

3 November 2023

Dear Prime Minister, Minister for Foreign Affairs, Minister for Defence and Attorney General

We the undersigned, legal practitioners and legal academics, in Australia, dedicated to upholding the rule of law both domestically and internationally, call on the Australian Government to act without delay to fulfil its international legal obligations in relation to the ever-escalating and horrific conflict in the Middle East.

In doing so, we are deeply mindful that many people in Australia – including Israelis and Palestinians, and those in the broader Jewish, Arab and Muslim communities – have close ties to the region, and we express our sympathy to all of them, particularly the bereaved, and those whose loved ones are still in grave danger. The death, trauma and other harm visited on individuals, families and whole communities in the last month has been devastating.

The well-accepted limits of international law, human rights law, and the law of armed conflict have been exceeded.

There is mounting evidence that atrocity crimes have been committed.<sup>1</sup> Atrocity crimes are considered to be the most serious crimes against humankind. Their status as international crimes is based on the belief that the acts associated with them affect the core dignity of human beings.<sup>2</sup>

### **The facts**

The situation in Gaza is catastrophic.

In response to the Hamas-led attacks in Israel on 7 October 2023, Israel has engaged in intensive airstrikes on Gaza, and more recently a ground invasion.

In the morning hours of 7 October 2023, Hamas fired a barrage of thousands of rockets from Gaza into Israeli territory, before breaching the security barrier surrounding Gaza in multiple locations. They killed young people partying at a music festival, and engaged in a widespread attack against communities, towns and kibbutzim in Southern Israel, as well as Israeli military bases.<sup>3</sup> 1,400 Israelis and other nationals were killed on and after 7 October 2023, according to figures provided by the Israeli Ministry of Health, most of them civilians,<sup>4</sup> including multiple members of the same family, women and at least 31 children.<sup>5</sup> There are reports of mutilation. At least 242 hostages are being held captive in Gaza, including at least one person with a disability, women, children, elderly

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<sup>1</sup> United Nations (UN) Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes*, 2014: The term "atrocity crimes" refers to: genocide, crimes against humanity and war crimes as defined under international law.

<sup>2</sup> Ibid.

<sup>3</sup> UN Office for the Coordination of Humanitarian Affairs (OCHA), *Hostilities in the Gaza Strip and Israel | Flash Update #1* (7 Oct 2023); and Human Rights Watch (HRW), *Israel/Palestine: Videos of Hamas-led attacks verified* (18 Oct 2023).

<sup>4</sup> Israeli Ministry of Health, *Press Release* (22 Oct 2023).

<sup>5</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #27* (2 Nov 2023).

people and Israeli soldiers.<sup>6</sup> Only four hostages have been released as at 2 November 2023, and one female soldier has been rescued by Israeli forces.<sup>7</sup> Those still held hostage in Gaza are *incommunicado*, save for short videos of several hostages released on 17 October and 30 October 2023.<sup>8</sup> An estimated 5,400 Israelis and others in Israel have been injured on and since 7 October 2023.<sup>9</sup> Rockets continue to be fired into Israel from Gaza,<sup>10</sup> prompting thousands of Israelis from communities near Gaza, as well as along the border with Lebanon, to flee or be evacuated.<sup>11</sup>

In response, Israel declared war on Hamas. The Israeli army has dropped thousands of bombs on Gaza, one of the most densely populated places on Earth, home to 2.1 million Palestinians,<sup>12</sup> of whom approximately half are children,<sup>13</sup> and the majority of whom are refugees from villages and towns within Israel.<sup>14</sup> From 7 October to 2 November 2023, 9,061 Palestinians in Gaza, including 3,760 children and 2,326 women, have been killed and 22,911 injured, according to figures provided by the Palestinian Ministry of Health.<sup>15</sup> Over 192 Gazan families have lost ten or more family members.<sup>16</sup> Thousands of people are reported missing, presumed to be still trapped beneath the rubble,<sup>17</sup> and over 140 unidentified bodies have been buried in mass graves.<sup>18</sup>

