Committee Secretary
Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

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1 September 2024

Dear Committee Secretary

Re: Senate Review of Australia's Sanctions Regime

We make this submission in our capacity as academics with broad expertise in international law, including international sanctions law, international humanitarian law, international economic and trade law, international criminal law, and international human rights law.

Our submission has been endorsed by over 40 academics and researchers with relevant expertise in the above-listed areas based at Australian universities.

Our submission highlights the current systemic deficiencies of Australia's sanctions regime, and contains **three key recommendations for legal reform**. These are:

- To amend the *Autonomous Sanctions Act 2011* (Cth) Section 3 in order to reorient the key objective of Australia's sanctions regime towards promoting fundamental principles of international law, in particular the right of all peoples to self-determination (see **Recommendation 1**);
- To amend the *Autonomous Sanctions Regulations 2011* (Cth) Regulation 6A(4)(a) to include violations of the right to self-determination; violations of the prohibition on genocide; violations of the prohibition on apartheid and racial segregation; and violations of the prohibition on the acquisition of territory by force, territorial annexation and foreign illegal occupation (see **Recommendation 2**);
- To amend the *Autonomous Sanctions Regulations 2011* (Cth) Regulation 6A to ensure a more consistent interpretation of the right to life, including through the use of a trigger mechanism that responds to and implements authoritative decisions of international courts, including the International Court of Justice, concerning serious violations and abuses of fundamental human rights (see **Recommendation 3**).

In addition, we recommend that the Senate Committee seriously enquire into the specific **systemic failures of and inconsistencies in Australia's current sanctions listings**, using the case study of the State of Israel, Israeli political and military leaders, Israel's military and security forces, and Israeli nationals. These include:

- The failure of Australia's sanctions listing process to apply sanctions on a range of Israeli nationals that have been sanctioned by other states, including Australia's allies (see **Recommendation 4**);

- The failure of Australia's sanction regime to meet one of its core objectives of seriously impacting unlawful individual behaviours, in the context of individuals who commit serious violations and abuses of human rights and who are granted impunity, or even supported by, by their own states and political leaders, such as the case of violent Israeli settlers (see **Recommendation 5**);
- The failure of Australia's sanctions listing process to consistently use sanctions to respond to Provisional Orders of the International Court of Justice that are issued pursuant to cases concerning state violations of the Genocide Convention (see **Recommendation 6**); and
- The failure of DFAT to give due consideration to civil society calls and submissions for new sanctions listings to date, and consider whether the establishment of a robust independent committee within DFAT would enhance the transparency and responsiveness to civil society of current sanctions listing processes (see **Recommendation 7**).

As a state with its own settler colonial history of genocide against First Nations people, white supremacy and racial segregation, we submit that it is imperative that the Senate Committee take stock of our history and moral obligations and of Australia's dismal failure to consistently apply autonomous sanctions in response to Israel's unlawful occupation and racial segregation. We submit that this Senate Inquiry must ensure Australia's sanctions regime enquires into the bases of this failure, and recommends law reforms and new departmental processes so that Australia's sanctions regime is in compliance with Australia's international legal obligations. This must particularly be the case concerning violations of peremptory norms such as the right to self-determination, and the prohibitions on apartheid, genocide, acquisition of territory by force, and illegal foreign occupation.

Please find our **Detailed Submission** annexed.

We welcome the opportunity to speak to the Senate Committee in relation to our submission.

International Legal Scholars against Genocide

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DETAILED SUBMISSION

in relation to Australia's Sanctions Regime

September 2024

SUBMISSION OVERVIEW

I. Australia's Sanctions Regime Must Be Reoriented towards the Key Objective of Promoting Fundamental Principles of International Law, in particular the Right of All Peoples to Self-Determination

II. Australia's Sanction Regime Must Recognise Additional Core Peremptory Norms of International Law within its Serious Violations or Serious Abuses of Human Rights Thematic Sanctions Regime

III. Australia's Sanctions Regime Must Interpret the Right to Life Consistent with International Jurisprudence, including to Encompass Fundamental Violations of the Genocide Convention

IV. Systemic Failure of Australia's Sanctions Regime to Sanction the State of Israel, including Military and Security Forces and its Political and Military Leadership, for the Creation, Enforcement and Continued Maintenance of its Illegal Occupation of Palestine and its conduct in Gaza, particularly since October 2023

   i. Failure of Australia's sanctions Regime to Sanction a Range of Israeli Nationals who Have Been Sanctioned Internationally, including by Australia's Allies

   ii. Failure of Australia's Sanction Regime to Address Unlawful Behaviour through Sanctioning Individuals Only

   iii. Failure of Australia's Sanctions Regime to Respond Consistently to UNSC Resolutions and ICJ Provisional Measures Orders, including to decisions made pursuant to the Genocide Convention

   iv. Failure of Australia's Sanctions Regime to Adequately Respond to Civil Society

V. **Recommendations**

Annexure I: An Open Letter from Legal Experts on the ICJ Advisory Opinion (2024)

I. Australia's Sanctions Regime Must Be Reoriented towards the Key Objective of Promoting Fundamental Principles of International Law, in particular the Right of All Peoples to Self-Determination

There is an urgent need to reorient Australia's sanctions regime towards the key objective of promoting fundamental principles of international law, in particular the right of all peoples to self-determination and to live free from apartheid, racial segregation, genocide and illegal foreign occupation. We note that both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) incorporate the right to self-determination in their Common Article 1 as a recognition of the fact that self-determination of peoples is the fundamental prerequisite for the enjoyment of all other rights.

The case of South Africa demonstrates that targeted international sanctions can be effective in bringing to an end state regimes of apartheid and racial segregation. Importantly, the call for targeted sanctions against the South African apartheid regime originated from within South Africa, with anti-apartheid leaders and campaigners proposing sanctions as early as the mid-1950s. Economic sanctions were subsequently promoted externally through the establishment in 1962 of the UN Special Committee on Apartheid in the aftermath of the 1960 Sharpeville massacre.[1]

Unlike many states in the Global South, Australia was slow to support and impose economic sanctions on South Africa under apartheid. While Australia supported the cultural boycott of South Africa during the 1970s, it was not until 1985 that Australia placed limited economic and trade sanctions on South Africa, including financial loans embargos and prohibiting exports to South Africa of petroleum, computer hardware equipment and other products known to be used by South African security forces.[2] The following year, Australia was part of a key group of 6 Commonwealth states (joined by Zambia, Canada, the Bahamas, India and Zimbabwe) to agree to impose financial sanctions on South Africa in August 1986. By 1989, then Australian Prime Minister Bob Hawke celebrated the effectiveness of economic and financial sanctions as an important foreign policy tool to oppose apartheid, stating that "sanctions do work… and should not be left to the judgment of the marketplace":

> governments can be effective in taking a lead through regulating trade activities, through drafting codes of conduct for business, and through examining other sanctions in driving home to white South Africa that while it practices the policies of apartheid, it will be at the margin of the international community.[3]

He has since stated that the collective "investment boycott [against South Africa in the late 1980s] was the dagger which finally immobilised apartheid."[4]

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[1] See UN Security Council Resolution 134 (1 April 1960) that condemns the South African "policy of apartheid" and names it as a potential endangerment of international peace and security; and UN General Assembly Resolution 1761 (5 November 1962) that calls on UN member states to break off diplomatic relations with South Africa, boycott South African goods, close their ports to South African vessels, among other measures. It also calls on the UN Security Council to "take appropriate measures", including imposing sanctions on South Africa, to ensure South Africa's compliance with international law.

[2] "Australia Imposes Sanctions on S. Africa for Stance on Reforms", LA Times (20 August 1985) https://www.latimes.com/archives/la-xpm-1985-08-20-mn-1977-story.html.

[3] Speech by the Prime Minister, "Launch of Apartheid and International Finance" (8 August 1989) https://pmtranscripts.pmc.gov.au/sites/default/files/original/00007701.pdf.

