AUSTRALIAN MUSLIM ADVOCACY NETWORK

4 JULY 2024

INQUIRY INTO CRIMINAL CODE AMENDMENT (GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES) BILL 2024

SUBMISSIONS FROM THE AUSTRALIAN MUSLIM ADVOCACY NETWORK LTD

Contents

1. ACKNOWLEDGEMENT

We acknowledge the lands of the Jagera, Toorbul and Gadigal people, where we work and live. We respect the Elders of those lands, both past and present. This land always was and always will be Aboriginal and Torres Strait Islander land because sovereignty has never been

ceded. We recognise the role of the colonial legal system in establishing, entrenching, and continuing the oppression and injustice experienced by First Nations peoples. We want to work in solidarity with Aboriginal and Torres Strait Islander people to undo this.

Genocide practices are major violations of human rights and serious crimes. Genocide practices include genocide by killing, genocide by causing serious bodily or mental harm, genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, and genocide by imposing measures intended to prevent births or genocide by forcibly transferring children. Sadly, Australia has carried out a long pattern of genocide against First Nations Peoples, including the different types of genocide listed above.

We also acknowledge the incredible network of tireless academics and legal volunteers who assisted with the research and preparation of this submission.

2. ABOUT AMAN

The Australian Muslim Advocacy Network Ltd (AMAN) works to prevent the harmful impact of systemic racism, online hatred and Islamophobia through policy engagement and law reform.

As a Muslim organisation, we are deeply concerned about the ongoing suffering of Australian Palestinians, Arabs, and the Muslim community due to the genocide, bombings, denial of medical aid, and starvation in Gaza. This situation will not end without intervention from Israel's allies like Australia, who have yet to set any red lines or consequences.

As an anti-racism and human rights-based organisation, AMAN is alarmed by the denial of Palestinians' equal worth and dignity under the law. Ignoring international humanitarian law for political or defence strategy undermines respect for all Australians.

The failure to protect all persons from genocide sends an abhorrent signal, which is a major driver of racism. We are determined to see the law upheld without discrimination and make this submission, including law reform proposals, to overcome this failure.

Racism against minorities, especially First Nations peoples, persists in Australia. Antisemitic vilification and hate crime are a genuine concern. AMAN seeks to educate on all forms of dehumanisation.[1] Conflating Judaism with Zionism is dehumanising because it essentialises

[1] https://www.aman.net.au/policy-brief-combatting-online-dehumanisation-of-minorities/

Jewish people and denies their capacity for independent thought and reason. Assuming Jewish people must be held accountable for Israel's crimes because they are Jewish (collective guilt attribution) is also a form of dehumanisation. We acknowledge the underlying historical collective trauma and the fear of being the 'frog in the boiling water', a metaphor used to describe the pre-Holocaust years. AMAN supports the Jewish Council of Australia for their pivotal anti-racism work.

While acknowledging the Jewish community's fears, AMAN does not tolerate using that fear to justify disdain or hatred towards Palestinians, Arabs, or Muslims. This fear is used by pro-Israel Zionists to suppress Palestinian voices, exclude them from public and shared platforms and, justify atrocities against them.

Zionist political organising aims to introduce criminal hate speech laws, formalise the IHRA definition of antisemitism, exclude pro-Palestinian activism from universities, increase police powers, tighten immigration restrictions, and penalise students for protesting. AMAN opposes these measures as harmful to democracy and human rights.

3. SUBMISSION OVERVIEW

Throughout history, genocides have inflicted immeasurable suffering and loss across the globe. Genocides have targeted specific ethnic, religious, or national groups, resulting in mass killings, displacement, and trauma on a profound scale. Despite international efforts to prevent such horrors, genocides continue to occur, underscoring the urgent need for effective legislative measures to combat impunity and protect vulnerable populations.

In a domestic environment where autonomous sanctions are not deployed in line with international legal rulings or developments but in line with Australia's overall defence and foreign policy aligning with the US, this opens up Australia, its officials and companies to tremendous legal and reputational risk.

We are now in an international environment where proceedings are brought against countries like Germany for aiding Israel in the commission of genocide, where arrest warrants are issued for Israeli leaders (major US partners), and where courts find that state legal obligations to prevent genocide and other crimes cannot be excused by national political or policy prerogatives, leading to successful rulings against exports.

Australia formally aims to rank among the world's top 10 arms exporters by 2028, has established defence and cyber security partnerships with Israel since 2017, and the Albanese government wants Australia to be a top maker of US weapons outside America.

A statement from 20 June 2024 by the United Nations lists arms companies involved in arms transfers to Israel and financial institutions investing in those companies. The Australian Government directly invests in quite a few of these companies and allows trade. The United Nations is calling on the Australian Government to end transfers to Israel, even if they are executed under existing export licenses. An end to transfers must include indirect transfers through intermediary countries that could ultimately be used by Israeli forces, particularly in the ongoing attacks on Gaza.

Australia has ratified the Genocide Convention through the *Genocide Convention Act 1949*, fulfilling its obligation to enact legislation to provide effective penalties for persons guilty of genocide under Article V of the Genocide Convention. Australia, therefore, has an international and national obligation to prevent and punish genocide under Article I of the Genocide Convention. However, Australia has failed to uphold its obligation to prevent and punish genocide by failing to call upon organs of the United Nations to take action on the genocide of Gaza, impose sanctions under the National Autonomous Sanctions Regimes or divest ties with companies with ties to Israel. A failure to fulfil this obligation under Article I may incur state responsibility, leading to diplomatic or legal consequences and risks complicity in genocide.

Beyond the Genocide Convention, the International Court of Justice (ICJ) has also stated that genocide is a peremptory norm of international law (*jus cogens*). Therefore, regardless of if states have ratified the Convention, they are bound by its jus cogens nature.

Australia has also ratified the Rome Statute, which established the ICC and its jurisdiction to prosecute international criminal offences.

The ICJ's preliminary measures orders against Israel not only have implications for Israel to follow the orders but also put all other states on notice of the risk of being an accessory to genocide. Additionally, Article IV of the Genocide Convention extends the complicity of genocide to include private individuals as well, and it can be established that as individuals comprising the State, persons in Australia would have obligations to prevent or punish genocide where the State itself refuses to uphold these obligations.

These obligations may be extended to relevant individuals whose decisions have had implications in Gaza, such as the Australian foreign minister Penny Wong, who cut funding to UNRWA, directly restricting aid to combat the genocide through collective punishment. Penny Wong may also be held liable concerning her failure to designate individuals and entities to be subject to financial sanctions and travel bans under the Australian Magnitsky sanctions framework for serious violation or serious abuses of human rights (s 3(3)(d) Autonomous Sanctions Act (2011)).

Prime Minister Anthony Albanese has been referred to the International Criminal Court pursuant to Article 15 of the Rome Statute for accessorial support to the genocide in Gaza. This referral includes other ministers and members of parliament, including Foreign Minister Wong and the Leader of the Opposition Peter Dutton, regarding their actions in 'freezing UNRWA funding… providing military aid and approving defence exports to Israel… deploying an Australian military contingent to the region… permitting Australians to travel to Israel to join the IDF, and providing unequivocal political support for Israel's actions…'

While removing barriers to commencing proceedings under Division 268 of the Criminal Code removes a clear conflict of interest that exists in enabling the Attorney General to moderate litigation against its own government, AMAN is concerned that this step alone will not prevent further genocide in Gaza or elsewhere, especially when the scale of impugned government and corporate involvement is prolific and subject to extensive national security and commercial sensitivity protections, as is the case right now.

This submission reviews various legal frameworks and makes recommendations about how Australia can strengthen this framework to vastly reduce the risk that it is contributing to active genocides.

The existing legal framework relies heavily on ministerial discretion. Red lines must be introduced into existing legislation where certain thresholds are crossed; for example, genocide risk is established through international court proceedings.

There is currently no formal mechanism in Australia that directly targets genocide in business operations and supply chains or supports the business community to take action to address genocide.

Given the ongoing situation in Gaza and the broader implications of unchecked arms trading, it is imperative to prevent the misuse of public funds and ensure compliance with international

standards. Australia's future should not be synonymous with contributing to global suffering and devastation.

4. RECOMMENDATIONS

(a) The requirement that the Attorney General consent for prosecution under Division 268 is removed.

(b) Exemptions under FOI requirements based on preserving international relations should not apply in matters concerning alleged violations of IHL.

(c) The independence of the AFP from the Attorney General in relation to war crimes must be upheld and recommendations from the Australian Centre for International Justice[2] in relation to war crime units implemented.

(d) Australia's legal framework to mitigate against Australian state liability for genocide must be strengthened:

(i) For circumstances where the International Court of Justice has provided or provides a provisional ruling against a nation-state finding a real and imminent risk of irreparable prejudice to a group's rights to be protected from acts of genocide and related prohibited acts identified in Article III of the Genocide Convention[3]; or the United Nations issues a statement requesting states and companies end arms transfer to a state to avoid the risk of being held responsible for serious human rights violations[4];

(A) Red lines must be introduced into the Defence Exports Controls Act to automate the imposition of autonomous military sanctions and Magnitsky Act sanctions.

(B) Australian nationals must not be allowed to serve in the military of the accused nation-state.

(C) Future Fund and other public investments in impugned arms companies (identified as having criminal involvement risk) should be immediately divested. This also applies, without limitation, to Future Made in Australia investments and Export Finance Australia investments.

(D) Contracts with impugned arms companies should be ended.

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[2] https://acij.org.au/policy-paper-challenging-impunity-why-australia-needs-a-permanent-specialised-international-crimes unit/#:~:text=Drawing%20on%20research%20and%20experience,establishment%20of%20an%20effective%20unit.

[3] For example, as the ICJ has done in relation to Israel following the application by the South Africa.

[4] For example: States and companies must end arms transfers to Israel immediately or risk responsibility for human rights violations: UN experts | OHCHR

(ii) Reverse the recently introduced national exemption for the 'United Kingdom and the United States from Australia's export control permit requirements' under the Defence Trade Controls Act 2012.

(iii) Legal obligations must be introduced onto defence industry companies to monitor their supply chains for genocide risk and to disclose and avoid genocide risk. Civil remedies must be available against companies that fail to disclose their genocide risk or mitigate that genocide risk.

(iv) All future government contracts should have genocide risk out-clauses.

(e) Legislation to prompt divestment from the illegal Israeli settlements should be introduced, focusing on the Future Fund and Australian Charities.

(f) Australia introduces a Human Rights Act.

5. DISCUSSION - EXISTING LAWS AND STRATEGIES

5.1 Legal framework in relation to genocide

(a) The *Criminal Code Act* 1995 establishes criminal liability for individuals and corporations involved in arms exports, particularly if there's knowledge that the arms could be used to commit war crimes or crimes against humanity.

(b) Genocide is clearly defined in existing international and Australian domestic law.

(c) Article II and the punishable acts listed in Article III of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (**the Convention**) also define genocide[5]. The Convention establishes that 'genocide, whether committed in time of peace or in time of war, is a crime under international law', which state parties must take measures to prevent and to punish, including by enacting relevant domestic legislation and punishing perpetrators. According to Article II of the Convention, 'genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(i) killing members of the group;

(ii) causing serious bodily or mental harm to members of the group;

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) imposing measures intended to prevent births within the group;

(v) forcibly transferring children of the group to another group.'

[5] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277

(d) Article III states that the following acts shall be punishable:

(i) Genocide;

(ii) Conspiracy to commit genocide;

(iii) Direct and public incitement to commit genocide;

(iv) Attempt to commit genocide;

(v) Complicity in genocide.

(e) The Convention has immense significance and was the first human rights treaty adopted by the United Nations General Assembly in the aftermath of the Second World War. It signified the international community's commitment, after witnessing the atrocities of the Holocaust, to 'never again' let a genocide happen.

(i) Article VI of the *Convention* states that 'Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'[6]

(f) Australia, through the *International Criminal Court (Consequential Amendments) Act 2002,* inserted Division 268 into the *Criminal Code* with the intention to: '...create offences in Australia that are equivalent to the crimes of genocide, crimes against humanity and war crimes in the International Criminal Court Statute so that Australia retains the right and power to prosecute any person accused of a crime under the Statute in Australia rather than surrender that person for trial in the International Criminal Court.[7]

(g) Article 6, in accordance with Article 25 of the Rome Statute:[8] The definition of genocide in Article 6 and the meaning of individual criminal responsibility in Article 25 of the Rome Statute is well understood and commonly used internationally to understand accessorial liability.

(h) Division 268, Subdivision B of the *Criminal Code* provides:

> Subdivision B—Genocide
>
> 268.3 Genocide by killing A person (the perpetrator) commits an offence if: (a) the perpetrator causes the death of one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator

[4] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

[7] International Criminal Court (Consequential Amendments) Bill 2002, Explanatory Memorandum, p. 1.

[8] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ("Rome Statute").

intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such. Penalty: Imprisonment for life.

268.4 Genocide by causing serious bodily or mental harm (1) A person (the perpetrator) commits an offence if: (a) the perpetrator causes serious bodily or mental harm to one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such. Penalty: Imprisonment for life. (2) In subsection (1): causes serious bodily or mental harm includes, but is not restricted to, commits acts of torture, rape, sexual violence or inhuman or degrading treatment.

268.5 Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction (1) A person (the perpetrator) commits an offence if

(a) the perpetrator inflicts certain conditions of life upon one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and (d) the conditions of life are intended to bring about the physical destruction of that group, in whole or in part. Penalty: Imprisonment for life. (2) In subsection (1): conditions of life includes, but is not restricted to, intentional deprivation of resources indispensable for survival, such as deprivation of food or medical services, or systematic expulsion from homes.

268.6 Genocide by imposing measures intended to prevent births A person (the perpetrator) commits an offence if: (a) the perpetrator imposes certain measures upon one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and (d) the measures imposed are intended to prevent births within that group. Penalty: Imprisonment for life.

268.7 Genocide by forcibly transferring children (1) A person (the perpetrator) commits an offence if: (a) the perpetrator forcibly transfers one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and (d) the transfer is from that group to another national, ethnical, racial or religious group; and (e) the person or persons are under the age of 18 years; and (f) the perpetrator knows that, or is reckless as to whether the person or persons are under that age. Penalty: Imprisonment for life. (2) In subsection (1), forcibly transfers one or more persons includes transfers one or more persons: (a) by threat of force or coercion (such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power) against the person or persons or against another person; or (b) by taking advantage of a coercive environment.

(i) For conduct to amount to any of these offences under Division 268 Subdivision B of the *Criminal Code*, the conduct (or result of the conduct) must occur in Australia or be performed by an Australian citizen, resident or corporate body. The genocide offences in Division 268 Subdivision B of the *Criminal Code* apply to conduct by any person or body corporate that occurs anywhere in the world.

(j) S 268.1 of the *Act* outlines offences related to war crimes, including the supply of arms with such knowledge. This should significantly burden companies to conduct thorough due diligence on export destinations and end-users to ensure compliance with domestic and international law. Similarly, frameworks such as the United Nations Guiding Principles on Business and Human Rights ('UNGP')[9] prompt corporations to integrate human rights due diligence into business practices while simultaneously identifying, preventing, mitigating, and accounting for potential adverse human rights impacts associated with their business activities. Theoretically, this obligation extends to arms export operations, requiring corporations to assess the human rights risks associated with their exports and take appropriate measures to address them.

5.2 No domestic forum to use laws - Attorney General Consent

Division 268 of the *Criminal Code Act 1995 ('CCA')*[10] encompasses penalties and/or punishments for crimes against humanity, war crimes and genocide. Proceedings for an offence under Division 268 *CCA* require the written consent of the Attorney-General before they can be commenced.[11] On the other hand, sedition offences contained in Division 80 *CCA* do not require Attorney-General consent for the commencement of proceedings.[12]

Academic critics of the Article 15 communication by Birchgrove Legal on 4 March 2024 have suggested the matter should have been referred to the domestic Office of Special Investigation, which was founded to investigate violations of human rights and war crimes committed by Australian defence force personnel in Afghanistan. However, a spokesperson for OSI confirmed the limitations of OSI's mandate, which again sits under the Attorney-General's portfolio and poses a conflict.

