Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Per email: legcon.sen@aph.gov.au

25 July 2024

Dear Committee Secretary

RE: Submission in relation to the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024

We write this submission in our capacity as law academics with expertise in public international law, including international criminal law (Dr Souheir Edelbi) and international human rights law (Dr Sara Dehm).

We write in strong support of the Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024 (the Bill). The Bill will ensure Australian federal legislation concerning the prosecution of serious crimes of international law (namely, the crime of genocide, crimes against humanity and war crimes) is consistent with Australia's obligations under international law to end impunity for acts of mass atrocities.

As a state party to the Rome Statute of the International Criminal Court (hereafter, **Rome Statute**), Australia has a clear obligation under international law to prosecute and punish perpetrators of genocide, crimes against humanity and war crimes under Australian law.

Yet, Australia has an abysmal record of prosecutions for such serious atrocity crimes. Of concern is that, to date, there have been no successful prosecutions for the crime of genocide in Australia, despite sustained calls from victim/survivor communities to do so, and despite there being credible evidence warranting further investigations and even prosecution of people in Australia. This includes credible evidence of atrocity crimes committed by Australian citizens, such as Australian citizens who have served in the Israel Defense Forces (IDF) or who have implemented genocidal policies against First Nations communities in Australia, as well as atrocities committed by non-citizen temporary visitors to Australia (such as visiting former government officials from Myanmar and Sri Lanka).

As we detail below, Australia's glaring failure to prosecute individuals reasonably suspected of committing genocide is linked to the procedural requirement in section 268.121 of the Criminal Code (Cth) that any prosecution for the crime of genocide requires the written consent of the Commonwealth Attorney-General in order to commence or proceed before Australian courts. This requirement is commonly referred to as the Attorney-General's fiat.

Our submission details the need for Australia to take a victim/survivor-centred approach to accountability for mass atrocities in line with its international obligations. This means that the justice claims of victim/survivor communities should be at the forefront of any accountability for

mass atrocity mechanisms, and that victim/survivor communities must be empowered in relation to decisions concerning whether to prosecute a suspected perpetrator of mass atrocities. Centring the justice claims of victim/survivor communities is essential as it facilitates their right to a remedy for serious violations of their human rights. Australia's current Criminal Code does not take a victim/survivor centred approach. Instead, it has the potential to disempower victim/survivor communities by placing the ultimate decision with the Attorney-General in relation to whether prosecutions for genocide, crimes against humanity and war crimes can commence or continue before Australian courts.

Under the current Criminal Code, there is no formal requirement for the Attorney-General to take the justice claims of victim/survivor communities, nor their right to a remedy, into consideration when exercising the power bestowed on the Attorney-General under section 268.121 of the Criminal Code (Cth). Although the Attorney-General may consider international law, practice and comity, prosecution and other matters of public interest, the Attorney-General exercises a broad discretion in deciding whether to grant consent for the prosecution of international crimes. **To uphold principles of impartiality and independence in accordance with the rule of law, and to ensure racial justice** by means of an equitable and non-discriminatory application of universal jurisdiction free from any racial, ethnic, political or nationality biases or preferences, this barrier to prosecuting international crimes in Australia should be removed.

We therefore welcome the Bill, as it presents an important opportunity to rectify this deficit in Australian legislation implementing Australia's obligations under the Rome Statute.

In sum, our recommendations are that the Bill be adopted in full, and specifically:

I. That Section 268.121 of the Criminal Code (Cth) be repealed.

II. That Section 268.122 of the Criminal Code (Cth) be repealed, even if Section 268.121 is not repealed to allow for judicial review of the Attorney-General's fiat.

III. That Australian law and practice is brought into line with best practice procedures concerning the prosecution of mass atrocity crimes, taking into account the practices of other ICC Member States that are more in line with states' international obligations and/or that have a more robust record in prosecuting crimes that attract universal jurisdiction. This includes establishing a special International Crimes Unit to investigate credible evidence of atrocity crimes that have been committed by Australian citizens or people present in Australia, as recommended by the Australian Centre for International Justice.

Please find our **Detailed Submission** annexed.

Please do not hesitate to contact us should any further information be required.