[4] Georgia Hitch, "Bob Hawke looks back at Australia's involvement in downfall of apartheid", ABC News (27 April 2016) https://www.abc.net.au/news/2016-04-27/bob-hawke-opens-apartheid-exhibition-in-canberra/7364762.

More recently, since 2005, a broad coalition of Palestinian civil society actors have called for the imposition of comprehensive sanctions against Israel on the basis of Israel's longstanding and manifest violations of fundamental principles of international law, including its failure to respect the Advisory Opinion of the International Court of Justice (ICJ) of July 2004.[5] As we outline below, two recent cases before the International Court of Justice concerning Israel's violations of core peremptory principles of international law (including genocide, apartheid and the right of Palestinians to self-determination) provide an authoritative legal basis for Australia to impose economic sanctions on Israel, including Israeli state authorities, entities and nationals involved in developing and maintaining Israeli's entrenched and lethal regime of illegal occupation in Palestine.

In order to reorient the core objectives of Australia's sanctions regime, we recommend amending section 3 of the *Autonomous Sanctions Act 2011* (Cth) that sets out the objectives of the Act.

RECOMMENDATION 1: We recommend amending Autonomous Sanctions Act 2011 (Cth) section 3 to include the following additional sub-paragraph in sub-section 3(3):

(g) serious violations of the right to self-determination;

(h) serious violations of the right of all peoples to live free from genocide, apartheid, racial segregation; and

(i) serious violations of the prohibition on the acquisition of territory by force, unlawful territorial annexation or illegal foreign occupation.

[5] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 ('*ICJ Wall Advisory Opinion*').

II. Australia's Sanctions Regime Must Recognise Additional Core Peremptory Norms of International Law within its Serious Violations or Serious Abuses of Human Rights Thematic Sanctions Regime

Peremptory norms of international law (also known as jus cogens obligations) apply to a limited number of fundamental obligations on all states from which no derogation is permitted, irrespective of whether a state has consented to be bound by these obligations via treaty or under customary international law. Australia's *Serious Violations or Serious Abuses of Human Rights thematic sanctions regime* recognises the following three peremptory norms on states:

- the prohibition on the arbitrary deprivation of life (the right to life);
- the prohibition on torture or cruel, inhuman or degrading treatment or punishment; and
- the prohibition on slavery, servitude, and forced or compulsory labour.

However, we submit that there are some serious omissions from the focus and scope of this thematic area, and that this thematic regime must be expanded to include additional peremptory norms that form the fundamental corpus of international human rights law. In particular, we submit that it needs to recognize **serious violations of the right to self-determination, and impose sanctions on states that manifestly violate the right of all peoples' to self-determination through practices of apartheid, genocide, acquiring territory by force, and illegal foreign occupation**.

Alongside being recognised as a fundamental principle of the United Nations,[6] the right to self-determination of all peoples is recognised in Common Article 1 of the ICCPR and ICESCR. There is now a significant and developed body of authority from the ICJ recognising the important status and scope of the right to self-determination in international law, including its status as an erga omnes obligation (that is, an obligation owed to all states) and that "all states have a legal interest in protecting that right".[7] Indeed, in its recent landmark *Advisory Opinion on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, the ICJ found that the right to self-determination has four core elements:

- the right to territorial integrity;
- the right to be 'protected against acts aimed at dispersing the population and undermining its integrity as a people';
- the right to exercise permanent sovereignty over natural resources; and
- the right of a people freely to determine its political status and pursue its economic, social and cultural development.[8]

Significantly, the Court also found that Israel had violated and continues to violate each of these four elements, thereby impeding the ability of the Palestinian people to exercise their right to self-determination. Additionally, the Court stressed the seriousness of Israel's violation of this right, in light of the "prolonged character of Israel's unlawful policies and

[6] UN Charter article 1(2).
[7] See especially *ICJ Wall Advisory Opinion*, para 155.
[8] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East* Jerusalem, Advisory Opinion, International Court of Justice (19 July 2024), paras 230-243 (hereafter "*ICJ Occupied Palestinian Territory Advisory Opinion*").

practices" spanning decades and undermining the ability of Palestinians to exercise their right to self-determination in the future too.[9]

The Court also reiterated the prohibition of acquisition of territory by force, including in the context of belligerent occupation. Court found that "to seek to acquire sovereignty over an occupied territory, as shown by the policies and practices adopted by Israel in East Jerusalem and the West Bank, is contrary to the prohibition of the use of force in international relations and its corollary principle of the non-acquisition of territory by force".[10] We note that the prohibition on the use of force is a foundational principle of the UN Charter,[11] and also a peremptory norm of international law.[12]

As a consequence, the Court advised that all States have obligations to:

- "to abstain from treaty relations with Israel in all cases in which it purports to act on behalf of the Occupied Palestinian Territory or a part thereof on matters concerning the Occupied Palestinian Territory or a part of its territory";
- "to abstain from entering into **economic or trade dealings with Israel** concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory";
- "to abstain, in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the Occupied Palestinian Territory"; and
- "to take **steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory**".[13]

The Court also found that all States, including Australia, are "under an obligation not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory". This means acting to "ensure that any impediment resulting from the illegal presence of Israel in the Occupied Palestinian Territory to the exercise of the Palestinian people of its right to self-determination is brought to an end".[14]

As we detail in Section IV below, given that Israel's regime of illegal occupation in Palestine is a long-standing and entrenched state project, and given the impossibility of ensuring that any dealings with Israel do not "assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory", Australia must apply targeted sanctions to the Israeli state and associated entities including the army and security forces, and to Israel's political and military leadership, as the key actors who have created, enforced and continue to maintain this regime of illegal occupation.[15] As noted by more than 100 legal experts, if Australia is to fulfil its legal obligations following the ICJ's Advisory Opinion, it must apply, at the very least, "a comprehensive arms and energy embargo on Israel that covers the export, import and transfer of weapons, including parts, components and other dual-use items as well as military jet fuel."[16] In addition, as the legal experts note, "given the Court's detailed exposition of the role of water management, city planning and infrastructure, and land policies in Israel's illegal practices of occupation, racial segregation and annexation, this

[9] Ibid.
[10] Ibid 179.
[11] See UN Charter article 2(4).
[12] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Rep 1986, p. 14 https://www.icj-cij.org/sites/default/files/case-related/70/070-19860627-JUD-01-00-EN.pdf.
[13] *ICJ Occupied Palestinian Territory Advisory Opinion*, para 278 (our emphasis).
[14] Ibid para 279.
[15] Ibid.
[16] "An Open Letter from Legal Experts on the ICJ Advisory Opinion", Overland (22 August 2024) https://overland.org.au/2024/08/an-open-letter-from-legal-experts-on-the-icj-advisory-opinion/.

obligation extends to all dealings between Australia and Israel in these sectors. Australia must urgently suspend all investment, trade and scientific, technical and technological cooperation in these areas and engage in a systematic evaluation of all economic ties with Israel".[17]

RECOMMENDATION 2: We recommend that Australia's Serious Violations or Serious Abuses of Human Rights thematic sanctions regime be expanded to explicitly include additional core violations of peremptory norms of international law.

This includes amending the Regulation 6A (Thematic designation of persons or entities or declaration of persons) of the Autonomous Sanctions Regulations 2011 (Cth) so that it includes violations of the right to self-determination; violations of the prohibition on genocide; violations of the prohibition on apartheid and racial segregation; and the prohibition on foreign illegal occupation.

This could be done through inserting the following new sub-paragraph into Regulation 6A(4)(a):

(i) Right to self-determination;

(ii) Right of all peoples to live free from genocide, apartheid and racial segregation;

(iii) Right of all peoples to live free from illegal foreign occupation, pursuant to the prohibition on the acquisition of territory by force and unlawful territorial annexation.

[17] Ibid.