"The Office of the Special Investigator's mandate includes reviewing the findings of the Inspector-General of the Australian Defence Force Afghanistan Inquiry and working with the Australian Federal Police to investigate the commission of criminal offences under Australian law arising from or related to any breaches of the Laws of Armed Conflict by members of the Australian Defence Force in Afghanistan from 2005 to 2016."

The OSI was formed after the now heavily redacted Brereton Report was handed down, identifying 39 Afghans had been unlawfully killed by 25 ADF members in 23 incidents. Three years after its establishment, OSI failed to bring responsible ADF soldiers to justice, bar one – Oliver Schulz.

When asked for further information, OSI referred the media to DFAT who provided this response: "The Department and Foreign Affairs and Trade has no further comment to the response you received from the Office of the Special Investigator."

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[9] 1. Guiding principles on business and human rights, 2011, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[10] *Criminal Code Act 1995* (Cth) ('*CCA*') *Div 268.*

[11] *CCA* (n39) s 268.121(1).

[12] *Ibid* Div 80.

DFAT then referred the media to the Department of Defence, who failed to acknowledge receipt of the inquiry, failed to provide a response to what ADF personnel were currently doing in the Middle East and failed to provide information regarding the extent to which Pine Gap was supporting Israel.[13]

Israel is accused of engaging in genocide and genocidal incitement. Despite warnings from the International Court of Justice, the International Criminal Court Prosecutor, UN bodies and a range of international human rights bodies, the Attorney General has not issued warnings to Australian nationals travelling to Israel of the risk of prosecution on their return for serving in the IDF, indicating there is no intention to investigate those involved in Israel's current military operation.

Lawyers representing concerned Australians have put the Australian Prime Minister on notice of criminal exposure twice in October 2023 and February 2024, which following no response, was followed up by a formal communication to the ICC Prosecutor on 4 March 2024. This communication provided credible evidence of accessorial liability by a range of Australian members of parliament and requested a full investigation by the Prosecutor. The lawyers also forwarded a letter from 20,000 Australians requesting that the ICC Prosecutor respond to the communication with an investigation, noting that there were no opportunities for domestic investigation. The letter stated, "Australian law presents a barrier to domestic investigation, as Attorney General consent is necessary, and the Office of the Special Investigator, responsible for probing war crimes, operates under the Attorney General's jurisdiction and lacks the necessary scope."

5.3 Advocating genocide offence – sedition offence

(a) Division 80.2D: Advocating Genocide is established in subsection 1(a): an individual commits an offense if *'the person advocates genocide.'*[14] Advocate is later defined in subsection 3 as to *'counsel, **promote**, encourage or urge.'*[15] Abiding by the Oxford Dictionary's definition of 'promote,' to promote is to 'help something happen or develop.'

(b) This offence sits outside Division 268 and does not require Attorney General consent to commence a proceeding.

(c) Case law further clarifies the meaning of 'advocate', 'promote' and 'encourage'. In *New South Wales v Hickey*, [16] The NSWSC construed 'advocates for' to mean 'supports and publicly recommends'.[17]

(d) The meaning of 'advocating support for' was considered by the NSWCA in *Hardy v New South Wales*.[18] The NSWCA held that one's actions may not, by the very act of engaging in

[13] Will Albo's referral to International Criminal Court put the brakes on weapons sales to Israel? - Michael West

[14] *Ibid* Div 80.2D(1)(a).

[15] *Ibid* Div 80.2D(3).

[16] [2022] 303 A Crim R 401.

[17] *New South Wales v Hickey* (2022) 303 A Crim R 401, [220].

[18] [2021] 294 A Crim R 424.

conduct, advocate support for that conduct. However, separate actions may have the effect of advocating support for that conduct.[19] In this case, the conduct of issuing a letter threatening violent conduct, and posting similar material online, had the effect of advocating support for violent extremism. Advocating support required the characterisation of conduct, not an inquiry into the underlying motivation.[20] What was relevant was that the statement threatening violence was made on the outside of the envelope, and this was sufficient to warrant a finding of advocacy.[21] What was also relevant was content posted on LinkedIn. It was held in *Cheema v New South Wales*,[22] that a subjective element of intent in 'advocating support for' should not be imported into the meaning of s 10(1A)(a)(ii) *Terrorism (High Risk Offenders) Act 2017* (NSW).[23] Similarly, intent is not an express requirement of advocating genocide under s 80.2D *CCA*. As such, it is possible that a court could find someone guilty of advocating for genocide if, by their actions or publications, they supported or publicly recommended the act of genocide, even if they did not intend to.

(e) French J in *Brown v Members of the Classification Review Board of the Office of Film ('Brown')* [24] referred to the Shorter Oxford English Dictionary in finding that 'to promote is to further the growth, development, progress or establishment of (anything); to further advance, encourage'.[25] The meaning of 'promote' was considered *in NSW Council for Civil Liberties Inc v Classification Review Board and Another (No 2)*[26] in which the FCA upheld the decision to ban two Islamic publications for promoting and inciting terrorism. The court noted that the terms of the legislation must be construed with reference to the context of the surrounding provisions,[27] and accepted the approach taken in *Brown*, finding that there is no requirement to look to the effect of the publication on the reader in construing whether something has been promoted, it is enough to look to the publication's content.[28] It was held in *Brown* that the effect of the publication and the author's or publisher's intent are irrelevant in determining whether a publication does, in fact, promote something.[29] What is relevant is the content, and assessing

[19] *Hardy v New South Wales* (2021) 294 A Crim R 424, [83]

[20] *Ibid* [24].

[21] *Ibid*.

[22] [2020] 102 NSWLR 714.

[23] *Cheema v New South Wales* (2020) 102 NSWLR 714, 730-1, [82]-[85] cited by *New South Wales v Ibrahim* [2021] NSWSC 793, [72].

[24] (1998) 82 FCR 225 ('*Brown'*).

[25] *Ibid* 239.

[26] [2007] *241 ALR 564 ('NSW Council for Civil Liberties').*

[27] *Ibid, 581 citing CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

[28] *Ibid, 580-1 [67].*

[29] *Ibid, 578 [55] – [56] quoting Brown (n 54)* 239, 242.

the content is an objective test.[30] However, both cases came to this conclusion when interpreting the *National Classification Code 2005* (Cth), and not Division 80 of the *CCA*.

(f) It was interpreted in *Coney*[31] that to encourage is to take active steps by word or action and that it may be satisfied by one's 'presence…misinterpreted words…gestures…silence, or non-interference, or…intentionally by expressions, gestures, or actions intended to signify approval.[32] As opposed to aiding and abetting, intent to instigate the principal is not required to satisfy that an act of encouragement occurred.[33] Additionally, a 'but for' test is not required to prove encouragement.[34] Further, Comcare v Mather held that encouragement is not limited to positive actions and could include 'requirements, suggestions, recognition of practices, fostering of participation, or providing assistance and may include the exercise of discretion or choice…'[35] However, this was in the context of an employment matter.[36]

(g) It is perplexing that sedition offences, which have more ambiguous thresholds and a greater potential to impact freedom of speech, do not require Attorney General consent, while Division 268 does. Attorney General consent requirements make more sense where there are risks to human rights if misused by the police. The requirement for Attorney General consent in relation to Division 268 seems to serve more as a safeguard for the government and geopolitical relationships than as a measure to protect human rights.

5.4 Legal framework in relation to arms exports

(a) Australian corporations engaging in arms exports operate within a legal landscape governed by both domestic legislation and international agreements.

(b) Arms export regulations in Australia are primarily governed by the *Customs (Prohibited Export) Regulations Act 1995* **('PE Regulations'**)[37] and the *Defence Trade Controls Act 2012* (**'DTC Act'.)**[38]

(c) In the context of a company's involvement in the arms supply chain,[39] compliance with these regulations is essential to ensure that exported arms do not contribute to human rights abuses or violations of international law, particularly in Gaza. The PE Regulations prohibit the

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[30] *Ibid.*

[31] [1882] 8 QBD 534.

[32] *Ibid*, 557-558 quoted by *R v Phan* (2001) 53 NSWLR 480, [70] quoted by *Blundell v The Queen* (2019) 279 A Crim R 302, [114].

[33] *Ibid.*

[34] *Blundell v The Queen* (2019) 279 A Crim R 302, [182] quoting *R v Mendez* [2011] QB 876, [23]

[35] *Ibid*, 462.

[36] *Ibid*.

[37] *Customs (Prohibited Export) Regulations Act 1995* (Cth).

[38] *Defence Trade Controls Act 2012* (Cth).

[39] See for example: Christopher Pyne, Varley and Rafael Australia - A high tech partnership, August 21, 2022, https://www.minister.defence.gov.au/media-releases/2018-08-22/varley-and-rafael-australia-high-tech-partnership.

export of certain goods, including arms, to specific destinations or entities deemed risky or involved in conflicts.[40]

(d) Following the finding of genocide in the International Court of Justice, Australian corporations involved in arms exports must ensure strict compliance with arms export regulations to avoid contributing to further human rights abuses or violations of international law.[41]

(e) It is important to appreciate that the Customs Act 1901 is additional legislation regulating defence export permits. While it may contribute to the control of such exports, these permits also fall under the scope of the Customs (Prohibited Exports) Regulations 1958, a set of regulations issued under the Customs Act's authority.

(f) The Customs Act 1901 is a legal framework that controls the export of goods from Australia. This includes provisions that allow the Australian Government to monitor, manage, and regulate the exportation of a wide range of defence and strategic goods. Specifically, section 112BA, grants powers to the Minister of Defence to intervene when there is a perceived risk to national security, defence, or Australia's international relations. According to subsection (1)(a) of this section, if the Minister harbours any suspicion that a person intends to 'export particular goods … for a military end use … that would prejudice the security, defence or international relations of Australia … they may give the person a notice prohibiting the export of the goods.'[42]

(g) When such a notice is issued, it legally restricts the export of the specified goods. Hence the framework relies largely upon the Defence and Strategic Goods List ('DSGL') in making legal determinations as to 'prohibiting the export of non-DSGL listed goods.'[43] While the Customs Act empowers the Minister for Defence to issue prohibition notices to prevent unauthorised exports, the Customs (Prohibited Exports) Regulations 1958, allows the Minister to issue permits for the approval of such exports.

(h) Per REG 13E(4) of the PE Regulations, the Defence Minister may grant *"permission (to export).. if satisfied that the export of the goods, or of any DSGL technology contained in the goods, would not prejudice the security, defence or international relations of Australia."*[44] This prompts scrutiny into how Australian corporations are receiving permission to export armed goods, including technology (DSGL) to Israel and thus raises significant questions about

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[40] *Customs (Prohibited Export) Regulations Act 1995* (Cth).

[41] "Israel Defying ICJ Ruling to Prevent Genocide by Failing to Allow Aid into Gaza," Amnesty International, February 26, 2024, https://www.amnesty.org/en/latest/news/2024/02/israel-defying-icj-ruling-to-prevent-genocide-by-failing-to-allow-adequate-humanitarian-aid-to-reach-gaza/#:~:text=One%20month%20after%20the%20International,bare%20minimum%20steps%20to%20comply%2C.

[42] The Customs Act (1901), Section 112BA, (1)(a).

[43] Australian Government Defence. (n.d.). Legislation, Regimes and Agreements. Retrieved 1 May, 2024, from https://www.defence.gov.au/business-industry/export/controls/export-controls/legislation-regimes-agreements#:~:text=Section%20112BA%20of%20the%20Customs,security%2C%20defence%20or%20international%20relations.

[44] *Customs (Prohibited Export) Regulations Act 1995* (Cth) REG13E(4).

whether the Australian government is inadvertently aiding and abetting actions by the Israeli military in Gaza that constitute serious violations of IHL.

(i) The Australian Department of Defence manages the country's export controls for defence and strategic goods. These controls are regulated under the Customs (Prohibited Exports) Regulations 1958, specifically Regulations 13E-13EK under Division 4. Although a subsidiary legislation under the authority of the Customs Act, the regulations go a step further in empowering the Minister for Defence, to grant export permits for items listed in the DSGL.

(j) Indeed, Regulation 13E, subsection 3, stipulates that the Defence Minister must either: 'grant the permission, by notice in writing to the applicant or refuse to grant the permission, by notice in writing to the applicant giving reasons for refusal.'[45] It is important to note that nuclear fuels and fissionable materials are an exception to this and may fall under the jurisdiction of the Department of Industry, Innovation and Science.[46]

(k) The regulation of defence exports is also governed by the Defence Trade Controls Act 2012 and its associated regulations, the Defence Trade Controls Regulation 2013. These legislative frameworks strengthen Australia's export controls and regulate 'the supply, publication and brokering of military and dual-use goods, software and technology.'[47] As set out in the DSGL List. Additionally, it requires a 'review every five years to ensure Australia's export control regime remains fit-for-purpose, balancing appropriate safeguards with a rapidly evolving strategic environment.'[48] The Act aims to halt 'goods and technology that can be used in chemical, biological and nuclear weapons, or military goods and technologies'[49] from being exported outside of Australia. Specifically, Part 1 governs 'munitions and military-related goods … used by armed forces or goods that are inherently lethal, incapacitating or destructive such as non-military firearms, nonmilitary ammunition and commercial explosives and initiators.'[50]. Part 2 lists goods that 'have dual use … may be used either as military components or for the

[45] The Customs (Prohibited Exports) Regulations 1958, Division 4A, Regulation 13E, (3)(a)-(b).

[46] (a) Australian Government Defence. (n.d.). Module Two - Overview of Australia's Export Controls. Retrieved 1 May, 2024, from https://www.defence.gov.au/business-industry/export/controls/training-faqs/awareness- training/module-two#:~:text=The%20Customs%20(Prohibited%20Exports)%20Regulations%201958%20allows%20the%20Minister%20for,Strategic%20Goods%20List%20%2D%20or%20DSGL.

[47] Australian Government Defence. (n.d.). Independent Review of the Defence Trade Controls Act 2012. Retrieved 1 May, 2024, from https://www.defence.gov.au/about/reviews-inquiries/independent-review-defence-trade-controls-act-2012#:~:text=The%20Defence%20Trade%20Controls%20Act%202012%20regulates%20the%20supply%2C%20publication,Defence%20and%20Strategic%20Goods%20List.

[48] Ibid.

[49] Frances Wheelahan and Lynton Brooks. (n.d.). Defence Trade Controls Act. Corrs Chambers Westgarth. https://www.corrs.com.au/site-uploads/images/PDFs/Insights/Defence-Trade-Controls-Act.pdf

[50] Ibid.

development or production of military systems or weapons of mass destruction.'[51] Accordingly, the legislation's focus is to prevent unauthorised or potentially dangerous transfers of technology that could threaten national security and international peace or could be used inappropriately. These regulations are distinct from the Customs Act, even though compliance with customs procedures is still required during the export process.

(l) The DTCA also requires exporters to obtain permits or approvals for exporting certain goods, technologies, or services pertaining to defence applications. Section 11 is similar in scope to that of the Customs (Prohibited Exports) Regulations 1958 and contends that the Defence Minister 'may give a person a permit for a specified supply if satisfied that the supply would not prejudice the security, defence or international relations of Australia.'[52]

(m) Moreover, it governs the movement of controlled items, particularly those listed on the DSGL, which includes both military and dual-use technologies. Section 15B subsection 2 'arranges for a person to supply specified goods listed in Part 2 of the Defence and Strategic Goods List from a place outside Australia to another place outside Australia'[53] Hence, this legislation also plays a role in regulating aspects of defence-related exports.

(n) It is also important to note that on March 27 2024, Parliament enacted the Defence Trade Controls Amendment Act 2024. This legislation introduces several changes by amending the Defence Trade Controls Act 2012. The key modifications include the creation of three new criminal offences for supplying DSGL technology to a non-exempt foreign person within Australia (Section 10A) and supplying goods and technology from Part 1 (Munitions) and Part 2 (Dual Use) 'Sensitive' and 'Very Sensitive' lists of the DSGL, after they have been previously exported or supplied from Australia (Section 10B).[54] Furthermore, it introduces a national exemption for the 'United Kingdom and the United States from Australia's export control permit requirements under the Defence Trade Controls Act 2012' (discussed further below).[55]

Meaning of 'end user'

(o) The Customs Act and the Defence Trade Controls Act both play significant roles in Australia's export regulatory framework. However, is significant to acknowledge that they serve distinct purposes. While the Customs Act plays a role in regulating exports, it does not

[51] Ibid.

