Submission to the inquiry into the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024

Contact information:

Australia Palestine Advocacy Network
contact@apan.org.au
PO Box 3166, Manuka ACT 2603, Australia

Introduction

> "Genocide is not just an international crime, it is *the* international crime; to fight it is not an obligation, but […] *the* obligation."[1]

As we write this, Israel's livestreamed genocide in Gaza enters its 10th month. The confirmed body count of Palestinians killed by Israel's relentless and unchecked genocidal violence lurches beyond 39,000 people, however there are thousands of people buried under rubble who have not yet been identified, and the indirect death toll resulting from this violence, and its health implications, has been conservatively estimated at approximately 186,000 Palestinians.[2] That is, eight per cent of the 2.3 million population of Gaza.

Despite Australia's global recognition as a champion of the Responsibility to Protect (R2P) principle, which mandates states to protect their citizens from atrocity crimes, assist other states in doing so, and intervene when a state is failing in its obligations, neither Australia nor any other of the 134 R2P state members has invoked the principle in response to Israel's genocide in Gaza.[3]

Furthermore, despite having been a longstanding signatory to the Rome Statute and the Genocide Convention, ratification which comes with the non-negotiable responsibility to establish robust mechanisms for impartially and effectively implementing theses treaties' prevention and punitive provisions domestically for just such a time as this, Australia has been disturbingly hesitant to take tangible action to make good on its commitments. The Australian Government's response to Israel's genocide and international law violations in Gaza has been inconsistent, to say the least, particularly when compared to the swift and decisive manner in

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[1] Schiffbauer, B,(2018)."The Duty to Prevent Genocide under International Law: Naming and Shaming as a Measure of Prevention," *Genocide Studies and Prevention: An International Journal: Vol. 12: Iss. 3: 83-94*, https://digitalcommons.usf.edu/gsp/vol12/iss3/11/

[2] Khatib, R; McKee, M; Yusuf, S, (2024). "Counting the dead in Gaza: difficult but essential," *The Lancet, Volume 404, Issue 10449:237-238,* https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(24)01169-3/fulltext

[3] Moses, J. (2024). "Gaza and the Political and Moral Failure of the Responsibility to Protect," *Journal of Intervention and Statebuilding, 18(2), 211–215*. https://doi.org/10.1080/17502977.2024.2304987

which it has taken actions to try to compel Russia to comply with international law regarding its attacks on Ukraine.

In fact, preventative action against genocide has been so politicised in Australia that it is “baked into” the domestic implementation of the Genocide Convention. The amendment of the Criminal Code Act in 2002 made the prosecution of genocide, crimes against humanity, or war crimes in Australia conditional upon explicit consent from a member of the governing political party of the day, the Attorney-General – via the Attorney-General’s fiat. This legislation also ensures that the Attorney-General’s decision cannot be legally contested.

Based on rhetoric alone, Australia may be held up by some as an exemplar when it comes to international law, but action speaks louder than words. It is this measure that calls into question whether these treaties and conventions hold any meaningful value, or if the political will to use them evaporates when they run counter to the interests of the powerful.

This question weighs heavily on the Australia Palestine Advocacy Network (APAN), Australia’s leading organisation advocating for justice, equality, and freedom for Palestinians. Our distress at witnessing the ongoing *Nakba* and the atrocities of Israel’s unchecked genocide in Gaza, is only compounded by evidence that the Australian Government is failing, in the most calamitous way, to live up to its obligations to take measures to prevent this genocide and has, in fact, politicised genocide prevention.

This failure has been manifested most glaringly in the government’s unwillingness to deviate from its stance of unwavering support for Israel: as Foreign Minister Penny Wong said, “Australia stands with Israel and always will.”[4] It has extended to an unwillingness to impose Magnitsky sanctions on Israeli officials, individuals and entities who have incited, orchestrated or ordered the genocide in Gaza, despite there existing precedent for such sanctions in the circumstances of other international conflicts and, indeed, in the case of the illegal behaviours of extremist Israeli settlers in the West Bank.[5] It manifests in a refusal to revisit, let alone suspend or sever, any of the multitude of agreements, tax treaties, and memorandums of understanding Australian shares with Israel, including those involving military relations.