Dr Souheir Edelbi
Lecturer, School of Law
Western Sydney University

Dr Sara Dehm
Senior Lecturer, Faculty of Law
University of Technology Sydney

DETAILED SUBMISSION

Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024

SUBMISSION OVERVIEW

I. The Duty to Prosecute under International Law and the Need for a Victim/Survivor Community-Centred Approach to Accountability for Mass Atrocities

International law establishes a clear duty to prosecute individuals who have allegedly committed mass atrocity crimes, such as war crimes, crimes against humanity and genocide. The four Geneva Conventions of 1949, to which Australia is a party,[1] provide that:

> Each High Contracting Party shall be under the obligation to **search for persons alleged to have committed, or to have ordered to be committed, such grave breaches**, and shall bring such persons, **regardless of their nationality, before its own courts**. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a "prima facie" case.[2]

The 1948 Genocide Convention, likewise, obliges states to "enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide **effective penalties for persons guilty of genocide** or any of the other act" (article 5).

Since coming into effect in 2002, the Rome Statute also reaffirms this duty on Member States of the International Criminal Court (ICC), including Australia,[3] to prosecute individuals who are reasonably suspected to have committed mass atrocities, with the ICC's complementarity regime being enlivened if a Member State is 'unwilling or unable genuinely to carry out the investigation or prosecution' of a particular case.[4]

The above obligations to prosecute are also reflected in customary international law and have attained the status of *jus cogens* norm, meaning that they are binding on all states irrespective of their consent to be bound.[5]

In addition to the duty to prosecute, there are additional duties under international law towards victim/survivor communities, including the duty to truth-telling, duty of reparations and duty of prevention.[6]

Yet, recent developments in international law recognise that this duty to prosecute individuals who have allegedly committed crimes of mass atrocities, should be exercised in such a manner that

[1] Australia ratified the Geneva Conventions on 14 October 1958.
[2] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Article 49.
[3] Australia deposited its instrument of ratification for the Rome Statute on 1 July 2002. *Rome Statute of the International Criminal Court,* opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002)
[4] Rome Statute, Article 17(1)(a).
[5] See eg Jean-Marie Kamatali, 'Accountability for Genocide and Other Gross Human Rights Violations: The Need for an Integrated and Victim-Based Transitional Justice' (2007) 9(2) *Journal of Genocide Research* 275, 278.
[6] Ibid.

provides for victim/survivor-centred access to mechanisms of justice and accountability.[7] In April 2019, the United Nations Security Council, for example, championed the idea of a 'survivor-centred approach' for addressing accountability for sexual violence in armed conflicts as part of its Women, Peace and Security agenda.[8]

The United Nations High Commission for Refugees defines a victim-centred approach as 'a way of engaging with victims that prioritizes listening, avoids re-traumatization, and systematically focuses on their safety, rights, well-being, expressed needs and choices'.[9] This approach, according to the United Nations, involves prioritising the treatment of victims:

> Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. **The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care** to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.[10]

A victim/survivor-centred approach is synonymous with the obligation 'to respect, ensure respect for and implement international human rights law and international humanitarian law' by means of ensuring access to justice and the right to an effective remedy.[11] This is essential in combating impunity for international crimes in line with Australia's international legal obligations under the Rome Statute.

Professor Luke Moffett, a leading international expert on victim-oriented justice, reparations, human rights, international humanitarian law and international criminal law, explains that:

> Impunity is the failure by a state to investigate and prosecute those responsible for international crimes, and to recognise and remedy the suffering of victims. As such, impunity is considered the "opposite of justice" as it serves to refute victims' suffering and access to redress. By denying them recognition and their ability to seek a remedy, it can send the message that such individuals, groups, and communities deserved to be harmed. **Justice for victims therefore serves to counter impunity by reaffirming victims' dignity, holding those responsible to account, and remedying their harm**.[12]

In the Australian domestic law context, we submit that this means that victim/survivor communities should not face procedural barriers that hinder prosecution of gross violations of international crimes, such as the requirement for the Attorney-General's consent to proceed with prosecution. Instead, Australian law should facilitate victims' access to justice by removing such barriers to

---

[7] United Nations Declaration of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147, UN Doc A/RES/60/147 (15 December 2005); United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34, UN Doc A/RES/40/34 (29 November 1985).
[8] UNSC Res 2467 (23 April 2019).
[9] UNHCR, 'Victim-Centred Approach', https://www.unhcr.org/au/what-we-do/how-we-work/tackling-sexual-exploitation-abuse-and-harassment/victim-centred-approach.
[10] United Nations Declaration of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147, UN Doc A/RES/60/147 (15 December 2005), Article 10.
[11] Ibid, Article 3.
[12] Luke Moffett, *Justice for Victims Before the International Criminal Court* (Routledge, 2014) p. 30.

better ensure procedural justice at different stages of legal proceedings for international crimes. As Professor Moffett points out:

> Procedural justice entails fairness in processes and outcomes. With regards to victims this involves their participation in proceedings, impact on decisions, and ability to shape outcomes.[13]

We propose the adoption of the following basic principles to provide a guiding framework to ensure justice, fairness and the protection of victims' rights in relation to international crimes and gross violations of international human rights and international humanitarian law:

Principle 1: Access to Justice

- Victims/survivors of mass atrocity crimes should have access to legal remedies and mechanism of justice. Procedural barriers, such as requiring the Attorney-General consent, can delay or prevent justice. Victim/survivor communities should be empowered at different stages of an investigation and prosecution including, in relation to decisions concerning whether to prosecute a suspected perpetrator of mass atrocities. Removing barriers means that justice is more accessible to victims and survivors of atrocity crimes.