[52] The Defence Trade Controls Act 2021, Section 11(4).

[53] The Defence Trade Controls Act 2021, Section 15B(2).

[54] Australian Government Defence. (n.d.) Defence Trade Controls Amendment Act 2024 and Defence Trade Legislation Amendment Regulations 2024. Retrieved 1 May, 2024, from https://www.defence.gov.au/about/reviews-inquiries/defence-trade-controls-amendment-act-2024-defence-trade-legislation-amendment-regulations-2024

[55] Ibid.

specifically address the term ‘end-user’ in the same way that the Defence Trade Controls Act does.

(p) In the Customs Act, the term 'military end-use' is related to the operations, exercises, or activities conducted by armed forces or armed groups. The concept is specifically defined as ‘goods used in operations, exercises or other activities conducted by an armed force or an armed group, whether or not the armed force or armed group forms part of the armed forces of the government of a foreign country.’[56] This definition has a broader focus on goods that could support or contribute to military end-use, with less emphasis on specific technologies.

(q) Contrastingly, in the Defence Trade Controls Act, the term ‘military end use’ extends beyond the scope of goods. The term is defined as ‘goods or DSGL technology is or may be for a military end-use if the goods or DSGL technology is or may be for use in relation to operations, exercises or other activities conducted by an armed force or an armed group, whether or not the armed force or armed group forms part of the armed forces of the government of a foreign country.’[57] This Act extends its control to DSGL items and includes both tangible goods and technology; the mention of DSGL technology introduces a layer of specificity not found in the Customs Act’s definition.

(r) While both Acts consider 'military end-use' as operations, exercises, or activities by armed forces or armed groups, the Defence Trade Controls Act extends this definition to DSGL technologies. Nonetheless, in both contexts, the ultimate focus is on whether the goods or technology could be used for military purposes, regardless of who the end-user is.

Internal transfers between companies

(s) Australia’s defence export laws regulate the export and supply of military and dual-use goods and technology to an external nation through various legislation, international regimes, and agreements.

(t) The *Defence Trade Controls Act 2012* (‘**DTC Act’**) grants the Minister for Defence power to permit or prohibit the supply, publication or brokering of goods and technologies listed on the Defence and Strategic Goods List (DSGL). The DTC Act creates an offence for the supply of DSGL technology, only covering a sale, exchange, gift, lease, hire or hire-purchase. If the elements of an internal transfer can fulfil the definition of a supply, this may count as a prohibited defence export under the DTC Act. However, this may be difficult if it is a transfer of inventory within a company.

(u) The *Customs (Prohibited Exports) Regulations 1958* - Reg 13E outlines the prohibition of exportation of goods containing DSGL technology. A permit is required when exporting, supplying, brokering or publishing a DSGL item, unless there is an exemption, which includes military and dual use items. The Minister must go through an assessment criteria to determine whether the export would prejudice Australia’s security, defence or international relations. A

[56] The Customs Act 1901, Section 112BA, (13).

[57] The Defence Trade Controls Act 2021, Section 4.

weapons company internal transfer, across international borders, is likely to count as an export under these regulations if the item falls within the DSGL.

(v) An 'internal transfer' of a weapons company subsidiary based in Australia is likely to be subject to defence export controls if the transfer involves a conveyance of a DSGL listed good from Australian territory to a place outside Australian territory. An internal transfer of goods within national borders is unlikely to satisfy the requirements of a defence export.

AUKUS Agreement: The Defence Trade Controls Amendment Act 2024 (DTC Amendment Act)

(w) The regulation of defence exports has been impacted by the AUKUS agreement. On 27 March 2024, the *DTC Amendment Act* was passed to provide a national exemption to the UK and the US from Australia's export control permit requirements under the DTC Act by 'narrowing the scope of the Act to those items and activities that could prejudice Australia's security, defence or international relations'.

(x) The removal of this requirement to obtain a permit has minimised the level of discretion over the impact of such defence exports, disregarding Australia's national interest and international obligations. The national exemptions remove export controls between AUKUS partners amongst numerous other permits, including the requirement for 900 export permits which would otherwise be required from Australia to the US and UK. The 'AUKUS licence-free environment' makes it easier for defence trade between AUKUS partners, removing the necessary safeguards that were in place to regulate defence trade.

(y) Although a weapons company's internal transfer to the US or the UK is likely to be a defence export under Australian law, there may not be a requirement to obtain a permit due to the AUKUS agreement.

5.5 International Arms Trade Treaty ('ATT)

(a) Australia's obligations under international law, including conventions and treaties it has ratified, must be considered when assessing the legality of arms exports by companies. For instance, the International Arms Trade Treaty ('ATT),[58] which aims to regulate the international trade in conventional arms to mitigate their impact on global peace and security.

(b) Article 6 subsections 1 through 3 of the ATT prohibits arms transfers when they may violate UN Security Council measures, relevant international obligations, or when there is knowledge that the arms would be used in grave breaches of international law, such as genocide. In accordance with these provisions, Australia's export permits for military and dual-use equipment to Israel raise concerns regarding compliance.[59]

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[58] *International Arms Trade Treaty*, opened for signature June 3, 2013, U.N. Doc. A/CONF.217/2013/8 (2013).

[59] "Break Australia's Military Links with Israel – Solidarity Online," Solidarity Online – Socialist organisation in Australia affiliated to the International Socialist Tendency, November 15, 2023, https://solidarity.net.au/palestine/break-australias-military-links-with-israel/.

(c) Despite Deputy Prime Minister Richard Marles' assertion that no weapons have been exported to Israel "for many years,"[60] The Department of Foreign Affairs' data indicates that between 2016 and 2023, Australia has approved approximately 322 export permits for military and dual-use equipment to Israel. While officials claim no exports of "military weapons" or "bombs,"[61] the distinction between items specifically for military use and dual-use products remains ambiguous. This ambiguity allows for potential loopholes in export controls and raises questions about Australia's adherence to the ATT.

5.6 Magnistky Act – sanctions on individuals[62]

(a) Australia's existing Magnitsky Act legal framework pertains to the Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021 (Cth) ('Act').

(b) Autonomous sanctions are non-military measures that the Australian Government may employ to act independently or in collaboration with similar-minded nations in navigating grave and serious misconduct. The Act amends the Autonomous Sanctions Act 2011 (Cth) (Act) to highlight that autonomous sanctions serve a dual purpose. They can be country-specific or enacted to address specific international concerns, i.e. thematic sanctions: 'threats to international peace and security, malicious cyber activity, serious violations or serious abuses of human rights, or activities that undermine good governance or the rule of law.' It is significant to recognise that Australia has previously imposed Magnitsky sanctions. Specifically, Former Foreign Minister Marise Payne, 'in 2022 applied targeted sanctions against 39 Russians implicated in Magnitsky's death and the serious corruption Magnitsky exposed.'

(c) In considering the application of autonomous sanctions, the Minister for Foreign Affairs ('Foreign Minister') must first confer with the Attorney-General, gain written approval, and consult with such other Ministers that the Foreign Minister would deem suitable. The Foreign Minister must consider Australia's national interests, like bilateral and multilateral considerations, and the potential impact of the proposed sanctions on the country's economic and security interests. In addition, the Foreign Minister must ascertain that such a declaration

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[60] "Hansard Display," Home – Parliament of Australia, June 5, 2020, https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber%2Fhansards%2F27143%2F&sid=0226.

[61] 1. Ali MC, "Australia Challenged on 'Moral Failure' of Weapons Trade with Israel," *Al Jazeera*, March 28, 2024, https://www.aljazeera.com/news/2024/3/28/australia-challenged-on-moral-failure-of-weapons-trade-with-israel.

[62] Authority of the Minister of Foreign Affairs, (2021), Autonomous Sanctions Amendment (Magnitsky-Style and Other Thematic Sanctions) Regulations 2021 (F2021L01855), Explanatory Statement.

Autonomous Sanctions Amendment (Russia) Regulations 2022.

Federal Register of Legislation, (2023), Sanctions update — Australia imposes further sanctions on Russians involved in human rights violations.

Human Rights Watch, (2022), Australia: Use Magnitsky-Style Sanctions to Target Abusers.

Parliament of Australia, (2024), Autonomous Sanctions Amendment Bill 2024.

will foster Australia's diplomatic interactions with other nations or, alternatively, will effectively govern unlawful acts that extend beyond the nation's territorial boundaries.

(d) The Foreign Minister is granted the authority under the Autonomous Sanctions Act 2011 (Cth) to declare sanctions against individuals or entities under regulation 6A (1)-(6). The Foreign Minister must be satisfied that the individual or entity has engaged in the following conduct: 'proliferation of weapons of mass destruction, significant cyber incidents, serious violations or serious abuses of human rights, and serious corruption' to succeed in the imposition of sanctions.

(e) In circumstances where the Foreign Minister has established that individuals and entities have been involved in serious human rights abuses and corruption, a two-step process will be implemented. First, 'the Government will amend the Autonomous Sanctions Regulations to expand the criteria for imposing sanctions'. This may broaden the application of sanctions to a specific region or thematic situation. Subsequently, 'the Foreign Minister must then separately designate and/or declare a person or entity as subject to sanctions'. In a declaration establishing this two-step process, the Governor-General enacted the Autonomous Sanctions Amendment (Russia) Regulations 2022 to revise the Autonomous Sanctions Regulations. This expanded the scope of legal functions for individuals and entities that were held liable following a breach of international law in Russia's invasion of Ukraine. Accordingly, Australia may impose sanctions on the individual or entity.

(f) Subordinate legislation is required in determining the application of autonomous sanctions, and the Foreign Minister must obtain the Attorney-General's agreement in writing. In particular, 'these designations and declarations must be made by legislative instrument and are disallowable by Parliament'.

(g) The Act does not specify a threshold for its application but rather grants discretionary authority to the Foreign Minister. The Minister may determine whether the person or entity has engaged in, has been responsible for, or is complicit in a serious, unlawful act. The Act does not confine its scope to specific countries or jurisdictions. Individuals or entities meeting the criteria under a thematic regime can face sanctions irrespective of where the conduct occurred.

(h) Schedule 1 of the Amendment Regulations categorises the set listing criteria for the Minister to discern in determining whether the individual or entity: 'has caused, or attempted to cause, has assisted with causing, or with attempting to cause, has otherwise been complicit in causing, or in attempting to cause,' the following crimes, 'threats to international peace and security, malicious cyber activity, serious violations or serious abuses of human rights, or activities that undermine good governance or the rule of law.'

(i) The executive government has the discretion to implement financial sanctions to the following: 'proscription of persons or entities … restriction or prevention of uses of, dealings with, and making available of, assets … restriction or prevention of the supply, sale or transfer of goods or services … restriction or prevention of the procurement of goods or services and provision for indemnities for acting in compliance or purported compliance with the regulations'.

(j) The listing above criteria demonstrates the Foreign Minister's discretionary power as to whether the individual or entity has been involved in unlawful acts. Additionally, the Foreign Minister must confer whether such involvement warrants the imposition of sanctions or if the individual constitutes a serious threat to Australia's security, where they may face a travel ban.

(k) The Act empowers the Executive government to impose graduated penalties and travel bans on perpetrators of atrocities, mirroring the Magnitsky-style sanctions adopted by other nations. Under this act, targeted financial sanctions can be imposed on designated individuals and entities found responsible for grave violations of human rights. With respect to financial sanctions, individuals or entities may be 'prohibited directly or indirectly in making an asset available.' Furthermore, the assets that the individual or entity own under regulation 15 'requires a person who holds a controlled asset to freeze that asset, by prohibiting that person from either using or dealing with that asset, or allowing it to be used or dealt with, or facilitating the use of or dealing with it.' Moreover, the act also imposes a travel ban, which ensures the person is 'prevented from travelling to, entering, or remaining in Australia.'

5.7 Ports law

(a) No Commonwealth legislation is specifically made to govern ports. However, each state has its own legislation. In NSW, this is regulated under the Ports and Maritime Administration Act 1995 (NSW), which sets out the framework for ports and maritime management.[63] Nonetheless, the Navigation Act 2012 (Cth) can disrupt ships entering or exiting in particular circumstances.[64] This Act is the primary legislation that regulates the operation of Australian and foreign ships in Australian waters.[65] Under the following provision, the detention of ships is regulated:[66]

s248: Power for AMSA to detain

(b) AMSA may detain a vessel and may also bring it, or cause it to be brought, to a port or to another place that AMSA considers appropriate if:

(a) AMSA reasonably suspects that the vessel is unseaworthy or substandard; or
(b) AMSA reasonably suspects that the vessel has been, is or will be involved in a contravention, either in or outside Australia, of this Act or
(c) AMSA reasonably suspects that a seafarer of the vessel or a person on board the vessel has been, is, or will be involved in a contravention, either in or outside Australia, of this Act or
(d) both of the following apply:

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[63] *Ports and Maritime Administration Act 1995* (NSW)

[64] Andre Probert, 'Maritime legislation: long anticipated reforms now in force,' *Colin Biggers & Paisley Lawyers*, (Webpage, July 2013)

<https://www.cbp.com.au/insights/insights/2013/july/maritime-legislation-long-anticipated-reforms-now>

[65] Ibid.

[66] *Navigation Act 2012* (Cth)

(i) AMSA reasonably suspects that the master of the vessel, or a seafarer of the vessel, would contravene this Act if he or she operated the vessel without a particular certificate or certificates, or other documentary evidence;

(ii) the master of the vessel, or the seafarer, does not produce the certificate or certificates or the other documentary evidence to AMSA when requested to do so; or

(e) a provision of this Act provides for AMSA to detain the vessel.

(c) According to this section, the Australian Maritime Safety Authority (AMSA) has the power to detain a vessel under numerous factors, including safety concerns involved in 'contravention.'[67] Ultimately, the discretion to disrupt a ship entering or exiting in particular circumstances is under the authority of AMSA.

(d) Under this act, aiding or abetting an international crime or a breach of a convention is prohibited. Section 3(d) of the Navigation Act 2012 (Cth) discusses the objects of the act which specifies that 'AMSA has the necessary power to carry out inspections of vessels and enforce national and international standards.'[68]

5.8 Legal Framework Governing Universities

(a) Australian public universities are statutory corporations. They are each established by an Act of Parliament by their respective States and may only act for the purposes stated in this legislation.

(b) The primary purpose of Australian public universities, based on the objectives in their respective legislation, is the general advancement of higher education, and the functions prescribed in the statutes set out the capacity of universities to achieve these objectives. Given that universities receive significant public funding from the government for a public purpose, there is a legal principle that is accepted to apply to universities:

Amalgamated Society of Railway Servants v Osborne (1910) AC 87, 94 (Lord Macnaghten):

> "[C]ompanies incorporated by statute for special purposes…which owe their constitution and their status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purpose foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned."

(c) As such, universities may not commence activities contrary to their statutory purpose, but given that this purpose is generally quite broad, it does not impose extreme restrictions on university independence, as universities are intended to be 'legal persons' in their own right.

(d) Further, it is unlikely that university legislation would prohibit universities from suspending their support or contributions to Israeli weapons, defence technology or illegal settlements.

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[67] Ibid.

[68] *Navigation Act 2012* (Cth)

(e) For example, regarding South Australian university legislation, there are currently two relevant Acts: the Adelaide University Act 2023[69], and the Flinders University Act 1966.[70] The Adelaide University Act 2023 does not explicitly set out legally enforceable parameters for the university, but it does, however include general considerations that must be taken into account by university activities: s 7 (2)(e)—Functions: The university has a duty, as part of its performance of its functions, to "encourage integrity in the conduct of its operations."

(f) This Act also recognises that the University is classified as a "body corporate…subject to the laws of this State" (s 6) and thus is capable of being sued (s 8(a)).

