POLICY BRIEF

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CONFRONTING REALITY: RESPONDING TO WAR CRIMINALS LIVING IN AUSTRALIA

WHAT IS THE PROBLEM?

It is likely Australia has unintentionally become home to a significant population of suspected war criminals. Border screening processes were strengthened in 2002-03, but more needs to be done.

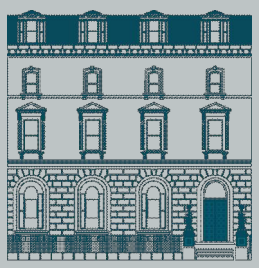
Sheltering war criminals runs counter to community expectations and our international commitment to end impunity for war crimes. It also undermines the integrity of our immigration and legal systems. Globally, the system for preventing the movement of war criminals is lacking coordination.

WHAT SHOULD BE DONE?

The Australian government needs to make a clear policy statement setting out how it intends to address the problem of suspected war criminals living here Its focus should shift from notionally seeking prosecutions – which have never been successful in Australia – to a wider range of options.

The AFP should develop a small, dedicated capability to investigate allegations of war criminals living in Australia. Consistent with government policy, gaps in Australia's legislation dealing with war crimes should be closed.

Australia should advocate measures to strengthen international information sharing on war crimes suspects.



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> 'It's all well and good for the Minister to talk about the legislation that's in place but what he needs to do now is direct action that will actually enforce those laws….we risk looking like a safe haven for war criminals.'
>
> Then Shadow Justice Minister, Senator the Hon Joe Ludwig[1]
>
> There are major gaps in Australia's domestic laws that allow such accused [war] criminals to enter and live here without fear of prosecution. Labor is committed to meeting Australia's international human rights obligations by closing these loopholes and Labor will review investigatory resources to ensure that any perpetrators found in Australia can be brought to justice.
>
> 2007 Labor Party National Platform and Constitution[2]

Introduction

It was as recently as 1994 that 800,000 Rwandans were systematically slaughtered and the world was reminded that genocide is still possible. July the following year it happened again, when more than 7,000 men were murdered in the Srebrenica massacre. Today, the killing continues in places like Darfur where the death toll now stands in the hundreds of thousands and the Democratic Republic of Congo where the toll stands in the millions. The crimes committed in these and the many other conflicts of recent decades – the mass killing of civilian populations, the rape of countless women and widespread use of torture – have shaken the conscience of the world.

Australia can sometimes seem remote from these killing fields, but its long tradition of mass migration means that it is not, and it is very likely that it has inadvertently become a safe haven for suspected war criminals.[3] This Policy Brief summarises Australia's history of dealing with war criminals before looking at their presence in Australia and why we need to do something about the problem. It outlines Australia's current approach and compares this with that of Canada, which has a domestic war crimes program. It finishes by suggesting ways to strengthen Australian policy towards war criminals.

Background

Australia's track record of dealing with war criminals is patchy. Between 1945 and 1951, it tried 807 Japanese defendants in and outside Australia resulting in 579 convictions and 137 executions.[4] Further action was not taken until 1986 – when an ABC series sparked the Menzies Review[5] of WWII war criminals living in Australia and the subsequent establishment of the Special Investigations Unit (SIU) in 1987 to examine the allegations raised. The SIU investigations led to three individuals being charged with war crimes, but the Unit was disbanded in 1992.[6]

In the financial year 2002-03, recognising the problem posed by modern war criminals, the Department of Immigration established a dedicated War Crimes Screening Unit (WCSU) to screen suspicious citizenship and visa applicants for potential involvement in war crimes. In December 2005, this was temporarily supplemented by the creation of a War Crimes Task Force when it emerged that high-profile alleged war criminals from the Middle East and the Balkans were living in

Australia.[7] This task force investigated 82 discrete cases and was disbanded in June 2006.[8]

Australia has never successfully extradited anyone to face trial for alleged war crimes.[9]

Nor have other remedies been much more successful. Despite amendments to the Citizenship Act to make revocation of citizenship easier, no war criminal has ever been stripped of Australian citizenship. The only mechanism Australia has used to any extent is the revocation of refugee protection under Article 1(F) of the Refugee Convention[10] which allows states to deny protection where there are serious reasons for considering a person has committed war crimes.

Are there war criminals in Australia?

Until a domestic law enforcement agency is given the resources to investigate allegations of war criminals living in Australia it is impossible to determine with any accuracy how many are living within our borders. However, there are good reasons to believe that significant numbers are living here.