III. Australia's Sanctions Regime Must Interpret the Right to Life Consistent with International Jurisprudence, including to Encompass Fundamental Violations of the Genocide Convention

Under the current *Serious Violations or Serious Abuses of Human Rights thematic focus*, the Foreign Minister can designate a state (such as the State of Israel) to be a designated entity (and thus subject to sanctions) on the basis that it "has engaged in, has been responsible for or has been complicit in an act that constitutes a serious violation or serious abuse of a person's:

(i) **right to life**; or
(ii) right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; or
(iii) right not to be held in slavery or servitude or right not to be required to perform forced or compulsory labour".[18]

Yet, to date, Australian authorities' interpretation and application of the right to life as a trigger for applying sanctions has been woefully inadequate. In particular, it has failed to adequately account for legal findings that acts of genocide, war crimes, crimes against humanity and violations of the right to self-determination in the context of illegal foreign occupation can encompass violations of the right to life. We demonstrate this in relation to Israel's conduct below.

State-orchestrated genocide constitutes a violation of the right to life. In *General Comment No 36* on the Right to Life, the UN Human Rights Committee recognised that acts of genocide constitute "widespread and systematic attacks on the right to life".[19] In its *Provisional Measures Order (South Africa v Israel)* of 26 January 2024, the ICJ found – by overwhelming majority – that Palestinians in Gaza were facing a plausible risk of genocide due to the Israeli military assault on Gaza that commenced after 7 October 2023, and ordered Israel to comply with a range of specific measures to protect Palestinians' right to be free from genocide from further "irreparable harm".[20] Since then, the ICJ has obliged Israel to take further measures in light of the "catastrophic humanitarian situation" in Gaza, including to cease its military offensive in Rafah and ensure the provision of humanitarian relief to address the 'adverse conditions of life' faced by Palestinians in Gaza.[21] Instead of complying with such obligations, Israel has instead intensified its military assault on all parts of Gaza, including continuing its blockade of Gaza and using starvation as a method of warfare.

Serious violations of the right to self-determination can also encompass serious violations and abuses of the right to life. In its *Occupied Palestinian Territory Advisory Opinion* of July 2024, the ICJ noted that Israel's settlement policy in the West Bank of the Occupied Palestinian Territories has given rise to extensive violence by settlers and security forces against Palestinians, and that this violence is inconsistent with Israel's obligation to respect the right to life of Palestinians (as protected persons in the occupied territory) under

[18] *Autonomous Sanctions Regulations 2011* (Cth) Regulation 6A(4)(a) (our emphasis).
[19] UN Human Rights Committee, *General Comment No 36: Right to Life*, CCPR/C/GC/36 (3 September 2019) para 70, https://documents.un.org/doc/undoc/gen/g19/261/15/pdf/g1926115.pdf.
[20] International Court of Justice, Provisional Measures Order, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, South Africa v Israel* (26 January 2024) https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf.
[21] International Court of Justice, Provisional Measures Order, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, South Africa v Israel* (24 May 2024) https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf.

international humanitarian law (as specified in article 46 of the Hague Regulations and article 27 of the Fourth Geneva Convention) and international human rights law (as guaranteed by articles 6 and 7 in the ICCPR).[22] In particular, the Court noted "Israel's systematic failure to prevent or to punish attacks by settlers against the life or bodily integrity of Palestinians, as well as Israel's excessive use of force against Palestinians" as violations of international law.[23]

Systemic acts of war crimes and crimes against humanity such as the crime of using starvation as a method of warfare can constitute violations of the right to life. In *General Comment No 36* on the Right to Life, the UN Human Rights Committee recognised that "deprivation of life involves intentional or otherwise foreseeable and preventable life terminating harm or injury, caused by an act or omission", and stressed that it "goes beyond injury to bodily or mental integrity or a threat thereto".[24] Numerous international NGOs and UN experts have now declared that Israel's conduct in Gaza entails an "intentional and targeted starvation campaign against the Palestinian people" and that Israel is using starvation as a method of warfare.[25] The experts have noted that Israel's use of starvation has caused the deaths of Palestinian civilians in Gaza, including young children.[26] The Chief Prosecutor of the International Criminal Court has sought arrest warrants for Israel's Defence Minister Yoav Gallant and Prime Minister Benjamin Netanyahu, alleging that "Israel has intentionally and systematically deprived the civilian population in all parts of Gaza of objects indispensable to human survival".[27] Khan's statement singled out the war crime of starvation of civilians as a method of warfare [contrary to article 8 (2)(b)(xxv) of the Rome Statute], and the crime against humanity of extermination and/or murder "including in the context of deaths caused by starvation" [contrary to articles 7(1)(a) and 7 (1)(b) of the statute].[28]

This international jurisprudence provides an authoritative legal basis for applying sanctions against Israel on the basis of serious violations and serious abuses of the right to life, under Australia's existing autonomous thematic sanctions regime. Yet, to date, Australia's sanctions regime has applied its interpretation of the right to life in an arbitrary, inconsistent and seemingly narrow manner. As we discuss below, the fact that Australia to date has only sanctioned 7 extremist individual Israeli settlers, rather than the Israel security forces maintaining the illegal occupation regime in the West Bank and genocide in Gaza, is a glaring failure to consistently interpret and apply objectives of this thematic sanctions regime.

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[22] *Occupied Palestinian Territory Advisory Opinion*, paras 148-9, 154.
[23] Ibid para 154.
[24] UN Human Rights Committee, *General Comment No 36: Right to Life*, CCPR/C/GC/36 (3 September 2019) https://documents.un.org/doc/undoc/gen/g19/261/15/pdf/g1926115.pdf.
[25] OHCHR, "UN Experts Declare Famine Has Spread throughout Gaza Strip" (9 July 2024) https://www.ohchr.org/en/press-releases/2024/07/un-experts-declare-famine-has-spread-throughout-gaza-strip. Among the earliest to argue that Israel was engaged in the war crime of starving civilians was the Euro-Med Human Rights Monitor: Euro-Med Human Rights Monitor, "Israel Is Waging an Extensive War of Starvation against Gaza's Civilian Population" (5 November 2023) https://euromedmonitor.org/en/article/5919/Israel-is-Waging-an-Extensive-War-of-Starvation-against-Gaza%E2%80%99s-Civilian-Population. Among the most recent was the EU's foreign policy head Josep Borrell Reuters, "EU's Borrell Says Israel Is Provoking Famine in Gaza" (19 March 2024) https://www.reuters.com/world/middle-east/eus-borrell-says-israel-is-provoking-famine-gaza-2024-03-18/.
[26] OHCHR, "UN Experts Declare Famine Has Spread throughout Gaza Strip" (9 July 2024) https://www.ohchr.org/en/press-releases/2024/07/un-experts-declare-famine-has-spread-throughout-gaza-strip.
[27] Karim Khan, Applications for Arrest Warrants in the Situation in the State of Palestine (20 May 2024).
[28] Karim Khan, "Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine | International Criminal Court" (20 May 2024) https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

RECOMMENDATION 3: We recommend that Australia's sanctions regime interpret the right to life in Regulation 6A(4)(a) consistent with international jurisprudence, including to encompass fundamental violations of the Genocide Convention. To promote such consistency, we recommend including a trigger mechanism that responds to and implements authoritative decisions of international courts, in particular the International Court of Justice, concerning serious violations and abuses of fundamental human rights.

In the case of Israel, this must include applying sanctions in line with ICJ fact-findings and legal findings to include sanctions on the Israeli state authorities, including Israel's military and security forces and Israel's political and military leadership, as key actors who have created, enforced and continue to maintain its entrenched regime of illegal occupation in Palestine.