(e) The University Council members also have statutory duties under this Act:

- s 22 (a): Duty to exercise care and diligence etc
    - Council members must at all times (a) "exercise a reasonable degree of care and diligence."
- s 23(1): Duty to act in good faith etc
    - Council members "must at all times act in good faith, honestly and for a proper purpose" when performing the functions of their office.
- S 25: Code of Conduct
    - Stipulates that Council members must have a code of conduct determined by the Council, with which all members must comply.

(g) The Flinders University Act 1966 does not impose any such legally enforceable obligations upon the university. In fact, this legislation is significantly less detailed than the Adelaide University Act 2023, as it is a much older statute. Nevertheless, Flinders University is also established as a body corporate (s 3(3)) like Adelaide University, and as such, it is subject to the laws of the State and thus can be sued.

It does, however, provide some stipulations regarding the University Council and its members:

- s 5(2)(e): The Council must establish policy and procedural principles that are consistent with community expectations

[69] Adelaide University Act 2023 https://www.legislation.sa.gov.au/__legislation/lz/v/a/2023/adelaide%20university%20act%202023_32/2023.32.un.pdf

[70] Flinders University Act 1966 https://www.legislation.sa.gov.au/__legislation/lz/c/a/flinders%20university%20act%201966/current/1966.23.auth.pdf

- s 5(3a)(b): Anyone appointed to the Council must have "an understanding of, and commitment to, the principles of…social justice"

- s 18A(a): Council members must "exercise a reasonable degree of care and diligence"

- s 18B(1): Council members also must "at all times act in good faith, honestly and for a proper purpose"

(h) Under the Flinders University Act, s 18D allows for the removal of council members for breaching ss 18A and 18B. If they are found to be non-compliant with their duties under these sections, it will be considered "serious misconduct and a ground for removal" from office.

(i) As corporate bodies, universities have the independence to voluntarily withdraw from such activities, including under a social obligation demanded by the public. RMIT recently did so by suspending its partnership with Elbit Systems, an Israeli military technology company.[71]

(j) However, Australian universities are bound by other Australian legislation, notably regarding Australian sanctions law. The Department of Foreign Affairs and Trade has a Guide[72] for universities on how Australian sanctions can affect university activities. The types of activities that may be affected include:

- Collaborating with another person or entity (including a foreign university) from a sanctioned country,

- The supply of certain goods to sanctioned countries,

- The provision of certain services to sanctioned countries.

(k) Australian sanctions law covers both those sanctions passed by the UN Security Council and Australia's own sanctions imposed by the Australian Parliament in response to various human rights violations worldwide. Therefore, if Australia or the UNSC were to impose sanctions against Israel in relation to funding, defence, or illegal settlements, Australian universities would be legally obliged to obey these sanctions and withdraw their partnerships and otherwise support from Israeli defence technology.

Potential criminal responsibility under the Criminal Code 1995 (Cth):

(l) In the absence of these sanctions, there may be an argument to be made regarding Australian universities' potential criminal responsibility for participation in research partnerships.

(m) Under Part 2.5 of the Criminal Code Act 1995, corporate bodies are to be held criminally responsible in the same way as individuals. Below are potential avenues through which Australian universities could be held criminally responsible for any involvement with Israel's war crimes. Although it may be difficult to criminally prosecute a university under these

[71] RMIT University Statement: Israel-Gaza conflict – 19/10/23, https://www.rmit.edu.au/news/media-releases-and-expert-comments/2023/october/israel-gaza-conflict

[72] Department of Foreign Affairs and Trade, 'Factsheet: General Guide for Universities', https://www.dfat.gov.au/international-relations/factsheet-general-guide-universities

sections, the fact that the Criminal Code may impose legal obligations on universities to abstain from supporting Israel through military research and defence technology partnerships is significant.

Part 5.1, Division 80, Subdivision C, 80.2D: Advocating genocide.

(n) Subsection (1) of this section provides that a person (which under Part 2.5 can extend to a corporate body) commits an offence if that person "engages in that conduct reckless as to whether another person will engage in genocide".

(o) Under this section, if Australian universities undertake military research partnerships that ultimately go towards Israeli defence technology, they could be held criminally responsible for advocating genocide, especially in light of Israel's genocide against Palestinians. If a link is proven between these research partnerships and Israel's defence technology and its subsequent use in Israel's genocide, this section of the Criminal Code could provide a legal obligation for Australian universities to abstain from such partnerships. Israel does not need to be found guilty of genocide for universities to consider this obligation, as they only need to be found "reckless" to the possibility of Israel engaging in genocide.

(p) The definition of the term 'advocating genocide' as per the Commonwealth Criminal Code means to "counsel, promote, encourage or urge". The term 'promote' would likely be the most appropriate term under which these university research partnerships could be classified.

(q) With the ICJ's recent preliminary judgment voting overwhelmingly in favour of finding that Israel was plausibly committing genocide in the occupied territories of Palestine and the general influx of information and awareness raised in recent events since October 7th, this recklessness requirement seems likely to be proven.

Part 2.4, Division 11, 11.2:Complicity and common purpose

(r) This section of the Criminal Code criminalises aiding and abetting an offence, which can include genocide and war crimes committed by the Israeli government. This section provides that a person may be found guilty of aiding or abetting the commission of an offence even if the other person has not been prosecuted or been found guilty. If there are links between university research partnerships and the use of this research in Israel's defence technology and, therefore, their war crimes, as outlined above, this section will be used to impose another legal obligation upon Australian universities.

(s) Offences brought under Division 268 must have the AG's written consent. The AG's decision on whether to give or refuse consent is final and cannot be appealed, which presents a significant hurdle.

(t) If the Attorney-General does give consent, the relevant offences under Division 268, by which universities could be held complicit, are listed below. This list focuses on the offences where there can be a reasonable link made between university research and the committing of the offence – i.e. this link could be made under s 268.8 (murder), but perhaps not under s268.14 (rape) or s268.31 (denying a fair trial). However, those offences are committed regardless of university research partnerships.

5.9 University links to genocide

(a) BDS Australia targeted RMIT's partnership with Elbit Systems through concentrated activism campaigns and protests beginning in 2022 from staff and students at the university[73]. The Palestinian Federation of Unions of University Professors and Employees wrote to the university urging them to suspend the collaboration alongside petitions and activist picketing movements that raised further awareness of the issue. However, the university only took heed to a protest march on 19 October 2023 on campus and responded in early November with a statement that it had cut ties with Elbit Systems or its Australian counterpart.[74] Besides the loss of funding RMIT would have received through the partnership, there has been no apparent consequences to these severed ties, legal or otherwise.

(b) The University of Sydney has connections with Safran, Rafean, and Lockheed Martin.

(c) Finding information on the University of Sydney's connections with these weapons companies remains extremely difficult, as little to no information about these connections is available to the public. Although a memorandum of understanding was mentioned with each of these arms companies, AMAN could not find and access these documents.

(d) Further, investment reports were minimal and gave very little detail; AMAN couldn't find any mention of any specific company, let alone these arms companies. Much information requires an application[75] under the Government Information (Public Access) Act 2009 (GIPA)[76]. This application invites the university's attention, as demonstrated by a 2022 investigation into USYD's fossil fuel investments by USYD student magazine *Honi Soit*[77]. During this investigation, there were attempts by USYD to stall and pre-empt some of the inevitable negative reactions from the GIPA Application, but they nevertheless gave over the information. If such information regarding USYD's connections with arms companies is required, then a GIPA application may need to be submitted.

(i) Safran: In November 2023, USYD signed a memorandum of understanding with Safran Electronics & Defense Australasia, a subsidiary of the global company Safran[78]. The agreement was regarding collaboration in research and development focusing on areas of aviation, space

[73] BDS Movement, 'RMIT Announces it has no partnerships with Israeli weapons maker Elbit Systems', 9/11/23 https://bdsmovement.net/news/rmit-announces-it-has-no-partnerships-with-israeli-weapons-maker-elbit-systems

[74] Kerry Smith, 'Under pressure, RMIT ends Elbit Systems partnership', 8/11/23 https://www.greenleft.org.au/content/under-pressure-rmit-ends-elbit-systems-partnership

[75] GIPA Application link: https://www.sydney.edu.au/content/dam/corporate/documents/about-us/governance-and-structure/privacy-information/gipa-access-application.pdf

[76] GIPA Legislation: https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2009-052#pt.3-div.5

[77] Investigation into USYD fossil fuel investments, *Honi*, 2022. https://honisoit.com/2022/04/a-masterclass-in-greenwashing-by-the-university-of-sydney/

[78] USYD Media Release, 17/11/23. https://www.sydney.edu.au/news-opinion/news/2023/11/17/university-collaboration-with-safran-opens-new-horizons.html?trk=feed-detail_main-feed-card_reshare_feed-article-content

and defence. USYD has said that this collaboration will allow the university to showcase its machine learning, robotics, autonomous systems, communications and sensor design expertise. They have also said it will supplement existing work funded through the NSW Defence Innovation Network and other sources.

(ii) Raytheon: In a recent Declassified Australia article, we Investigated the funding of Australian universities by the US Defense Department through major defence companies, including Raytheon. According to this article, in 2022, Raytheon provided USYD with $105,000, which was classified under the very general term of 'Basic Research' as part of the US Pentagon Quantum Benchmarking Program, which is apparently where the funding is coming from.

(iii) Lockheed Martin: At the University of Sydney, the Eggleton Research Group brings together Lockheed Martin, L3Harris, the Royal Australian Air Force, several government agencies and the University's Jericho Smart Sensing Laboratory for several research projects with military applications. Back in 2017,[79] Lockheed Martin announced its partnership with USYD and RMIT for advanced manufacturing R&D for technologies involving significant implications for defence and commercial space applications. With USYD, they focused on developing the use light to carry Radio Frequency (RF) signals more efficiently than traditional RF processors, which would allow data from transmitters (including satellites) to be manipulated faster and in different ways. In August 2023[80], USYD chemistry and physics scientists performed an experimental process for the first time using a quantum computer to slow down a critical chemical reaction to the point that it could be directly observed. This process is called a 'conical intersection' and is crucial to photochemical processes, which involve the transfer of energy at incredibly high speeds. This research was supported by funding and grants from a number of both US and Australian government agencies and organisations, as well as defence companies including Lockheed Martin. While this research doesn't appear to have specific ties to defence technologies, it certainly highlights the extent to which Lockheed Martin provides funding to USYD. Interestingly, the research done in 2017 and 2023 research seems to have some similarity to the types of research previously outlined, indicating a focus on developing technologies using light to make processes more efficient and faster. This may point indicate Lockheed Martin's significant influence over the types of research done at USYD and the applications of this research.

(e) Regarding USYD's investments, there are no current reports available on public record. However, a 2018 ABC article by Avani Dias[81] investigated Australian universities' links to arms manufacturing companies. At the time of writing, that article stipulated that USYD was investing over $4 million in some of the biggest weapons manufacturers, including Lockheed Martin. In response, a USYD spokesperson maintained that this investment in arms only accounted for 0.28% of the university's investments. The university also justified these investments, stating

[79] Announcement of Lockheed Martin's partnerships: https://www.manmonthly.com.au/lockheed-martin-partners-two-australian-universities-advanced-manufacturing-rd/

[80] Article on the breakthrough experiment: https://www.sydney.edu.au/news-opinion/news/2023/08/29/conical-intersection-simulation-slowed-by-quantum-computer-100-billion-times.html

[81] https://www.abc.net.au/triplej/programs/hack/universities-condemned-for-investing-with-weapons-companies/9600914

that in many of these companies, arms and weapons manufacturing is only one part of their business activity, and many undertake other activities, such as climate solutions. USYD also insisted that "Investing in these companies has no bearing on the university's academic independence [and] there is no relationship between companies the university invests in…and the way we teach our students."

(f) UNSW also has a Memorandum of understanding with Lockheed Martin. The two-year agreement was signed in November 2022, and thus should expire in November 2024. The memorandum with UNSW is to contribute to a comprehensive space education program with research, development and industry engagement pathways. The activities seem primarily focused on Australia's space industry and workforce. However, when UNSW and Lockheed Martin refer to the space industry or space technologies, it refers to the *use of space* in terms of *war-fighting*, not, space exploration. When AMAN looked further into Lockheed Martin, its Australia Space program web page states that one of its defining features is "recognising the new realities of space as a contested warfighting domain" and gives further examples of improved satellite technology to combat anti-satellite operations. The Lockheed Martin and UNSW MoU referring to Australia's space industry and workforce would fall into the same characterisation. Thus, while the R&D that will eventuate from this partnership will likely be to enhance Australia's defence technologies in space, it will very likely have strong connections to non-space defence technologies as well.

5.10 BDS against the Israeli Government, Economy and Universities

International Legal Justification

Human Rights Violations

Established in 2005, the Boycott, Divestment, Sanctions ('BDS') movement uses nonviolent means to leverage pressure on the State of Israel. Indeed, the movement has three primary demands:

(a) 'to end the occupation of all Arab lands and dismantle the wall;

(b) recognise the rights of Arab-Palestinian citizens of Israel and;

(c) respect the rights of Palestinian refugees to return to their homes, per *United Nations ('UN') Resolution 194*.'[82]

Drawing inspiration from the anti-apartheid movement in South Africa, BDS employs boycotts, institutional divestment, and government sanctions to target entities that are perceived as being complicit in Israel's violations of Palestinian rights. The goal of the campaign is to challenge Israel's lack of accountability with respect to human rights violations. Ahmad et al.

[82] Michiel, Bot, (2019), 'The right to boycott: BDS, law, and politics in a global context'. Transnational Legal Theory, 10(3–4), https://doi.org/10.1080/20414005.2019.1672134.

considers the roots of this conflict to be found in 1948 where Israel implemented a 'regime of settler colonialism, apartheid and occupation over the Palestinian people.'[83]

> 'For nearly seventy years, Israel has denied Palestinians their fundamental rights and has refused to comply with international law.'[84]

This is reinforced by Whitson who confirms: 'Israel today maintains an entrenched system of institutionalised discrimination against Palestinians in the occupied territory.'[85] Interestingly, Ahmad et al. writes about the way, 'Governments fail to hold Israel to account, while corporations and institutions across the world help Israel to oppress Palestinians.'[86] The advent of the BDS movement can be largely linked to the failure of governments to pressure Israel into complying with international law and address human rights abuses endured by Palestinians.

There is overwhelming evidence to confirm that Israel has committed a human rights violations, which have disproportionately impacted Palestinians. Indeed, there are 'credible reports of unlawful or arbitrary killings; torture or other cruel, inhuman, or degrading treatment or punishment by Israeli officials; arbitrary arrest or detention; arbitrary or unlawful interference with privacy; restrictions on freedom of expression, including violence, threats of violence, unjustified arrests and prosecutions against journalists, and censorship; serious restrictions on internet freedom; substantial interference with the rights of peaceful assembly and freedom of association, including harassment of nongovernmental organizations; serious restrictions on freedom of movement and residence including arbitrary or unlawful interference with privacy, family.'[87] Such an extensive list of abuses strongly supports the justification for BDS movements against the Israeli government, economy and universities, as there is a close nexus to the facilitation of international crimes committed by Israel.

International Law and Freedom of Expression

Article 19 of the *International Covenant on Civil and Political Rights* ('ICCPR') protects the right to freedom of expression. Specifically, Article 19(2) stipulates that 'Everyone shall have the right to freedom of expression.'[88] However, Article 19(3), states that the exercise of this right may be subject to restrictions as prescribed by law and deemed necessary: '(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order,

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[83] Bina Ahmad, Ben White, Phyllis Bennis, (2018), 'Shrinking Space & The BDS Movement', Transnational Institute and the Institute for Policy Studies, p.5.

[84] Ibid.

[85] Human Rights Watch, (2017), 'Israel: 50 Years of Occupation Abuses'. Retrieved from, https://www.hrw.org/news/2017/06/04/israel-50-years-occupation-abuses

[86] Bina Ahmad, Ben White, Phyllis Bennis, (2018), 'Shrinking Space & The BDS Movement', Transnational Institute and the Institute for Policy Studies, p.5.

