

AUSTRALIAN ■■■■■
■■■■■ **CENTRE**
FOR INTERNATIONAL
JUSTICE ■■■■■

Australian citizenship revocation provisions & Australia's duty to prosecute international crimes

Submission to the Parliamentary Joint
Committee on Intelligence and Security

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About the Australian Centre for International Justice

The Australian Centre for International Justice is a newly established independent and not-for-profit legal centre working to develop Australia's universal jurisdiction practice by providing access to justice in Australia to survivors and victims of serious human rights violations which amount to the international crimes of torture, war crimes, crimes against humanity and genocide.

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1 Executive summary

1. The Australian Centre for International Justice (**ACIJ**) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security's (the **Committee**) review of the operation, effectiveness and implications of the amendments introduced to the *Australian Citizenship Act 2017* (Cth) (the **Citizenship Act**). These amendments are reflected in sections 33AA, 35, 35AA and 35A of the Citizenship Act. We thank the Committee for granting an extension of time to allow us to prepare this submission.
2. The ACIJ was established to develop Australia's universal jurisdiction practice and in particular Australia's obligation to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law and other crimes which amount to what are known as international crimes, namely: torture, war crimes, crimes against humanity and genocide.
3. The ACIJ opposes these provisions because they violate fundamental human rights including that foreign fighters who are stripped of their Australian citizenship offshore are exposed to a real risk of torture and other inhuman treatment. They also face the prospect of unfair trials and the death penalty in Iraq or Syria. In addition, they expose persons to the risk of statelessness. In Australia, the provisions also threaten the rule of law, restrict the right to access remedies and shift fundamental notions of citizenship and the devaluation of citizenship attached to dual nationals. All of these concerns have been competently addressed in submissions already made to the Committee by relevant experts in field.
4. The ACIJ's prime concern and opposition to these provisions, and the focus of this particular submission, is relevant to the implications that arise as a result of the automatic revocation provisions based on conduct by operation of sections 33AA and 35.
5. The revocation of citizenship of foreign fighters whilst offshore has raised practical and legal challenges regarding extradition and prosecution and has impacted on Australia's opportunity and responsibility to prosecute its own citizens for international crimes. This is represented in the case of Neil Prakash who was stripped of his citizenship whilst Australia was still seeking his extradition causing confusion in Turkey and ultimately resulted in Australia's failure to have him extradited.

6. In addition, the ACIJ is critical of the prosecutorial strategy which conveniences terrorism charges. The revocation of citizenship as a result of section 35A, following conviction of terrorism related offences only without significant efforts to pursue prosecutions for international crimes where there is strong indication that such crimes were committed, risks misrepresenting the potential involvement of international crimes of the perpetrators. It represents a prosecutorial strategy that conveniences domestic counterterrorism efforts only and entrenches the climate of impunity for perpetrators of international crimes.
7. Ultimately, the ACIJ believes that revoking citizenship from foreign fighters to protect Australia's national security is an ineffective way of responding to the risks foreign fighters represent. All of these provisions are wholly inconsistent with Australia's obligation and duty to prosecute international crimes. For these broad fundamental reasons, the ACIJ strongly urges the Committee to recommend repealing all of the provisions under review.
8. The Australian government has an obligation and responsibility to extradite and prosecute its citizens for international crimes but has not acted on its responsibility and has left the burden and risk the foreign fighters represent, on other nation states that are inadequately resourced or prepared to meet the expectation.
9. The Australian government announced that as of July 2019, 12 individuals have been automatically stripped of their citizenship whilst offshore, and that there remains approximately another 80 persons that remain offshore who may be impacted by the provisions.
10. There are a number of fundamental reasons why Australia must consider investigating, extraditing and prosecuting its citizens for international crimes. Firstly, Australia is under an obligation to investigate and prosecute international crimes.
11. Secondly, the prosecution of international crimes provides meaningful opportunities for justice and accountability for the victims and survivors of the crimes.
12. Third, prosecuting international crimes reflects the scope and nature of the violations committed and provides an accurate historical record of the crimes. Whereas resorting to terrorism charges for convenience misrepresents the involvement of international crimes and risks undermining efforts to prevent the commission of these crimes and ensure compliance with international humanitarian law.