IV. Systemic Failure of Australia's Sanctions Regime to Sanction the State of Israel, including Military and Security Forces and its Political and Military Leadership, for the Creation, Enforcement and Continued Maintenance of its Illegal Occupation of Palestine and its conduct in Gaza, particularly since October 2023

Australian political leaders have recognised the severity of Israel's ongoing violations of international law in recent months, but have as yet failed to adequately sanction Israel. For example, in a joint statement on 26 July 2024, the Prime Ministers of Australia, Canada and New Zealand called on Israel "to respond substantively to the ICJ's advisory opinion and ensure accountability for ongoing acts of violence against Palestinians by extremist settlers, reverse the record expansion of settlements in the West Bank which are illegal under international law, and work towards a two-state solution".[29] In a statement on the ICJ's Occupied Palestinian Territories Advisory Opinion, Foreign Minister Penny Wong reiterated Australia's position that "settlement activity is illegal under international law" and called for Israel to take "concrete steps" to "cease the expansion of settlements and to respond to extremist settler activity".[30] Instead, in August 2024, Israel announced the establishment of the first entirely new West Bank settlement since 2017, in the UNESCO World Heritage Site of Jabal al-Makhrur near Bethlehem. Israel's Finance Minister Bezalel Smotrich made clear his open disregard for the ICJ's Advisory Opinion and international law, stating "No anti-Israel or anti-Zionist decision will stop the development of the settlement".[31] Smotrich described this unlawful seizure of Palestinian land as part of his life-long attempt to "fight against" a future Palestinian state by "establishing facts of the ground".[32] This move came only a month after Israel's Ministry of Defence approved the construction of more than 5000 new housing units in the occupied West Bank, after the Israeli Cabinet fast-tracked the approval process.[33]

It is critical that Australia recognises its obligations following the International Court of Justice Occupied Palestinian Territories Advisory Opinion of July 2024 to:

- **"to abstain from treaty relations with Israel in all cases in which it purports to act on behalf of the Occupied Palestinian Territory or a part thereof on matters concerning the Occupied Palestinian Territory or a part of its territory";**
- **"to abstain from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory";**

[29] "Joint Statement by the Prime Ministers of Australia, Canada and New Zealand" (26 July 2024) https://www.pm.gov.au/media/joint-statement-prime-ministers-australia-canada-and-new-zealand-1.
[30] Senator Penny Wong [@SenatorWong], "Statement on the International Court of Justice Ruling on Israeli Settlements in Occupied Palestinian Territories", Twitter (20 July 2024) https://x.com/SenatorWong/status/1814480858134598104.
[31] "Israel Advances Building of New West Bank Settlement", Haaretz (14 August 2924(https://www.haaretz.com/israel-news/2024-08-14/ty-article/israel-advances-building-of-new-west-bank-settlement/00000191-50e4-d3e5-a9bd-d8e69bd60000.
[32] Jeremy Sharon, "Land Allocation Approved for First New West Bank Settlement to Be Built since 2017", The Times of Israel (15 August 2024) https://www.timesofisrael.com/land-allocation-approved-for-first-new-west-bank-settlement-to-be-built-since-2017/.
[33] Josef Federman, Tia Goldenberg and Kareem Chehayeb, "Israel Approves Plans for Nearly 5,300 New Homes in West Bank Settlements, Group Says', Los Angeles Times (4 July 2024) https://www.latimes.com/world-nation/story/2024-07-04/israel-approves-plans-for-nearly-5-300-new-homes-in-west-bank-settlements-group-says.

- **"to abstain, in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the Occupied Palestinian Territory"; and**
- **"to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory".[34]**

In the below, we set out key substantive and procedural failures of Australia's application and interpretation of its existing sanctions regime to date:

i. Failure of Australia's sanctions regime to sanction a range of Israeli nationals who have been sanctioned internationally, including by Australia's allies

Following the ICJ's Advisory Opinion, Australia imposed Magnitsky-style targeted sanctions and travel bans on seven individuals (Yinon Levi, Zvi Bar Yosef, Neria Ben Pazi, Elisha Yered, David Chai Chasdai, Einan Tanjil and Meir Ettinger) and imposed targeted sanctions on the entity of Hilltop Youth.[35] In announcing these sanctions, Foreign Minister Penny Wong noted that these individuals "have been involved in violent attacks on Palestinians" including "beatings, sexual assault and torture of Palestinians resulting in serious injury and in some cases, death". In the case of the entity, Wong noted that Hilltop Youth is "responsible for inciting and perpetrating violence against Palestinian communities". While this is an important step in taking measures to respond to Israeli nationals who use violence against Palestinians, it is unclear why Australia has not imposed sanctions on numerous other individuals who have been sanctioned internationally including by allied countries such as the United States, the European Union and Canada, on the same grounds. Australia has consistently lagged behind its allies in sanctioning Israeli nationals. On 1 February 2024, the United States introduced Executive Order 14115 Imposing Certain Sanctions on Persons Undermining Peace, Security, and Stability in the West Bank, and has since imposed four rounds of sanctions under the EO, sanctioning 11 individuals and 10 Israeli entities.[36]

Among those figures who have been sanctioned by the US and the EU but not by Australia are Ben Zion Gopstein (US, EU) and his organisation Lehava, which the US state department describes as "the largest violent extremist organization in Israel," and Isaschar Manne, (US, EU) and his "Manne Farm outpost" in the Hebron Hills.[37] Australia is also yet to have imposed sanctions on Reut Ben Haim and Shlomo Yehezkel Hai Sarid, leaders of the Tzav 9 organisation which has been organizing blockades of food trucks entering Gaza, and which is sanctioned by both the US and the EU. In announcing the sanctions on Tzav 9, the US Department of State noted that Tzav 9 is "a violent extremist Israeli group that has been blocking, harassing, and damaging convoys carrying lifesaving humanitarian assistance to Palestinian civilians in Gaza." The State Department noted that individuals from Tzav 9 have "repeatedly sought to thwart the delivery of humanitarian aid to Gaza, including by blockading roads, sometimes violently, along their route from Jordan to Gaza,

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[34] *ICJ Occupied Palestinian Territory Advisory Opinion,* para 278 (our emphasis).
[35] Penny Wong, Australian Minister for Foreign Affairs, "Human Rights Sanctions in Response to Israeli Settler Violence in the West Bank" (25 July 2024) https://pennywong.com.au/media-hub/media-statements/human-rights-sanctions-in-response-to-israeli-settler-violence-in-the-west-bank/.
[36] At the time of writing, the Israeli nationals sanctioned under Executive Order 14115 are Zvi Bar Yosef, Reut Ben Haim, Neriya Ben Pazi, David Chai Chasdai, Ben-Zion Gopstein, Yinon Levi, Isaschar Manne, Shlomo Yehezkel Hai Sarid, Moshe Sharvit, Einan Tanjil, Shalom Zicherman and the sanctioned entities are Hamohoch Farm, Lehava, Manne Farm Outpost, Meitarim Farm, Moshes Farm, Mount Hebron Fund, Neriya's Farm, Schlom Asiraich, Tzav 9, and Zvis Farm.
[37] United States Department of State, "Designation of Individuals and Entities Contributing to Violence and Instability in the West Bank" (11 July 2024) https://www.state.gov/designation-of-individuals-and-entities-contributing-to-violence-and-instability-in-the-west-bank/.

including in the West Bank", and have looted and damaged aid trucks, including by setting fire to two trucks near Hebron in the West Bank as they were on their way to deliver life-saving medications to Palestinians in Gaza.[38] While the Tzav 9 sanctions are an example of the United States moving to impose sanctions in response to the violation of international humanitarian law in Gaza, Australia has to date failed to sanction any Israeli over consistent violations of international humanitarian law, crimes against humanity and, plausibly, genocide in Gaza.

It is unclear why Australia, unlike its allies and despite the existence of widespread evidence, has chosen to sanction only seven individuals and one entity involved in violent attacks against Palestinians. These inconsistencies and time-lags raise questions about the rationale for Australia's imposition of targeted sanctions on only some of those violent settlers already sanctioned by allies. Clearly stating that Australia will sanction all individuals and entities who engage in or incite violent attacks against Palestinians will enhance the consistency of Australia's sanctions regime, and send a far stronger message that Australia is serious about sanctioning those who carry out violent attacks against Palestinians.