Principle 2: Impartiality and Efficiency

- Decisions regarding prosecution of international crimes should be made by those with relevant expertise and without undue delay or political influence. The Director of Public Prosecution for each state and territory is better positioned to make impartial and independent decisions based on objective legal standards rather than political considerations, which ensures an efficient and more evidence-based processes and outcomes.

Principle 3: Transparency

- The legal process should be transparent to maintain public trust and ensure accountability. By making criteria and rationale for giving or denying consent transparent, victims/survivors and their representatives can understand the decision-making process and take steps to protect their legal rights.

Principle 4: Protective Measures

- The safety and well-being of victims/survivors and their families are paramount. Implementing protective measures during the consent-seeking process ensures that victims are not subjected to further harm, intimidation or harassment. This principle recognises that some victims may be in positions of vulnerability and that the state has a responsibility to create a safe environment for them to pursue justice.

While we acknowledge that there may at times be conceptual, political and practical difficulties in centring 'victim/survivor communities' in relation to prosecutions of mass atrocity crimes (including how to define a victim/survivor and which victim/survivor communities are recognised or empowered (or conversely, not recognised and disempowered) through such processes), for the purpose of this Bill and our submission, such questions do not need to be legislated nor resolved. Instead, we submit that the Bill's removal of the Attorney-General's fiat in relation to prosecutions

[13] Ibid, 31.

for crimes of mass atrocities is consistent with facilitating the possibility of a more victim/survivor community-centred approach within Australian law and practice around such matters.

II. The Flawed Nature of the Attorney-General's Fiat under Section 268.121

Section 268.121 of the Criminal Code (Cth) requiring the written consent of the Attorney-General for any prosecution of the crime of genocide to commence is flawed, dangerous and places Australia at serious risk of violating its obligations under the Rome Statute.

Numerous leading Australian experts of international law have identified the requirement for Attorney-General approval to be a serious flaw in Australia's implementing legislation. In practice, it has become a nearly insurmountable barrier to facilitating international justice and accountability as required pursuant to Australia's international legal obligations under the Rome Statute. This means that the Attorney-General's fiat places Australia at risk of being in violation of its obligations under the Rome Statute.

Professor Gillian Triggs, an Australian world-renowned expert in public international law and a former President of the Australian Human Rights Commission, identified the Attorney-General's fiat as a **significant deficit** in Australia's legislation in the following way:

> … the implementing legislation makes it clear, not only that Australia has primacy of jurisdiction, but also that **any decision to allow a prosecution will lie exclusively with the unimpeachable 'political' judgment of the Attorney-General**. While it is highly improbable that an Attorney-General would permit prosecutions against members of his own government or officers of the defence forces, it becomes possible, for example, for any subsequent government to prosecute those who were responsible for any war crimes that might have been committed in the recent conflict in Iraq.
>
> While these provisions appear to be valid under the Constitution, **it remains open to the judgment of the ICC itself whether a State party 'is unwilling or unable genuinely to carry out the investigation or prosecution' under Article 17 of the Rome Statute**. If a State were to be unwilling or unable to do so, the ICC may assert a secondary jurisdiction over the offences. … however, the ICC may not be able to obtain physical control of the alleged perpetrator for a trial because, if they are present in Australia, the Attorney-General could refuse to surrender the accused under the new International Criminal Court Act 2002 (ICC Act).[14]

Similarly, Dr Anna Hood and Dr Monique Cormier, both experts in international humanitarian law and international human rights law, have concluded that:

> the breadth of **the Attorney-General's discretion over the prosecution of international crimes is that it creates the potential for political bias** to influence the Attorney-General's decision or the potential for the Attorney-General's decision to *appear* to be influenced by political bias.[15]

[14] Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25(4) *Sydney Law Review* 507.
[15] Anna Hood and Monique Cormier, Prosecuting International Crimes in Australia: The Case of the Sri Lankan President' (2012) 13 *Melbourne Journal of International Law* 1, 6.