13. More broadly, the prosecution of international crimes can have a powerful deterrent objective because these crimes are considered to be so egregious they are against all of humanity and States are obligated to prevent and punish their commission.

Recommendations

- 1)** Repeal provisions 33AA and 35, 35AA and 35A and ensure a prosecutorial strategy where Australians suspected of international crimes are extradited and prosecuted for these crimes.
- 2)** Where there is sufficient evidence to link a suspect to torture, war crimes, crimes against humanity, or genocide, do not limit charges to terrorism offenses.
- 3)** Recommend that Australian authorities engage and cooperate with other States, and international partners including the UN International, Impartial and Independent Mechanism on Syria, multi-state and non-governmental and civil society organisations who have been collecting, documenting and analysing the evidence.
- 4)** Recommend more broadly the establishment of a permanent, dedicated and specialist war crimes unit with adequate ongoing training for investigators, prosecutors, judges and lawyers in interviewing torture and trauma witnesses and assessing their needs with a particular focus on established good practice relating to investigating sexual and gender-based crimes; and ensure the unit has access to regional experts and experienced translators.

2 Introduction

Background to revocation provisions

14. Following the emergence of the Islamic State of Iraq and Syria (**ISIS**) in 2014, and the large number of foreign fighters around the world who moved to the region to fight with this group and other belligerent groups, together with a series of terrorist attacks claimed by ISIS outside of Iraq and Syria, a number of countries including Austria, Belgium, Canada, France, the Netherlands, the United Kingdom and others moved to enact a series of measures to respond to the threat the foreign fighters represent and the prospect of fighters returning to their home countries. These measures which included citizenship revocation, allow authorities to strip the citizenship of their nationals following conviction of terrorism-related offences, or in some cases even if they are not convicted or charged with a crime.
15. In Australia the process to amend the citizenship laws began in 2015 and in December of that year the *Australian Citizenship Act 2007* (Cth) was amended to include certain provisions relating to the ‘renunciation and cessation’ of Australian citizenship of dual nationals.
16. This specification relating only to persons who are dual nationals is an attempt to comply with Australia’s international obligations to prevent statelessness. However, it has been shown that it still exposes persons to the risk of statelessness.¹ In addition, in 2017 Canada repealed the revocation provisions it introduced in 2014,² because of the problems and confusion the laws caused.

The provisions

17. There are three circumstances a person who is a dual citizen may have their citizenship revoked under the Citizenship Act:

¹ Law Council of Australia, Submission 5 to Independent National Security Legislation Monitor, *Review of the Terrorism-Related Citizenship Loss Provisions in the Australian Citizenship Act 2007* (14 June 2019) 11 [30] (*LCA Submission to INSLM*).

² Australian Human Rights Commission, Submission 7 to Independent National Security Legislation Monitor, *Review of the Terrorism-Related Citizenship Loss Provisions in the Australian Citizenship Act 2007* (14 June 2019) 6 [21] (*AHRC Submission to INSLM*).

- 1) As a result of the operation of **section 33A** which provides for the cessation of Australian citizenship if a person as young as 14 years has engaged in specified terrorist-related conduct offshore, or the person left Australia after engaging in the conduct but before being convicted of an offence related to the conduct;
- 2) As a result of the operation of **section 35** which provides that a person as young as 14 years ceases to be an Australian citizen if they served in the armed forces of a country at war with Australia or have fought with a declared terrorist organisation as determined by the Minister for Home Affairs by legislative instrument made under **section 35AA**;
- 3) As a result of a Ministerial determination that a person ceases to be an Australian citizen following conviction in Australia of a number of specified terrorism-related offences (**section 35A**).

18. Only two organisations have been listed as declared terrorist organisations by the Minister for Home Affairs: ISIS and Jabhat al-Nusra which was later known as Jabhat Fateh al-Sham and then Hayat Tahrir al-Sham.

The automatic conduct-based revocation

19. As noted above, sections 33A and 35 of the Citizenship Act provides for the automatic loss of citizenship on account of conduct in terrorist activity. By contrast the conviction-based citizenship revocation provisions only occur following conviction for certain terrorism related offences only.