[87] United States Department of State, Bureau of Democracy, Human Rights and Labor, (2022), 'West Bank and Gaza Strip 2022 Human Rights Report', p.3. Retrieved from, https://www.state.gov/wp-content/uploads/2023/03/415610_WEST-BANK-AND-GAZA-2022-HUMAN-RIGHTS-REPORT.pdf

[88]'Australian Human Rights Commission, (n.a.), 'Freedom of information, opinion and expression'. Retrieved from, https://humanrights.gov.au/our-work/rights-and-freedoms/freedom-information-opinion-and-expression

or of public health or morals.'[89] Components of the ICCPR have also been implemented in Australian domestic law. Section 16(1)-(2) of the Human Rights Act 2004 similarly contends that 'everyone has the right to freedom of expression'[90].

By considering this legal instrument as a foundation for interpreting the justification of BDS movements, it is evident that BDS actions are premised upon the objective to 'end international support for Israel's oppression of Palestinians and pressure Israel to comply with international law.'[91] These actions are framed as efforts to promote and safeguard the rights of Palestinians, who face discrimination and human rights violations. Therefore, the BDS movement can be justified under Article 19 of the ICCPR as an exercise of the right to freedom of expression, provided that its activities do not involve actions that would require restriction under Article 19(3).

Subsequently, the *Charter of the Fundamental Rights of the European Union* also grapples with the legal issue of the right to freedom of expression. Article 11 contends that, 'everyone has the right to freedom of expression.'[92] The nature and weight of this provision was considered by Vice-President of the European Commission, Federica Mogherini. Mogherini articulates that, 'the EU stands firm in protecting freedom of expression in line with the Charter of Fundamental Rights of the European Union, which is applicable on EU Member States' territory, including with regard to BDS actions carried out on its territory'.[93] This statement affirms that the EU strongly supports the right to freedom of expression, including for those involved in BDS activities within EU Member States. This stance indicates that the EU views BDS actions, such as boycotts, as protected forms of political expression and advocacy.

The legal instruments aforementioned are primary sources of international law. Specifically, 'international conventions, customs, and general principles of law',[94] as outlined in Article 38(1) sub-paragraphs (a)-(c) of the *Statute of the International Court of Justice* ('ICJ Statute'). These sources reflect the contemporary instruments and principles that presently govern international law. Accordingly, they provide a framework for lawyers in navigating the complex interplay of legal functions akin to BDS movements. Significant weight should be given to these sources, as they offer authoritative guidance on the legal standards and practices that underpin the justification of BDS actions. By applying these sources, legal practitioners can navigate the complexities surrounding BDS actions, evaluating their conformity with established international standards. In essence, the utilisation of these primary sources informs legal arguments and discussions concerning the legitimacy and effectiveness of BDS as a tool for promoting accountability and justice in the context of Palestinian rights and Israeli policies.

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[89] Ibid,

[90] Human Rights Act 2004.

[91] Ariel Sheffey, (2024), 'Protecting the right to boycott Israel: a foreign affairs preemption approach to striking down state anti-BDS laws', Columbia Human Rights Law Review 55(1), p.182.

[92] Charter of the Fundamental Rights of the European Union (2000) Official Journal of the European Communities. Retrieved from, https://www.europarl.europa.eu/charter/pdf/text_en.pdf

[93] European Parliament, (2016), 'Parliamentary question - E-005122/2016(ASW) Answer given by Vice-President Mogherini on behalf of the Commission.' Retrieved from, https://www.europarl.europa.eu/doceo/document/E-8-2016-005122-ASW_EN.html

[94] Statute of the International Court of Justice, Art. 38, (1)(a)-(c).

It is important to appreciate the following landmark judgments that recognise the right to boycott: the *1958 Lüth judgment by the German Federal Constitutional Court* and the *1982 NAACP v. Claiborne Hardware decision by the Supreme Court of the United States*. These cases ultimately contend that there is a fundamental right to participate in political activities such as boycotts, because they are an extension of one's ability to exercise their freedom of expression.

The Lüth judgment of the German Federal Constitutional Court in 1958 established a significant precedent regarding the right to call for a boycott as an inherent aspect of freedom of speech. In this case, Erich Lüth publicly urged film distributors, producers, and German citizens to boycott Veit Harlan's film, 'Unsterbliche Geliebte' (Immortal Beloved), arguing that it was unworthy of representing German cinema. The Court ruled that Lüth's advocacy for the boycott fell within the realm of constitutionally protected speech. Indeed, fundamental rights such as one's freedom of speech is characterised as 'defensive rights of citizens against the state that secures a sphere of freedom from interference by public authority.'[95] Moreover, the Court articulated that the essence of expressing an opinion lies in its potential to 'let that opinion make an intellectual impact on one's environment'[96]. Therefore, 'it would be absurd to separate expression from the effect of an expression'.[97]

In addition, the Court acknowledged that while the right to freedom of speech is crucial, it is not absolute. Accordingly, one 'must take a step back when the expression harms another person's interests that are worthy of protection and that weigh more heavily'.[98] The Court determined that Lüth's freedom of speech outweighed the private interests of Harlan. In applying this principle, one can argue that BDS movements are justifiable because they aim to protect the rights of Palestinians, who endure significant human rights violations and discrimination. The harm experienced by Palestinians is considered more deserving of protection and carries greater weight compared to the interests of entities perceived to support or benefit from Israeli policies that harm them.

The right to participate in a political boycott is further explored in the case of *NAACP v Claiborne Hardware (1982).* The case was centred upon a boycott organised by the National Association for the Advancement of Coloured People, aimed at achieving racial equality demands, including desegregation of public facilities and fair employment practices. The Court affirmed that collective action such as 'the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process'.[99] In addition, the Court emphasised that due to the 'close nexus between the freedoms of speech and assembly',[100] individuals are able to 'make their views known when, individually, their

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[95] Michiel, Bot, (2019), 'The right to boycott: BDS, law, and politics in a global context'. Transnational Legal Theory, 10(3–4), https://doi.org/10.1080/20414005.2019.1672134.

[96] Ibid.

[97] Ibid.

[98] Ibid.

[99] Ibid.

[100] Ibid.

voices would be faint or lost'.[101] This principle supports the notion that activities like boycotts are fundamental to protecting freedom of speech rights. Regarding political boycotts, the Court argued that 'while States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case'[102]. Therefore, as BDS movements are inherently non-violent forms of political expression, it may be argued that the Court's recognition of political action and its protection under freedom of speech akin to this case, could be applied to justify BDS activities.

Courts and tribunals expound international law and its application; it is for this reason that international law is able to fully develop. By drawing upon the judicial decisions aforementioned, one must have consideration to *Article 38 of the ICJ Statute.* Specifically, in paragraph (d), 'judicial decisions' are regarded as subsidiary means for establishing rules of international law. Undoubtedly, as Roberts and Sivakumaran argue, 'international law has developed considerably as a result of judicial decisions'.[103] Accordingly, the cases aforementioned are pertinent sources of international law with respect to discourse pertaining to the right to boycott and whether this is supported by the right to freedom of expression. Hence, in deciphering whether BDS movements can be legally justified, one must have regard to the judgments of the cases aforementioned, to ensure compliance with international legal standards.

South African Boycott

The BDS movement against Israeli universities finds justification in historical parallels with the anti-apartheid movement and the South African academic boycott. The South African boycott involved a complete 'exclusion of South Africa from all forms of academic connection and exchange - a total boycott,'[104] aiming to pressure the apartheid regime into dismantling racial segregation. Similarly, it may be argued that Israeli universities, as part of a state accused of human rights violations and occupying Palestinian territories, should face similar international scrutiny and pressure. This notion is further reinforced by Weissbrodt and Mahoney who argue that 'the case of South Africa has been used to develop very important international human rights law precedents which have been helpful with respect to countries in all parts of the world.'[105]

The core objective of anti-discrimination laws, and arguably the law in general, is to safeguard individuals from being treated unjustly based on characteristics such as gender, sexual

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[101] Ibid.

[102] Ibid.

[103] Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm Evans (ed), *International Law* (Oxford University Press, 2018) 89.

[104] Jonathan Hyslop, Salim Vally and Shireen Hassim, (2006), 'The South African Boycott Experience', Academe 92(5). Retrieved from, https://www.jstor.org/stable/pdf/40253495.pdf?casa_token=yL7d6QHpJyQAAAAA:Lrk4osO6e_1tcZMYuIpSu56I-W4kFC_nAQ1-Gwn5t7bUTn9uhiFQT3VdbeVHiB2b6AsUoGbxTvYO--HHYsoYG5rYnOzjtXBAH0ZKrh3CmRjc-HjWQJg

[105] David Weissbrodt and Georgina Mahoney, (1986), 'International Legal Action Against Apartheid', 4 Law & Ineq, p.491. Retrieved from, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1365&context=faculty_articles

orientation, race, ethnicity, religion, as opposed to their actions. BDS campaigns have explicitly clarified that their stance is not against individuals because of their Israeli nationality or Jewish identity. Rather, the BDS movement focuses on political activism against a regime perceived as discriminatory and the institutions that support it. It is for this reason that BDS movements extend an inclusive invitation for all to participate, including 'conscientious Israelis.'[106]

Boycott of South Africa

It is pertinent to acknowledge the extent to which the boycott of South Africa achieved fundamental status in discourse pertaining to global anti-apartheid movements. At its core, the boycott aimed to exert pressure on the South African government to dismantle its system of racial segregation. There are limited sources to contend that the boycott contravened any hate speech or discrimination laws. Rather, there is a plethora of scholarship arguing that the boycott was a legitimate and non-discriminatory form of protest against the South African government's institutionalised racial hierarchy, which justified apartheid.

Boycotts

Central to the anti-apartheid movement was the strategy of boycott. Indeed, 'boycotts have also become synonymous with attempts to put political pressure on entire political regimes.'[107] Stevens defines this form of protest as 'the refusal to interact or engage – and efforts to encourage or coerce others not to interact or engage – with another entity, its products, institutions, or representatives.'[108] These efforts took diverse forms including 'consumer boycotts of South African goods; sanctions on trade and investment with South Africa; diplomatic boycotts; sports, cultural, and academic boycotts of interaction with South African institutions; disinvestment; industrial boycotts.' [109]

Legitimacy of protest

The legitimacy of the boycott against the apartheid system was premised on widespread recognition of the system's human rights violations. The apartheid system implemented in South Africa by the minority white Nationalist Party in 1948 aimed to uphold notions of white supremacy. Indeed, the regime was designed as a stark antithesis to the principles of the Universal Declaration of Human Rights. The term apartheid, 'translated as separateness, was deemed a crime against humanity by the UN in 1976.'[110] This system violated the foundational principles of international human rights law, combining 'state-sponsored authoritarianism, militarism, race and gender discrimination, and economic exploitation.' [111] Under apartheid, the

[106] Ibid.

[107] K McEvoy and A Bryson, (2022), 'Boycott, Resistance and the Law: Cause Lawyering in Conflict and Authoritarianism'. The Modern Law Review, 85: 69-104. https://doi.org/10.1111/1468-2230.12671

[108] Simon Stevens, (2016) 'Boycotts and Sanctions against South Africa: An International History, 1946-1970', Columbia University.

[109] Ibid.

[110] Penelope Andrews, (2009), "South Africa," in Encyclopedia of Human Rights. Retrieved from https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2316&context=fac_articles_chapters

[111] Ibid.

minority white population, constituting roughly 12 percent of South Africa's total population, monopolised the distribution of the nation's wealth and resources. The apartheid system was upheld by a series of laws designed to ensure 'the utopia of racial separation, racial hierarchy, and racial purity would be instituted and maintained'.[112] Notable examples of these laws included the *Population Registration Act of 1950*, which categorised South Africa's population into racial groups, facilitating segregation and 'an attendant hierarchy of racial benefits and privileges … based on appearance and racial descent.[113]' Another prominent example was the *Separate Representation of Voters Act of 1951* which removed Black South Africans 'from the common voters roll'[114], denying them political representation. Therefore, the boycott was justified as a necessary response to the South African regime's violations of human rights, as aforementioned.

Non-discrimination principles

Black South Africans endured apartheid since 1948, a legal system that subjected them to violent oppression and severe discrimination. The UN has addressed this issue of racial discrimination in South Africa since its first General Assembly session in 1946. The UN determined in Security Council resolution 473 that 'apartheid is a crime against the conscience and dignity of mankind and is Incompatible with the rights and dignity of man.'[115] The basis of the boycott is grounded in principles of international law, particularly as articulated in the *Universal Declaration of Human Rights* ('UDHR'), which emphasises the principle of non-discrimination. Specifically, Article 1 of the UDHR states, 'All human beings are born free and equal in dignity and rights.'[116] Article 2 states: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinctions of any kind, such as race, colour, sex, language, religion.'[117]

The UN has passed several resolutions condemning apartheid and endorsing the boycott of South Africa. The initiation of the UN's efforts to establish a cultural boycott against South Africa can be traced back to U.N. Resolution 2396, adopted by the General Assembly in 1968. This resolution called for 'All states and organisations to suspend cultural, educational, sporting, and other exchanges with the racist regime and with other organisations or institutions in South Africa which practise apartheid.'[118] In 1972, the General Assembly encouraged 'all organisations, institutions, and information media to organise a boycott of

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[112] Ibid.

[113] Ibid.

[114] Ibid.

[115] UN Security Council, Security Council resolution 473 (1980) [South Africa], S/RES/473 (1980), 13 June 1980, https://www.refworld.org/legal/resolution/unsc/1980/en/113150

[116] United Nations, (n.a.) 'Universal Declaration of Human Rights'. Retrieved from, https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%201,in%20a%20spirit%20of%20brotherhood.

[117] Ibid.

[118] Michael Beaubien, (1982), 'The Cultural Boycott of South Africa', Africa Today, 4th Qtr., 29(4). Retrieved from, https://www.jstor.org/stable/pdf/4186110.pdf?casa_token=c7px-G2c_wcAAAAA:3w8C6M9Yo9Cy5-CCCxrNrOa-ASttvD2xsInfjXVpzQefVI8T_xPSOoAfSxK_grZ_X2ojQfsOsKVkx-JjhiZBg3QUcP8-BRBTAQvXCNHUShxSWuekleo

South Africa in sports and in culture and other activities.'[119] Subsequently, in 1974, Resolution 3324 saw the General Assembly urging 'all governments to ban all cultural, educational, scientific, sporting, and other interactions with the apartheid regime.'[120] By 1980, the General Assembly directly appealed to 'writers, artists, musicians, and other personalities to boycott South Africa.'[121] The UN supported the boycott through the aforementioned resolutions, recognising apartheid as a violation of human rights and endorsing international efforts to isolate and pressure the South African government to dismantle apartheid. Therefore, the boycott was seen as a legitimate and justified means to challenge human rights violations, rather than an act of hate speech or discrimination.

On the contrary, there are limited examples from scholarly literature describing the South African Boycott as having constituted hate speech or discrimination laws. The only sources that characterise the South African Boycott in a negative light is Hyslop's argument that, 'the South African academic boycott was riddled with conflicts among its supporters, inconsistencies, and minor injustices. It was plagued by the problem of unintended consequences. In my view it had no important political effect in undermining apartheid and ... may have had a minor negative impact on post-apartheid society.'[122] Hyslop continues, 'compared with economic, sports, and cultural boycotts, the academic boycott was feeble indeed. Throughout the 1980s, I did not talk to a single South African scholar or university employee whose political views had been changed in any way by the academic boycott. Whereas the economic boycott had some palpable effect on the regime, and sports and cultural boycotts had irritant effects on white society, the academic boycott had little in the way of visible achievements.'[123] In addition to this Nordkvelle also articulates that 'the academic boycott against South Africa had a limited success.'[124]

To conclude, there are very few sources that characterise the South African boycott in a negative light. Instead, there is overwhelming evidence to contend that the boycott was a legitimate and non-discriminatory form of protest against the South African government.

5.11 Application of International Humanitarian Law to nation states – IHL has a necessary limitation on executive power

Hague Court of Appeal decision on F35 Jet parts (Dutch case).

(a) Under international law, nations' states have the freedom to implement international treaties in a manner that aligns with their legal systems, so long as they conform with their international obligations. International humanitarian law (IHL) must be upheld by all 196 nation-states due to

[119] Ibid.

[120] Ibid.

[121] Ibid.

[122] Jonathan Hyslop, "The South African Boycott Experience," http://www.aaup.org/file/Papers-From-A-Planned-Conference-on-Boycotts.pdf, p. 59.