Currently, the Attorney-General possesses broad discretion in deciding whether to grant consent for the prosecution of international crimes. This discretion may undermine the implementation of Australia's international legal obligations, as it allows the Attorney-General to deny consent based on political considerations, such as Head of State immunity and diplomatic relations or foreign policy grounds.

For example, in October 2011, Attorney-General Robert McClelland cited head of state immunity as the reason for denying consent to prosecute Sri Lankan President, Mahinda Rajapaksa, for alleged war crimes and crimes against humanity following charges brought against the President while he was present in Australia.[16] A similar legal reason was used by Attorney-General Christian Porter to halt proceedings brought against Aung San Suu Kyi, the then de facto leader of the Myanmar government, in relation to alleged crimes against humanity against Rohingya people, specifically concerning the forcible population transfer or forced mass deportations of an estimated 650,000 Rohingya to Bangladesh in a period of a few months.[17] While international law does oblige states like Australia to grant absolute immunity to sitting foreign Heads of States (for the duration of their period in office) before their domestic courts, this principle of absolute immunity has come under sustained critique from victims/survivors of mass atrocities as a legal grounds for facilitating and justifying impunity even in the face of *jus cogens* international crimes. Indeed, we also note that Head of State immunity does not apply in relation to ICC criminal proceedings.

As a result, victim/survivor-communities have been left with little recourse to justice and accountability for international crimes in Australia. The 2011 proceedings against Sri Lankan President, Mahinda Rajapaksa, was brought by Sri Lankan-born Australian citizen Arunachalam Jegatheeswaran. Mr Jegatheeswaran had returned to Sri Lanka as an aid worker during the civil war and witnessed the Sri Lankan army's bombings and military attacks against Tamil civilians and civilian infrastructure, including shelters, schools, hospitals, orphanages and community centres. Following the 2011 dismissal of the case against President Rajapaksa before a Melbourne magistrate, Mr Jegatheeswaran stated:

> I can't bear that the person who is responsible for all of this — who is the commander-in-chief — is coming to my country and getting off scot-free. I'm asking the highest court of justice in Australia to decide whether he is guilty or not guilty.
>
> I saw Sri Lankan planes directing bombs into towns and open areas where displaced people were congregated, including areas declared as no-fire zones. I saw many hundreds of civilians killed and injured by these attacks.
>
> I am living testimony to what happened. I'm trying to forget, but I just can't.[18]

Such words should haunt us all. Yet, Mr Jegatheeswaran was unable to appeal the Magistrates' Court's decision due to the operation of section 268.122 of the Criminal Code (Cth) that stipulates that the Attorney-General's decision is 'final' and 'cannot be reviewed or appealed, except in the

[16] Ibid. See also Adam Gartrell, 'Sri Lankan envoy welcomes crimes case halt', *Sydney Morning Herald* (25 October 2011), https://www.smh.com.au/national/sri-lankan-envoy-welcomes-crimes-case-halt-20111025-1mgyp.html.
[17] Ben Doherty, 'Aung San Suu Kyi cannot be prosecuted in Australia, Christian Porter says', *The Guardian* (17 March 2018), https://www.theguardian.com/world/2018/mar/17/aung-san-suu-kyi-cannot-be-prosecuted-in-australia-christian-porter-says.
[18] Quoted in Michael Gordon, 'Sri Lankan President accused in Australian court', *Sydney Morning Herald* (25 October 2011), https://www.smh.com.au/world/sri-lankan-president-accused-in-australian-court-20111024-1mgea.html.

limited circumstance of judicial review by the High Court under section 75(v) of the Constitution'. We submit that this too is an unjust barrier to facilitating a victim/survivor-centred approach to accountability for the perpetration of mass atrocities.

We submit that section 268.121 of the Criminal Code (Cth) should be repealed in the first instance. Alternatively, it should be amended to restrict the Attorney-General's discretion by mandating her/him to prioritise access to justice for victims and survivors of international crimes, as well as gross violations of human rights and international humanitarian law, when deciding whether to grant consent. This would enable Australia to implement its international legal obligations more effectively under the Rome Statute in accordance with the ICC's complementarity framework.

We also submit that section 268.122 of the Criminal Code (Cth) should be repealed, independent of any repeal of section 268.121. At a minimum, this would allow for judicial review of any decisions made by the Attorney-General under section 268.121, if section 268.121 is not repealed. While judicial review in certain circumstances can be a limited panacea, it can still be an important safeguard to ensure that administrative decisions are done in a lawful, unbiased manner.