On 9 October 2023, Israel cut off access by Palestinians in Gaza to food, water, electricity, fuel, medical supplies.<sup>19</sup> Clean drinking water is scarce, and the risks of fatal dehydration and the outbreak of waterborne diseases, including cholera, are acute.<sup>20</sup> The restricted amount of aid so far permitted into Gaza (amounting to just four percent of the daily average of imports into Gaza prior to the hostilities),<sup>21</sup> has been wholly insufficient to meet the needs of the civilian population, the majority of whom were already dependent on humanitarian assistance as a result of the 16-year blockade of the territory.<sup>22</sup> Israel continues to block fuel from entering Gaza,<sup>23</sup> even though hospitals are now running out of fuel to power generators, and many major hospitals have ceased to function entirely, exposing hundreds of patients with serious injuries to imminent risk of death or lifelong disability.<sup>22</sup> Fourteen out of 35 hospitals with inpatient capacities are no longer functioning due to lack of fuel or airstrike damage, and Gaza's already fragile health system is in

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6 *Ibid.*; OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #4 (10 Oct 2023); see also, Human Rights Watch, Hamas, Islamic Jihad: Holding Hostages is a War Crime (19 Oct 2023).

7 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #27 (2 Nov 2023).

8 International Committee of the Red Cross (ICRC), Statement from President Mirjana Spoljaric – Israel and Occupied Territories: ICRC helps in the release of hostages in Gaza, Press Release (20 Oct 2023).

9 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #27 (2 Nov 2023).

10 *Ibid.*

11 *Ibid.*

12 UNRWA, Where We Work – Gaza.

13 World Health Organisation (WHO), WHO pleads for immediate reversal of Gaza evacuation order to protect health and reduce suffering (13 Oct 2023).

14 UNRWA, Where We Work – Gaza; and UNRWA, Palestine Refugees.

15 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #27 (2 Nov 2023).

16 *Ibid.*

17 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #16 (22 Oct 2023).

18 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #15 (21 Oct 2023).

19 Emanuel Fabien, Defence Minister announces complete siege of Gaza 'no power, food or fuel', Times of Israel (9 Oct. 2023).

20 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #16 (22 Oct 2023); and Médecins Sans Frontières, Five ways the war in Gaza is impacting Palestinians' health (20 Oct 2023).

21 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #15 (21 Oct 2023); OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #16 (22 Oct 2023); and Action Aid, Insufficient aid will lead to more innocent deaths in Gaza (19 Oct 2023).

22 UNRWA, Where We Work – Gaza.

23 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #27 (2 Nov 2023).

collapse.<sup>24</sup>

As of 24 October 2023, Israeli military bombing has resulted in 73 healthcare workers being killed - 16 while on duty - with 57 healthcare facilities directly attacked.<sup>25</sup> An initiative launched on 1 November 2023 to monitor Israeli attacks on healthcare workers and facilities - Healthcare Workers Watch - reports that 140 healthcare workers have now been killed.<sup>26</sup> Israeli forces have also repeatedly hit places of worship, United Nations facilities, bakeries, schools, roads, water treatment facilities, and food storage facilities.<sup>27</sup> Seventy-two UNRWA staff members have been killed in Gaza, the largest number of United Nations aid workers to be killed in such a short time span.<sup>28</sup>

Human rights groups have also documented the use of white phosphorus in built-up areas.<sup>29</sup> By the 22 October 2023, the Israeli army had levelled or damaged over 169,100 homes, reported to constitute 43% of all housing units in Gaza,<sup>30</sup> figures which would now be well exceeded - and laid waste to entire neighbourhoods.<sup>31</sup> Over 1.5 million Gazans, including an estimated 15 percent with disabilities, have been displaced.<sup>32</sup> Over four weeks, there have been warnings by the Israeli military for civilians to leave homes and hospitals in the North of Gaza<sup>33</sup> - warnings described by UN Secretary General, António Guterres, as “*dangerous*” and capable of “*devastating humanitarian consequences*”,<sup>34</sup> and by the World Health Organisation as “*tantamount to a death sentence*” for hospital patients.<sup>35</sup> Leaflets dropped by Israel over Gaza City - home to some 590,000 people - on 21 October 2023 warned residents that they may be considered “*complicit with a terrorist organization*” if they did not leave.<sup>36</sup> However, many civilians who have fled in search of safety have been killed or injured in Israeli airstrikes on the South or while evacuating.<sup>37</sup> For two straight days, the Israeli Defence Force bombed Jabalia refugee camp in North Gaza, the most densely populated area of the Gaza Strip, destroying residential buildings, targeting an UNRWA school, and killing hundreds.<sup>38</sup> Further UNRWA schools sheltering displaced Gazans have been hit in the past 24 hours causing death and injury.<sup>39</sup>

Violent incidents have also increased significantly in the occupied West Bank, where Israeli

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24 Ibid.