We already know that suspected war criminals have slipped through Australian border checks. The 1986 Menzies Review of Nazi war criminals living in Australia identified 'very substantial gaps'[11] in Australia's initial post-WWII war crimes screening procedures. The SIU, established in response, conducted 841 investigations[12] and identified 27 cases where it 'was satisfied that the suspect had committed serious war crimes but was not able to gather sufficient evidence for prosecution under the War Crimes Act'.[13] Some WWII suspects are still alive today. Officials privately suggest that screening has been a problem at other times since WWII.

In the public mind war criminals seem to be commonly associated with greying men from WWII. However, as the Simon Wiesenthal Center – an organisation dedicated to pursuing Nazi war criminals – points out, Australia is probably now facing its final opportunity to take successful legal action against suspected Nazi war criminals.[14]

Modern war criminals are a far more significant problem for Australia. It was reported in 2005 that people who had been denied refugee protection on the basis of involvement in war crimes had come from Afghanistan, Palestine, Sri Lanka, Nepal, Lebanon, Sierra Leone, Bangladesh, Tibet, Nigeria, Chile, Iran, Iraq and India.[15] It is likely that Australia is also home to suspected war criminals from the countries of the former Yugoslavia, as well as Cambodia,[16] and possibly Rwanda and East Timor among others.

The fact that other countries continue to request the extradition of alleged war criminals from Australia – albeit in small numbers[17] – offers another reason for suspecting they are living here. [18]

Another reason for suspecting that a significant number of war criminals are living in Australia comes from examining the experience of a comparable country – Canada – that has dedicated resources to addressing the problem of resident war criminals (see page 10).

As Tanya Plibersek stated in a debate in parliament on crimes against humanity:

> 'Mr Deputy Speaker, you can imagine someone walking into a community centre who spies across the room someone whom they believe to be responsible for the deaths of their family members….I am not saying for a moment that an accusation is all that is required, but we at least owe it to the victims of these crimes to examine their claims, and we owe it to ourselves as a nation to be confident that we are not sheltering people here who have committed such crimes.'[19]

Why now?

Since the establishment of the ICTY in 1993 to prosecute the worst criminals from the Balkans conflict, there has been a dramatic revival in international interest in war crimes. The ICTY was followed by a similar tribunal for Rwanda in 1994, another for Sierra Leone in 2002 and the world's first permanent international criminal court – the ICC – came into existence the same year with Australia as a member. The process did not stop there. A string of other international courts were established including one to try members of the Khmer Rouge in 2004, and in 2007 a special court for Lebanon to prosecute criminal acts relating to the assassination of former Prime Minister Rafik Hariri. Australia has been an active participant in these international efforts. In 2008, it spent $15.7 million on these international criminal courts and tribunals (the Lebanon tribunal is the only one it is yet to contribute towards).[20]

There has been a parallel growth in domestic war crimes units to pursue resident war criminals. As a recent report on Canada's war crimes program stated: 'The international logic of this system argues that as fewer countries provide safe haven, the scope for impunity will be significantly diminished'.[21] Western countries that have dedicated resources to meeting this challenge include: the United States (unit established 1979), Canada (unit established 1987), Belgium (unit established 1998), the Netherlands (unit established 1998), Denmark (unit established 2002), Norway (unit established 2005) and Sweden (unit established 2008).

Australia has been whole-hearted in its support of international criminal courts and tribunals, but that system is integrally connected to national efforts. Under the Rome Statute of the International Criminal Court Australia has accepted the principle of complementarity, whereby:

> 'States have the first responsibility and right to prosecute international crimes. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings.'[22]

As the ICC plans only to pursue high-ranking accused war criminals, Australia's direct obligation to prosecute or extradite under the Rome Statute is likely to be limited. However, it is clear that under the principle of complementarity and as a responsible international actor, Australia must do its bit to deny safe haven to all war criminals. The Geneva Conventions also place international legal obligations on Australia to take action against persons suspected of grave breaches.[23]

Joining the international network of countries committed to ending impunity for war crimes would also be consistent with the Rudd government's wider agenda. It would help to demonstrate a genuine commitment to multilateral solutions to global problems and its credentials as a good international citizen in the lead up to Australia's UN Security Council bid.

Australia is described in the Simon Wiesenthal Center's annual status report on Nazi war crimes investigations and prosecutions as 'the only major Western country of refuge'.[24] The passage of time means Australia is increasingly unlikely to be able to take effective action against suspected Nazi war criminals. However, it should keep pace with international trends and make sure it does its part to deny modern war criminals safe haven.

