IV – VI.

²⁷ Alexander Butler, 'Met Police investigating reports of war crimes in Gaza' *The Independent* (27 November 2023).

Sincerely,



Rawan Arraf
Executive Director
Australian Centre for International Justice

Cc:
Mike Burgess
Director-General of Security
Australian Security and Intelligence Organisation