RECOMMENDATION 4: While we do not believe that consistency with allies per se should be an animating principle of Australia's sanctions regime, we recommend that, in order to fully understand the operations of Australia's sanctions regime to date, the Senate Committee must seriously enquire into the basis for these inconsistencies, using the case study of Israel, Israeli political and military leaders, Israel's military and security forces, and Israeli nationals.

ii. Failure of Australia's Sanction Regime to Address Behaviour by Sanctioning Individuals without Reference to their official supporters

Despite the sanctions imposed by Australia and its allies on a small number of violent Israeli settlers, violence against Palestinians in the West Bank has only intensified. On 15 August 2024, hundreds of armed settlers attacked the Palestinian village of Jit, burning homes, land and vehicles and shooting at Palestinians. One Palestinian was killed as he attempted to prevent settlers from burning down his home, and around a dozen were injured in the attack. Despite Israeli soldiers, border force and a security squad being present during the attack, none of the attackers were arrested.[39] The effectiveness of Magnitsky-style targeted sanctions in preventing violence against Palestinians in the West Bank will remain extremely limited without a recognition that Israel's creation, enforcement and maintenance of an entrenched and longstanding regime of illegal occupation in Palestine is a state project. In announcing sanctions on seven violent settlers, Foreign Affairs Minister Penny Wong called on Israel "to hold perpetrators of settler violence to account".[40]

[38] United States Department of State, "Sanctioning Israeli Group for Disrupting and Destroying Humanitarian Aid to Civilians" (14 June 2024) https://www.state.gov/sanctioning-israeli-group-for-disrupting-and-destroying-humanitarian-aid-to-civilians/.
[39] Josh Breiner, "Investigation Shows Settler Raid on Palestinian Village Took Place as IDF Forces Stood By", Haaretz (17 August 2024) https://www.haaretz.com/israel-news/2024-08-17/ty-article/.premium/investigation-shows-settler-raid-on-palestinian-village-took-place-in-front-of-idf-forces/00000191-5ce6-d7bf-a5b9-fcf66a940000.
[40] Penny Wong, Minister for Foreign Affairs, "Human Rights Sanctions in response to Israeli settler violence in the West Bank" (25 July 2024) https://www.foreignminister.gov.au/minister/penny-wong/media-release/human-rights-sanctions-response-israeli-settler-violence-west-bank.

Instead, settler violence against Palestinians has been repeatedly encouraged by Israeli Cabinet Ministers, who have incited against Palestinian civilians and created a regime of permissiveness and impunity. On the 10 October 2023, Israel's National Security Minister Itamar Ben Gvir announced that his Ministry would distribute 10,000 assault rifles to civilians, including West Bank settlers.[41] In August 2023, Ben-Gvir praised a settler who fatally shot a Palestinian teenager in the town of Burqa, in the occupied West Bank.[42] In March 2023, following a violent settler attack against the village of Huwara, Israel's Israel's Finance Minister Smotrich called for Israel to "wipe out" the village of 7000 people.[43] Smotrich has also made clear that he will work to shield sanctioned settlers and to retaliate against the Palestinian Authority for any sanctions imposed. Most significantly, Smotrich has threatened to freeze the transfer of tax revenues to the Palestinian Authority and cut off correspondent banking services to the Palestinian Financial system in retaliation for sanctions on Israeli settlers.[44]

The bulk of violence against Palestinian civilians in the West Bank is carried out not by individual settlers but by Israel's military. Prior to 7 October 2023, Save the Children announced that 2023 had already become the deadliest year on record for children in the West Bank, with 38 children (more than one per week) killed by Israeli forces by September.[45] Of the 549 Palestinians killed in the West Bank, including East Jerusalem, between October 2023 and August 2024, the vast majority (577) were killed by Israeli forces.[46] During this period, the "number of Palestinian children killed by live ammunition fired by Israeli forces has almost tripled since October 7th, compared with the previous 10 months, rising from 39 to 115". In the same period, 1,411 Palestinian children were injured by live ammunition fired by Israeli forces.[47] Australia's sanctions will not be effective in preventing violence against Palestinians in the West Bank unless they also target those Israeli political and military leaders and organisations who are inciting, arming, and shielding those who carry out these attacks.

RECOMMENDATION 5: In order for Australia's sanctions regime to seriously impact individual behaviours, the Senate Committee should enquire into the extent to which individuals who commit serious violations and abuses of human rights are granted impunity, or even supported by, by their own states and political leaders, with a particular focus on Israel and Israeli nationals.

[41] Jeremy Sharon, "Ben Gvir Says 10,000 Assault Rifles Purchased for Civilian Security Teams", The Times of Israel (10 October 2023) https://www.timesofisrael.com/ben-gvir-says-10000-assault-rifles-purchased-for-civilian-security-teams/.
[42] Etan Nechin, "Israeli Civilians Are Taking Up Arms," Foreign Policy (22 March 2024) https://foreignpolicy.com/2024/03/22/israel-gun-laws-ben-gvir-hamas-war-gaza/.
[43] Michael Bachner, "Israel Should 'Wipe Out' Palestinian Town of Huwara, Says Senior Minister Smotrich", The Times of Israel" (1 March 2024) https://www.timesofisrael.com/israel-should-wipe-out-palestinian-town-of-huwara-says-senior-minister-smotrich/amp/.
[44] Ariel Kahana, "Revealed: Smotrich's Plan to Hurt PA Economy Following US Sanctions", Israel Hayom (15 March 2024) https://www.israelhayom.com/2024/03/15/revealed-smotrichs-plan-to-hurt-pa-economy-in-retaliation-to-us-sanctions/.
[45] Save the Children Australia, "2023 Marks Deadliest Year on Record for Children in the Occupied West Bank" (19 September 2023) https://www.savethechildren.org.au/media/media-releases/2023-marks-deadliest-year-on-record-for-children-i.
[46] "Humanitarians Report Rise in Children Killed and Injured in the West Bank", UN News (14 August 2024) https://news.un.org/en/story/2024/08/1153206.
[47] Ibid.

iii. Failure of Australia's Sanctions Regime to Respond Consistently to UNSC Resolutions and ICJ Provisional Measures Orders, including to decisions made pursuant to the Genocide Convention

Since 2019, the International Court of Justice has issued provisional measures orders in relation to three cases relating to violations of the Genocide Convention. These three cases concern violations of the Genocide Convention on the part of Myanmar, Russia and Israel. Given the peremptory nature of the prohibition on genocide and the prohibition on the use of force under international law, we submit that, in all cases, third states like Australia should have domestic mechanisms for giving legal effect to such provisional measures orders, including though the imposition of economic sanctions on such states in order to induce their compliance with the Court's provisional measures orders, orders that are binding as a matter of international law.

This is particularly important in relation to ICJ provisional measures orders issued pursuant to the Genocide Convention given that state signatories to the Genocide Convention, such as Australia, have an obligation to prevent genocide, and all states have an interest in ensuring that no state party violates their duty to not commit genocide and their duty to not incite genocide under the Convention. This duty to prevent genocide means that Australia is under a primary legal obligation to "make … use of … means [available to it within its "capacity"] as the circumstances permit", where such means are "likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent" to commit genocide.[48] The ICJ has stressed that states are obliged to act to prevent genocide "at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed", rather than only once the acts of genocide occur or after there has been a final court decision that the Genocide Convention has been violated.

The issuing of ICJ provisional measures orders puts Australia on notice that it must act pursuant to its duty to prevent genocide. Specifically, in the two cases concerning violations on the part of Myanmar and Israel, the ICJ recognised that the Rohingya and Palestinian people faced a real and imminent risk of irreparable harm to their right to not to be subjected to genocide and other acts that violate article 3 of the Genocide Convention.[49] Yet, Australia has not responded consistently to the Orders in each case, despite ongoing violations on the part of both Israel and Myanmar.