25 Alser O and Alser M (31 Oct 2023). Urgent call for protecting healthcare workers in Palestine, *The Lancet*: [https://doi.org/10.1016/S0140-6736\(23\)02404-2](https://doi.org/10.1016/S0140-6736(23)02404-2)

26 <https://twitter.com/HCWWatch> (3 Nov 2023).

27 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #13, (19 Oct 2023); Press Release, Gaza: UN experts decry bombing of hospitals and schools as crimes against humanity, call for prevention of genocide, UN Special Procedures (19 Oct. 2023).

28 <https://www.unrwa.org/newsroom/videos/tribute-unrwa-staff-members-killed-gaza#> (3 Nov 2023).

29 Human Rights Watch, Questions and Answers on Israel's Use of White Phosphorus in Gaza and Lebanon, (12 Oct 2023).

30 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #16 (22 Oct 2023).

31 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #15 (21 Oct 21, 2023).

32 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #27 (2 Nov 2023).

33 ICRC, Israel and the Occupied Territories: Evacuation order of Gaza triggers catastrophic humanitarian consequences, (13 Oct 2023).

34 António Guterres, Why Israel Must Reconsider Its Gaza Evacuation Order - UN Secretary-General, New York Times Op-Ed, United Nations Guest Essay (13 Oct 2023).

35 WHO, Statement, Evacuation orders by Israel to hospitals in northern Gaza are a death sentence for the sick and injured (14 Oct 2023).

36 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #16 (22 Oct 2023).

37 Sari Bashi, Why Israel's Gaza Evacuation Order is So Alarming, Human Rights Watch (16 Oct 2023).

38 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #27 (2 Nov 2023).

39 Ibid.

soldiers and armed settlers have killed at least 132 Palestinians since 7 October 2023 – including 41 children – and injured more than 2,281 others.<sup>40</sup> Two Israeli soldiers have been killed by Palestinians.<sup>41</sup> Entire West Bank and East Jerusalem Palestinian households and communities have been displaced amid intensified settler violence, access restrictions, and punitive demolitions.<sup>42</sup> Over 1,900 Palestinian adults and children have been detained, with credible reports of widespread cruel, inhuman, and degrading treatment of detainees.<sup>43</sup> Electricity and water to security wings in Israeli prisons, primarily housing Palestinian prisoners from occupied Palestinian territory, was reportedly cut off the day after the Hamas attacks.<sup>44</sup>

## The law

Hamas' attacks against Israeli civilians constitute serious violations of international law. International law strictly prohibits the targeting of civilians,<sup>45</sup> the use of indiscriminate weapons,<sup>46</sup> murder,<sup>47</sup> mutilation,<sup>48</sup> and hostage taking.<sup>49</sup>

As Palestine is a State Party to the Rome Statute of the International Criminal Court (RS), war crimes and crimes against humanity committed by Palestinian nationals, including attacks on civilians (RS, Arts 8.2.b.i/8.2.e.i), and hostage-taking (RS, Arts 8.2.a.viii/8.2.c.iii), would fall under the subject-matter and personal jurisdiction of the International Criminal Court (ICC) (RS, Arts 12.2.b and Art 13.a). Crimes committed by Hamas on 7 October 2023 would fall therefore to be investigated as part of the Office of the Prosecutor's investigation into the 'Situation in the State of Palestine'.<sup>50</sup>

The commission by one party to a conflict – including an armed group – of serious violations of international humanitarian law does not, however, justify their commission by another party. That fundamental principle applies, whatever the nature of the armed conflict, and whatever "*the causes espoused by or attributed to the Parties*" (Geneva Conventions, Additional Protocol (API)).<sup>51</sup> It also applies where a party seeks to invoke the right to self-defence.<sup>52</sup> Hamas's war crimes cannot be justified by reference to prior war crimes by Israel; neither do they justify further such crimes by Israel in its response, which must comply with international law. As the UN Secretary General has

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40 OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #27 (2 Nov 2023).