[123] Ibid, p.61.

[124] Y Nordkvelle. (1990). The academic boycott of South Africa debate: Science and social practice. Studies in Higher Education, 15(3), 253–275. https://doi.org/10.1080/03075079012331377390.

their ratification of the Geneva Convention in 1949.[125] Nonetheless, how a nation-state implements international humanitarian law depends on whether it has a monist or dualist legal system.[126] Monism posits that international and domestic law are under a single legal system, with international law taking precedence over domestic law.[127] In contrast, dualism treats international and domestic law as separate entities.[128] The Netherlands follows the monist legal system, contributing to the outcome of the Hague Court of Appeal decision on F35 Jet parts. Furthermore, the judgement held by the Appeals Court of the Hague is seen as a pivotal moment in the ongoing debate surrounding the balance between state obligations under international humanitarian law and the executive government's prerogatives to make policy decisions.

(b) Under the Netherlands' legal system, treaties that are legally binding on the State are applied to relevant parts of the kingdom.[129] Parliament approval is not a necessity unless listed under the treaty.[130] Additionally, Articles 93 and 94 of the Constitution state that treaties can only be enforced by courts, and takes precedence over any domestic statute that may exist once disclosed publicly.[131]

(c) Oxfam Novib, PAX and the Rights Forum Foundation brought the Dutch case to the Hague Court of Appeal amid the growing international concern over arms exports to Israel.[132] The case was originally held in the District Court, where it ruled in favour of the executive government, highlighting its broad discretionary power to make decisions on foreign policy and security matters.[133] In the first case, the complainants' main argument was that after the events on October 7th, the government was obligated to conduct a new risk assessment for its F-35 program.[134] However, the judge ruled that the government had already conducted a risk assessment in 2016 and was not obligated to create a new appraisal. As a result of this judgement, the complainants appealed to the Hague Court of Appeal.[135]

(d) In the appeal, the plaintiffs drew on the disproportionate level of civilian casualties in Gaza, highlighting Israel's targeting strategy as one that is creating a 'serious risk of impending

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[125]Red Cross, 'Even in times of war, there are laws,' *Australian Red Cross* (Webpage)

<https://www.redcross.org.au/ihl/#:~:text=The%20rules%20of%20war%20are,and%20non%2Dstate%20armed%20groups.>

[126] Pieter van Dijk, *European Commission For Democracy Through Law (Venice Commission)* (No 690, 20 September 2014) 2-3.

[127] Ibid.

[128] Ibid.

[129] Ibid.

[130] Ibid.

[131] Ibid.

[132] León Castellanos-Jankiewicz, 'Dutch Court Halts F-35 Aircraft Deliveries for Israel,' *Verfassungsblog* (Webpage, 14 February 2024) <https://verfassungsblog.de/f-35/>

[133] Ibid.

[134] Ibid.

[135] Ibid.

genocide.'[136] The plaintiffs requested that the government cease all actual exports and transit of the F-35 jets to Israel and conduct a fresh risk assessment.[137] On the other hand, the government tried to argue that it was not stipulated under the Arms Trade Treaty nor the EU Common Position to reassess export licences once they have already been issued.[138] Moreover, the government relied on the fact that judicial review was limited in foreign policy and security matters & that the ministers had wide discretion.[139] Ultimately, this argument was rejected by the Hague Court of Appeal, as the court held that the interest in complying with the Geneva Conventions and the Arms Trade Treaty held greater importance.[140]

(e) More significantly, the court favoured against the government as it concluded that there was an 'obvious risk' that the F-35 fighter jets would be used in a manner that would violate International Humanitarian Law. This was due to evidence provided in the proceedings, which showed that Israel deploys the F-35 jets in Gaza to support ground troops and carry out bombings. Furthermore, the court examined Israel's various human rights violations, stating that "there are many indications that Israel has violated the humanitarian law of war in a not insignificant number of cases." It was not necessary for the court to make a definitive judgement based on the facts; it was only necessary to show that there was an 'obvious risk' of human rights violations.

(f) The court's judgement argues that specific international obligations, particularly IHL, take precedence over the executive government's freedom to make policy decisions.[141] It spotlights the importance of considering international treaties when interpreting domestic law and affirms that states have a 'positive obligation' to prevent violations of IHL.[142] Moreover, the Court may supersede executive powers when interpreting statute law as seen in the 'reasonable interpretation' of the facts in the case.[143] Thus, the implications of this judgement are substantial for future decisions on arms exports from the Netherlands, prompting the State to appeal the decision to the Supreme Court.[144]

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[136] Ibid.

[137] Ibid.

[138] Ibid.

[139] Ibid.

[140] Ibid.

[141] Marten Zwanenburg and Joop Voetelink, 'Appeals Judgment in Case concerning the Shipment from the Netherlands of Parts for F-35 Fighter Aircraft to Israel,' *ejiltalk* (Webpage, February 16, 2024) <https://www.ejiltalk.org/appeals-judgment-in-case-concerning-the-shipment-from-the-netherlands-of-parts-for-f-35-fighter-aircraft-to-israel/>

[142] Ibid.

[143] Ibid.

[144] Ibid.

(g) Ultimately, the court can uphold international instruments such as the EU Common Position and the Arms Trade Treaty (ATT) when interpreting domestic law.[145] While the State held the contention that these instruments did not directly affect Dutch law, the Court held that these instruments inform the interpretation of domestic legislation, specifically the Strategic Goods Decree (SGD).[146] This assertion implies that state obligations under international law cannot be disregarded or diluted by executive policy decisions, as they are integral to interpreting and applying domestic law.

(h) Conclusively, the Dutch case effectively challenged the Netherlands State's discretion through the assessment of arms export licences, pursuant to the potential violations of IHL by the recipient state. The final judgement depicted a departure from the notion of unchecked executive authority in matters involving national security and foreign policy. Ultimately, it affirmed the judiciary's role in scrutinising and, in this case, restraining executive powers that may breach international legal obligations.

[145] Ibid.

[146] Ibid.

6. DISCUSSION – AUSTRALIAN GOVERNMENT EXPOSURE TO GENOCIDE RISK

ANNEXURE A refers to several companies in Australia associated with the Israeli military supply chain. **ANNEXURE B** is a statement from 20 June 2024 by the United Nations listing arms companies involved in arms transfers to Israel and financial institutions investing in those companies. The Australian Government directly invests in some of these companies and allows trade. Thus, the United Nations calls on the Australian Government to end transfers to Israel, even if they are executed under existing export licenses. An end to transfers must include indirect transfers through intermediary countries that could ultimately be used by Israeli forces, particularly in the ongoing attacks on Gaza.

According to the Department of Foreign Affairs and Trade, Australia and Israel have been working towards expanding cooperation on national security, defence and cyber security since 2017, when they signed the Memorandum of Understanding of Defence Cooperation.

According to the Defence Department, the 2018 Defence Export Strategy sets out a "comprehensive system to plan, guide and measure defence export outcomes" until 2028. The Export Strategy also clearly states that "Israel has an advanced and innovative defence industry that also presents opportunities for [the] Australian defence industry to collaborate on the development of advanced capabilities".

However, while the 2024 National Defence Strategy states that investing in global partnerships ensures the Government can respond to unexpected events that impact Australia's interests and that "Australia remains committed to transparency about Australia's strategic intentions and defence capabilities", the government continues to remain increasingly unclear about what the defence relationship between Israel and Australia entails, particularly since October 7.[147]

Enough evidence exists to make reasonable inferences and ask critical questions, but the government holds many of the cards by refusing to answer certain questions. It is also increasingly difficult to have information released on some details of Australia's defence exports to the UK, US and Germany, which are part of Israel's global supply chain.

The formal communication to the ICC Prosecutor dated 4 March 2024 by Birchgrove Legal, acting for concerned Australians, outlines different categories of rhetorical and material assistance, as listed earlier in this submission. Further to that evidence, AMAN refers to the evidence below:

Case study – New Zealand comparison

Lawyers in New Zealand have put the New Zealand Prime Minister on notice of potential complicity in genocide. The facts cited in that letter are compared against the conduct of Australia in the table below, surfacing further evidence of complicity.

New Zealand Complicity	Australia Complicity
Potential failure to prevent the export of military components	

[147] Defence cash boost queried over 'genocide' support - Central News

for use in weaponry by Israel. Specifically, failure to adequately regulate Rakon Limited (a company based in Tāmaki Makaurau Auckland) regarding the export of components to the United States for use in military equipment, which may be being used in Israel's genocide;	Like NZ, Australia has failed to prevent the export of military components for use in weaponry by Israel:
	
	Amnesty
	
	The Government has said they have not exported weapons for 5 years, but they have not confirmed nor denied whether they have manufactured weapons parts in Australia/approved for export where Israel will be the end user.
	
	The Guardian Report 15 April 2024:
	- 'Defence-related exports'- dual use items like software, radio and chemicals with a legitimate use; items with both commercial and civilian uses
	- When Senator Shoebridge asked Hugh Jeffrey, Department of Defence if Bomb bay doors were produced in Australia, Jeffrey replied: "A pencil is used for writing, it is not designed in of itself to be a weapon, but it can be a weapon".
	- Allegations by the Greens that Australian manufacturers are providing bomb bay doors for Lockheed Martin that manufactures Israeli Defence Force F-35 fighter jets
	- MoU on Defence Industry Cooperation between Australia and Israel in 2017- we have no information on this as the government refuses to allow access to it.
	
	The Greens Statement
	- Head contractor for the f-35 Lockheed Martin: "Every f-35 built contains some Australian parts and components."
	  - They likely go to the US and then to Israel
	- Department of Defence revealed there are currently 66 military export permits active with Israel:
	  - "Public information can give an indication of what they are. For example, Currawong Engineering is a Tasmania-based company that creates the Corvid-29 engine, which is used in the Israeli-made Bluebird Aero System's ThunderB drone. Bisalloy Steels provides military-grade steel for Plasan Re'em, an Israeli company, that makes armoured cars used in occupied Palestine both by the military and the armed settler militias. "
	- DFAT Data: Over the last 5 years, Australia has exported $10 million in 'arms and ammunition'
	
	ABC Article: 'Controversial Israeli weapons company awarded $917 million Australian army contract'
	- In February= Israeli company Elbit Systems was awarded a defence contract worth $917 million
	- "advanced protection, fighting capabilities and sensors"

	SBS - While there may be no direct weapons donations — like Australia has provided to Ukraine — there is a permit system that allows some exports: dual-use items - Additional Sources: - https://www.aljazeera.com/news/2024/3/28/australia-challenged-on-moral-failure-of-weapons-trade-with-israel - https://centralnews.com.au/2024/05/15/defence-funding-boost-queried-over-potential-genocide-support/ -
Sending New Zealand Defence Force (NZDF) personnel to train alongside Israel Defence Forces during the US-led Rim of the Pacific (RIMPAC) military exercises beginning on 26 June 2024;	Department of Defence ADF attends the biennial international military exercise (last attended 2022) where they sent 1600 personnel, multiple ships and aircrafts between end of June until August. Al Jazeera Article - It was established in 1971 by Australia, Canada and the US. - Israel will be participating in its third one, but will have no aircrafts or ships present Defence Connect - Advocacy groups are calling for the ADF to withdraw from the largest international maritime warfare exercise because the IDF will be attending from 26 June to 2 August
Sending NZDF personnel to assist in United States and United Kingdom-led military operations against the Houthis in Yemen, with the effect of suppressing regional protest against Israel's genocide in Gaza;	Department of Defence - "As Houthi rebels sank and raided vessels in the Red Sea, the Australian Government announced **ADF personnel would deploy under the newly formed Operation Hydranth.** - "The ADF team is embedded in the US-led headquarters to support Operation Poseidon Archer – the US and UK strikes targeting Houthi capabilities. - "It came after the ADF increased the number of personnel contributing to combined maritime forces in Bahrain – a coalition of 43 countries safeguarding one of the world's busiest shipping lanes."
Withholding approval for funding for the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA);	Australia previously withheld funding for UNRWA after allegations that workers had participated on October 7th, however on 15 March 2024, $6m in funding was 'unpaused'. Funds were paused between 27 Jan to 15 March.

	https://www.theguardian.com/australia-news/2024/mar/15/unrwa-funding-australia-reinstates-gaza-aid-october-7-hamas-claims
Failure to provide humanitarian visas to Palestinians in Gaza who have family members in Aotearoa (by contrast with the 2022 Special Ukraine Visa for Ukrainians fleeing from war);	Australia has failed to provide humanitarian visas to Palestinians in Gaza who have family members in Australia. Instead, if they wish to seek refuge in Australia, they must apply for tourist visas, such as under a s 600 Visitor Visa. Nevertheless, the Department of Home Affairs has reported that 4,616 Palestinians have been denied tourist visas, which amounts to 60% of applications. When the Visa expires, Palestinians are allowed to apply for a Bridging Visa E. Such is paradoxical to the treatment of Ukrainians, who were allowed to apply for 786 Safe Haven visa. Source: https://www.amnesty.org.au/humanitarian-visas-gaza/
Failure to take any measures of retortion against Israel, such as expelling diplomats or suspending diplomatic relations;	Australia has failed to take any measures of retortion against Israel. No diplomats have been expelled nor have diplomatic relations been suspended.
Continuing to allow shipping company ZIM to use New Zealand ports;	Shipping company ZIM still utilises Australian Ports. Protests have been held since late last year. The Israel Corporation is the sole owner of the company, with 49% of its shares. According to Unionists for Palestine, it played a integral role in the colonisation of Palestine. Since them, it has remained central to the operations of Israel's transportation of weaponry for the Israeli military
Failure to suspend the Israel Working Holiday Visa for Israeli citizens who have served with the Israel Defense Forces	Australia continues to maintain a working holiday visa for Israeli citizens fighting for the IDF. Such is in breach of the Rome Statue 2002, which Australia has ratified.

carrying out international crimes;	HOWEVER, the ABF questioned three people suspected of travelling to join the Israeli army, as reported on the 19 June. The Guardian - 'The government (Department of Home Affairs) is also warning Australians who seek to serve with the armed forces of a foreign country "to carefully consider their legal obligations and ensure their conduct does not constitute a criminal offence".' - 'The Department of Home Affairs has revealed that it and the ABF "are aware of four Australian citizens who have travelled outside of Australia since 7 October 2023 and who were suspected to have departed Australia to serve or attempt to serve with the IDF".' **They only intervened between 3/4** - **The guardian clarified that this doesn't mean they were discouraged from travelling, but rather they were asked more detailed questions** - **The Australian Centre for International Justice** has identified 20 individuals in Australia who have recently fought/currently fighting for the IDF- they plan to take it to the AFP. Overall, Australia has failed to suspend the visas and has not done anything about Australians fighting in the IDF.
Relatedly, failure to implement a ban on investments in, and imports from, companies building and maintaining illegal Israeli settlements on Palestinian land in line with UN Security Council resolution 2334 (UNSC2334 was co-sponsored at the UN Security Council by New Zealand in 2016).	Federally, Australia has failed to implement a ban on investments in and imports from companies maintaining illegal Israeli settlements. However, ACT has begun divesting from investments related to illegal Israeli settlements. https://conference.actlabor.org.au/amendments/91
Failure to engage with proceedings in the genocide case at the International Court of Justice (ICJ), and failing to denounce Israel's breaches of ICJ rulings, most notably by illegally continuing its military assault on Rafah;	Australia has failed to engage with proceedings in the genocide case at the ICJ, nor have they denounced Israel's breaches to the rulings. In January, Albanese said Australia will not participate in the case against Israel. The Guardian - We obviously are not a participant in the process [and] don't intend to be a participant in the process," he told ABC Radio Melbourne when asked about the ICJ proceedings. The Guardian

	Following the interim rulings, the spokesperson for the foreign minister stated: “we note decisions of the ICJ are binding on the parties to a case”. HOWEVER, no measures the denounce their breaches of rulings have occurred. When the initial strikes of Rafah occurred in late May, Penny Wong stated that “this cannot continue”, however did not uphold nor refer to any ICJ rulings.

