

AUSTRALIAN 
 CENTRE
FOR INTERNATIONAL
JUSTICE 

The duty to investigate crimes of torture in national law and practice

Submission to the Special Rapporteur on Torture

25 November 2022

About the Australian Centre for International Justice

The Australian Centre for International Justice (ACIJ) is an independent and not-for-profit legal centre working to develop Australia's capacity to investigate and prosecute the international crimes offences in the Commonwealth Criminal Code. ACIJ aims to combat impunity and works with survivors of international crimes to seek justice, redress and accountability.

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1 Introduction

ACIJ welcomes the opportunity to make this submission to the Special Rapporteur on Torture for the purposes of providing input to her forthcoming report on the duty to investigate crimes of torture in national law and practice.

About ACIJ

ACIJ aims to develop and encourage Australia's domestic investigations and prosecutions of egregious violations of human rights which correlate to the international crimes offences in the Commonwealth Criminal Code,¹ namely: torture, war crimes, crimes against humanity and genocide.

ACIJ represents victims of atrocity crimes and works with victims and survivor communities and organisations in Australia and abroad. We develop legal strategies to challenge impunity for these crimes.

Primary focus of submission

ACIJ's work focuses on seeking avenues for justice and accountability for grave human rights abuses, including through criminal proceedings under the principle of universal jurisdiction. Our submission thus focuses on Australia's legal obligations and capacity to investigate and prosecute torture that has occurred overseas, often in the context of an armed conflict or a situation of serious human rights abuses.

ACIJ welcomes any further opportunity to provide additional commentary or supplementary submissions to the Special Rapporteur if this would assist.

Recommendations

This submission argues that Australia can better comply with its duty to investigate and prosecute crimes of torture by establishing a permanent, specialist unit to investigate international crimes (including torture) and ensuring redress for Afghan survivors and families of victims of war crimes (including the crimes of cruel treatment and torture). It makes the following recommendations:

¹ *Criminal Code Act 1995* (Cth) Schedule (**Commonwealth Criminal Code**).

Recommendation 1

Australia should establish a permanent, specialist unit to investigate international crimes, so that it can more effectively investigate and prosecute perpetrators of international crimes, including torture.

Recommendation 2

Australia should adopt the recommendations of the Afghanistan Inquiry Report and provide prompt compensation for Afghan survivors and families of victims, including in relation to where there is credible information of cruel treatment or torture perpetrated by Australian Special Forces.

2 Challenges, impediments and obstacles to effective national investigations and prosecutions of acts of torture

Recommendation 1

Australia should establish a permanent, specialist unit to investigate international crimes, so that it can more effectively investigate and prosecute perpetrators of international crimes, including torture.

As discussed below under '[Regulatory frameworks](#)', Australia has the legal framework required to investigate and prosecute crimes of torture. What is lacking is the institutional capacity to investigate these crimes. This could be addressed through the establishment of a permanent, specialist unit which has the capacity to undertake the complex task of compiling briefs of evidence in preparation for prosecution, in relation to international crimes including torture.

Traditionally, Australia has relied on ad hoc units to investigate international crimes. For example, the Special Investigations Unit (SIU) was set up in 1987 to investigate alleged war crimes committed by Nazis who had immigrated to Australia following World War II.² More recently, in 2020, the Office of the Special Investigator (OSI) was established to investigate potential war crimes during Australia's engagement in Afghanistan, but it is a temporary unit with a narrow remit,³ namely to

² See, for example, Gideon Boas and Pascale Chifflet, 'Suspected War Criminals in Australia: Law and Policy', *Melbourne University Law Review* (2016) 40:46.

³ See 'Inquiry into Australia's Engagement in Afghanistan – Submission to the Senate Foreign Affairs, Defence and Trade References Committee', *Australian Centre for International Justice* (Submission, 13 October 2021) <[https://acij.org.au/wp-content/uploads/2021/10/Australian-Centre-for-International-Justice-Inquiry-Submission-Australias-Engagment-in-Afghanistan .pdf](https://acij.org.au/wp-content/uploads/2021/10/Australian-Centre-for-International-Justice-Inquiry-Submission-Australias-Engagment-in-Afghanistan.pdf)> 20.

investigate allegations of criminal offences arising from or related to any breaches of the Laws of Armed Conflict by members of the Australian Defence Force in Afghanistan from 2005 to 2016.⁴ The establishment of the OSI followed the release of the Afghanistan Inquiry Report in November 2020, in which it was found that there was credible evidence that members of the Australian Special Forces had committed war crimes, including unlawful killings and cruel treatment.⁵

Ad hoc units like the SIU and OSI are not sufficient for Australia to comply with its ongoing obligations to investigate and prosecute crimes of torture. This is demonstrated by the serious mishandling of the matter of retired General Jagath Jayasuriya by the Australian Federal Police (AFP) from 2019 to 2022.