20. The Department of Home Affairs indicates that as of 2019 around 80 Australians remain in Syria and Iraq. They admit that ‘some of these individuals may attempt to leave the conflict zone and return to Australia’.³

³ Department of Home Affairs, Submission 4 to Independent National Security Legislation Monitor, *Review of the Terrorism-Related Citizenship Loss Provisions in the Australian Citizenship Act 2007* (7 June 2019) 3 (*DHA Submission to INSLM*).

21. It was announced in February 2019 by the Minister for Home Affairs that 12 individuals had ceased to be Australian citizens through the operation of the provision.⁴ Previously in August 2018, it was announced that five people had their citizenships stripped⁵ and in November 2018 the total had been increased to nine.⁶ No information is released about the individuals involved or the case and evidence against them.
22. The only submissions to raise a concern in relation to the obligation to prosecute international crimes to the Committee and the Independent National Security Legislation Monitor (**INSLM**) came from the Law Council of Australia⁷ and the Australian Human Rights Commission.⁸ The ACIJ recognises the benefit of assisting the Committee in providing further information in relation to this significant implication relating to Australia obligations to prosecute international crimes.

The conviction-based revocation

23. Section 35A of the Citizenship Act provides for the revocation of citizenship following conviction for certain terrorism, treason, espionage, foreign interference and other like offences only, in addition to other criteria that must be fulfilled before the Minister for Home Affairs determines revoking citizenship.
24. The ACIJ agrees with Professor Kim Rubenstein, Associate Professor Matthew Zagor and Dr Dominique Dalla-Pozza in their submission to the Committee regarding the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* who state that citizenship law should not be used inappropriately where criminal law is better achieved for the purposes of protecting Australia's national security.⁹

⁴ Ibid 6.

⁵ Stephanie Borys and Louise Yaxley, 'Islamic State Involvement Sees Five Australian Terrorists Stripped of Citizenship', *ABC News* (online, 9 August 2018) <<https://www.abc.net.au/news/2018-08-09/islamic-state-terrorists-lose-australian-citizenship/10092678>>.

⁶ Minister for Home Affairs Peter Dutton and Prime Minister Scott Morrison, 'Combatting Australian Terrorists' (Joint Media Release, 22 November 2018). <<https://minister.homeaffairs.gov.au/peterdutton/Pages/Combatting-Australian-terrorists.aspx>>.

⁷ *LCA Submission to INSLM* 22 [86].

⁸ *AHRC Submission to INSLM* 33 [144].

⁹ Kim Rubenstein et al, Submission 13 to Parliamentary Joint Committee on Intelligence and Security, *Review Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018* (15 January 2019).

25. The most appropriate criminal law – relating to prosecuting international crimes where there is sufficient evidence available – has the ability to achieve both the purpose of protecting Australia’s national security and complying with Australia’s international obligations and responsibility.

The context of the Syrian conflict and climate of impunity

26. This submission does not seek to provide a legal analysis based on international criminal law of the contextual element of the crimes alleged. In this next section this submission provides a general background in light of the context which gave rise to foreign fighters and other belligerents whom found a renewed opportunity to fight in the context of the Syrian conflict and the instability and conflict in Iraq arising from the US-led invasion of Iraq in 2003.

27. Since 2011 some 570,000 people have been killed in the Syrian conflict,¹⁰ and over 100,000 have been detained or disappeared, mostly by Syrian government forces. Thousands have also died from torture and ill-treatment in government detention facilities where the practice of torture and sexual violence is widespread and systematic.¹¹ The Syrian government has also used cluster, incendiary, and chemical weapons in widespread and systematic attacks, in some cases directed against civilians.¹² The Syrian-Russian coalition has carried out airstrikes targeting or indiscriminately striking civilian areas.¹³

Genocide and other crimes against the Yazidi people

28. In June 2014 ISIS had taken control of the Iraqi city of Mosul just east of the Sinjar region and were set to break into the Syrian border. On 3 August 2014 ISIS fighters swept across the Sinjar region in northern Iraq in what began as a coordinated and certified campaign to target the Yazidi people for genocide. ISIS systematically killed up to 5,000 and held

¹⁰ Syrian Observatory for Human Rights (9 March 2019) <<http://www.syriahr.com/en/?p=120851>>

¹¹ Amnesty International, *Syria: ‘It Breaks the Human’: Torture, Disease and Death in Syria’s Prisons* (18 August 2016) <<https://www.amnesty.org/en/documents/mde24/4508/2016/en/>>.