41 Ibid.

42 Ibid.

43 Ibid.

44 Adalah, Israel Cuts Off Electricity and Water to Palestinian Prisoners in the 'Security Wings' of Israeli Prisons (14 Oct 2023).

45 ICRC, Customary International Humanitarian Law database, rule 1 (Principle of Distinction between Civilians and Combatants).

46 ICRC, Customary International Humanitarian Law database, rules 11–13 (Indiscriminate Attacks).

47 ICRC Customary International Humanitarian Law database, rule 89 (Violence to Life).

48 ICRC, Customary International Humanitarian Law, 2005, Volume II: Rules, Rule 92 (Mutilation and Medical, Scientific or Biological Experiments).

49 ICRC Customary International Humanitarian Law database, rule 96 (Hostage – Taking).

50 International Criminal Court, State of Palestine: Investigation ICC-01/18 (3 Mar 2021).

51 ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3. An analysis of the competing theories regarding the legal regime applicable to the conflict in Gaza is beyond the scope of this letter, which highlights the breaches of humanitarian law and criminal law applicable in international armed conflicts, non-international armed conflicts and military occupations, in relation to which there is in any event considerable overlap.

52 Ryan Goodman, et al., Expert Guidance: Law of Armed Conflict in the Israel-Hamas War, Just Security (17 Oct 2023). See also, UN General Assembly (UNGA), Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel (05 September 2023) UN Doc. A/78/198, §11.

made unequivocally clear, the attacks by Hamas in Israel “*can never justify the collective punishment of the Palestinian people. International humanitarian law – including the Geneva Conventions – must be upheld*”.<sup>53</sup>

International humanitarian law is not being upheld.

International humanitarian law requires parties to an armed conflict: to distinguish between civilians and civilian objects on the one hand and combatants and military objectives on the other, prohibiting both direct attacks against civilians and civilian objects, and means and methods of warfare that may lead to indiscriminate attack (the principle of distinction);<sup>54</sup> to take all feasible measures, including in the choice of the means and methods of attack, to spare civilians and civilian objects, and to verify that targets are military objectives (the principle of precaution);<sup>55</sup> and to ensure that the expected incidental loss of civilian life and damage to civilian objects are not excessive in light of the military advantage of an attack (principle of proportionality). Area bombardment is prohibited,<sup>56</sup> and where doubt exists, a civilian or object normally dedicated to civilian purposes must be presumed to remain as such.<sup>57</sup> In such a densely populated area as Gaza, home to a population – including over a million children – already weakened by 16 prior years of stringent blockade and decades of military occupation, and now under complete siege, heightened care in the adherence to the laws of war is imperative.

Customary international law prohibits the arbitrary failure to allow and facilitate the rapid, impartial and unimpeded passage of humanitarian relief, including food, water, medical supplies, clothing, bedding, shelter, heating fuel and other supplies and related services essential for the survival of a civilian population.<sup>58</sup> The starvation of a civilian population as a method of warfare, including wilfully impeding adequate relief supplies, as Israel is doing in Gaza, is strictly prohibited under customary international law (as codified in API, Art 54), has been robustly condemned by the UN Security Council,<sup>59</sup> and constitutes a war crime (RS Art 8.2.b.xxv).<sup>60</sup>

Customary international law also strictly prohibits the forcible transfer of the civilian population from one area to another, unless the security of the civilians involved or imperative military reasons so demand (GCIV, Art 49/APII, Art 17(2)).<sup>61</sup> Breach of the prohibition constitutes a war crime (RS, Arts 8.2.a.vii/8.2.b.viii/8.2.e.viii) and a grave breach of the Geneva Conventions (GCIV,

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<sup>53</sup> UN, UN Secretary General António Guterres statement before the Cairo Peace Summit (21 Oct 2023).

<sup>54</sup> ICRC Customary International Humanitarian Law database, rule 1 (Principle of Distinction between Civilians and Combatants), rule 7 (Principle of Distinction between Civilian Objects and Military Objectives), rule 11 (Indiscriminate Attacks), and rule 71 (Weapons That Are by Nature Indiscriminate); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 48; and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 257, para. 78.

<sup>55</sup> *Ibid.*, rules 16 and 17 (Principle of Precaution in Attacks and Choice of Means and Methods of Warfare); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), 8 June 1977, 1125 UNTS 3, Arts 50.1 and 57.2.a.ii.