Jagath 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.

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 (ITJP) and ACIJ wrote to the AFP requesting an urgent meeting, advising that Jayasuriya, an alleged war criminal, may have been in Australia and was likely to return. The request for an urgent meeting was not granted.

On 01 October 2019, the ITJP, ACIJ and the Human Rights Law Centre (HRLC) 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 05 February

⁴ ‘Home’, *Australian Government – Office of the Special Investigator* (Web Page) <<https://www.osi.gov.au/>>.

⁵ ‘Afghanistan Inquiry Report’, *Inspector-General of the Australian Defence Force* (Report, 10 November 2020) <<https://www.defence.gov.au/sites/default/files/2021-10/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>>.

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 ITJP made multiple requests to the AFP for an update in relation to the matter. On 01 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 investigate Jayasuriya given, amongst other things, that Jayasuriya was not in Australia and that Australia supported a domestic determined inquiry process within Sri Lanka.

The stated reasons for the refusal to investigate are unsatisfactory for two reasons. First, the AFP pointed to Jayasuriya not being in the jurisdiction as a reason not to investigate, overlooking the fact that it was only due to their mishandling of the case which led to the allegations not being considered until well after his multiple visits to Australia in 2019. Moreover, Jayasuriya's current absence from the jurisdiction should have no bearing on whether an investigation should be commenced, given the possibility of future visits by Jayasuriya and the availability of extradition mechanisms. Secondly, the AFP's reliance on a domestic determined inquiry process is not compatible with well recognised fact that domestic processes within Sri Lanka have no credibility and have no prospects of leading to accountability. 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”.⁶ The most recent UN Report to the Human Rights Council dated 06 September 2022 stated that “the Sri Lankan State, including through successive governments, has consistently failed to pursue an effective transitional justice process to hold perpetrators of gross human rights violations and abuses accountable and uphold victims' rights to truth, justice and reparations”.⁷ The same Report recommended that Member States “cooperate in investigating and prosecuting perpetrators of international crimes committed by all parties in Sri

⁶ ‘Open Wounds and Mounting Dangers – Blocking Accountability for Grave Abuses in Sri Lanka’, *Human Rights Watch* (Report, 01 February 2021) <<https://www.hrw.org/report/2021/02/01/open-wounds-and-mounting-dangers/blocking-accountability-grave-abuses-sri-lanka>>.

⁷ ‘Situation of human rights in Sri Lanka – Comprehensive Report of the United Nations High Commissioner for Human Rights’, *Human Rights Council*, A/HRC/51/5 (Report, 6 September 2022) <<https://www.ohchr.org/en/press-releases/2022/09/sri-lanka-critical-juncture-un-report-urges-progress-accountability>> 11[51].

Lanka through judicial proceedings in national jurisdictions, including under accepted principles of extraterritorial or universal jurisdiction”.⁸

The complete description of events can be found on the ACIJ website,⁹ and is also summarised in the infographic at [Annex A](#). The mishandling of the Jayasuriya matter highlights the challenges and obstacles to the effective investigation of international crimes, including torture, in Australia and emphasises the need for a permanent, specialised unit to investigate these crimes.

3 Regulatory frameworks

As a party to the Convention against Torture, Australia is bound to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction, take measures to establish jurisdiction when the alleged offender or victim is a national, or where the alleged offender is present in any territory under its jurisdiction, and either prosecute or extradite alleged perpetrators.¹⁰ Australia has passed legislation to ensure that crimes of torture are included as offences under its domestic criminal legislation, pursuant to sections 268.13 (crime against humanity – torture), 268.25 (war crime – torture – international armed conflict), 268.73 (war crime – torture – non international armed conflict) and 274.2 (torture) of the Commonwealth Criminal Code.