RECOMMENDATION #1:	**That Section 268.121 of the Criminal Code (Cth) be repealed.**
RECOMMENDATION #2:	**That Section 268.122 of the Criminal Code (Cth) be repealed, even if Section 268.121 is not repealed to allow for judicial review of the Attorney-General's fiat.**

III. Universal Jurisdiction Mechanisms in Other ICC Member States

The ICC was established to end impunity for international crimes, but it cannot investigate and prosecute all perpetrators, especially where it lacks jurisdiction. Universal jurisdiction complements the ICC and other international courts and tribunals by allowing any state to prosecute serious international crimes in national courts, regardless of where the crimes were committed or who committed them. This principle of international law is crucial for filling jurisdictional gaps, such as when crimes are committed in the territory of, or by nationals of, states not party to the ICC, or when the UN Security Council has not referred the situation. As the Permanent Mission of Australia to the United Nations outlined in April 2018 in observations and views of the Commonwealth of Australia submitted on 'the scope and application of the principle of universal jurisdiction':

> …the territorial State is often best placed to obtain evidence, secure witnesses, enforce sentences, and to deliver the "justice message" to perpetrators, victims and affected communities. Nonetheless, **it is a fact that many serious crimes of international concern go unpunished in the territorial and national jurisdiction**, including because alleged perpetrators are allowed to leave the jurisdiction.[19]

Allegations of genocide in Gaza highlight the importance of universal jurisdiction in deterring and punishing individuals responsible for the most serious international crimes. The ICC is currently investigating this situation and arrest warrants have been issued. In December 2023, the Australian Centre for International Justice reported that an estimated number of Australian dual nationals are serving in the Israel Defense Forces in Gaza, raising concerns about their potential involvement in serious international crimes:

> Numerous media publications have reported that dual Australian-Israeli citizens returned to Israel to participate in hostilities, with Israeli officials confirming that Australians are among those reservists called up to fight. Although the Israel Defense Force (IDF) does not release official statistics in relation to serving foreign nationals, estimates stated there could be up to 1,000 Australians currently serving in the IDF or being an active reservist. Media reporting has noted that those dual Australian citizens include both reservists and active duty soldiers in the IDF and some have indicated they are involved in combat units.[20]

The application of universal jurisdiction has remained a significant problem for international law as it often manifests in differential treatment and outcomes based on the racial, national or ethnic identity of the perpetrator. The African Union has expressed particular concern over what it perceives as the selective application of universal jurisdiction, which it argues disproportionately targets African leaders and African individuals.[21] This concern arises from instances where international criminal prosecutions have primarily focused on cases involving African countries or

[19] Australia, *Observations and views of the Commonwealth of Australia on the scope and application of the principle of universal jurisdiction*, UN Doc A/73/123, 9 July 2018.
[20] Australian Centre for International Justice (ACIJ), 'Letter to Australian Government regarding Australians in the IDF' (20 December 2023) https://acij.org.au/wp-content/uploads/2023/12/2023-12-20-Letter-to-Ausgov-regarding-Australians-in-the-IDF.pdf.
[21] *Report of the AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction*, ReliefWeb (April 2009) https://reliefweb.int/report/sudan/au-eu-technical-ad-hoc-expert-group-principle-universal-jurisdiction-report.

individuals, while similar crimes committed in other regions have received less attention. The African Union's position underscores the need for equitable and non-discriminatory application of universal jurisdiction, emphasising that justice mechanisms must be impartial and unbiased in addressing serious international crimes regardless of the geographic or racial origins of the perpetrators. Addressing racial inequalities in universal jurisdiction requires vigilance to ensure that legal processes are fair, transparent, and free from biases that could undermine the pursuit of justice for victims of international crimes.

Given this, there is **an urgent need for Australian law and practice to be made more consistent with best practice procedure concerning the prosecution of mass atrocity crimes, taking into account the laws and practices of other ICC Member States that have a more rigorous records in prosecuting Rome Statute crimes.** The following section of our submission provides a brief overview of the laws and practices of the following five ICC Member States that all do not require prosecutions of mass atrocity crimes to receive political approval from a sitting government minister such as the Attorney-General: Germany, the Netherlands, Belgium, France, South Africa, and Switzerland. These examples are illustrative only, and are not intended to be representative of all the current 124 ICC Member States.

As a result of best practices, we note that investigations and prosecutions into international crimes committed, among others, in Ukraine, Syria, Iraq, Libya, Chechnya, Chad, Rwanda, Afghanistan and the Democratic Republic of the Congo have been, or are being, successfully conducted in France, Germany, Norway, Sweden, Belgium, Austria, the Netherlands, New Zealand, the United States and Switzerland.