Case Study 2 – Relationship with Germany, a key supplier to Israel

A media release by PM Albanese on 21 March 2024[148] provided an update on these armoured vehicles being supplied to Germany. German arms manufacturer Rheinmetall will build these vehicles at its Military Vehicle Centre of Excellence in Queensland and then export them to Germany. Rheinmetall has previously worked with Elbit Systems, the Israeli arms company that makes IDF drones used in Gaza, with these partnerships having direct links to other procurement programmes between Elbit and Israel.[149]. The Rheinmetall media release on this partnership also states that it is intended to strengthen ties between Germany and Israel and their armed forces.[150].

A Queensland Question on Notice[151] is mentioned in the 'Wage Peace' article[152] on Australia's manufacturing and export of 155mm shells to Germany. The question itself specifically asked whether the shells were being exported for use by the IDF. Still, the corresponding answer did not mention the IDF or Israel, just saying that all current production within the Rheinmetall facility in Maryborough, Queensland, is responding to a "large-scale order from the German Government". The 'Wage Peace' article included a link to a recent report on German arms exports to Israel published on 2 April 2024, by Berlin researchers from Forensis (a sister agency to Forensic Architecture, a London-based research agency that investigates state and corporate violence). According to this report, Rheinmetall is one of the world's largest manufacturers of these 155mm shells, and the export of these shells to Israel has been approved by the German government in recent years (Forensis report, 2/4/24, p57[153])

The report also references the *Stockholm International Peace Research Institute's* Arms Transfers Database, which shows that in 2023, Germany was the second largest supplier of "major conventional weapons" to Israel after the U.S. This has been the general trend for the last 20 years since 2003; Germany has consistently been the second, and sometimes first,

[148] PM Albanese Media Release, 21/3/24. https://www.pm.gov.au/media/australian-made-armoured-vehicles-be-exported-germany

[149] Elbit systems Media Release, 16/5/23. https://elbitsystems.com/pr-new/rheinmetall-and-elbit-systems-conduct-live-fire-demonstration-of-automated-155mm-l52-wheeled-self-propelled-howitzer/

[150] Rheinmetall Media Release, 16/5/23. https://www.rheinmetall.com/en/media/news-watch/news/2023/mai/2023-05-16-rheinmetall-and-elbit-systems-carry-out-live-fire-demonstration-of-wheeled-self-propelled-howitzer

[151] QLD Question on Notice, 20/3/24, https://documents.parliament.qld.gov.au/tableoffice/questionsanswers/2024/314-2024.pdf

[152] Wage Peace, n.d., 'Australia sends 155mm shell exports to Germany; Probably to the IDF', https://www.wagepeaceau.org/155mm-to-germany/

[153] Forensis report, 2/4/24, 'Short Study: German Arms Exports to Israel 2003-2023', p57 https://content.forensic-architecture.org/wp-content/uploads/2023/04/Forensis-Report-German-Arms-Exports-to-Israel-2003-2023.pdf

exporter of major conventional arms to Israel (Forensis report, 2/4/24, p23[154]). Especially in late 2023, there was a significant uptick in approved arms export licenses from Germany to Israel. This corresponds to Germany's higher demand for weapons manufacturing, namely by Australia, to keep their munitions stores filled.

The manufacturing facility in Maryborough, Queensland, where these 155mm shells are being produced, was a joint venture between Rheinmetall and NIOA (an Australian munitions company). This factory received substantial government funding and backing: $28.5m from the Federal Government's Regional Growth Fund, $7.5m from the Queensland Government's Jobs and Regional Growth Fund, and also support from the Fraser Coast regional council (NIOA Group, Latest News, 'Rheinmetall NIOA Munitions Triumphs on National Stage', 25/9/23[155])

Case study 3 – Future fund investments

Last December, Greens Senator David Shoebridge acquired documents under the Freedom of Information Act, which detailed Australia's Future Fund had invested almost half a million dollars directly into Elbit systems, despite it being formerly blacklisted due to ethical concerns relating to activities in the occupied Palestinian territories.

"This investment is in addition to the hundreds of millions that Future Fund has invested in its broad aerospace and defence portfolio such as Boeing, BAE Systems, Thales, Lockheed Martin and Rheinmetall AG who are all producing weapons currently employed in the genocide on Gaza," Shoebridge said.

In total, the FOI document revealed that Future Fund had invested more than $650M in 30 'Aerospace and Defence' companies as of October 31, 2023.

This includes:

- $71.3M in Lockheed Martin, manufacturer of the F-35 fighter jets that Israel uses in the bombing of Gaza;
- $43M in Northrop Grumman Corp, which produces artillery and mortar systems and battle tanks;
- $3.5M in Thales, a manufacturer of assault rifles, sophisticated surveillance, and weapons control systems; and

[154] Ibid, p23.

[155] NIOA Group, News release, 25/9/23, https://www.nioa.com.au/latest-news/rheinmetall-nioa-munitions-triumphs-on-national-stage#:~:text=It%20was%20built%20within%20two,the%20Fraser%20Coast%20Regional%20Council.

- $72.4M to RTX Corporation (formerly Raytheon), which produces Patriot Missiles used by the Israel Defence Force.[156]

Case Study 3

The Albanese Government's $1.7 billion investment in bolstering the Australian Defence Force with weapon systems included Rafael. Specifically, 'under a contract worth more than $50 million, Varley Rafael Australia is expected to deliver the first Spike missile early next year.'[157] Australian media characterise weapons manufactured by Rafael as the, 'most powerful and technologically advanced weapons systems **ever fielded**.'[158]

It is important to acknowledge the plethora of scholarship arguing that weapons manufactured by Rafael Advanced Defense Systems were used in Palestine. Indeed, a range of evidence reveals that Rafael's weapons were 'manufactured for Israel's murder and repression of Palestinians, including guided Spike missiles.'[159] The Spike 'family' of missiles are a documented example of military equipment used by the Israeli state in Palestine. Specifically, the Spike LR2 missile finds utility among infantry and light combat vehicles, 'deployed in Sentry Tech remotely controlled weapons stations along the Gaza border.'[160] In addition to this, Human Rights Watch contends that in Gaza, Israel used 'two Spike-MR missiles, produced by Rafael Advanced Defense Systems Ltd.'[161]

The American Friends Service Committee pertinently articulates that 'the Israeli military has used Rafael Spike Anti-Tank Guided Missiles extensively to target, from the ground, people inside buildings in the Gaza Strip.'[162] In Gaza's third war of 2014, Ahmed Saeed Al-Najar, 28, was behind the wheel of his taxi in Rafah when an 'Israeli Spike drone rocket'[163] instantly decapitated all six passengers. This specific attack reveals how a Rafael missile was 'modified to carry a fragmentation sleeve of thousands of 3mm tungsten cubes and said to affect an area of approximately 20 metres in diameter,'[164] causing widespread civilian casualties. Erik Fosse, a Norwegian doctor who worked in Gaza, stated that 'the cubes' punctured metal can cause tissue to be torn from the flesh,'[165] producing extensive damage to anyone within range. These attacks are distinct examples of Rafael weapons used in Palestine for destructive purposes.

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[156] Client State: Australia the "51st state of the US" for deadly weapons production - Michael West

[157] Australian Government Defence, (2023), *Australia invests in powerful new high-tech missiles*.

[158] Ibid.

[159] Palestine Action, (2023), *Palestine Action Occupation of Israeli State Owned Weapons Factory Enters Second Day*.

[160] Wikipedia, (2024), *Spike (Missile)*.

[161] Human Rights Watch, (2009), *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles.*

[162] American Friends Service Committee, (2024), *Companies Profiting 2023-2024 Attacks on Gaza*.

[163] Dowling, P, (2023), *Dirty secret of Israel's weapons exports: They're tested on Palestinians*. Al Jazeera.

[164] Ibid.

[165] Ibid.

Furthermore, Human Rights Watch analysed six Israeli strikes in Palestine, which in total killed 29 civilians. In all six attacks, 'the impact mark of the missile and the fragmentation pattern was consistent with the Israeli-produced Spike missile, which has a concentrated blast and spreads tiny cube-shaped fragments up to 20 metres away.'[166] Evidence relied upon by Human Rights Watch was 'wounded civilians showed impact marks from the cubic fragments … x-rays showed metal cubes lodged in the leg and chest of a victim … missile pieces found at attack sites were consistent with a small missile such as the Spike.'[167] Moreover, Human Rights Watch collected samples of the cubes and missile fragments from two attack sites and dispatched them to the Institute for Energy Technology in Norway for analysis. The IFE's findings revealed that the cubes were composed primarily of a metal alloy containing mainly tungsten and some traces of nickel and iron.[168]. Additionally, a weapons expert from the Norwegian Defence Research Establishment, Ove Dullum, conducted an analysis of the samples. Dullum concluded that 'the weapon used in the attacks was a guided anti-tank missile with sensors and other equipment to hit its target precisely and was most likely a Spike missile.'[169] The precision of the attack is associated with spike missiles and 'traditionally Israel's weapon of choice for precise, targeted killings.'[170]

Another occasion consistent with impact from a Spike missile was in early November. Three generations of the Al-Rayyes family, located in Gaza, were killed as 'their home was struck by two missiles.'[171] Muayyad, a witness, recounted how 'dust enveloped the area, with fragments scattered everywhere, likening the experience to an earthquake, but more violent'.[172] It is clear why Moffett contends, 'the problem with using large explosive weapons — it is having an effect of indiscriminately killing civilians, and this is something the International Criminal Court is looking at in relation to Gaza.'[173] The aforementioned occasions demonstrate the use of Rafael weapons in Palestine, and raise significant concerns regarding civilian casualties.

Nonetheless, there is a range of scholarship from Rafael and third parties, characterising Rafael weapons as 'battle tested' or 'fielded' and having such use in Palestine:

- "Another system in focus is the TROPHY APS, which is the world's only active protection system that has saved lives on the **battlefield …** Using innovative **battle-ready technology**, this miniature loitering munition serves to both heighten situational awareness in urban combat … This lightweight solution has a low visual and acoustic signature, making it a powerful tool for **battlefield** reconnaissance all while also enabling strikes on hostile forces from afar … TROPHY APS has reshaped the **battlefield,** enabling an unprecedented level of survivability with over 5,300 live fire

[166]Human Rights Watch, (2009), *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles.*

[167]Ibid.

[168]Ibid.

[169]Ibid.

[170] Rathbone, J. P, (2023), *Military briefing: the Israeli bombs raining on Gaza*. Financial Times.

[171]Medhora et al. (2024), *Three Generations killed within days: why whole families are dying in Gaza,* Sunday Times, Factiva.

[172]Ibid.

[173]Ibid.

events and 1 million operational hours" (See Rafael Advanced Defense Systems Ltd, 2022).[174]

- "India Revives Deal for Israeli Missiles **Battle-Tested** on Gazans … India has agreed to revive talks to spend $500m on Israeli-made anti-tank missiles **battle-tested** in Gaza ...
- stipulates any weapons bought have to be **battle proven**" (See Ullah, 2018).[175]
- "Israel had **battle-tested** these new technologies on its five million Palestinian captive population" (See Australian Institute of International Affairs, 2023).[176]
- "SPIKE LR2 is a state-of-the-art, multipurpose, multiplatform, combat-proven missile system, designed to meet the needs of modern warfare and complex **battlespace** challenges" (See Asian Military Review, 2023).[177]
- "The offensive enabled Israel to **'battle-test'** its armed drones for the first time" (See Cronin et al. 2016).[178]
- "Israel tries out weapons in the West Bank and Gaza and then presents them as **battle proven** to the international market' (See Kennard, 2016).[179]
- "For Israeli Arms Makers, the Gaza War Is a Cash Cow. Factories worked around the clock turning out munitions as the army tested their newest systems against a real enemy. Now, they are expecting their **battle-tested** products will win them new customer" (See Sadehm 2014).[180]
- "Rafael utilised the war in Gaza to **test** the system and study its responses in various scenarios" (See Azulay, 2024).[181]
- "Israeli startups hope to export **battle-tested** AI military tech" (See Kumon, 2017).[182]

Future Made in Australia Bill

AMAN has voiced profound concern regarding the Future Made in Australia Bill 2024[183], introduced in Parliament on 3 July.

Under the new Bill, provisions expanding public investment and support into companies supplying military equipment or weapons to Israel could heighten Australia's exposure to

[174]Rafael Advanced Defense Systems Ltd, (2022), *Rafael is participating in Land Forces 2022*.

[175] Ullah, A, (2018), *India Revives Deal for Israeli Missiles Battle-Tested on Gazans*. The Wire.

[176] Australian Institute of International Affairs, (2023), *The Palestine Laboratory - Australian Institute of International Affairs*.

[177]Asian Military Review, (2023), *Australian Defence Ministry chooses RAFAEL for GWEO*.

[178] Cronin et al. (2016), *The Israel Lobby and the European Union.* Public Interest Investigations.

[179] Kennard, M, (2016), *The Cruel Experiments of Israel's Arms Industry*. Pulitzer Center.

[180] Sadeh, S, (2014), *For Israeli Arms Makers, Gaza War Is a Cash Cow - Haaretz Com*.

[181] Azulay, Y, (2024), *Rafael orders surge 85% to over $8 billion amid war, global arms race*. CTech.

[182] Kumon, T, (2017), *Israeli startups hope to export battle-tested AI military tech*. Nikkei Asia.

[183] Future Made in Australia (Omnibus Amendments No.1) Bill 2024 (Cth).

violations of the Genocide Convention[184]. This concern is compounded by the government's strategic aim to elevate Australia to a top 10 global arms exporter by 2028.

AMAN refers to the First Reading and Explanatory Memorandum of the Future Made in Australia Bill 2024.

The first reading states that under the Export Finance and Insurance Corporation Act 1991, the meaning of eligible activity (s 3B) will include 'an activity carried out with respect to the defence of Australia.'

The Explanatory Memorandum states that the goal is '[to support] domestic projects in the national interest consistent with the Future Made in Australia National Interest Framework'.[185] Under 'Delivering on the broader Future Made in Australia Agenda', it states that the agenda 'also includes broader investments in the Government's growth agenda, including critical technologies, defence priorities, skills in priority sectors, a competitive business environment and reforms to better attract and deploy investment'.[186] Additionally, the Explanatory Memorandum states that one of the goals of the National Interest Framework is to establish 'some level of domestic capability is necessary or efficient to deliver economic resilience and security…'.[187]

The most significant reference to defence and security is stated under the 'National Interest Framework' (1.11), which clarifies that sector assessments will be conducted to ascertain if a sector aligns with the National Interest (1.21). While the government does not explicitly clarify what is in the national interest, they split it into two:

- the net zero transformation stream, and
- the economic resilience and security stream.

The latter stream refers to circumstances where some level of domestic capability is necessary to deliver economic resilience and security to Australia, and the private sector would not deliver the necessary investment in the absence of government support.[188]

The Secretary will conduct sector assessments to consider 'whether support for the sector could improve Australia's economic resilience and security' (1.21). Every reference to defence and security is minimal, to the point where they clarify that the Minister may redact information

[184] *Convention on the Prevention and Punishment of the Crime of Genocide,* opened for signature 9 December 1948 (entered into force 12 January 1951).

[185] Explanatory Memorandum, Future Made in Australia (Omnibus Amendments No. 1) Bill 2024 (Cth) 1- 4.

[186] Ibid.

[187] Ibid 15.

[188] Ibid 17.

that has the potential to 'cause damage to the security, defence, international relations of the Commonwealth' (1.37).[189]

[189] Ibid 20.

7. DISCUSSION – MANAGING GENOCIDE RISK

7.1 Use of Australian public funds in high genocide risk activities

(a) The Commonwealth's tax power is found under Section 51(ii) of the Australian Constitution[190] and is defined in Quick and Garran's *The Annotated Constitution of the Australian Commonwealth* as 'any exaction of money or revenue, by the authority of a State, from its citizens within its jurisdiction, for the purpose of defraying the cost of government [and] promoting the common welfare.' Arguably, the use of funds to support genocide is not in the best interest of 'common welfare. ' However, a federal human rights framework is missing in relation to how taxes are used,[191] in circumstances where a government chooses not to prevent or punish genocide.