There has been no public advice, legal warning, or investigation into Australian citizens joining the Israeli Occupying Force in its attacks on Gaza, despite repeated warnings by institutions including the Australian Centre for International Justice that not only might these individuals be at risk of individual criminal liability, but that any failure to investigate and prosecute these individuals where they are involved in atrocity crimes would be in breach of Australia’s

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[4] Minister for Foreign Affairs, (2024). “Speech to the Senate - Hamas attacks on Israel - Senate motion,” *Parliament House,*
https://www.foreignminister.gov.au/minister/penny-wong/speech/speech-senate-hamas-attacks-israel-senate-motion-parliament-house

[5] Minister for Foreign Affairs, (2024). “Human Rights Sanctions in response to Israeli settler violence in the West Bank,”
https://www.foreignminister.gov.au/minister/penny-wong/media-release/human-right-sanctions-response-israeli-settler-violence-west-bank

obligations under international law.[6] In fact, the most significant action Australia has taken in response to the Gaza crisis has been suspending funding for UNRWA, which provides essential humanitarian aid to Palestinians in dire need.[7]

Even warnings of complicity expressed by UN experts[8], and a legal case documenting the alleged complicity of the Australian Prime Minister, Foreign Minister, Opposition Leader and others, submitted by a team of Australian lawyers in March 2024, has failed to prompt decisive action or accountability measures from the Australian Government.[9]

The lack of political will to take measures to prevent Israel from committing genocide in Gaza are having serious, ultimately intergenerational ramifications for Palestinians, including the aforementioned ever-rising Palestinian death toll and wiping out of entire family lines; the wholesale destruction of the foundations of life across Gaza, including homes, infrastructure and vital services; prolonged psychological trauma and displacement among Palestinians both in historic Palestine and the diaspora; and deepening economic hardship and food insecurity. The Australian Government's failures are also eroding domestic trust in its widely touted commitment to uphold human rights, justice and international law.

These failures, at what is undoubtedly the time of greatest need for Palestinians, gives APAN an undeniable stake in ensuring the Australian Government urgently reviews its policy and legal frameworks to ensure robust enforcement of international humanitarian law and accountability measures when it comes to genocide and other atrocity crimes. Indeed, all people in Australia have a stake in ensuring that Australia's policy and legal frameworks for preventing and punishing atrocity crimes do not subordinate human rights to trade relationships, economic opportunities, military partnerships, or geopolitical strategic agendas.

Australia's lack of political will to take any of the suite of measures prescribed by international law during this time of genocide, compels us to comment not only on the issue that is of most immediate concern to this inquiry – the removal of political barriers to the prosecution of genocide under the Criminal Code – but also on the broader measures Australia can adopt to realise its legal and moral commitments to prevent atrocity crimes, in Palestine and wherever else they may be occuring.

The Australian Government's commitment to international law and human rights, to democracy and the rule and law, is professed as being central to national values, and foundational to its

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[6] Australian Centre for International Justice, (2023). "Letter: Australia should investigate citizens fighting in the IDF," https://acij.org.au/letter-australia-should-investigate-citizens-fighting-in-the-idf/

[7] Al Jazeera, (2024). "Palestinians condemn suspension of UNRWA funding by Western nations," https://www.aljazeera.com/news/2024/1/27/palestinians-slam-suspension-of-unrwa-funding-by-some-western-nations

[8] Knott, M., (2023). "Israel should make peace with Hamas, top UN expert on Palestine says," *The Sydney Morning Herald*, https://www.smh.com.au/politics/federal/israel-should-make-peace-with-hamas-top-un-expert-on-palestine-says-20231110-p5ej2o.html

[9] Birchgrove Legal, (2024). "PM referred to International Criminal Court accused of complicity in genocide," https://birchgrovelegal.com.au/2024/03/01/birchgrove-legal-files-case-for-complicity-to-genocide-to-the-hague-international-criminal-court-media-release/

engagement with the international community.[10] But it requires much more than lip service and certainly cannot fall prey to political interests. It must be proactively demonstrated by depoliticising the domestic implementation of the Rome Statute and Genocide Convention.

In every word and every action, the Australian Government must actively uphold, cherish and protect the sanctity of human life and rights, including and especially at this time, those of Palestinians.

About the Australia Palestine Advocacy Network

The Australia Palestine Advocacy Network is a member-based organisation formed in May 2011 to provide a national voice to the many thousands of Australians who are concerned about Israel's continuing human rights abuses against Palestinians, and the continuing effects of dispossession and displacement.

APAN's membership base is diverse, taking in grassroots human rights groups, Palestinian and Jewish groups, aid and development agencies, and unions. Individual members come from a variety of backgrounds, including religious leaders, academics, lawyers, former politicians, diplomats and public servants, teachers, medical professionals, and many others.

Our activities and campaigns range from advocacy and political lobbying to community organising, youth training and media engagement, all of it aimed at building greater understanding amongst all Australians – including policy-makers – about the situations that Palestinians face and what can be done about it.

We acknowledge the connected struggle and strength of First Nations siblings here, and the genocide, dispossession and ongoing harm perpetrated against them as part of the colonising project on this continent. Our fight for Palestinian self-determination, equality, justice and rights from the river to the sea is also a struggle for First Nations recognition, rights, culture and self-determination on what was, and always will be, Aboriginal land.