(i) Germany

Germany has codified the crime of genocide, crimes against humanity and war crimes under its Code of Crimes Against International Law (CCAIL) (Völkerstrafgesetzbuch, VStGB). German criminal law does not require a nexus between Germany and the crimes committed, nor is the accused required to be present in Germany in order for prosecutions to commence. For this reason, Germany is considered to be one of the few states that has implemented a form of genuine universal jurisdiction.

The Federal Prosecutor General (Generalbundesanwalt) is responsible for initiating and leading criminal investigations under the VStGB, and can assign investigations to a specific Central Authority for Fighting War Crimes (Zentralstelle für die Bekämpfung von Kriegsverbrechen – ZBKV) within the Federal Criminal Police Office (Bundeskriminalamt). Any person, including victim-groups and civil society organisations, can submit evidence of possible offences to the Federal Prosecutor General.

Under German criminal law, prosecutors have an obligation to investigate and prosecute crimes under the VStGB, including in response to victim complaints of possible crimes.[22] This principle of mandatory prosecution (known as the *Legalitätsprinzip*) intended to ensure that perpetrators of mass atrocities do not enjoy impunity in Germany, and to facilitate the gathering of evidence for a future criminal prosecution or trial. However, the German Federal Prosecutor General does have a

[22] Trial International, *Universal Jurisdiction Law and Practice in Germany: Briefing Paper* (April 2019) https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-Germany.pdf

wide discretion to not pursue investigations into crimes where there is no nexus to Germany or where the suspect is not present in Germany (or unlikely to be present in Germany in the future).

Importantly, political approval is not required at any stage for investigations or prosecutions in relation to the crimes under the VStGB.[23] However, the prosecutor has the discretion to discontinue investigations if the ICC or another state with a stronger nexus claim commences investigations.

(ii) The Netherlands

In the Netherlands, the International Crimes Act of 19 June 2003 prohibits serious international crimes and establishes universal jurisdiction over these crimes, allowing national authorities to investigate and prosecute even when committed abroad by foreign nationals.[24] The decision to investigate lies with the National Office of the Dutch Public Prosecution Service (DPPS), where the public prosecutor has exclusive authority to initiate criminal proceedings. The public prosecutor exercises a wide discretion taking into account several considerations including the prospects of a successful investigation and the availability of evidence.[25] Investigations are carried out by the Dutch International Crime Unit within the National Crime Squad of the police.[26]

Political approval is not required for these prosecutions. However, the Minister of Justice and Security has the discretion to direct the DPPS to prosecute a crime. If the Minister decides to order the DPPS not to prosecute, they must immediately inform the Dutch Parliament of their decision.[27]

(iii) Belgium

In Belgium, the Criminal Code of the Kingdom of Belgium (1867, as amended 2021) prohibits serious international crimes, such as genocide,[28] crimes against humanity,[29] war crimes[30] and torture[31]. Under Articles 10(1)bis and 12bis of the Preliminary Title of the Code of Criminal Procedure, prosecutions may only be brought by the Federal Prosecutor (Parquet Federal) who has exclusive authority to decide whether to initiate investigations for international crimes.[32] The Federal Prosecutor operates under the Ministry of Justice, which can instruct the prosecution to proceed with a case but cannot order it to refrain from doing so.[33]

Under Article 151 of the Constitution of the Kingdom of Belgium (1994, as amended 2020), the public prosecutor's office is independent in matters of individual investigations and prosecution policy. The Minister retains the right to authorise prosecutions, and issue binding criminal policy

[23] Trial International, *Universal Jurisdiction Law and Practice in Germany: Briefing Paper* (April 2019) https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-Germany.pdf.
[24] International Crimes Act of 19 June 2003.
[25] Trial International, *Universal Jurisdiction Law and Practice in the Netherlands: Briefing Paper* (May 2022) https://trialinternational.org/wp-content/uploads/2022/05/UJ-Netherlands.pdf.
[26] Ibid.
[27] Ibid.
[28] Criminal Code of the Kingdom of Belgium (1867, as amended 2021), Article 136bis.
[29] Criminal Code of the Kingdom of Belgium (1867, as amended 2021), Article 136ter.
[30] Criminal Code of the Kingdom of Belgium (1867, as amended 2021), Article 136quater.
[31] Criminal Code of the Kingdom of Belgium (1867, as amended 2021), Article 417bis.
[32] Open Society Justice Initiative, *Universal Jurisdiction Law and Practice: Belgium* (May 2022) https://www.justiceinitiative.org/uploads/3372554c-5c03-4710-8098-883e7c7d3696/universal-jurisdiction-law-and-practice-belgium-fr-05232022.pdf.
[33] Human Rights Watch, 'Prosecuting International Crimes: The Role of Victims and Witnesses' (2006) https://www.hrw.org/reports/2006/ij0606/6.htm.

directives (*droit d'injonction positive*).[34] However, this authority does not extend to interfering in investigations or assuming control over them.[35] Importantly, it is strictly prohibited for the Minister to instruct the public prosecutor not to prosecute specific acts.[36] This approach ensures the independence of the Prosecutor when deciding whether to initiate prosecutions for international crimes. It also improves access to justice for victims under universal jurisdiction in line with Belgium's international legal obligations under the Rome Statute.