Israel has also violated a series of provisional measures ordered by the International Court of Justice. Israel remains in violation of provisional measures orders of 26 January 2024 and 28 March 2024. On May 24th, the court ordered that these measures be "immediately and effectively implemented" and also ordered Israel to "Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part"; and

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[48] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, paras 428-32.
[49] ICJ, Provisional Measures Order, *The Gambia v Myanmar* (23 January 2020) https://www.icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-00-EN.pdf; ICJ, Provisional Measures Order, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, South Africa v Israel* (26 January 2024) https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf; ICJ, Provisional Measures Order, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, South Africa v Israel* (28 March 2024) https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf; ICJ, Provisional Measures Order, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, South Africa v Israel* (24 May 2024) https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf.

"Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance". Since that time, Israel has continued its offensive in Rafah, including by bombing areas it had previously declared safe zones, and has seized and closed the Rafah crossing which was the key entry point for humanitarian aid and the sole crossing that enabled evacuations of Palestinian civilians from Gaza.

As the July joint statement of the Prime Ministers of Australia, Canada and New Zealand noted: "The situation in Gaza is catastrophic. The human suffering is unacceptable and cannot continue." Noting that Palestinian civilians cannot be made to pay the price for defeating Hamas, the three Prime Ministers made clear that "Israel must listen to the concerns of the international community". Yet Israel's political leaders have consistently made it equally clear that they have no intention of ending the suffering of Gaza's civilians or of listening to the mounting demands for a ceasefire coming from the international community. Israel's Prime Minister Benjamin Netanyahu has consistently stated that Israel will continue its assault on Gaza until all of its war aims have been achieved. In May 2023, Netanyahu stated that a permanent ceasefire without "the destruction of Hamas's military and governing capabilities, the freeing of all hostages and ensuring that Gaza no longer poses a threat to Israel" is "a non-starter".[50] Following the International Court of Justice hearing in January, Netanyahu announced "No one will stop us, not The Hague, not the axis of evil and not anyone else".[51] Israel's government has also refused to listen even to the United Nations Security Council. In March 2024, the UNSC adopted resolution 2728, which demanded "an immediate ceasefire for the month of Ramadan respected by all parties leading to a lasting sustainable ceasefire". In June 2024, the UNSC adopted Resolution 2735, which welcomed a new hostage deal proposal, supposedly supported by Israel, called upon Hamas to accept it and "urged both parties to fully implement its terms without delay and without condition". However, Prime Minister Netanyahu soon announced that he would accept only a "partial deal" and was "committed to continuing the war after a pause, in order to complete the goal of eliminating Hamas".[52] It has become abundantly clear that Israel is unwilling to listen to the concerns of its allies, or to authoritative international bodies such as the UNSC and the ICJ.

Despite the ICJ's provisional measures orders, Israel has continued to restrict the entry of humanitarian aid into Gaza, including by closing the Rafah crossing, and has continued to destroy objects essential to the survival of the civilian population. As numerous UN experts and human rights organisations have now affirmed, Israel's conduct in Gaza amounts to the war crime of using starvation as a method of warfare. The use of starvation as a method of war is prohibited under international law. (API, Article 54(I). "It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive." (API, Article 54(II)). Israel has blockaded Gaza, obstructed aid supplies, destroyed agricultural lands, bakeries and water facilities, and has

[50] Bethan McKernan, "Benjamin Netanyahu Insists on Hamas 'Destruction' as Part of Plan to End Gaza War", The Guardian (1 June 2024) https://www.theguardian.com/world/article/2024/jun/01/no-end-to-gaza-war-until-destruction-of-hamas-says-netanyahu-israel.
[51] Tom Bennett, "'No One Will Stop Us' Says Netanyahu, as Israel-Hamas War Reaches 100-Day Milestone", The Independent (15 January 2024) https://www.independent.co.uk/news/world/middle-east/netanyahu-israel-hamas-100-days-b2478410.html.
[52] "Netanyahu Says He Will Only Accept a Partial Cease-Fire Deal That Would Not End the War," Associated Press News (24 June 2024) https://apnews.com/article/israel-hamas-mideast-latest-06-24-2024-02725bcefa1d1498bbb836b9a5d4a210.

conducted numerous military attacks on aid convoys, humanitarian facilities, and the offices of international NGOs.[53] Despite Israel's clear violation of the ICJ's Provisional Measures orders, the Australian Government has failed to impose any sanctions on Israeli individuals or entities over their conduct in Gaza.

In contrast to Australia's failure to sanction Israel, Australia has been quick to take action in relation to Myanmar, at times independent of its allies. Following a UN Independent Fact-Finding Mission to Myanmar that established a "consistent patterns of serious human rights violations and abuses [by the Myanmar military on Rohingya communities in Rakhine], of which many amount to grave crimes under international law", Australia acted swiftly and decisively to impose autonomous sanctions on Myanmar in October 2018.[54] Following the ICJ Provisional Measures Order in January 2020 that found that the Rohingya people faced a "real and imminent risk" of irreparable damage to their rights under the Genocide Convention,[55] Australia deemed the ICJ case an "important step towards accountability and justice" in Myanmar and called on Myanmar to "engage constructively" with the ICJ process.[56] Australia has also assumed a global leadership role in pushing for sanctions on Myanmar, included co-sponsoring a UN General Assembly resolution on 18 June 2021 that called on UN member states to prevent the flow of arms to Myanmar;[57] and the Australian government also noted in December 2021 that it "takes appropriate opportunities to advocate against supply of arms by other countries to Myanmar".[58] In February 2023 and February 2024, Australia imposed additional targeted economic sanctions on Myanmar on the basis of the regime's human rights violations and in order to prevent the regime from "continu[ing] to commit atrocities against its own people".[59]

The failure to apply similar measures to Israel in the face of its invasion of Gaza and what the ICJ has described as a plausible genocide creates the impression of double standards, weakening the authority and the effectiveness of Australia's sanctions regime. The effectiveness of Australia's sanctions regime will be jeopardised if it is perceived to be

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[53] Oxfam, "Inflicting Unprecedented Suffering and Destruction: Seven Ways the Government of Israel Is Deliberately Blocking and/or Undermining the International Humanitarian Response in the Gaza Strip" (15 March 2024) https://policy-practice.oxfam.org/resources/inflicting-unprecedented-suffering-and-destruction-seven-ways-the-government-of-621591/. Euro-Med Human Rights Monitor, "Israel Is Waging an Extensive War of Starvation against Gaza's Civilian Population" (5 November 2023) https://euromedmonitor.org/en/article/5919/Israel-is-Waging-an-Extensive-War-of-Starvation-against-Gaza%E2%80%99s-Civilian-Population; Alexander De Waal, "Famine Expert Alex de Waal on Israel's Starvation of Gaza", The New Humanitarian (18 January 2024) https://www.thenewhumanitarian.org/interview/2024/01/18/israel-icj-gaza-famine-starvation-de-waal; Refugees International, "Siege and Starvation: How Israel Obstructs Aid to Gaza" (7 March 2024) https://www.refugeesinternational.org/reports-briefs/siege-and-starvation-how-israel-obstructs-aid-to-gaza/.

[54] Joint Ministerial Statement Marking the 5th Anniversary of the Myanmar Military's Attack against Rohingya and Ensuing Crisis, EU, Australia, Canada, New Zealand, Norway, UK and USA (25 August 2022) https://www.dfat.gov.au/news/media-release/joint-ministerial-statement-marking-5th-anniversary-myanmar-militarys-attack-against-rohingya-and-ensuing-crisis.

[55] International Court of Justice Provisional Measures Order, *The Gambia v Myanmar* (23 January 2020) https://www.icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.

[56] International Court of Justice Provisional Measures Order, *The Gambia v Myanmar* (23 January 2020) https://www.icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.

[57] UNGA Resolution A/RES/75/287 (18 June 2021) https://documents.un.org/doc/undoc/gen/n21/164/66/pdf/n2116466.pdf.