Recommendations

1. **Human-rights-oriented foreign policy:** Commit to human rights-oriented foreign policy, enabling Australian decision-makers to assess patterns of discrimination and internal conflicts and how various elements of Australian foreign policy interact with human rights in other countries, particularly at times of heightened atrocity risk.
2. **Centre vulnerable groups:** Ensure that genocide prevention actions, decision-making and policy formulation not only include, but centre, the knowledge, insights, and strategic thinking of marginalised and/or vulnerable groups and their associated institutions/ organisations.

[10] Department of Foreign Affairs and Trade, (no date). "Australia's commitment to human rights," https://www.dfat.gov.au/international-relations/themes/human-rights

3. **Removal of political interference**: Amend the Criminal Code Act to eliminate the Attorney-General's discretionary power over genocide prosecutions, ensuring judicial independence and adherence to international legal standards.
4. **Review and prosecution**: Review cases of atrocity crimes previously blocked by the Attorney-General since 2002 to pursue justice without political influence.
5. **Diplomatic and sanctions measures**: Commit to diplomatic sanctions, travel bans and financial penalties against states or entities implicated in genocide or other severe international crimes, with a view to averting or halting the commission of atrocity crimes.
6. **Arms embargoes:** In line with the Arms Trade Treaty, ban arms, ammunition and componentry transfers if they pose a risk of being used for atrocity crimes by the end user.

Case study – the Australian response to Israel's genocide in Gaza

Israel's genocide in Gaza must not be considered a singular event of this particular moment in time, but rather the latest brutal expression of the ongoing *Nakba,* 'the Catastrophe' – Israel's 76-year-long project of settler-colonial violence and ethnic cleansing of Palestine. It began between 1947 and 1949 when Zionist militias and the Israeli military forcibly expelled 800,000 Palestinians from their homes and lands, destroyed 531 Palestinian villages, and massacred more than 15,000 Palestinians to facilitate the establishment of the Jewish-majority Israeli state.[11]

For almost eight decades, the ongoing *Nakba* has manifested in Israel's continued oppression of Palestinians through violence, occupation, displacement, home demolitions, arbitrary arrests, discriminatory apartheid policy, siege and starvation.[12] Gaza has been frequently described as an "open air prison,"[13] with Israeli authorities controlling the territory's waters and airspace, the movement of people and goods, the Palestinian population registry and the infrastructure upon which the people of Gaza have relied.[14] Israel has willfully ignored the law of occupation, which requires that an occupier restores public life for the occupied population, and has instead indefinitely suspended public life in Gaza, with debilitating effects on the population, family and social connections, healthcare and economic opportunity.[15] In an Advisory Opinion on 19 July 2024 by the International Court of Justice (ICJ), the judges asserted that the continuing illegal occupation and apartheid that Israel enforces must be immediately dismantled.[16]

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[11] Al Mezan, (2024). "76 Years of Ongoing Nakba," *Relief Web*, https://reliefweb.int/report/occupied-palestinian-territory/76-years-ongoing-nakba

[12] Al Jazeera, (2017). "The Nakba did not start or end in 1948," https://www.aljazeera.com/features/2017/5/23/the-nakba-did-not-start-or-end-in-1948

[13] The Guardian, (2009). "Gaza is still an open-air prison, says Sinn Féin's Gerry Adams," https://www.theguardian.com/politics/2009/apr/09/gaza-sinn-fein-gerry-adams

[14] Human Rights Watch, (2022). "Gaza: Israel's 'Open-Air Prison' at 15," https://www.hrw.org/news/2022/06/14/gaza-israels-open-air-prison-15

[15] ibid

[16] International Court of Justice, (2024), "Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem Summary of the Advisory Opinion of 19 July 2024," https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-sum-01-00-en.pdf

Turning our mind to the present day, at the time of writing this submission, Israel's Occupying Forces had, since 7 October 2023, killed more than 39,000 Palestinians and injured more than 90,000 people, many of them in ways that will change the course of the remainder of their lives.[17] As of 31 May 2024, Israel had damaged or destroyed 55% (137,297) of structures in Gaza, including residences, educational facilities, healthcare facilities, cultural sites, mosques, churches, and water, electricity and transport infrastructure.[18] The UN has said that returning Gaza to its pre-genocide state would take "decades of labour-intensive clearance of rubble, unexploded munitions and landmines."[19]

Israel's forcible displacement of Palestinians has seen about 90% of the 2.3 million population of Gaza uprooted and shunted endlessly from one so-called "safe zone" to another – themselves the targets of repeated and brutal Israeli attacks – during the past 10 months.[20] This displacement is, and will be, compounded by the widespread destruction of civilian infrastructure, which "in a sense allow[s] Israeli officials to deny any responsibility for Palestinians leaving their homeland."[21]

The UN has reported that Israeli forces have detained at least 2,300 – probably more – Palestinians from Gaza since October 2023, holding almost 900 of these people as "unlawful combatants", a category that does not exist under international law.[22] Testimonies from medics, whistleblowers and freed detainees have indicated that detainees are subjected to ""forced nudity, sexual harassment, threats of rape, as well as torture through severe beatings, dog attacks, strip searches, waterboarding, and denial of food, sleep, and bathroom access, among other cruel practices."[23]

Israel's violations of international law, including war crimes and crimes against humanity in Palestine, persist due to decades of impunity. This cycle of impunity is perpetuated each time a third state, such as Australia, neglects its duty to initiate legal actions to compel Israel to cease these actions and hold it accountable.