Australia's current approach to war criminals

With the brief exceptions of the period immediately following WWII and the short life of the SIU from 1987-92, Australia has never had a clear policy approach on suspected war criminals, although – at least officially – the emphasis still lies on prosecution. In correspondence during preparation of this Policy Brief, the Attorney-General's Department wrote:

> 'Australia has a strong framework for ensuring the proper investigation and prosecution of such [war] crimes. This framework is based on three pillars: border security, international crime cooperation and domestic investigation and prosecution….the framework is primarily directed at ensuring perpetrators are properly investigated and prosecuted…'.

In practice, however, dedicated resources are not available to conduct substantive war crimes investigations, and achieving a conviction is extremely difficult. As a result, successive governments have, in effect, continued with a 'no policy' approach where taking action against suspected war criminals is not ruled out, but resources are not provided nor clear guidance given to government agencies on how to approach the problem. This section will look at existing avenues available to Australia to deal with war criminals and the government bodies engaged.

The War Crimes Screening Unit

The War Crimes Screening Unit (WCSU) is the only dedicated government body dealing with war criminals. Located within the Department of Immigration and Citizenship (DIAC) it has approximately ten staff (up from five in late 2005[25]) responsible for screening citizenship and visa applicants suspected of committing war crimes. Migration statistics demonstrate the challenge that screening for war criminals presents. In 2007-08 DIAC issued 13,014 refugee and humanitarian visas, 158,630 migration visas and 3,609,928 visitor visas.[26]

The WCSU has received an average of about 730 referrals a year.[27] In the only year in which DIAC published data (2004-05), of 881 referrals received seven were recommended for refusal.

DIAC maintains a Movement Alert List (MAL) of people with serious criminal records or

whose presence in Australia may constitute a risk to the community. In October 2008, there were 640,000 identities listed on MAL,[28] with the latest available report stating that 7,600 of these related to war crimes or crimes against humanity.[29] To put this in perspective, the databases maintained by the ICTY alone are estimated to contain evidence that tens of thousands of people were involved in war crimes in the former Yugoslavia in some form.

The WCSU liaises with a range of international counterparts. DIAC has concluded a Memorandum of Understanding with the US, the UK and Canada 'to provide a framework for joint efforts in respect of investigations relating to genocide, war crimes and crimes against humanity'.[30]

Canada Border Services Agency – which forms part of Canada's leading War Crimes Program – hosts a visiting DIAC officer for a one-week training program and Canada has posted an Intelligence Liaison Officer to Canberra to assist DIAC with its program and to facilitate information sharing.[31] The WSCU has also made use of the databases kept by the ICTY and the International Criminal Tribunal for Rwanda.

International criminal courts, like the ICTY, tend to focus their efforts on a small number of suspected senior political and military leaders but in the course of their investigations gather information on a vast number of mid-level suspects and direct perpetrators of war crimes.

The ad hoc international tribunals contacted in the course of this review provided assistance to states requesting information on suspects and/or allowed national investigators physically to access the archives on the court's premises. However, this was on an informal basis and few resources were available to facilitate this process. For one court, the information sources on mid-level suspects were not easily accessible or searchable. Information sharing between states and the International Criminal Court is yet to occur in the same way it does with other international tribunals.

This is an imperfect system. The international courts presently have little incentive to gather sufficiently complete information on the mid-level suspects and direct perpetrators they come across in the course of their investigations or to make this easily available in a secure and timely way to national immigration and law enforcement authorities.

Prosecution

Australian law provides several options for dealing with suspected war criminals who escape border screening procedures. Prosecution in an Australian court is the most direct way of confronting the issue – and the government's preferred approach – but is fraught with difficulties. Australia has never concluded a successful prosecution of a war criminal since the military trials immediately following WWII and no prosecutions have been initiated since the SIU was closed down. The story of the SIU illustrates the general difficulty of prosecuting war criminals in Australia.

Over its short life the SIU cost taxpayers $15.4 million.[32] It resulted in three individuals being charged with war crimes, none resulting in a conviction. The distance of the trials from the crime scenes in Europe and the time elapsed since the events occurred presented enormous challenges (although they may be less of an

issue in modern trials). Investigations needed to take place in Europe and included the exhumation of mass graves.