(iv) France

In France, the crimes outlined in the Rome Statute of the ICC have been incorporated into the French Code of Criminal Procedure since August 2010. Article 689-11 of the Code grants jurisdiction over genocide, crimes against humanity, and war crimes. Article 689-1 further stipulates that any person present on French territory can be prosecuted, although this principle is applied differently depending on the specific crime. For crimes under the ICC's jurisdiction and crimes against cultural property, the alleged perpetrator must legally reside in France.[37]

By contrast to Australia, France allows for the prosecution of genocide, crimes against humanity, and war crimes without prior approval from political authorities.[38] While the Ministry of Foreign Affairs may offer an opinion in cases involving diplomatic officials, the Federal Prosecutor has the discretion to decide whether to initiate or close an investigation for international crimes and crimes involving cultural property.[39] Investigations for international crimes are carried out by a dedicated and specialised unit of the police.[40]

(v) South Africa

In South Africa, international crimes are prohibited under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. This Act grants South African courts jurisdiction over individuals who commit international crimes outside the country and are subsequently found on South African territory, regardless of the nationality of the perpetrator or victim.[41]

Prosecutions for genocide, war crimes and crimes against humanity do not require prior political approval. The decision to prosecute lies with the National Director of Public Prosecutions, who operates independently to ensure prosecutions proceed without political interference.[42] If the National Director decides not to prosecute a person, they must provide the Central Authority (or

[34] Open Society Justice Initiative, *Universal Jurisdiction Law and Practice: Belgium* (May 2022) https://www.justiceinitiative.org/uploads/3372554c-5c03-4710-8098-883e7c7d3696/universal-jurisdiction-law-and-practice-belgium-fr-05232022.pdf.
[35] Ibid.
[36] Ibid.
[37] French Code of Criminal Procedure, Articles 689-11 and 689-14.
[38] Open Society Justice Initiative, *Universal Jurisdiction Law and Practice: France*, https://www.justiceinitiative.org/uploads/b264bc4f-053f-4e52-9bb8-fccc0a52816a/universal-jurisdiction-law-and-practice-france.pdf.
[39] French Code of Criminal Procedure, Articles 689-11 and 689-14.
[40] Open Society Justice Initiative, *Universal Jurisdiction Law and Practice: France*, https://www.justiceinitiative.org/uploads/b264bc4f-053f-4e52-9bb8-fccc0a52816a/universal-jurisdiction-law-and-practice-france.pdf.
[41] *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (South Africa), s 4(3).
[42] Ibid, s 5(1).

Director-General of Justice and Constitutional Development) with full reasons for their decision for further consideration.[43]

(vi) Switzerland

In Switzerland, the Swiss Criminal Code prohibits serious international crimes such as genocide, crimes against humanity and war crimes, allowing for the exercise of universal jurisdiction.[44] No political authority is needed to initiate an investigation or prosecution. Although, the Federal Department of Foreign Affairs can provide opinions, typically on issues like immunity, the public prosecutor retains the discretion to decide independently.[45]

Prosecuting authorities are generally required to 'commence and conduct proceedings that fall within their jurisdiction, where they are aware or have grounds for suspecting that an offense has been committed'.[46] However, Article 264m(2) of the Criminal Code allows for prosecutorial discretion when the alleged crimes are committed abroad and neither the victim nor the perpetrator are Swiss nationals. In such cases, the public prosecutor may terminate or refrain from investigating and prosecuting under certain conditions.[47]

In light of the above best practices and successful investigation and prosecutions of international crimes in Germany, The Netherlands, Belgium, France, South Africa and Switzerland, we recommend that Australia adopt a similar approach. This would help remove significant obstacles to the effective investigation and prosecution of serious international crimes within Australia.

Specifically, we propose that: (1) consent for prosecutions of international crimes should sit with the Director of Public Prosecutions of each state and territory and not the Attorney-General, and (2) an independent multi-disciplinary specialised unit within the Australian Federal Police be established to investigate international crimes, as broadly recommended by the Australian Centre for International Justice. The Australian Centre for International Justice has highlighted the benefits of specialised units:

> The successful investigation and prosecution of international crimes requires a significant commitment of resources and the development of expertise, an investigative capacity which is built up over time. **The establishment of a permanent, specialised unit by a State thus indicates a "concrete expression of the States" determination to fight impunity**, and a real opportunity for survivors to meaningfully seek accountability through the principle of universal jurisdiction.[48]

***

The above ICC Member States all provide examples of robust approaches to the investigation and prosecution of international crimes that safeguard the independence of the prosecuting authority, and do not require any form of political approval process that may allow for political interference.