Accusations of Israeli genocide in Gaza have grown stronger and steadier since 13 October 2023, with hundreds of UN experts, international legal experts, genocide and Holocaust scholars and human rights organisations arguing that Israel's actions in Gaza not only pose a

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[17] Al Jazeera, (2024). "Live update: Israel war on Gaza live: Wave of air strikes hit southern, northern cities," https://www.aljazeera.com/news/liveblog/2024/7/26/israel-war-on-gaza-live-wave-of-air-strikes-hit-southern-northern-cities

[18] Salhani, J., (2024). "Genocide, urbicide, domicide – how to talk about Israel's war on Gaza," *Al Jazeera*, https://www.aljazeera.com/news/2024/7/3/genocide-urbicide-domicide-how-to-talk-about-israels-war-on-gaza

[19] ibid

[20] Agence France-Presse in Geneva, (2024). "About 90% of people in Gaza displaced since war began, says UN agency," *The Guardian*, https://www.theguardian.com/world/article/2024/jul/03/about-90-of-people-in-gaza-displaced-since-war-began-says-un-agency

[21] Salhani, J., (2024). "Genocide, urbicide, domicide – how to talk about Israel's war on Gaza," *Al Jazeera*, https://www.aljazeera.com/news/2024/7/3/genocide-urbicide-domicide-how-to-talk-about-israels-war-on-gaza

[22] United Nations, (2024). "Deep concerns over 'inhuman' detention of Gazans by Israeli authorities," *UN News,* https://news.un.org/en/story/2024/05/1150281

[23] ibid

"risk of genocide,"[24] or constitute a "plausible case of genocide,"[25] but are, in fact, a "textbook case of genocide."[26]

During this period, two significant reports have underscored the gravity of Israel's actions in Gaza. The first pivotal report was the ICJ's ruling in January 2024, which concluded that Israel faced plausible allegations of genocide in Gaza.[27] The ICJ specifically ordered provisional measures to prevent Israel (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group.[28] Without international pressure to compel its compliance, Israel continues to defy these provisional measures.

The second critical report was a March 2024 report, *Anatomy of a genocide*, by Francesca Albanese, the United Nations Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967. In her report, Albanese meticulously detailed the stages of genocide, emphasising how initial persecution and discrimination can escalate to mass atrocities when unchecked.[29] Her findings underscored that genocide was a systemic process, often preceded by policies aimed at erasing the identity and presence of targeted groups. She concluded that, "there are reasonable grounds to believe that the threshold indicating Israel's commission of genocide is met" and that "evidence…suggests Israel has committed at least three of the acts proscribed in the Convention" – namely "killing members of the group," "causing serious bodily or mental harm to members of the group" and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[30]

Critically, for the purposes of this submission, one of the report's many recommendations was for member states to "discharg[e] their obligations under the principles of universal jurisdiction, ensuring genuine investigations and prosecutions of individuals who are suspected of having committed, or aided or abetted, in the commission of international crimes, including genocide, starting with their own nationals."[31]

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[24] United Nations Office of the Human Rights High Commissioner, (2023). "Gaza: UN experts decry bombing of hospitals and schools as crimes against humanity, call for prevention of genocide," *Office of the High Commissioners for Human Rights*, https://www.ohchr.org/en/press-releases/2023/10/gaza-un-experts-decry-bombing-hospitals-and-schools-crimes-against-humanity

[25] International Court of Justice, (2024). "Order of 26 January 2024," https://www.icj-cij.org/node/203447

[26] Segal, R, (2023). "A Textbook Case of Genocide," *Jewish Currents*, https://jewishcurrents.org/a-textbook-case-of-genocide

[27] International Court of Justice, (2024). "Order of 26 January 2024," https://www.icj-cij.org/node/203447

[28] ibid

[29] Albanese, F., (2024). "Anatomy of a Genocide: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese," *Office of the Human Rights High Commissioner*, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session55/advance-versions/a-hrc-55-73-auv.pdf

[30] ibid

[31] Albanese, F., (2024). "Anatomy of a Genocide: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese," *Office of the Human Rights High Commissioner*,
https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session55/advance-versions/a-hrc-55-73-auv.pdf