Legislative gaps present another potential obstacle to prosecuting war criminals successfully. As Labor MP Tanya Plibersek stated in parliament in 2004:

> '...Australia has no domestic legislation enabling the prosecution in Australian courts of the following international crimes committed outside Australia by people who subsequently settled here:
>
> (a) Genocide (the Genocide Convention Act 1949 did not make genocide a crime under Australian law; it only approved ratification of the Convention);
>
> (b) Crimes Against Humanity (other than torture after 1988 and hostage taking after 1989); and
>
> (c) War Crimes committed in the context of non-international armed conflicts anywhere in the world at any time, or committed in the context of an international conflict prior to 1957 (except Europe 1939-1945)'.[33]

The legislation that implemented Australia's obligations under the Rome Statute, in particular the *International Criminal Court (Consequential Amendments) Act 2002* 'is the most comprehensive legislation Australia has passed to deal with war criminals' covering both international and non-international armed conflict but it applies only to crimes committed after 2002.[34]

Perhaps the biggest obstacle to Australia's prosecuting resident war criminals is that there are no dedicated resources to conduct investigations.

The AFP stated in correspondence during preparation of this paper that:

> The AFP utilises a flexible team based model rather than dedicated specialist teams to undertake this type of [war crimes] investigation. War crime referrals, if accepted for investigation, are allocated to the Economic and Special Operations (ESO) portfolio.
>
> ....The AFP evaluates all referrals and accepts or rejects matters in accordance with a consistent evaluation process underpinned by the Case Categorisation Prioritisation Model (CCPM). As such appropriate resources are allocated as required.

As one war crimes expert noted in response: 'put another way, these cases are never a resource priority in the face of other easier investigations'. The AFP's current approach also ignores the fact that war crimes cases require specialist expertise and ad hoc investigations are therefore unlikely to be successful.

Extradition

Extradition is theoretically a quicker, more effective and cost-efficient way of dealing with suspected war criminals living in Australia. Trials run in (or closer to) the place where the alleged events occurred can be cheaper and easier to conduct. And unlike other options like

citizenship revocation (discussed below), suspected war criminals still face trial.

In practice, however, a number of factors have worked to stymie this option – not least of which is that in most countries where war crimes have been committed, justice systems have usually collapsed along with governance structures.

Extradition is also a lengthy and cumbersome process that has never been used successfully in Australia for a suspected war criminal. Even where extradition arrangements are in place the process is inefficient, and in a report of December 2005, the Attorney-General's Department pointed out a raft of problems and blockages in the extradition process.[35] Proposals to reform the system were, at the time of writing, being considered by government.

Excluding technical barriers to extradition, there may be sound legal reasons why a person cannot be extradited. These could include considerations that the person might not receive a fair trial or could be tortured in the requesting country or face the death penalty if convicted.

In the past ten years, the Commonwealth Director of Public Prosecutions has received just three extradition requests for accused war criminals.[36] The small number of requests for extradition over the last decade is not necessarily a strong indication that war criminals are absent from Australia. It could reflect the lack of resources available (both in Australia and the war-torn countries from which they have come) for identifying suspected war criminals and/or the delays associated with our extradition process.

Denial of refugee protection

Article 1(F) of the Refugee Convention allows states to deny protection where 'there are serious reasons for considering' a person has committed 'a crime against peace, a war crime, or a crime against humanity'. In the last ten years the Administrative Appeals Tribunal has upheld 23 decisions to refuse to grant or cancel refugee protection under this provision.[37]

This option for dealing with suspected war criminals is not without its problems. The person's case is heard by an administrative body that has no real background or expertise in war crimes issues and where a lower standard of proof is required;[38] there is also no need under the convention 'to balance the seriousness of the person's 1F crime against the possible harm he or she may face if returned to his or her state of origin'.[39]

Once people are refused refugee protection or have it cancelled under Article 1 (F) a practical problem can then arise of how to deport them. A receiving state must be found – and some people are stateless. An investigation in 2005 by Fairfax journalists found a number of people denied refugee protection living in the Australian community, some for over a decade since first confessing to atrocities.[40]

Citizenship revocation and migration fraud

Amendments to the *Australian Citizenship Act 1948* in 1997 widened the scope for stripping people of citizenship on the basis of convictions for migration-related fraud and removed the ten-year time limit that once applied, but do not apply retrospectively.[41]

Removing suspected war criminals from Australia by stripping them of citizenship, while having the potential to be easier than prosecution or extradition, also has its difficulties. The person does not face trial for war crimes offences and the Minister's ability to revoke citizenship is restricted in some instances where, if by doing so, the person would become stateless. As with denial of refugee protection, Australia must also identify a state that will accept the individual.

DIAC advised there is no record of any Australian ever being stripped of their citizenship on the basis of suspected involvement in war crimes.

For non-citizens suspected of involvement in war crimes there are broad powers under the *Migration Act 1958* to cancel their visas.