---

[43] Ibid, s 5(5).
[44] Swiss Criminal Code of 21 December 1937 (RS 311.0).
[45] Trial International, *Universal Jurisdiction Law and Practice in Switzerland Briefing Paper* https://www.justiceinitiative.org/uploads/180eda19-de98-44f5-afc7-4dc25d42b1a0/universal-jurisdiction-law-and-practice-switzerland.pdf.
[46] Ibid.
[47] Ibid.
[48] Australian Centre for International Justice (ACIJ), *Challenging Impunity: Why Australia Needs a Permanent Specialised International Crimes Unit* (September 2023) https://acij.org.au/wp-content/uploads/2023/09/ACIJ-Policy-Paper-Challenging-Impunity-Why-Aus-Needs-a-Permanent-Specialised-Intl-Crimes-Unit-FINAL.pdf.

In addition, it shows best practice within ICC Member States to establish specific authorities tasked with the investigation and prosecution of international crimes, that must respond to any complaints or evidence of mass atrocities submitted by victim/survivor groups.

In conclusion, we submit that the establishment and operations of such a special International Crimes Unit to investigate international crimes could and must be at the forefront of implementing a victim/survivor-centred approach to accountability for mass atrocities in practice, including through ensuring victim/survivor communities are empowered through the policies, priorities, processes and decision-making of the Unit.

RECOMMENDATION #3:	**That Australian law is brought into line with best practice procedures concerning the prosecution of genocide, taking into account the practices of other ICC Member States that have a more successful record in prosecuting crimes that attract universal jurisdiction. This includes establishing a special International Crimes Unit to investigate credible evidence of atrocity crimes that have been committed by Australian citizens or people in Australia, as recommended by the Australian Centre for International Justice.**

IV. The Need for Urgent Reform

The reforms proposed by the Bill are urgent in light of recent mass atrocities committed in Gaza and elsewhere. Victim/survivor communities should have the ability to pursue and seek accountability through a variety of mechanisms, legal and otherwise. In response to Israel's ongoing genocide of the Palestinian people in Gaza, Palestinians in Australia have called on the Australian Federal Police (AFP) to investigate credible evidence that Australian citizens who have served in the IDF have committed war crimes and the crime of genocide in Gaza specifically. Yet, to date, the AFP has failed to initiate any such investigations. Establishing a specially-tasked International Crimes Unit within the AFP would provide a clear mandate and increased institutional capacity for conducting such investigations and bringing any prosecutions in response to victim/survivor community demands for justice and accountability. Any prosecutions that are brought pursuant to such credible evidence should not require the additional written consent of the Attorney-General of the day. This creates an undesirable political barrier to pursuing justice and accountability for acts of mass atrocities and risks a perception that Australian law is not only partial but racially biased in its application.

In conclusion, we strongly welcome the Bill's proposed amendments to the Criminal Code.

Please do not hesitate to contact us should any further information be required.

Dr Souheir Edelbi
Lecturer, School of Law
Western Sydney University

Dr Sara Dehm
Senior Lecturer, Faculty of Law
University of Technology Sydney

Author biographies

Dr Sara Dehm is a Senior Lecturer in the Faculty of Law at UTS. Her research expertise is in the history and theory of international law, with a focus on migration and refugee law. Her work has appeared in leading Australian law journals, including Federal Law Review and UNSW Law Journal. She is an External Affiliate at Queen Mary School of Law's (B)OrderS: Centre for the Legal Study of Borders, Migration and Displacement, and an Associate Member of the Institute for International Law and the Humanities, Melbourne Law School, and an Editorial Board member of the Australian Journal of Human Rights.

Dr Souheir Edelbi is a Lecturer in the School of Law at Western Sydney University and a Convenor of the Palestine Project. She has published on race and coloniality in international criminal law, with a focus on postcolonial and critical race theory. Souheir was awarded her PhD from the Faculty of Law at UNSW in November 2021 and has extensive experience as a litigation solicitor. From 2022 to 2024, she served as an Advisory Committee Member of the Racial Justice Centre. Prior to entering academia, Souheir worked as a legal researcher and advocacy officer in Palestine and Belgium, supporting the rights of Palestinians and minorities in Iraq and Iran.