(b) AMAN calls for robust amendments to legislation governing defence cooperation and industry investments, export finance, future funds and Australian charities concessions to ensure compliance with international law where there is a genocide risk.

7.2 Red Lines Needed in Defence Export Legislation

(a) We must mitigate potential human rights abuses linked to Australia's expanding defence export strategy.

(b) The existing legal framework relies heavily on ministerial discretion. Red lines must be introduced into defence export legislation where certain thresholds are crossed; for example, genocide risk is established through international court proceedings.

7.3 Support for the Australian business community and government agencies to address genocide

(a) There is a high risk that Australian businesses and government agencies are exposed to genocide risks and that Australian goods and services are tainted by genocide. This risk may be heightened for large companies and other entities with extensive, complex, global supply chains.

(b) There is currently no formal mechanism in Australia that directly targets genocide in business operations and supply chains or supports the business community to take action to address genocide.

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[190] *Australian Constitution* s 51(ii).

[191] *"International Association of Tax Judges," Home - International Association of Tax Judges(IATJ), accessed March 28, 2024, https://iatj.net/content/congresses/madrid2016/Income%20Tax%20and%20Human%20Rights%20-%20Australia.pdf.*

(c) Legislation should be introduced in a manner similar to the Modern Slavery Act that supports defence industry-related businesses to identify and address genocide risks, and to develop and maintain responsible and transparent supply chains.

(d) Such legislation would establish a Genocide Reporting Requirement, requiring reporting entities to provide annual Genocide Statements to the responsible Minister to be published online on a central register.

(e) Australian and foreign entities conducting business in Australia are required to submit Genocide Statements for every twelve-month period that are involved in military-related industries, as most commonly defined in Australian autonomous sanctions. The Australian Government would also be required to publish an annual Genocide Statement. Entities not required to report can volunteer to provide annual public Genocide Statements.

(f) A Genocide Statement must cover mandatory criteria by describing:

- the entity's structure, operations and supply chains;
- the potential genocide risks in the entity's operations and supply chains;
- actions the entity has taken to assess and address those risks, including due diligence and remediation processes; and
- how the entity assesses the effectiveness of those actions.

(g) Genocide Statements must also identify the reporting entity, describe consultation with other entities, details of approvals, and include other relevant information. A Genocide Statement must be signed by a responsible member of the entity, approved by the principal governing body of the entity and provided to the Minister within six months from the end of the entity's financial year.

(h) A legislative framework designed to prevent companies from facilitating international crimes, such as genocide, would need robust penalties to ensure compliance and deter transgressions. The violations warranting penalties could include a failure to conduct due diligence to identify and mitigate risks of international crimes, failure to report or accurately disclose those risks, and active complicity in such crimes. The Modern Slavery Act provides that transgressions pertaining to non-disclosure and failure to produce modern slavery statements may lead the Minister to 'give a written request to the entity to do either or both of the following: provide an explanation for the failure to comply within a specified period of 28 days … undertake specific remedial action in relation to that requirement in accordance with the request.'

(i) The types of consequences or punishments that would be applied to companies if they fail to meet the obligations outlined in the proposed legislation, modelled after the MSA, are quite limited.

(i) If the Minister is 'reasonably satisfied that an entity has failed to comply with a request, the Minister may publish the following information on the register: the identity of the entity; the date the request was given, details of the explanation requested, the periods specified in

the request; the reasons why the Minister is satisfied that the entity has failed to comply with the request.' Hence, companies violating the legislation could be publicly named and shamed, leading to reputational damage. This consequence may affect their business relationships, investor confidence and customer trust. Yet, the penalty is not stringent enough, particularly when facilitating severe international crimes.

(ii) In addition, the MSA 'itself imposes no penalty for a failure to report other than the Minister potentially publishing information about an entity's failure to comply.' Rather, the Act specifies that the Minister cannot make rules in accordance with the Act that would 'create an offence or civil penalty … arrest or detention … entry, search or seizure … impose a tax.' Consequently, businesses that fail to comply with the Act do not face substantial repercussions. The MSA does not go far enough in ensuring that penalties are imposed for non-compliance.

(j) Thus, additional measures are needed to create stronger incentives for businesses to meet their obligations and deter practices contributing to genocide.

ANNEXURE A

Companies operating in Australia where concerns have been raised in relation to links to the Israeli military.

Consolidated Revenue	**Australian Employees**
Bisalloy Steel – 76,648 million Bisalloy-Steel-31-Dec-2023-Final-Signed-1.pdf pg 18	51-200 Bisalloy Steels | LinkedIn
BAE Systems - 23,078 million pounds 2023-annual-report.pdf (baesystems.com) p 152	5,700 Where we operate | BAE Systems
Bluescope Steel – 18.2 billion 2023_bluescope_fy_report_annual_report.pdf p.16-17	7,000 Where We Are (bluescope.com)
Boeing – 77,794 million USD Boeing-2023-Annual-Report.pdf (q4cdn.com) p 5	4,800 About Boeing in Australia
Dickinson's Metallurgical Supplies - < 5 million Dickinson's Metallurgical Supplies - Overview, News & Similar companies | ZoomInfo.com	11-50 Dickinson's Metallurgical Supplies Pty. Ltd.: Overview | LinkedIn
Elbit Systems – 6 billion 26032024E.pdf (elbitsystems.com) p 1	51-200 Elbit Systems of Australia Pty Ltd: Overview | LinkedIn
Ferra Engineering - 9 million Ferra Engineering: Contact Details and Business Profile (rocketreach.co)	117 (exact number unavailable) Ferra Engineering: Contact Details and Business Profile (rocketreach.co)
General Dynamics – 42, 272 million 2023-general-dynamics-annual-report-form-ars-_final-pdf.pdf (q4cdn.com) p 3	10,000+ General Dynamics Land Systems – Australia: Overview | LinkedIn
Glyde Metal (Co-founders of Zenith Group) – 5.1 million	35+

Glyde Metal Industries - Overview, News & Similar companies | ZoomInfo.com	Our story - Glyde Metal
HIFraser Group – 5,449.8 million pounds fg-annual-report-2023-web.pdf (frasers-cms.netlify.app) p 128	100+ About Us | HIFraser Group Australia
Heat Treatment – 11.4 million HTA Group - Overview, News & Similar companies | ZoomInfo.com	23 Heat Treatment Australia: Employee Directory | ZoomInfo.com
Aerospace Industries – 5,327 million USD IAI Publishes its Annual Financial Statements for 2023 | IAI	13,872 (Australian employees unavailable) Israel Aerospace Industries Ltd Company Profile - Israel Aerospace Industries Ltd Overview - GlobalData
Lintek - < 5 million Lintek - Overview, News & Similar companies | ZoomInfo.com	50 Lintek | Careers
Lockheed Martin – 67.6 billion USD Lockheed Martin Reports Fourth Quarter and Full Year 2023 Financial Results - Jan 23, 2024	1,500+ Lockheed Martin Australia | Lockheed Martin Australia
Marand - 25.3 million Marand Precision Engineering Pty Ltd: Contact Details and Business Profile (rocketreach.co)	177 Marand Precision Engineering Pty Ltd: Contact Details and Business Profile (rocketreach.co)
Northrop Grumman – 39.3 billion USD 2023-Annual-Report.pdf (northropgrumman.com) p 2	800+ Careers in Australia | Northrop Grumman
Nupress Group – 6.7 million Nupress Group - Overview, News & Similar companies | ZoomInfo.com	11-50 Nupress Group: Overview | LinkedIn
Partech Systems -9.3 million ATE Support - Overview, News & Similar companies | ZoomInfo.com	<25 ATE Support - Overview, News & Similar companies | ZoomInfo.com

Plasan – 146.7 million Plasan Sasa - Overview, News & Similar companies | ZoomInfo.com	634 Plasan Sasa - Overview, News & Similar companies | ZoomInfo.com
Quickstep Holdings Limited - 94.4 million QHL-Appendix-4E-and-Annual-Report-30-June2023-Final.pdf (quickstep.com.au) p 27	280 Modern-Slavery-Statement-2023-BoD-approved-0723.pdf (quickstep.com.au) p 2
RFD – 44 million What is the annual revenue of RFD (Australia) Pty Ltd? - RocketReach	7 What is the annual revenue of RFD (Australia) Pty Ltd? - RocketReach
Rockwell Collins – 5.3 billion Rockwell Collins - Overview, News & Similar companies | ZoomInfo.com	19,000 (Australia unavailable) Working at Rockwell Collins company profile and information | SEEK
Rosebank Engineering – 127.8 million RUAG Australia - Overview, News & Similar companies | ZoomInfo.com	51-200 Rosebank Engineering: Overview | LinkedIn
RTX – 74.3 billion USD 2870406d-da57-4e95-8048-2c043e03dc8a (rtx.com) p 2	1,500 Who We Are | Raytheon Australia
SMASH – 5.4 million (Australia unavailable) Smart Shooter - Overview, News & Similar companies | ZoomInfo.com	67 (Australia unavailable) Smart Shooter - Overview, News & Similar companies | ZoomInfo.com
Thales – 1,023 million Euros Thales reports its 2023 full-year results | Thales Group	4,300 Australia | Thales Group
TR Calibration - 11.2 million TR Calibration: Contact Details and Business Profile (rocketreach.co)	201-500 TR Calibration: Overview | LinkedIn
Varley Group - 126.8 million The Varley Group - Overview, News & Similar companies | ZoomInfo.com	501-1,000 Varley Group: Overview | LinkedIn

Varley Rafael - 12 billion (Australia unavailable) Israel-Based Rafael Advanced Defense Systems Ltd. | S&P Global Ratings (spglobal.com)	2-10 Varley Rafael Australia (VRA): Overview | LinkedIn
ZenithGroup (ZG) - 1.8 billion Zenith: Revenue, Competitors, Alternatives (growjo.com) (Australia unavailable)	2-10 Zenith Group - Defence: Overview | LinkedIn
Zim Shipping – 5,162 million ZIM - ZIM Reports Financial Results for the Fourth Quarter and the Full Year of 2023	4,778 (total not Australian) zim-esg-report-2023.pdf p 78

States and companies must end arms transfers to Israel immediately or risk responsibility for human rights violations: UN experts

GENEVA (20 June 2024) – The transfer of weapons and ammunition to Israel may constitute serious violations of human rights and international humanitarian laws and risk State complicity in international crimes, possibly including genocide, UN experts said today, reiterating their demand to stop transfers immediately.

In line with recent calls from the Human Rights Council and the independent UN experts to States to cease the sale, transfer and diversion of arms, munitions and other military equipment to Israel, arms manufacturers supplying Israel – **including BAE Systems, Boeing, Caterpillar, General Dynamics, Lockheed Martin, Northrop Grumman, Oshkosh, Rheinmetall AG, Rolls-Royce Power Systems, RTX, and ThyssenKrupp – should also end transfers, even if they are executed under existing export licenses.**

"These companies, by sending weapons, parts, components, and ammunition to Israeli forces, risk being complicit in serious violations of international human rights and international humanitarian laws," the experts said. This risk is heightened by the recent decision from the International Court of Justice ordering Israel to immediately halt its military offensive in Rafah, having recognised genocide as a plausible risk, as well as the request filed by the Prosecutor of the International Criminal Court seeking arrest warrants for Israeli leaders on allegations of war crimes and crimes against humanity. "In this context, continuing arms transfers to Israel may be seen as knowingly providing assistance for operations that contravene international human rights and international humanitarian laws and may result in profit from such assistance."

An end to transfers must include indirect transfers through intermediary countries that could ultimately be used by Israeli forces, particularly in the ongoing attacks on Gaza. The UN experts said that arms companies must systematically and periodically conduct enhanced human rights due diligence to ensure that their products are not used in ways that violate international human rights and international humanitarian laws.

Financial institutions investing in these arms companies are also called to account. **Investors such as Alfried Krupp von Bohlen und Halbach-Stiftung, Amundi Asset Management, Bank of America, BlackRock, Capital Group, Causeway Capital Management, Citigroup, Fidelity Management & Research, INVESCO Ltd, JP Morgan Chase, Harris Associates, Morgan Stanley, Norges Bank Investment Management, Newport Group, Raven'swing Asset Management, State Farm Mutual Automobile Insurance, State Street Corporation, Union Investment Privatfonds, The Vanguard Group, Wellington and Wells Fargo & Company**, are urged to take action. Failure to prevent or mitigate their business relationships with these arms manufacturers transferring arms to Israel could move from being directly linked to human rights abuses to contributing to them, with repercussions for complicity in potential atrocity crimes, the experts said.

"Arms initiate, sustain, exacerbate, and prolong armed conflicts, as well as other forms of oppression, hence the availability of arms is an essential precondition for the commission of

war crimes and violations of human rights, including by private armament companies," said the experts.

They said the ongoing Israeli military assault is characterised by indiscriminate and disproportionate attacks on the civilian population and infrastructure, including through extensive use of explosive and incendiary weapons in densely populated areas, as well as in the destruction and damage of essential and life-sustaining essential civilian infrastructure, including housing and shelters, health, education, water and sanitation facilities. These attacks have resulted in more than 37,000 deaths in Gaza and 84,000 injured. Of these deaths and injuries, an estimated 70 per cent are women and children. Today, children in Gaza are the largest group of amputee children in the world due to grave injuries sustained in the war. These operations have also resulted in severe environmental and climate damages.

"The imperative for an arms embargo on Israel and for investors to take decisive action is more urgent than ever, particularly in light of states' obligations and companies' responsibilities under the Geneva Conventions, the Genocide Convention, the international human rights treaties, and the UN Guiding Principles on Business and Human Rights," the UN experts said.

The experts paid tribute to the sustained work of journalists who have been documenting and reporting on the devastating impact of these weapons systems on civilians in Gaza, and human rights defenders and lawyers, among other stakeholders, who are dedicated to holding States and companies accountable for the transfer of weapons to Israel.

They have also engaged with States, as well as the involved businesses and investors on these issues.

The experts: Robert McCorquodale (Chair), Fernanda Hopenhaym (Vice-Chair), Pichamon Yeophantong, Damilola Olawuyi, Elzbieta Karska, Working Group on business and human rights; George Katrougalos, Independent Expert on the promotion of a democratic and equitable international order; **Pedro Arrojo-Agudo**, Special Rapporteur on the human rights to safe drinking water and sanitation; **Reem Alsalem,** Special Rapporteur on violence against women and girls, its causes and consequences; **Paula Gaviria Betancur,** Special Rapporteur on the human rights of internally displaced persons; **Tlaleng Mofokeng**, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; **Michael Fakhri,** Special Rapporteur on the right to food; **Morris Tidball-Binz,** Special Rapporteur on extrajudicial, summary or arbitrary executions; **Mary Lawlor,** Special Rapporteur on the situation of human rights defenders; **Cecilia M Bailliet**, Independent Expert on human rights and international solidarity; **Ms. Margaret Satterthwaite,** Special Rapporteur on the independence of judges and lawyers; **Farida Shaheed**, Special Rapporteur on the right to education; **Carlos Salazar Couto (Chair-Rapporteur), Michelle Small, Ravindran Daniel, Jovana Jezdimirovic Ranito, Sorcha MacLeod,** Working Group on the use of mercenaries; **Francesca Albanese,** Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967; **Ben Saul**, Special Rapporteur on the promotion and protection of human rights while countering terrorism; **Dorothy Estrada Tanck (Chair), Laura Nyirinkindi (Vice-Chair), Claudia Flores, Ivana Krstić, and Haina Lu,** Working group on discrimination against women and girls; **Astrid Puentes**, Special Rapporteur on the human right to a clean, healthy and sustainable environment; **Attiya Waris**, Independent Expert on the effects of foreign debt; **Marcos A.**

Orellana, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; Balakrishnan Rajagopal, Special Rapporteur on the right to adequate housing

The Special Rapporteurs, Independent Experts and Working Groups are part of what is known as the **Special Procedures** of the Human Rights Council. Special Procedures, the largest body of independent experts in the UN Human Rights system, is the general name of the Council's independent fact-finding and monitoring mechanisms that address either specific country situations or thematic issues in all parts of the world. Special Procedures' experts work on a voluntary basis; they are not UN staff and do not receive a salary for their work. They are independent from any government or organisation and serve in their individual capacity.