Criminal responsibility is extended to commanders and superiors in relation to torture where it is committed as part of a crime against humanity or war crime, pursuant to section 268.115 of the Commonwealth Criminal Code. In relation to potentially applicable defences for crimes of torture, the defence of superior orders is limited only to war crimes that are committed by a person pursuant to an order that the person was under a legal obligation to obey, but the person did not know that the order was unlawful and the order was not manifestly unlawful.¹¹ For the stand-alone offence of

⁸ ‘Situation of human rights in Sri Lanka – Comprehensive Report of the United Nations High Commissioner for Human Rights’, Human Rights Council, A/HRC/51/5 (Report, 6 September 2022) <<https://www.ohchr.org/en/press-releases/2022/09/sri-lanka-critical-juncture-un-report-urges-progress-accountability>> 16.

⁹ ‘Case Against Sri Lankan General Jagath Jayasuriya’, *Australian Centre for International Justice* (Web Page) <<https://acij.org.au/our-work/international-accountability/sri-lanka/accountability-for-crimes-in-sri-lanka/case-against-sri-lankan-general-jagath-jayasuriya/>>.

¹⁰ *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) (**‘Convention Against Torture’**) articles 2, 5 to 7.

¹¹ Commonwealth Criminal Code s 268.116.

torture, the defence of exceptional circumstances or superior orders does not apply, but the circumstances may be considered in sentencing.¹²

All of these crimes have extraterritorial effect, in accordance with the ‘extended geographical jurisdiction’ provisions in sections 268.117 and 274.2 of the Commonwealth Criminal Code. Concerningly, the Attorney-General’s consent is required for torture proceedings to be commenced.¹³ Administrative review in relation to the Attorney-General’s decision to give, or refuse to give consent for torture proceedings where it is part of a crime against humanity or war crime has been curtailed by virtue of section 268.122 of the Commonwealth Criminal Code. While the requirement for consent does not interfere with the ability for an investigation to take place, or for charges to be laid or an arrest made, this requirement unnecessarily injects a political element into the prosecution of international crimes, including torture, offences.

4 Elements of human-rights compliant investigations and prosecutions

Recommendation 2

Australia should adopt the recommendations of the Afghanistan Inquiry Report and provide prompt compensation for Afghan survivors and families of victims, including in relation to where there was credible information of cruel treatment or torture perpetrated by Australian Special Forces.

Given Australia’s lack of practice or precedent in investigating and prosecuting crimes of torture, it is difficult to determine whether any torture investigations or prosecutions would be human rights-compliant in adhering to the elements of being independent and impartial, prompt, adequate and effective, accessible and safe, open to public scrutiny and transparent, and securing rights and remedies for victims and survivors. However, ACIJ has identified a number of areas of concern.

Independent and impartial. The requirement for Attorney-General’s consent for the initiation of proceedings for torture means that there is a potential for politicisation and a lack of independence and impartiality in torture prosecutions.

¹² Commonwealth Criminal Code s 274.4.

¹³ Commonwealth Criminal Code s 268.121 (crime against humanity – torture and war crime – torture), 274.3 (torture – where the alleged offence occurs wholly outside Australia).

Prompt, adequate and effective. As highlighted [above](#), the lack of a permanent, specialised unit dedicated to investigating international crimes including torture may have contributed to the mishandling and unconscionable delay in the consideration of an investigation request made in relation to retired General Jagath Jayasuriya in 2019. This indicates that Australia has failed to ensure prompt, adequate and effective torture investigations and prosecutions, and may continue to fail in these respects unless remedial measures are taken.

Accessible and safe, open to public scrutiny and transparent. The lack of investigations and prosecutions into torture raises questions as to how accessible, safe, open to public scrutiny and transparent any investigation or prosecution would be. Historically, the AFP has provided limited information on its war crimes investigations on Afghanistan, while in relation to the work of the OSI, transparency could be enhanced through outreach to ensure that updates become accessible to affected victims and observers in Afghanistan.¹⁴

Rights and remedies for victims and survivors. There is an absence of a national compensation scheme applicable to victims of Commonwealth Crimes,¹⁵ which means that victims of torture offences in Divisions 268 and 274 of the Commonwealth Criminal Code have limited avenues for redress. There exists a mechanism for reparation orders under section 21B of the *Crimes Act 1914* (Cth), but it is dependent on successful prosecution, there is a lack of clarity regarding reparation applications and no guarantee any orders will be made.¹⁶ Further, Australia has failed to adhere to the recommendations in the Afghanistan Inquiry Report to provide prompt compensation to victims and their families for unlawful killings and cruel treatment.¹⁷ There are also indications in that report and in other reporting that the abuse of detainees in some cases rose to the level of

¹⁴ Fiona Nelson and Kobra Moradi, 'The Role of Transparency in Australia's Response to War Crimes in Afghanistan', *OpinioJuris* (Blog Post, 04 November 2022) <<http://opiniojuris.org/2022/11/04/the-role-of-transparency-in-australias-response-to-war-crimes-in-afghanistan/>>.