[58] Australian Government, "Australian Government response to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Foreign Affairs and Aid Sub-committee report: Australia's response to the coup in Myanmar" (December 2021) https://t.co/ut3d6VAYhV. Some experts have rightly noted that Australia could still do more to fulfil its obligations under the Genocide Convention: Felicity Gerry, "Australia must do more to ensure Myanmar is preventing genocide against the Rohingya", The Conversation (29 October 2020) https://theconversation.com/australia-must-do-more-to-ensure-myanmar-is-preventing-genocide-against-the-rohingya-147451.

[59] DFAT, "Myanmar Sanctions Regime", https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/myanmar-sanctions-regime.

inconsistent and arbitrary and to apply different standards to allies than to adversaries. The failure to sanction Israel in the face of its clear violations of international law, ICJ orders and resolutions of the UNSC will generate significant skepticism in the Australian community and internationally about the consistency of Australia's sanctions regime.

RECOMMENDATION 6: We recommend that Australia should consistently use sanctions to implement International Court of Justice Provisional Orders that are issued pursuant to cases concerning violations of the Genocide Convention. We also recommend that, in order to fully understand the operations of Australia's sanctions regime to date, the Senate Committee must seriously enquire into the basis for the existing inconsistencies in Australia's sanctions listings concerning Australia's responses to UNSC Resolutions and ICJ Provisional Orders relating to Myanmar and Israel.

iv. Failure of Australia's Sanctions Regime to Adequately Respond to Civil Society

We note that, internationally and within Australia, there has been a long-standing call from civil society organisations and social movements to apply and increase sanctions on Israeli state entities, Israel's political and military leaders, and certain Israeli nationals such as Israeli nationals who are suspected of committing war crimes during their time serving in the IDF.

Internationally, prior to the findings of the International Court of Justice in June 2024 (discussed above), there is a growing consensus in the international human rights community that Israel's regime of control over Palestinians meets the definition of apartheid under international law.[60] As the prohibition on apartheid is also a peremptory norm of international law, UN experts have also stressed that international economic sanctions and arms embargoes on Israel are an appropriate response to induce Israel compliance with international law. In Australia, civil society petitions have been presented to the Australian House of Representatives to call on the Australian government to impose sanctions on Israel for its "blockade of food, fuel, electricity and water" to Palestinians in Gaza.[61] Other civil society organisations to have called for comprehensive sanctions on Israel in light of Israel's unlawful occupation in Palestine, Israel's systematic regime of arbitrary arrest and torture of Palestinian prisoners, and Israel's manifest violation of the right of the Palestinian people to self-determination.

[60] See UN Human Rights Experts, "Israel's 55-year occupation of Palestinian Territory Os Apartheid" (22 March 2022) https://www.ohchr.org/en/press-releases/2022/03/israels-55-year-occupation-palestinian-territory-apartheid-un-human-rights; Al-Haq, *Israeli Apartheid: Tool of Zionist Settler Colonialism* (2022) https://www.alhaq.org/advocacy/20931.html; Amnesty International, *Israel's Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity* (2022) https://www.amnesty.org.au/israels-apartheid-against-palestinians-a-look-into-decades-of-oppression-report/; B'Tselem, *This is Apartheid: The Israeli regime promotes and perpetuates Jewish supremacy between the Mediterranean Sea and the Jordan River* (2022) https://m.btselem.org/press_releases/20210112_this_is_apartheid; Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crime of Apartheid and Persecution* (2021) https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution.

[61] See eg "Petition EN6141 - Impose Trade and Arms Sanctions on Israel", https://www.aph.gov.au/e-petitions/petition/EN6141 (attracting over 5,000 signatures as of June 2024).

Prominent such calls to include from peak Australian civil society organisations and legal experts such as:

- Australia Palestine Advocacy Network (APAN)[62]
- Australian Centre for International Justice (ACIJ)[63]
- Australian Muslim Advocacy Network (AMAN)[64]
- Jewish Council of Australia;[65]
- Over 100+ International Lawyers and Legal Experts.[66]

While the Department of Foreign Affairs and Trade (DFAT) does have a process for civil society organisations to make submissions concerning information to support new sanctions listings, this process is not subject to any transparency requirements nor independent review mechanisms. We understand that civil society submissions regarding the need for additional Australian sanctions on Israeli state entities and certain Israeli nationals have been submitted directly to the DFAT via this existing civil society engagement process.[67] However, these submissions to date have not resulted in the necessary imposition of comprehensive Australian sanctions against Israel, Israeli entities and Israeli nationals, as is required of Australia in order for Australia to comply with its international legal obligations, particularly following the ICJ's clarification of the obligations on all states in its 2024 Advisory Opinion.

We note the recommendation made by the Australian Centre for International Justice in March 2023 that Australia's autonomous sanctions regime "should be amended to allow for the establishment of a committee independent of the executive to provide monitoring, recommendations, guidance and expertise to the Minister for Foreign Affairs in sanctions decisions. … An independent committee could enhance the transparency, accountability and consistency in Australia's consideration and imposition of targeted human rights sanctions".[68]

We submit that, in order for such a committee to be effective, it must as a minimum have the statutory authority, legal mandate and functional capacity:

- to give due consideration to submissions for new sanctions listings made to DFAT by civil society organisations and individuals, particularly Australia-based diaspora victim/survivor communities who have experienced or are experiencing mass atrocities and serious violations or abuses of their human rights;
- to review civil society submissions and report to the Minister within stipulated timeframes; and

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[62] For APAN's most recent reiteration of this call, see APAN, "Australia Must Sanction Israel Now for Genocide, Occupation, Apartheid and Torture" (9 August 2024) https://apan.org.au/media_release/australia-must-sanction-israel-now-for-genocide-occupation-apartheid-and-torture-apan/.
[63] See eg ACIJ, "Australia's Obligation to Actively Oppose Israel's Annexation of the West Bank" (2020), https://acij.org.au/wp-content/uploads/2020/06/ACIJ-Policy-Brief-June-2020.pdf.
[64] AMAN, "Submission to the Senate Inquiry into the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024" (July 2024) https://www.aph.gov.au/DocumentStore.ashx?id=47dc2be0-c2dd-46c3-bf0b-f6e6a4d4d75a&subId=759839.
[65] Jewish Council of Australia, "Australia Must Cut All Military Ties and Place Sanctions on Israel' (April 2024) https://www.jewishcouncil.com.au/media/australia-must-cut-military-ties-sanctions-israel.
[66] "An Open Letter from Legal Experts on the ICJ Advisory Opinion", Overland (22 August 2024) https://overland.org.au/2024/08/an-open-letter-from-legal-experts-on-the-icj-advisory-opinion/.
[67] See DFAT, "Civil Society Engagement", https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/information-note-autonomous-human-rights-and-corruption-sanctions.
[68] ACIJ, "Submission to the DFAT Review of Australia's Autonomous Sanctions Framework" (March 2023) para 13, https://www.dfat.gov.au/sites/default/files/review-australia-autonomous-sanctions-framework-submission-australian-centre-international-justice.pdf.

- to assess civil society submissions in light of Australia's core international legal obligations including peremptory obligations.

RECOMMENDATION 7: We recommend the Senate Committee investigate the failure of DFAT to give due consideration to civil society calls and submissions for new sanctions listings to date, and consider whether the establishment of a robust independent committee within DFAT would enhance the transparency and responsiveness to civil society of current sanctions listing processes.

V. Recommendations

Our submission makes the following recommendations:

1. We recommend amending *Autonomous Sanctions Act 2011* (Cth) section 3 to include the following additional sub-paragraph in sub-section 3(3):

g. serious violations of the right to self-determination;
h. serious violations of the right of all peoples to live free from genocide, apartheid, racial segregation or illegal foreign occupation; and
i. serious violations of the prohibition on the acquisition of territory by force, unlawful territorial annexation or illegal foreign occupation.