At first glance, a policy focused on prosecutions appears the most comprehensive. In practice however, a single approach will not cover all circumstances. Australia needs to be ready to use the whole gamut of available remedies to confront the problem. These remedies – such as citizenship revocation and denial of refugee protection – are not perfect but they are an important part of any comprehensive response needed to deny war criminals safe haven in Australia.

The experience of several Western countries suggests a broad-ranging approach can produce considerable success in confronting domestic war crimes problems.

A comparison with Canada

Canada, like Australia, has a significant capacity to regulate people movements across its borders. It has a strong border screening program in place and operates a large migration and refugee program. Unlike Australia, however, Canada has established a domestic war crimes program. Canada's experience may offer policy lessons for Australia.

Like Australia, Canada conducted a commission of inquiry into WWII war criminals living in Canada in the mid 80s. The Canadian inquiry resulted in charges being laid in four cases between 1987 and 1992; none resulted in a conviction. Unlike Australia, however, the Canadian government responded by broadening its domestic war crimes program and reshaping its policy approach.

In 1995, Canada shifted from pursuing prosecutions to revocation of citizenship and removed any real distinction in applicable policy to WWII and modern war criminals. In 1997, it reviewed its war crimes program and in 1998 announced a whole-of-government approach and $C46.8 million in funding over the following three years.[42]

Canada's War Crimes Program is coordinated across government bringing together the Canada Border Services Agency, the Department of Justice and the Royal Canadian Mounted Police, each of which has a specialised unit dealing with war crimes as well as Citizenship and Immigration Canada.

The program is coordinated through the War Crimes Steering Committee which meets on an *ad hoc* basis and consists of senior managers. At the operational level, the War Crimes Program Coordination and Operations Committee meets regularly to develop policy, coordinate operations and assess allegations and is composed of senior officials from each department.[43]

Like Australia, Canada has a unit devoted to screening for war criminals before they can enter Canada. This has prevented some 3,360 unwanted entries of suspected war criminals since 1997-98.[44] DIAC does not publish equivalent figures, but its 2004-05 annual report states that of 881 cases referred for screening 'seven recommendations were made for refusal in relation to war crimes'.[45]

These and other comparisons in this paper between Canada and Australia are imperfect: Canada's population is about 12 million more than Australia's and over the last decade Australia has accepted 55 per cent as many migrants and about 45 per cent as many refugees.[46] Each country also has its own unique migration profile. The comparisons do, however, suggest that Australia's actions against resident war crimes suspects are not proportionate to the likely numbers present and that if it devoted resources to investigating resident war criminals a substantial problem would be identified.

Given the strong systems Canada has had in place for over a decade to screen war criminals it is noteworthy that domestic resources devoted to pursuing war criminals there have, despite this, uncovered a significant problem.

Since 1997-98, Canada has conducted approximately 1,800 domestic investigations into war crimes.[47] The AFP by contrast, stated it had conducted 30 investigations since 1997.[48]

Since the mid-90s Canada has shied away from running domestic prosecutions of war criminals, focusing on other avenues. A recent review of Canada's war crimes program found even the simplest prosecution cost $C4 million,[49] but it has not ruled them out completely. In 2005, charges were laid against Désiré Munyaneza of Rwanda, following a five-year investigation.[50]

Revocation of citizenship has been an alternative method pursued by Canada over the years: in 2005-06 21 modern war crimes cases were identified for possible revocation.[51]

Exclusions from refugee protection under Article 1(F) of the Refugee Convention are also common, with 564 exclusions over the nine-year period from 1997-98 compared with 23 exclusion decisions upheld by the Administrative Appeals Tribunal in Australia over the ten-year period from 1998-99.[52]

Over the years Canada's war crimes program has resulted in a modest, but steady stream of war criminals being removed (408 from 1997-98 to 2005-06).[53] There is also no end in sight. As a recent review of Canada's war crimes program stated:

> '…there is no indication that the number of allegations against those seeking to enter Canada or already resident will decline. The combination of new conflicts, the changing pattern of immigration to Canada from countries in

> conflict and allegations arising from older conflicts, indicate that the Program will continue to deal with a significant volume of allegations.'[54]

In terms of resources devoted to its war crimes program, Canada Border Services Agency has 55 full-time employees working at headquarters and in regional offices (with C$7.2 million of the annual C$15.6 million war crimes budget). The Royal Canadian Mounted Police have 12 regular members (with C$682,000 of the annual budget), the Department of Justice is allocated 42 full-time employees and six are allocated for Citizenship and Immigration Canada (with C$5.7 million and C$1.9 million of the annual budget respectively).