Australia has thus far not only failed to take decisive legal action to prevent the ongoing genocide in Gaza and hold Israel accountable, but has actively and vocally supported the Israeli Government, refusing to move from its pledge that it "stands with Israel and always will"[32] and justifying Israel's actions as a reflection of its "right to defend itself."[33] This is despite the fact that the recent ICJ ruling has found that Israel's obligations, as occupying power, "undermine the proposition that Israel's occupation qualifies as an act of self-defence."[34]

Australia has only after almost 10 months of genocide, on 25 July 2024, implemented Magnitsky sanctions and travel bans against extremist Israeli settlers responsible for settler violence in the West Bank,[35] despite there being ample precedent of hundreds of these sanctions being applied to Syria,[36] Iran,[37] Myanmar[38] and Russia.[39]

The agreements, tax treaty and memorandums of understanding Australia enjoys with the Israeli Government – including those dealing with its military relationship with Israel – remain intact and unchanged.[40] The Australian Government has failed to provide public advice or a legal warning to, and failed to investigate, Australian citizens travelling to fight with the Israeli Occupying Forces.[41] Indeed, the most decisive action Australia has taken in regard to the situation in Gaza has been its suspension of funding to support UNRWA to provide desperately needed humanitarian aid to starving Palestinians, a move that former UNRWA chief spokesperson Chris Guinness said made Australia "complicit in a massacre in slow motion" in Gaza.[42]

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[32] Minister for Foreign Affairs, (2024). "Speech to the Senate - Hamas attacks on Israel - Senate motion, Parliament House,"
https://www.foreignminister.gov.au/minister/penny-wong/speech/speech-senate-hamas-attacks-israel-senate-motion-parliament-house

[33] Minister for Foreign Affairs, (2023). "Doorstop, Adelaide",
https://www.foreignminister.gov.au/minister/penny-wong/transcript/doorstop-adelaide

[34] International Court of Justice, (2024), "Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem Summary of the Advisory Opinion of 19 July 2024,"
https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-sum-01-00-en.pdf

[35] Minister for Foreign Affairs, (2024). "Human Rights Sanctions in response to Israeli settler violence in the West Bank,"
https://www.foreignminister.gov.au/minister/penny-wong/media-release/human-right-sanctions-response-israeli-settler-violence-west-bank

[36] Department of Foreign Affairs and Trade, (no date). "Syria sanctions regime,"
https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/syria-sanctions-regime

[37] Minister for Foreign Affairs, (2024). "Targeted sanctions in response to Iran's destabilising activities in the Middle East,"
https://www.foreignminister.gov.au/minister/penny-wong/media-release/targeted-sanctions-response-irans-destabilising-activities-middle-east

[38] Department of Foreign Affairs and Trade, (no date). "Myanmar sanctions regime,"
https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/myanmar-sanctions-regime

[39] Department of Foreign Affairs and Trade (no date). "Snapshot Russia/Ukraine sanctions regime,"
https://www.dfat.gov.au/sites/default/files/sanctions-snapshot-russia-ukraine-regime.pdf

[40] Tranter, K., (2024). "Australia 'gone missing' on preventing genocide," *Declassified Australia*,
https://declassifiedaus.org/2024/05/17/exclusive-australia-gone-missing-on-preventing-genocide/

[41] Arraf, R., (2023). "Letter to Minister for Home Affairs, Attorney-General of Australia, Australian Federal Police Commissioner," *Australian Centre of Human Rights,*
https://acij.org.au/wp-content/uploads/2023/12/2023-12-20-Letter-to-Ausgov-regarding-Australians-in-the-IDF.pdf

[42] ABC News, (2024). "Australia 'complicit' in Gaza deaths with suspension of UNRWA funding: Former UN official,"
https://www.youtube.com/watch?v=7_2POuw7RH4

These failures are direct evidence of a yawning gap between Australia's commitments under international law, and the action it is willing to take to prevent genocide. They're also evidence of the politicisation of genocide prevention in Australia. This politicisation serves to perpetuate the systemic causes of genocide referred to by Albanese in her report, contradicting the principles of justice and accountability upheld by the Genocide Convention, and, in the case of Israel, sustaining the impunity its government enjoys.

This highlights the need for more robust Australian mechanisms to ensure prompt and effective domestic preventative measures to stop genocide, and the prosecution of genocide, crimes against humanity, and war crimes.

Key issues

Atrocity prevention is a fundamental moral and legal obligation for all states

Atrocity prevention, grounded in a human rights approach to policy, represents a fundamental obligation for nations committed to upholding international law and moral principles. This imperative stems from the recognition that atrocities, such as genocide, war crimes, ethnic cleansing, and crimes against humanity, not only inflict severe human suffering but also violate the core principles of human rights and dignity.

From a legal standpoint, atrocity prevention is underpinned by various international legal frameworks. Key among these is the Genocide Convention, which obligates state parties, including Australia, to prevent and punish genocide.[43] Additionally, the R2P concept, endorsed by the United Nations, reaffirms the international community's responsibility to intervene when a state fails to protect its populations from these grave crimes.[44] By ratifying such conventions and principles, states like Australia commit themselves to upholding these norms and taking proactive measures to prevent atrocities before they occur.