2. We recommend that Australia's Serious Violations or Serious Abuses of Human Rights thematic sanctions regime be expanded to explicitly include additional core violations of peremptory norms of international law. This includes amending the Regulation 6A (Thematic designation of persons or entities or declaration of persons) of the Autonomous Sanctions Regulations 2011 (Cth) so that it includes violations of the right to self-determination; violations of the prohibition on genocide; violations of the prohibition on apartheid and racial segregation; and the prohibition on foreign illegal occupation.

This could be done through inserting the following new sub-paragraph into Regulation 6A(4)(a):

i. Right to self-determination;
ii. Right of all peoples to live free from genocide, apartheid and racial segregation;
iii. Right of all peoples to live free from illegal foreign occupation, pursuant to the prohibition on the acquisition of territory by force and unlawful territorial annexation.

3. We recommend that Australia's sanctions regime interpret the right to life in Regulation 6A(4)(a) consistent with international jurisprudence, including to encompass fundamental violations of the Genocide Convention. To promote such consistency, we recommend including a trigger mechanism that responds to and implements authoritative decisions of international courts, in particular the International Court of Justice, concerning serious violations and abuses of fundamental human rights.

In the case of Israel, this must include applying sanctions in line with ICJ fact-findings and legal findings to include sanctions on the Israeli state authorities, including Israel's military and security forces and Israel's political and military leadership, as key actors who have created, enforced and continue to maintain its entrenched regime of illegal occupation in Palestine.

4. While we do not believe that consistency with allies per se should be an animating principle of Australia's sanctions regime, we recommend that, in order to fully understand the operations of Australia's sanctions regime to date, the Committee must seriously enquire into the basis for these inconsistencies, using the case study of Israel, Israeli political and military leaders, Israel's military and security forces, and Israeli nationals.

5. In order for Australia's sanctions regime to seriously impact individual behaviours, the Senate Committee should enquire into the extent to which individuals who commit serious violations and abuses of human rights are granted impunity, or even supported by, by their own states and political leaders, with a particular focus on Israel and Israeli nationals.

6. We recommend that Australia should consistently use sanctions to implement International Court of Justice Provisional Orders that are issued pursuant to cases concerning violations of the Genocide Convention. We also recommend that, in order to fully understand the operations of Australia's sanctions regime to date, the Senate Committee must seriously enquire into the basis for the existing inconsistencies in Australia's sanctions listings concerning Australia's responses to UNSC Resolutions and ICJ Provisional Orders relating to Myanmar and Israel.

7. We recommend the Senate Committee investigate the failure of DFAT to give due consideration to civil society calls and submissions for new sanctions listings to date, and consider whether the establishment of a robust independent committee within DFAT would enhance the transparency and responsiveness to civil society of current sanctions listing processes.

Annexure I: An Open Letter from Legal Experts on the ICJ Advisory Opinion (22 August 2024)

The following Open Letter has been signed by over 170 Australian-based lawyers and legal scholars.

FULL LIST OF SIGNATORIES IS AVAILABLE HERE:
https://overland.org.au/2024/08/an-open-letter-from-legal-experts-on-the-icj-advisory-opinion/

To the Prime Minister, Minister for Foreign Affairs, Minister for Defence and Attorney General

As Australian and/or Australian-based lawyers and legal scholars, we call on the Australian government to act without delay to ensure Australia's compliance with its international obligations, as articulated by the International Court of Justice (ICJ) Advisory Opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*.

The ICJ Advisory Opinion of 19 July 2024 provides an authoritative legal statement of the illegality of the policies and practices of Israel in the Occupied Palestinian Territory and found multiple grave breaches of international law. Specifically, the ICJ found with overwhelming majorities that:

- the State of Israel's prolonged occupation of the Occupied Palestinian Territory, which includes Gaza, the West Bank and East Jerusalem, is unlawful and, therefore, Israel is under an obligation to bring this unlawful occupation to an end as rapidly as possible;
- Israel's prolonged occupation violates multiple facets of the right to self-determination of Palestinian people, including permanent sovereignty over their natural resources. The Court confirmed that this right is *erga omnes* and *jus cogens* in nature. The *erga omnes* and *jus cogens* nature of this right mean that this is not a bilateral dispute, but rather a multilateral issue with legal ramifications for all states, including Australia.
- The State of Israel engages in systematic violations of Art. 3 of the *Convention on the Elimination of all Forms of Racial Discrimination*, which prohibits racial segregation and apartheid.
- The State of Israel engages in a systematic practice of unlawful settlement in parts of the Occupied Palestinian Territory. Importantly, the Court found that both the maintenance of settlements and ongoing settler violence against Palestinians are not isolated acts carried out by 'rogue' individuals or groups, but part of a broader policy of unlawful annexation.

We also note that in her separate opinion the recently re-elected Judge Hilary Charlesworth emphasised the specific harms inflicted by Israel's policies on Palestinian women and girls. Her emphasis on intersectional harm is a reminder of the additional legal obligations that all states, including Australia, have under international human rights law toward different Palestinian groups including women and girls, but also Palestinians living with disabilities, Afro-Palestinians and Palestinian children.

These historic findings by the ICJ do not create new obligations for states. These obligations have existed for decades, and – regrettably – most states, including Australia, have been in violation of them. Rather, the Advisory Opinion is a formal, authoritative reminder of these obligations. In particular, we note that the ICJ held that all states are under a number of concrete and far-reaching obligations, including the obligation:

- not to recognise any changes in the physical character or demographic composition, institutional structure or status of the territory occupied by Israel on 5 June 1967, including East Jerusalem, except as agreed by the parties through negotiations and to distinguish in their dealings with Israel between the territory of the State of Israel and the Palestinian territory occupied since 1967;
- to abstain from treaty relations with Israel in all cases in which it purports to act on behalf of the Occupied Palestinian Territory or a part thereof on matters concerning the Occupied Palestinian Territory or a part of its territory;
- to abstain, in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the Occupied Palestinian Territory;
- to take steps to prevent economic, trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory;
- not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory;
- while respecting the Charter of the United Nations and international law, to ensure that any impediment resulting from the illegal presence of Israel in the Occupied Palestinian Territory to the exercise of the Palestinian people of its right to self-determination is brought to an end; and
- to contribute to multilateral efforts at the UN to ensure the General Assembly and Security Council consider and take appropriate further action to realise the obligations outlined in the Advisory Opinion to put an end to the illegal presence of Israel in the Occupied Palestinian Territory.

We consider the legal obligations pertaining to trade and investment to be crucial from a legal and practical point of view. Any good-faith interpretation of this obligation involves, at the very least, a comprehensive arms and energy embargo on Israel that covers the export, import and transfer of weapons, including parts, components and other dual-use items as well as military jet fuel. In addition, given the Court's detailed exposition of the role of water management, city planning and infrastructure, and land policies in Israel's illegal practices of occupation, racial segregation and annexation, this obligation extends to all dealings between Australia and Israel in these sectors. Australia must urgently suspend all investment, trade and scientific, technical and technological cooperation in these areas and engage in a systematic evaluation of all economic ties with Israel.

We consider Australia's government's imposition of sanctions and travel bans against seven individuals and one entity for involvement in settler violence against Palestinians in the West Bank to be insufficient. This is because the ICJ found that settler violence in the West Bank is not the aberrational doing of individual extremist settlers, but part of Israel's broader policy of unlawful occupation, annexation and apartheid. In light of this, the Australian government must impose targeted sanctions, including asset freezes against Israeli individuals and

entities involved in Israel's illegal occupation, settlement enterprise, annexation, persecution, racial segregation and/or apartheid policies.

Australia has been vocal about its ongoing commitment to international law and institutions. We call for a public statement by the Minister of Foreign Affairs welcoming the Advisory Opinion and confirming that Australia will comply with its obligations promptly and fully, and demand Australia take concrete steps ensure compliance with its international obligation.