By comparison, Sweden's war crimes unit has one detective superintendent, seven detective inspectors, one analyst and one administration assistant with four public prosecutors in Stockholm designated for war crimes cases. The Netherlands war crimes unit has two team leaders, eighteen investigators and two assistant investigators making a total of 22 personnel which will be extended to 35 in 2009. The Netherlands Immigration and Naturalisation Service also has 25 investigators devoted to war crimes investigations, with eight more expected to be added.[55]

Clearly no two countries' circumstances are identical. However, given Canada operates a world-class border screening program – that includes training of Australian DIAC officials – and still has a domestic war crimes problem, this suggests suspected war criminals would be discovered in Australia if government were to allocate dedicated resources to this problem.

Significant numbers of suspected war criminals have probably entered Australia because screening has not always been adequate but also because comprehensive screening is impossible. In Canada's experience, the majority of modern war criminals who are in Canada entered as visitors or refugees.[56] War criminals attempting to subvert the refugee process are particularly difficult to screen out. They often plausibly lack documentation, are coming from conflict situations where reliable information is difficult to obtain, and in humanitarian emergencies a balance must be struck between screening and the timely processing of the overwhelming number of genuine applications.

Conclusion

In the four decades leading up to the 1990s there was a steady increase in the number of wars being fought globally,[57] ushering in the next generation of modern war criminals.

Strong grounds exist for believing Australia has, over the years, inadvertently admitted a substantial number of these suspected criminals and there is no plausible reason why those who are alleged to have committed the most abhorrent crimes should continue to find refuge in Australia. While the Australian government has begun to confront the challenge – via the establishment of the WCSU in 2002-03 – more needs to be done to address the problem.

International efforts to end impunity for war crimes require responsible countries like Australia to take action against suspected war criminals living within its borders. This is also needed to meet community expectations and

match stated government policy and is important to uphold the integrity of our legal and migration systems. It would also complement the government's wider agenda – seeking multilateral solutions to global problems and demonstrating its credentials as a good international citizen in the context of its bid to win a UN Security Council seat.

Recommendations

International experience shows that dealing with resident war criminals is immensely difficult and there are no quick fixes, but a few modest reforms would go some way towards beginning to confront the problem in Australia.

Clearly state government policy: The government should make a clear statement on its policy towards suspected resident war criminals to guide bureaucratic priority setting. This should include clear guidance on its preferred policy approach. Australia's own experience and that of other countries suggests that prosecutions are complex, lengthy and costly – although modern war crimes trials in Europe indicate they can be run successfully. Prosecutions should not be ruled out in some circumstances. However, a practical solution would focus on the full gamut of options including extradition, citizenship revocation, visa cancellation and exclusion from refugee protection depending on the circumstances.

Commit dedicated resources: A small war crimes unit[58] should be established within the AFP. This unit could conduct a preliminary inquiry – which should include awareness raising in key communities – to ascertain the scale of the problem. It could then investigate a small number of the most appropriate cases each year. To help clear the initial backlog and/or run an occasional domestic prosecution it should have the ability to draw on additional AFP resources on a temporary basis. The unit should report directly to the Commissioner.

The Attorney-General's Department may also need to establish a small unit to allow it to play a part in developing a comprehensive policy response. The Commonwealth Director of Public Prosecutions would also need to nominate staff responsible for war crimes cases.

Border screening resources should also be strengthened with a view to further enhancing preventative measures.

Cost is naturally an important consideration – particularly with the Commonwealth budget under growing pressure because of the financial crisis – and Canada currently spends $18.7 million per year on its whole-of-government program. Other countries operate more modest programs: Sweden's unit operates on an annual budget of $1.7 million and the Netherlands' on $4 million. Putting this in perspective Australia gave $15.7 million to international criminal courts and tribunals last year.

Any response should be closely coordinated across government with an interdepartmental committee given a central role in prioritising cases, identifying appropriate legal and administrative responses and allocating them to relevant government departments. It could also play a role in policy development to allow government to respond better to the challenge of war criminals.

Improve transparency: DIAC should publish annual statistical data on the effectiveness of its war crimes screening, as one accountability measure of its effectiveness and as a deterrent. If dedicated resources are supplied to the AFP a joint annual report should be produced by all relevant government bodies.

Review blockages: The government should push ahead with its election commitment to close the 'loopholes' in Australia's domestic laws relating to war crimes and should extend this to a review of other obstacles to efficiently dealing with war criminals such as the extradition process (currently under consideration by government).