¹² Human Rights Watch, *These Are the Crimes We Are Fleeing: Justice for Syria in Swedish and German Courts* (December 2017) 12 <<https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>> (*‘HRW These Are the Crimes We Are Fleeing’*).

¹³ Ibid.

another 5,000 to 7,000.¹⁴ Over 40 mass graves have so far been uncovered. Thousands more were abducted, in particular women and girls were held in sexual slavery and faced brutal forms of sexual violence and young boys were taken for indoctrination and forced to learn how to fight for the group.

29. The Yazidi people are a distinct religious community whose beliefs and practice span thousands of years. They have been subject to cycles of persecution dating back to the Ottoman Empire and have continued to suffer widespread discrimination in modern history. The Yazidi people and their practices are reviled by ISIS whom they considered as infidels. Following the attack on 3 August 2014, ISIS fighters encircled Yazidi villages in an attempt to stop them from escaping and the hundreds of Yazidis including children who did manage to escape to Mount Sinjar died from heat in searing temperatures before they were able to be rescued.
30. In June 2016, the United Nations Commission of Inquiry on Syria concluded that ISIS has been committing genocide, crimes against humanity and war crimes against the Yazidi people.¹⁵ With respect to the genocidal crimes of ISIS it is important to state how their plan and commission were gendered.¹⁶
31. On 26 February 2018, the Australian Parliament passed a motion¹⁷ to condemn the continuing genocide perpetrated against the Yazidi population by ISIS and called on the Australian government to investigate and prosecute the perpetrators where possible in Australian courts. The motion also stated that Australia should provide mutual legal

¹⁴ Richard Spender, 'Isil Carried Out Massacres and Mass Sexual Enslavement of Yazidis, UN Confirms', *The Telegraph* (online, 14 October 2014)

<<https://www.telegraph.co.uk/news/worldnews/islamic-state/11160906/Isil-carried-out-massacres-and-mass-sexual-enslavement-of-Yazidis-UN-confirms.html>>.

¹⁵ *Report of the UN Commission of Inquiry on the Syrian Arab Republic, 'They Came to Destroy': ISIS Crimes Against the Yazidis*, HRC, 32nd sess, Agenda Item 4, A/HRC/32/CRP.2 (15 June 2016).

¹⁶ Global Justice Centre, *Beyond Killing: Gender, Genocide and Obligations Under International Law*, (December 2018) <<http://globaljusticecenter.net/blog/20-publications/briefs-and-white-papers/1009-beyond-killing-gender-genocide-and-obligations-under-international-law>>.

¹⁷ Commonwealth, Parliamentary Motion, House of Representatives (26 February 2018) 1970 (Chris Crewther).

assistance and support other national, international and hybrid investigations and prosecutions of crimes committed by ISIL against the Yazidi people.¹⁸

32. The Minister for Home Affairs, Peter Dutton, has previously been on record to state his support for investigations and prosecutions of the international crimes allegations against ISIS perpetrators:

We can work with international partners the ICC and others within the UN system as well looking at ways in which people have committed war crimes or mass murder can be brought to justice.

If there is a way in which the AFP can be involved in taking witness statements or gathering of evidence here in Australia to facilitate prosecution or investigation, then the police will do that.¹⁹

33. Nadia Murad, Nobel Peace Prize winner, activist and leading advocate for survivors of ISIS brutality, visited Australia in 2016, and on behalf of the Yazidi organisation Yazda, she provided Australian authorities with briefs of evidence against a number of Australian ISIS perpetrators calling on the authorities to act and undertake investigations and prosecutions. In addition to Yazda's significant advocacy and work in collecting and documenting evidence of ISIS crimes,²⁰ other groups have also been working on similar vital documentation initiatives.²¹

34. Despite the previous encouraging statements from the Minister for Home Affairs and the availability of certain international mechanisms that Australian investigators and prosecutors have access to, Australian authorities have not shown any active steps to

¹⁸ Susan Hutchinson, 'The Pain of Hearing: Australia's Parliament Recognises Yazidi Genocide' *The Interpreter* (online, 8 March 2018) <<https://www.lowyinstitute.org/the-interpreter/pain-hearing-australia-parliament-recognises-yazidi-genocide>>.