<sup>56</sup> ICRC Customary International Humanitarian Law database, rule 13 (Area Bombardment).

<sup>57</sup> ICRC Customary International Humanitarian Law database, rule 6 (Civilians' Loss of Protection from Attack).

<sup>58</sup> *Ibid.*, rule 55 (Access for Humanitarian Relief to Civilians in Need).

<sup>59</sup> UN Security Council (UNSC) Res 2417 (24 May 2018) S/RES/2417; and CRC Customary International Humanitarian Law database, rule 53 (Starvation as a Method of Warfare).

<sup>60</sup> Tom Dannenbaum, *The Siege of Gaza and Starvation as a War Crime, Just Security*, (11 Oct. 2023).

<sup>61</sup> ICRC Customary International Humanitarian Law database, rule 129 and 131 (The Act of Displacement and Treatment of Displaced Persons).

Art 147); and may amount to a crime against humanity when committed as part of a systematic attack directed against any civilian population (RS, Art 7.1.d). Importantly, a demand that the civilian population leave a given area does not deprive remaining civilians or civilian objects in that area – such as homes, schools and hospitals – of their civilian status. The International Committee of the Red Cross (ICRC) – entrusted by the international community with the role of “guardian” and “watchdog” of international humanitarian law<sup>62</sup> – has stated in terms that: *[t]he instructions issued by the Israeli authorities for the population of Gaza City to immediately leave their homes, coupled with the complete siege explicitly denying them food, water, and electricity, are not compatible with international humanitarian law*.<sup>63</sup> Eight UN Special Rapporteurs have further warned that the *“complete siege of Gaza coupled with unfeasible evacuation orders and forcible population transfers”* also constitute *“a violation of international... criminal law”*,<sup>64</sup> amounting to a war crime; and human rights organisations have expressly called on Australia and other States with influence to *“demand that the illegal and impossible order to relocate is immediately rescinded”*.<sup>65</sup> Any forced movement of some or all Palestinians from Gaza into Egypt would also be similarly incompatible with international humanitarian law (GCIV, Art 49; APII, Art 17(2)); constituting a grave breach (GCIV, Art 147) and a possible crime against humanity (RS, Art 7.1.d).

International humanitarian law prohibits the intentional directing of attacks against the civilian population, against individual civilians not taking a direct part in hostilities,<sup>66</sup> as well as against civilian objects, such as Red Cross/Crescent buildings, vehicles and personnel, and against UN premises.<sup>67</sup> Violation of the prohibition constitutes a war crime (RS, Art 8.2.b.i-iii/Art 8.2.e.i-iii). Even attacks directed against legitimate military objectives are unlawful under customary international law if they breach the precaution or proportionality principles, including where widespread severe damage to the natural environment would be clearly excessive in relation to the concrete and direct military advantage anticipated, and attract international criminal responsibility (RS, Art 8.2.b.iv/customary international law<sup>68</sup>). The sheer scale of the loss of life and injury in Gaza, particularly to women and children, together with the widespread damage to civilian objects and infrastructure indicate a clear breach of those principles,<sup>69</sup> and a violation of international law. Amnesty International has asserted that its *“research points to damning evidence of war crimes in Israel’s bombing campaign that must be urgently investigated”*.<sup>70</sup> Indeed, seven Special Rapporteurs have asserted that Israel’s *“wilful and systematic destruction of civilian homes*

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62 Yves Sandoz, *The International Committee of the Red Cross as guardian of international humanitarian law*, International Committee of the Red Cross, ICRC (31 Dec 1998).

63 ICRC, *Israel and the Occupied Territories: Evacuation order of Gaza triggers catastrophic humanitarian consequences*, International Committee of the Red Cross (13 Oct 2023).

64 UN, *Gaza: UN experts decry bombing of hospitals and schools as crimes against humanity, call for prevention against genocide*, Press Release (19 Oct 2023); see also: Human Rights Watch, *Why Israel’s Gaza Evacuation Order is So Alarming* (16 Oct. 2023); Amnesty International, *Israel/OPT: Appalling Gaza “evacuation order” must be rescinded by Israel immediately* (13 Oct 2023).