Strengthen international coordination: Australia should seek to establish informal channels for information exchanges on suspected war criminals with the ICC – as the world's only permanent international criminal court and likely future repository of a great deal of information on war criminals. It should work with likeminded states to ensure the ICC's current electronic database will have the capacity to manage the tens of thousands of cases likely to be added in coming years.

Options for strengthening information sharing between likeminded states should be explored, including via the establishment of a common war crimes database or information sharing protocols (with appropriate safeguards in place to protect against erroneous information prejudicing a person's immigration prospects).

NOTES

[1] Joe Ludwig, cited in Chris Johnson, Track down war criminals. *The West Australian*, 17 January 2007.

[2] *ALP National Platform and Constitution 2007*: http://www.alp.org.au/platform/chapter_12.php#12war_crimes.

[3] Throughout this Policy Brief the term 'war criminals' is used generically to refer to those suspected of perpetrating war crimes, crimes against humanity and genocide.

[4] Dr Helen Durham and Dr Michael Carrel, Lessons from the past: Australia's experience in war crimes prosecution and the problem of the applicable legal framework. *Asia-Pacific Yearbook of International Humanitarian Law*, 2, 2006, p 135.

[5] A.C.C. Menzies, *Review of material relating to the entry of suspected war criminals into Australia.* Canberra, Australian Govt. Publ. Service, 1987.

[6] The SIU was succeeded by the War Crimes Prosecution Support Unit. This was staffed with SIU personnel and provided support and expertise to the Director of Public Prosecutions in the prosecutions launched as a result of SIU investigations. It was closed on 31 January 1994.

[7] Lachlan Heywood, War crimes taskforce monitors 34. *The Courier Mail*, 28 June 2006.

[8] Sandi Logan, DIMIA National Communications Manager, War crimes unit open. *The Sun-Herald*, 28 January 2007.

[9] Tim McCormack, cited in Man faces extradition over alleged war crimes. *The 7.30 Report*, 11 July 2006 and correspondence with the Commonwealth Director of Public Prosecutions.

[10] *Convention relating to the Status of Refugees.* Geneva, 28 July 1951.

[11] Menzies Review, p 86.

[12] *Report of the investigations of war criminals in Australia.* Attorney-General's Department, p 47.

[13] *Report of the investigations of war criminals in Australia*, p 552.

[14] Efraim Zuroff, *Worldwide investigation and prosecution of Nazi war criminals*, 1 April 2007 – 31 March 2008. Simon Wiesenthal Center, November 2008, p 38.

[15] This includes those guilty of acts contrary to the purposes and principles of the United Nations. Lisa Pryor and Debra Jopson, Federal police not told of alleged war criminals. *The Age*, 6 December 2005.

[16] See for example, Mark Aarons, *War criminals welcome*. Melbourne, Black Inc, 2001, p 514.

[17] While Australia has only received a small number of requests for extradition over the last decade this is not necessarily a good indication war criminals are not present. It could reflect the lack of resources available (both in Australia and the war torn countries from which they have come) to identify war criminals and/or the delays associated with our extradition process.

[18] See for example Snedden v Republic of Croatia [2009] FCA 30 (3 February 2009): http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2009/30.html?query=vasiljkovic.

[19] Tanya Plibersek, *House of Representatives Official Hansard*, 29 March 2004, p 27387: http://www.aph.gov.au/hansard/reps/dailys/dr290304.pdf.

[20] Australia did not make a contribution to the Special Court for Sierra Leone in 2008, but has contributed $800,000 since 2001.

[21] Department of Justice, Canada, *Crimes against humanity and war crimes program, final report*, October 2008, p 40: http://canada.justice.gc.ca/eng/pi/eval/rep-rap/08/war-guerre/index.html.

[22] *Informal expert paper: the principle of complementarity in practice:* http://www.icc-cpi.int/library/organs/otp/complementarity.pdf p 3.

[23] Ben Saul, Prosecuting war criminals at Balibo under Australian law. Forthcoming 2009, *Sydney Law Review*.

[24] Efraim Zuroff, *Worldwide investigation and prosecution of Nazi war criminals*, p 38.

[25] Debra Jopson and Lisa Pryor, War crimes unit questions seven. *The Sydney Morning Herald*, 8 December 2005 and correspondence with DIAC. A Canadian report recently suggested this was likely to increase to 16 in the near future: Department of Justice, Canada, *Crimes against humanity and war crimes program, final report*, p 55.

[26] DIAC, *Annual report 2007-08*, pp 74, 34, 49.