As well as being a legal obligation, atrocity and genocide prevention is a moral imperative. It reflects a commitment to universal human rights principles, including the rights to life, security, equality, and freedom from persecution. At the heart of this moral imperative is the recognition that every individual, regardless of nationality, ethnicity, religion, or political affiliation, possesses inherent dignity and deserves protection from systematic violence and persecution.

The moral dimension of atrocity prevention compels states like Australia to act decisively in the face of threats to human security and wellbeing, both domestically and internationally. It requires not only the condemnation of atrocities but also proactive diplomatic and economic steps to prevent their occurrence. This is particularly crucial given the courts that deal with atrocity crimes – the International Criminal Court and International Court of Justice – have no

[43] United Nations, (no date). "Convention on the Prevention and Punishment of the Crime of Genocide," https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf
[44] Global Centre for the Responsibility to Protect, (no date). "What is R2P?," https://www.globalr2p.org/what-is-r2p/

independent volition or enforcement qualities of their own.[45] The power of these courts, and international law, itself, is derived from the collective will and actions of nations committed to upholding them. A key element of this is the capacity of domestic courts to prosecute atrocity crimes.

Moreover, effective atrocity prevention requires that human rights are centred in policy formulation and implementation, and are not superseded by trade relationships, geopolitical agendas, or strategic interests. This involves assessing how domestic and foreign policies interact with human rights standards, identifying potential risks of discrimination and conflict escalation, and addressing root causes of vulnerability and marginalisation.

While the expert advice of international humanitarian law experts and organisations is central to this assessment and the implementation of such policy, this is not the sole preserve of elites in governments and non-government organisations.[46] The knowledge, experience and expertise of impacted communities is also critical to this process, and the Australian Government must not only be receptive to this knowledge and lived experience, but actively seek it out.

As we have seen throughout Israel's genocide in Gaza, however, even Palestinians' direct, live documentation of their experiences, and the Palestinian community's repeated engagement with and advocacy to decision-makers, has not sufficiently stirred policy-makers into action, or guided Australia's response to this genocide. Indeed, this engagement is increasingly being dismissed, if not demonised, as a threat to "social cohesion" and "democratic values", rather than being understood as a vital and legitimate contribution to the shaping of people-centred, human rights-focused policy.[47]

Atrocity prevention as a legal and moral imperative demands a robust commitment to human rights principles in policy-making and international relations, and a commitment to engage with the people impacted by those atrocities to ensure their rights, needs and aspirations are centred. By upholding these principles, states like Australia not only fulfill their legal obligations under international law but also contribute to a more just and peaceful global community where human rights are respected and protected for all, without bias, favour or compromise.

Recommendations

- **Human-rights-oriented foreign policy:** Australia should commit to a human rights-oriented foreign policy approach, particularly in its interactions with countries at risk of atrocities. This approach would empower Australian decision-makers to systematically assess patterns of discrimination and internal conflicts within these countries. By aligning foreign policy objectives with human rights standards, Australia

[45] International Criminal Court, (no date). "How the court works," https://www.icc-cpi.int/about/how-the-court-works
[46] Lemkin Institute, (no date). "11 Principles of Genocide Prevention," https://www.lemkininstitute.com/principles-of-prevention
[47] Keane, B., (2024). "Social cohesion is impossible when the national business model is division," *Crikey,* https://www.crikey.com.au/2024/05/03/social-cohesion-impossible-division/

can effectively promote stability and prevent potential conflicts that may escalate into atrocities.

- **Centre vulnerable groups:** Australia must ensure that marginalised and vulnerable groups are not only included but are central to decision-making processes regarding atrocity prevention measures. This involves actively engaging with impacted individuals, and institutions and organisations that represent these groups to ensure their voices are heard and their interests are prioritised. By centring vulnerable groups in these initiatives, Australia can contribute to prevention efforts that address underlying grievances and oppressions, and reduce the risk of future atrocities.

The politicisation of domestic enactment of the Genocide Convention

Australia ratified the Genocide Convention in 1948, undertaking to "enact, in accordance with [its] Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III."[48]

Australia codified its international obligations under the Rome Statute, and the creation of the offences of crimes against humanity, genocide and war crimes, via the insertion of Division 268 into the Commonwealth Criminal Code in 2002.[49] However, this amendment made the prosecution of genocide, crimes against humanity, or war crimes in Australia conditional upon explicit consent from a member of the governing political party of the day, the Attorney-General – via the Attorney-General's fiat.

Section 268.121(1) of the Criminal Code grants the Attorney-General unchecked discretion without the obligation to provide reasons or criteria for the decision, severely limiting accountability and transparency in the legal process. Moreover, Section 268.122 restricts judicial review over these decisions, further undermining the ability of the judiciary to independently uphold the rule of law.