¹⁵ Jennifer Burn, Fiona McLeod SC and Nicola Knackstredt, 'Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime', *Law Council of Australia* (Report) <<https://www.lawcouncil.asn.au/files/web-pdf/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>>.

¹⁶ Jennifer Burn, Fiona McLeod SC and Nicola Knackstredt, 'Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime', *Law Council of Australia* (Report) <<https://www.lawcouncil.asn.au/files/web-pdf/National-Compensation-Scheme-for-Victims-of-Commonwealth-Crime.pdf>> 8.

¹⁷ 'Afghanistan Inquiry Report', Inspector-General of the Australian Defence Force (Report, 10 November 2020) <<https://www.defence.gov.au/sites/default/files/2021-10/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>> 173.

torture.¹⁸ It has been two years since the release of the Afghanistan Inquiry Report, yet the government has taken no action on the issue of compensation and other forms of redress.¹⁹

5 Mechanisms/institutions/entities involved in complaints, investigations and prosecution

As stated [above](#), there is no specialised unit to investigate and prosecute crimes of torture. It is ACIJ's view that this has contributed to the mishandling of previous requests to investigate serious international crimes including torture.

The AFP has the responsibility for investigating offences under the Commonwealth Criminal Code, with the Counter Terrorism and Special Investigations Team appearing to have the current mandate for crimes against humanity and related offences.²⁰ The Commonwealth Director of Public Prosecutions has responsibility for prosecution of Commonwealth offences, and the involvement of the Attorney-General is required due to the requirement for consent to commence torture proceedings, as noted above.

6 Complex investigations

The lack of a permanent, specialised unit may mean that the AFP is not in a position to draw on the expansive and cooperative investigatory and prosecutorial networks required to effectively address complex crimes like torture. The practice of universal jurisdiction is still in its infancy in Australia, and to properly comply with its obligations to investigate and prosecute crimes of torture, Australia will need to better link with these networks in order to adopt best practices and procedures and obtain access to available, relevant evidence. To address this, Australia could, for example, seek Observer State status as part of the EU Genocide Network and have a member of the

¹⁸ See, for example, 'Afghanistan Inquiry Report', Inspector-General of the Australian Defence Force (Report, 10 November 2020) <<https://www.defence.gov.au/sites/default/files/2021-10/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>> pages 92 – 93, 108 – 109; Mark Willacy, *Rogue Forces: An Explosive Insiders' Account of Australian SAS War Crimes in Afghanistan* (Simon & Schuster, 2021) 331.

¹⁹ See, for example, 'Joint Media Release: Human rights groups call on Australia to provide full, effective and prompt reparation to Afghan victims', *Australian Centre for International Justice* (Media Release, 05 August 2021) <<https://acij.org.au/joint-media-release-human-rights-groups-call-on-australia-to-provide-full-effective-and-prompt-reparation-to-afghan-victims/>>; 'Australian War Crimes in Afghanistan: Questions and Answers', Australian Centre for International Justice (Web Page) <<https://acij.org.au/our-work/international-accountability/afghanistan/australian-war-crimes-in-afghanistan-questions-and-answers/>>.

²⁰ 'Annual Report 2020 – 21', *Australian Federal Police* (Report) <<https://www.afp.gov.au/sites/default/files/PDF/Reports/AFPAnnualReport20-21.pdf>> 25.

AFP serve as Australia's contact point within the Network, in order to draw upon the experience of other Member State investigators who have been involved in complex investigations relating to crimes of torture and other core international crimes.

7 Conclusion

Australia has the basic legislative framework required to investigate and prosecute crimes of torture. However, it lacks the institutional capacity to properly comply with its obligations. This could be addressed through the establishment of a permanent, specialised international crimes investigations unit. Further, Australia should take steps to promptly provide redress to Afghan victims of cruel treatment and other war crimes as recommended by the Afghanistan Inquiry.

8 Annex A - Infographic in relation to the mishandling of the Jagath Jayasuriya matter by the AFP