65 Human Rights Watch, *Why Israel’s Gaza Evacuation Order is So Alarming* (16 Oct 2023); Amnesty International, *Israel/OPT: Appalling Gaza “evacuation order” must be rescinded by Israel immediately* (13 Oct 2023); Norwegian Refugee Council, *Statement by Jan Egeland, Secretary General of the Norwegian Refugee Council, Israeli ultimatum to Gaza must be reversed* (13 Oct 2023).

66 See: Nils Melzer, *Interpretive guidance on the notion of Direct participation in hostilities under international humanitarian law*, International Committee of the Red Cross (ICRC) (May 2009).

67 ICRC Customary International Humanitarian Law database, rules 7 to 10 (Distinction Between Civilian Objects and Military Objectives).

68 *Ibid*, rule 14 (Proportionality in Attack); and Andrew Clapham, *War*, Oxford University Press, (2001), 492-3: “practice points to states and other International Tribunals treating such actions as war crimes even when perpetrated in the context of a non- international armed conflict”.

69 For the relevant legal framework, see Adil Ahmad Haque, *The IDF’s unlawful attack on Al Jalaa Tower, Just Security*, (27 May 2021).

70 Amnesty International, *Damning evidence of war crimes as Israeli attacks wipe out entire families in Gaza*, (20 Oct 2023).

and infrastructure” is “resulting in crimes against humanity in Gaza”.<sup>71</sup>

Those and other Rome Statute crimes committed in Gaza or the West Bank fall within the subject matter and territorial jurisdiction of the ICC’s investigation into the ‘Situation in the State of Palestine’ (RS, Arts 12.2.a and 13.a), which extends “to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem”.<sup>72</sup>

The rhetoric from senior Israeli Government and military officials immediately before and during the military assault on Gaza is of extreme concern, having regard to the nature, scale and impact of the attacks. By way of illustration, Israeli Minister of Defence, Yoav Gallant, has publicly declared that he has “released all restraints”,<sup>73</sup> that the Israeli army are “fighting human animals and will act accordingly”,<sup>74</sup> that the plan is to “eliminate everything” and that “Gaza won’t return to what it was before”.<sup>75</sup> Senior Israeli military and governmental officials have variously declare that “the emphasis is on damage and not on accuracy”<sup>76</sup> and that “there will be no electricity and no water, there will only be destruction. You wanted hell, you will get hell”.<sup>77</sup> Former Head of the Israeli National Security Council, Major General (Res) Giora Eiland, has publicly asserted that “[c]reating a severe humanitarian crisis in Gaza is a necessary means to achieve the goal” and that “Gaza will become a place where no human being can exist”.<sup>78</sup> Israeli President, Isaac Herzog, has asserted that “it’s an entire nation out there that is responsible – it’s not true this rhetoric about civilians not aware not involved, it’s absolutely not true...”,<sup>79</sup> while Prime Minister, Benjamin Netanyahu, has described the conflict as “a struggle between the children of light and the children of darkness”.<sup>80</sup>

Such statements indicate an intention not to be bound by the fundamental principles of international law, and an intention to engage in unlawful collective punishment. Indeed, coupled with the actions of Israeli forces in Gaza and the West Bank, a group of Special Rapporteurs to the United Nations warned on 2 November 2023 that time is running out to prevent genocide and humanitarian catastrophe, highlighting that “Israel’s allies also bear responsibility and must act now to prevent its disastrous course of action”.<sup>81</sup>

## Urgent requests

Australia is duty-bound to “respect and ensure respect” for international humanitarian law in all

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71 UN, Gaza: UN experts decry bombing of hospitals and schools as crimes against humanity, call for prevention against genocide, Press Release (19 Oct 2023).

72 ICC, Situation in Palestine, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, ICC-01/18-143 (5 Feb. 2012), para 118, para 118.

73 Emanuel Fabian and Jacob Magid, Gallant: Israel moving to full offense, Gaza will never go back to what it once was, Times of Israel, (10 Oct 2023).

74 “We are fighting human animals” said Israeli Defence Minister Yoav Gallant.

75 See, Israeli Defense Minister Warns Hamas ‘Will Regret’ Deadly Attacks (10 Oct 2023).

76 Bethan McKernan and Quique Kierszenbaum, ‘Emphasis is on damage, not accuracy’: ground offensive into Gaza seems imminent, The Guardian (10 Oct 2023).