The Attorney-General's fiat has, in the past 13 years, twice limited the potential for international crimes to be prosecuted under Australian law. In 2011, an Australian citizen filed an indictment in the Melbourne Magistrates Court for war crimes and crimes against humanity against then-President of Sri Lanka Mahinda Rajapaksa.[50] Within 24 hours, this indictment was quashed by the Attorney-General at the time, Robert McClelland, who claimed "he would be in breach of

[48] United Nations, (no date). "Convention on the Prevention and Punishment of the Crime of Genocide," https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

[49] Parliament of Australia, (2002). "International Criminal Court (Consequential Amendments) Bill 2002," https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1607

[50] Hood, A; Cormier, M, (2012). "Prosecuting International Crimes in Australia: The Case of the Sri Lankan President" *Melbourne Journal of International Law* 8; (2012) 13(1) https://classic.austlii.edu.au/au/journals/MelbJIL/2012/8.html

international laws which provide immunity to heads of diplomatic missions if he allowed the case to go ahead."[51]

In 2018, the Attorney-General Christian Porter made this same assertion of diplomatic immunity in rejecting a private prosecution brought against Aung San Suu Kyi, who was then the Minister of the Office of the President and Foreign Minister and State Counsellor of the Republic of the Union of Myanmar.[52]

While immunity from prosecution may be a legitimate legal shield for foreign heads of state during their tenure, some argue that it is Australian courts, not the Attorney-General, who should deliberate on whether customary international law provides an exemption to this immunity for international crimes.[53]

This would align with the principle of judicial independence, so cherished in Australia. Judicial independence protects the legal process from political interference, ensuring that prosecutions for genocide, crimes against humanity and war crimes are conducted fairly and in accordance with international standards of justice, rather than political considerations. This protection is vital for maintaining the integrity of the legal system, guaranteeing that these standards are met, thereby ensuring that perpetrators of such heinous crimes are held accountable in a manner consistent with global and community expectations. Indeed, Amnesty International has criticised exactly this kind of "political interference" with judicial decision-making, identifying it as "one of the most serious problems preventing the exercise of universal jurisdiction."[54]

To our minds, the existence of the Attorney-General's fiat also begs the question – to what extent does political interference compromise other methods of implementing the Genocide Convention domestically, and potentially obstruct Australia from fulfilling its international obligations to upholding justice?

Questions as to the ability of the Attorney-General to act independently of political considerations on these matters are not new. In 1999, then-leader of the Queensland Opposition Lawrence Springborg said of the Queensland Attorney General Bill 1999:

> "For all intents and purposes Queensland has an independent Attorney General, or at least when one considers the vagaries and machinations of the political process, an Attorney General who can be as independent as he possibly can in a political

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[51] ABC News, (2011). No war crimes case against Sri Lanka leader, https://www.abc.net.au/news/2011-10-25/mcclelland-sri-lanka-decision/3600104

[52] Chen, M., Nelson, F., Arraf, R. (2023). "Challenging Impunity Why Australia Needs a Permanent, Specialised International Crimes Unit," *Australian Centre for International Justice,* https://acij.org.au/wp-content/uploads/2023/09/ACIJ-Policy-Paper-Challenging-Impunity-Why-Aus-Needs-a-Permanent-Specialised-Intl-Crimes-Unit-FINAL.pdf

[53] Hood, A; Cormier, M, (2012). "Prosecuting International Crimes in Australia: The Case of the Sri Lankan President" *Melbourne Journal of International Law 8;* (2012) 13(1) https://classic.austlii.edu.au/au/journals/MelbJIL/2012/8.html

[54] Amnesty International, (2001). "Overcoming obstacles to implementing universal jurisdiction," https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530172001en.pdf

> environment. The Attorney General in Queensland is an elected member of the Parliament. The Attorney General is a member of the Executive arm of Government. He sits in cabinet. He is a member of Executive Council. He participates in parliamentary debate. He is a member of a political party – a political party which has a certain philosophy or an ideology – and he invariably is a person who is involved in the development of policy and the implementation of that policy. Unless we take the political process out of the role of the Attorney General and take the Attorney General out of the political process and the Executive arm of Government, I think what the Attorney General is seeking to achieve is probably a bit misleading and may, in fact, be a misnomer. If the Attorney General wants to achieve what he is espousing, he should change the system and become a non-executive member of Government, that is, he should not participate in the processes of cabinet."[55]

It is clear that change is needed to ensure the legislative frameworks Australia has in place to ensure accountability for these most grievous of international law violations remain free of political interference. By eliminating the Attorney-General's fiat, Australia would strengthen judicial independence, safeguard the integrity of legal proceedings, and ensure that allegations of genocide and other serious crimes are adjudicated impartially and in accordance with both domestic legislation and international legal obligations. This reform is essential to uphold Australia's commitment to human rights and justice, providing a robust framework for accountability and fair trials.