[27] Based on DIAC annual reports, which provides data for four of six years. In correspondence, DIAC advised the figure for 2007-08 was 674. In a Question on Notice in 2007, DIAC advised the figure was around 1,000 a year. Question on Notice, Budget Estimates Hearing, Immigration and Citizenship Portfolio, 21-22 May 2007.

[28] Fact Sheet 77, *The Movement Alert List*, DIAC, http://www.immi.gov.au/media/fact-sheets/77mal.htm.

[29] DIAC, *Annual report 2006-07*, p 115.

[30] DIAC, *Annual report 2006-07*, p 78.

[31] Canada Border Services Agency, *Departmental Performance Report 2006-07*: http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/bsf/bsf02-eng.asp.

[32] *Report on the operations of the War Crimes Act 1945 to June 1992*, p 6.

[33] Tanya Plibersek, *House of Representatives Official Hansard*, 29 March 2004, pp 27386-7: http://www.aph.gov.au/hansard/reps/dailys/dr290304.pdf.

[34] Helen Durham and Michael Carrel, Lessons from the past, p 154.

[35] *A new extradition system: a review of Australia's extradition law and practice*. Attorney-General's Department, December 2005, pp 20-21.

[36] Correspondence with the CDPP.

[37] These figures may also relate to decisions made under articles 32 or 33(2) of the Convention relating to the Status of Refugees. Twenty decisions over the period were set aside by the AAT. Correspondence with the AAT.

[38] 'Clear and convincing evidence' is required rather than a standard of proof that is 'beyond reasonable doubt' or 'on the balance of probabilities': *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 1, paragraphs 79-80.

[39] DIMIA, *Persons deemed unworthy of international protection (Article 1F)*, p 39. The paper acknowledged 'such consideration may become an issue in meeting obligations under the Convention Against Torture and the International Covenant on Civil and Political Rights'.

[40] Lisa Pryor and Debra Jopson, Federal police not told of alleged war criminals. *The Age*, 6 December 2005.

[41] *The Legal Status of Australian Citizen — Evolution of Law and Policy*: http://www.citizenship.gov.au/_pdf/04.pdf, p 36.

[42] Department of Justice, Canada, *History of the war crimes program*: http://canada.justice.gc.ca/eng/pi/wc-cg/hist.html.

[43] Department of Justice, Canada, *Crimes against humanity and war crimes program, final report*, p 3.

[44] Canada's program on crimes against humanity and war crimes, ninth annual report, 2005-06: http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html.

[45] DIAC, *Annual report 2004-05*, p 112.

[46] For Australia, 'refugee' figures include all humanitarian visas. For Canada, some humanitarian categories are excluded from the 'refugee' figures, but are included in the 'permanent resident' category. See DIAC annual reports 1998-99, 2007-08 and DIAC, *Population Flows: Immigration Aspects 2006-07*, pp 25, 69. For Canada, see

Citizenship and Immigration Canada, *Facts and Figures: Immigration Overview 2007*.

[47] Correspondence with Canadian War Crimes Unit.

[48] Correspondence with Attorney-General's Department and AFP as well as AFP annual reports. The AFP was unable to provide figures for three years: 2004-05, 2005-06 and 2006-07.

[49] Department of Justice, *Canada, Crimes against humanity and war crimes program, final report*, p 47.

[50] Canada's program on crimes against humanity and war crimes, ninth annual report, 2005-06: http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html.

[51] Canada's program on crimes against humanity and war crimes, ninth annual report, 2005-06.

[52] Exclusions from Article 1(F) protection recorded by Canada's war crimes program and decisions in Australia to refuse to grant or to cancel a protection visa which were upheld by the Administrative Appeals Tribunal under articles 1F, 32 or 33(2). Figures provided by the AAT. For Canadian statistics see Canada's program on crimes against humanity and war crimes, ninth annual report, 2005-06.

[53] Canada's program on crimes against humanity and war crimes, ninth annual report, 2005-06.

[54] Department of Justice, Canada, *Crimes against humanity and war crimes program, final report*, p ii.

[55] Figures provided by the Swedish and Dutch war crimes units. See also Department of Justice, Canada, *Crimes against humanity and war crimes program, final report*, p 54.

[56] Department of Justice, Canada, *Modern war crimes program*: http://canada.justice.gc.ca/eng/pi/wc-cg/mwcp-pcgc.html.

[57] *Human Security Report 2005*, p 22: http://www.humansecurityreport.info/HSR2005_HTML/Part1/index.htm.

[58] Since the final report of the SIU recommended that a permanent war crimes unit, like the SIU, be established several similar calls have been made. *Report of the investigations of war criminals in Australia*, p 569.

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