77 Gianluca Pacchiani, COGAT chief addresses Gazans: ‘You wanted hell, you will get hell’, The Times of Israel (Oct. 10, 2023).

78 Giora Eiland, It’s time to rip off the Hamas band-aid, Ynet News (12 Oct 2023).

79 CNN, The Lead with Jake Tapper, Rush Transcript (13 Oct 2023).

80 Israeli Ministry of Foreign Affairs, Excerpt from PM Netanyahu’s remarks at the opening of the Winter Assembly of the 25th Knesset’s Second Session, Press Release (16 Oct 2023).

81 United Nations Human Rights Office of the High Commissioner, Press Release: Gaza is ‘running out of time’ UN experts warn, demanding a ceasefire to prevent genocide, 2 November 2023.

circumstances (1949 Geneva Conventions, Common Art 1; API, Art 1(1)). That means that Australia must not itself violate international humanitarian law, and that it must not encourage violations of international humanitarian law by others. It is also interpreted as incorporating a duty to prevent or bring to an end any such violations of the law by other parties (ICRC Commentaries). That is further to Australia's obligation to search for and bring before its courts those alleged to have committed grave breaches of the Geneva Conventions (GCIV, Art 146). As a State party to the Genocide Convention, the Australian Government is also required to act to prevent genocide where there is a risk of genocide occurring.<sup>82</sup>

Pursuant to those obligations, we call upon the Australian Government urgently to exert its influence to secure a ceasefire in Gaza and the West Bank, and to ensure urgently the adequate provision of food, fuel, medicine and other humanitarian assistance to Gaza, and the unconditional restoration of water and electricity.

Australia signed the *Rome Statute* on 9 December 1998 and deposited its instrument of ratification on 1 July 2002 and, in so doing, Australia, on behalf of the Australian people, agreed to become legally bound by the Rome Statute. Australia has enshrined those commitments into domestic law through the passage of the *International Criminal Court Act 2002* (Cth) (ICC Act) which establishes mechanisms which allow Australia to assist the International Criminal Court (ICC) in accordance with the Rome Statute. Additionally, the Australian Government has comprehensively criminalised genocide, crimes against humanity and war crimes in Division 268 of the *Commonwealth Criminal Code*, as contained in the Schedule to the *Criminal Code Act 1995* (Cth). The Criminal Code also criminalises a range of conduct that interferes with the administration of justice of the ICC. Through this legislation, Australia is able to prosecute any person accused of a Rome Statute crime under Australian law consistent with the principle of complementarity. Other relevant legislation includes the *Geneva Conventions Act 1957* (Cth), *Crimes (Hostages) Act 1989* (Cth) and *War Crimes Act 1945* (Cth).

Australian nationals responsible for aiding, abetting or facilitating international crimes, as well as those committing them, are liable for prosecution in Australia pursuant to the and the *International Criminal Court Act 2002* (Cth), as are foreign nationals, including pursuant to the principle of universal jurisdiction. Australian nationals would similarly be liable for prosecution before the ICC.

We call on the Australian Government to continue to use its best endeavours to secure the urgent return of the hostages.

We call on the Australian Government immediately to halt defence exports to Israel, and confirm what military-specific goods have been provided with the 322 export permits granted between 1

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<sup>82</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.



January 2017 and 31 March 2023.<sup>83</sup> We call on the Government to confirm whether these defence goods are being used in accordance with international law.

We further call on the Australian Government to work toward ending Israel's illegal permanent occupation of Palestine, as per the September 2022 findings of the Permanent United Nations Fact Finding Mission on the Israel Palestine Conflict.<sup>84</sup>

To prevent further atrocities, we urge the Australian Government, together with the wider international community, to act with utmost urgency pursuant to the UN Charter, Art 1,<sup>85</sup> to ensure that that the fundamental rights – including the human rights – of both Israelis and Palestinians are upheld, and to work towards a just, lasting and sustainable peaceful settlement for all those in the region, including those in the now devastated Gaza Strip.

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<sup>83</sup> Hugh Jeffrey, Foreign Affairs, Defence and Trade Legislation Committee, Hansard, 25 October 2023.

<sup>84</sup> Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel (14 September 2022) UN Doc. A/77/328.

<sup>85</sup> Charter of the United Nations, and Statute of the International Court of Justice (ICJ).