Recommendations:

- **Removal of political interference**: Amend the Criminal Code Act to eliminate the Attorney-General's discretionary power over genocide prosecutions, ensuring judicial independence and adherence to international legal standards.
- **Review and prosecution**: Review cases of atrocity crimes previously blocked by the Attorney-General since 2002 to pursue justice without political influence.

Australia needs a more consistent, transparent process to guide actions for genocide prevention

The Australian Government's hesitancy to impose sanctions and other diplomatic and economic consequences upon Israeli ministers, officials, military personnel, individuals or entities inciting, ordering, facilitating or committing violations of international law in Gaza, despite months of calls from UN representatives and legal experts, is evidence of the country's cautious approach to implementing sanctions. It also hints at the political priorities that may be at play in this space.

[55] Springborg, L., (1999). "Speech by Mr L. Springborg: Attorney General Bill," https://documents.parliament.qld.gov.au/speeches/spk1999/Lawrence%20Springborg%20spk%20Southern%20Downs%2019990303-1.PDF

A comparison with Australia's response to Russian violations of international law in Ukraine is educational in this instance, with Australia having imposed more than 1200 Magnitsky sanctions on Russian individuals and entities in the two years since February 2022.[56] Despite Israel's repeated, brazen war crimes and violations of international law in Gaza – not to mention the recent ICJ ruling that Israel was responsible for "racial segregation and apartheid" across the Occupied Palestinian Territories[57] – the Australian Government has, thus far, only imposed sanctions and travel bans on extremist Israeli settlers operating in the occupied West Bank.[58] It has not imposed a single sanction on the state of Israel.

One can only presume that the reluctance to swiftly implement sanctions in the case of Israel stems from political calculations, including concerns over strategic alliances or diplomatic relationships. As noted earlier in this submission, however, atrocity prevention is not just "an obligation" for nations committed to upholding international law, but "*the* obligation." And rhetoric alone is insufficient for meeting this obligation. The use of sanctions, arms embargoes and other diplomatic and economic measures in the service of atrocity prevention and the upholding of international law is vital, and requires consistency and transparency.

By clearly outlining criteria – such as the severity of wrongdoing and the seniority of implicated individuals – that guide decision-making, the Foreign Minister can mitigate ambiguity and ward off accusations of politicisation or bias in applying sanctions and embargoes, while ensuring Australia consistently meets its obligations as a party to the Genocide Convention.

Recommendations:

- **Diplomatic and sanctions measures**: Commit to diplomatic sanctions, travel bans and financial penalties against states or entities implicated in genocide or other severe international crimes, with a view to averting or halting the commission of atrocity crimes.
- **Arms embargoes:** In line with the Arms Trade Treaty, ban arms, ammunition and componentry transfers if they pose a significant risk of being used for atrocity crimes by the end user.

Conclusion

Israel's ongoing genocide in Gaza underscores a critical failure of international obligations and moral responsibility, and highlights that it is resolute action, not just condemnation, that is

[56] Minister for Foreign Affairs, (2024). "Two years on, Australia stands with Ukraine," https://www.foreignminister.gov.au/minister/penny-wong/media-release/two-years-australia-stands-ukraine
[57] International Court of Justice, (2024), "Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem Summary of the Advisory Opinion of 19 July 2024," https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-sum-01-00-en.pdf
[58] Minister for Foreign Affairs, (2024). "Human Rights Sanctions in response to Israeli settler violence in the West Bank," https://www.foreignminister.gov.au/minister/penny-wong/media-release/human-right-sanctions-response-israeli-settler-violence-west-bank

required of the Australian Government. The Australian Government's current stance on Israel’s genocide in Gaza, marked by reluctance, political unwillingness and selective enforcement of international law, starkly contrasts with its professed commitment to human rights and the rule of law. This inconsistency not only erodes trust domestically but also undermines Australia's standing on the global stage, and certainly contributes to the growing impunity Israel enjoys to continue committing atrocities against the Palestinian people.

To rectify this, urgent reforms are imperative. Australia must adopt a foreign policy deeply rooted in human rights, ensuring robust mechanisms for early intervention and prevention of atrocities. Central to this approach must be the depoliticisation of legal frameworks and a commitment to prosecute all cases of genocide without political interference. Furthermore, corporate accountability and strategic diplomatic measures, including targeted sanctions and arms embargoes where necessary, are essential to uphold international norms and prevent complicity in atrocities.

The time for meaningful action is now. Australia must align its policies with its stated values, demonstrating unequivocally its commitment to human rights and the prevention of genocide, especially in moments of global crisis such as the one unfolding in Gaza. This is both a legal obligation and a moral imperative that demands Australia's unwavering dedication and leadership on the world stage.