¹⁹ Leesha McKenny, Marija Zivic, 'Compelled to Act: Dutton Opens Door to More IS Victims,' *SBS News* (online, 21 May 2018) <<https://www.sbs.com.au/news/compelled-to-act-dutton-opens-door-to-more-is-victims>>.

²⁰ For example see Yazda, *Working Against the Clock: Documenting Mass Graves of Yazidis Killed by Islamic State*, 2019 <https://docs.wixstatic.com/ugd/92f016_b2c5d9bdf3994c1e8994e72c571d107d.pdf>.

²¹ Valeria Cetorelli and Sareta Ashraph, 'A Demographic Documentation Of Isis's Attack on the Yazidi Village of Kocho,' *LSE Middle East Centre Report*, (June 2019) <http://eprints.lse.ac.uk/101098/1/Cetorelli_Demographic_documentation_ISIS_attack.pdf>

comply with obligations to extradite and prosecute Australian ISIS members for genocidal or other international crimes.

War crimes and other crimes against the Iraqi and Syrian civilian population

35. The UN Commission of Inquiry on Syria and the UN Assistance Mission for Iraq have independently found that ISIS and other non-state armed groups have violated international human rights law and international humanitarian law in Syria²² and Iraq.²³ Human Rights Watch has stated that belligerent groups like ISIS and Jabhat al-Nusra in Syria 'are responsible for systematic and widespread violations, including targeting civilians with artillery, kidnappings, and executions...impos[ing] strict and discriminatory rules on women and girls and have actively recruited child soldiers'.²⁴ Further in Syria, 'ISIS has also committed at least three documented attacks against civilians using chemical weapons'.²⁵ The scale, scope and nature of the crimes committed by non-stated armed groups operating in Syria and Iraq are horrific and should be investigated and prosecuted.

²² *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic Rule of Terror: Living Under ISIS in Syria*, HRC, 27th sess, Agenda Item 4, A/HRC/27/CRP.3 (19 November 2014).

²³ See for example, UN Assistance Mission for Iraq (UNAMI) and Office of the UN High Commissioner for Human Rights (OHCHR), *Report on the Protection of Civilians in the Context of the Ninewa Operations and the Retaking of Mosul City 17 October 2016 – 10 July 2017*, (November 2017) <http://www.uniraq.org/images/factsheets_reports/Mosul_report%2017Oct2016-10Jul201731%20October_2017.pdf>.

²⁴ *HRW These Are the Crimes We Are Fleeing*, 12.

²⁵ *Ibid.*

3 The duty to prosecute international crimes

International obligations to prosecute

36. Australia has international obligations to investigate and prosecute allegations of international crimes.²⁶ These obligations²⁷ arise out of number of treaties Australia has ratified, some of which have the status of customary international law. These include for example the Four Geneva Conventions,²⁸ the Convention against Torture²⁹ and the Genocide Convention.³⁰

37. The preamble to the Rome Statute of the International Criminal Court³¹ (**Rome Statute**) affirms that ‘the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’. Further the Rome Statute recalls that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’. To this end, the Rome Statute emphasised that the International Criminal Court established by the Statute is complementary to national criminal jurisdictions. Australia’s obligations are therefore enlivened by its ratification of the Rome Statute and the implementation of the offences of the Rome Statute as crimes recognised by the Commonwealth of Australia.

²⁶ The International Court of Justice has stated that: ‘... Extradition and prosecution are alternative ways to combat impunity in accordance with Art. 7, para 1 [of the Convention against Torture]’. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, (Judgment), [2012] ICJ Rep, 422, 443,[50].

²⁷ See 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, GA Res 60/147, 60th sess, UN Doc A/RES/60/147 (16 December 2005).

²⁸ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) and other Geneva Conventions.

²⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

³⁰ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

³¹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

Australia's legislative framework for prosecuting international crimes

a) Offences

38. In 2002 the *International Criminal Court Act 2002* (Cth) (**ICC Act**) was enacted to give effect to Australia's obligations under the Rome Statute which is attached to Schedule 1 of the ICC Act. Section 3(1) of the ICC Act, provides that its principal purpose is to 'facilitate compliance with Australia's obligations under the Statute' and in a Note to section 3, provides that the crimes within the jurisdiction of the ICC are set out as crimes in Australia in Division 268 of the Commonwealth Criminal Code.
39. The *International Criminal Court (Consequential Amendments) Act 2002* (Cth) amended the *Criminal Code Act 1995* (Cth) (**Criminal Code Act**) giving effect to the primacy of Australian jurisdiction to prosecute the offences of the Rome Statute. The Commonwealth Criminal Code is attached to Schedule 1 of the Criminal Code Act. This amendment created a new Chapter 8 in the Criminal Code, titled 'Offences against humanity and other related offences.' Division 268 is titled 'Genocide, crimes against humanity, war crimes and crimes against the administration of justice of the International Criminal Court'. The Rome Statute crimes of article 6 (genocide), article 7 (crimes against humanity), and article 8 (war crimes) are thus criminal offences in the Commonwealth of Australia.
40. In addition, since April 2010, torture in terms similar to the definition in article 1 of the Convention against Torture was criminalised as a standalone criminal offence in Division 274 of the Criminal Code.³²

b) Jurisdiction

41. Prosecution of international crimes in national or domestic courts varies in different jurisdictions. In the traditional sense, states on which the territory where the crime was committed prosecute the crime according to the territorial principle. In some jurisdictions, states can prosecute on the basis of 'active personality principle' – that is where the alleged perpetrator of the crime is a citizen; or 'passive personality' principle, where the victim of a crime is a citizen. In some national systems courts have the jurisdiction to act even where there is no territorial, active or passive personality link in what is commonly referred to as 'universal jurisdiction'.

³² See the amending legislation, *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth).

42. Australia's legislative framework for international crimes allows for absolute universality, meaning there is no requirement for a territorial or personality link. Extended geographical jurisdiction therefore applies to the offences of genocide, war crimes, crimes against humanity and torture.³³

International crimes prosecutions abroad

43. European countries have been proactive in prosecuting their citizens, and non-citizens, who have engaged in criminal conduct in Syria and Iraq for international crimes.³⁴

44. In Germany there are ongoing investigations into former ISIS and other non-state armed group members who are either German or non-German nationals. In one case a German national and ISIS member, is charged with six counts of murder and war crimes.³⁵ In another case a suspected high-ranking ISIS commander was issued with an arrest warrant in 2016 on allegations of genocide and war crimes against the Yazidi minority in Syria and Iraq.³⁶ However there are criticisms of Germany's prosecutorial strategy which in some cases has shown to favour convenience of terrorism charges, for example in regards to adequately investigating genocidal killings.³⁷

45. In Finland, Iraqi nationals and suspected ISIS members are on trial for war crimes and murder.³⁸ In France, directors of a French company are charged with complicity in war crimes and crimes against humanity and financing a terrorist enterprise. The company is alleged to have entered into negotiations with ISIS to purchase oil as well as obtaining passes from ISIS for crossing checkpoints, risking the lives of their employees in the process.³⁹ In the Netherlands, an ISIS member is on trial for crimes committed in Iraq and

³³ See ss 268.117(1), 274.2(5) and 15.4 of the Criminal Code.

³⁴ TRIAL International et al, *Make Way for Justice: Universal Jurisdiction Review # 4*, 2018 <<https://trialinternational.org/wp-content/uploads/2018/03/UJAR-Make-way-for-Justice-2018.pdf>> (*'TRIAL International Make Way for Justice'*).

³⁵ Ibid 54.

³⁶ Ibid 50.

³⁷ Alexandra Lily Kather and Anne Schroeter, 'Co-opting Universal Jurisdiction? A Gendered Critique of the Prosecutorial Strategy of the German Federal Prosecutor in Response to the Return of Female ISIL Members' *Opinio Juris* (Blog Post, 7 March 2019) <<http://opiniojuris.org/2019/03/07/co-opting-universal-jurisdiction-a-gendered-critique-of-the-prosecutorial-strategy-of-the-german-federal-public-prosecutor-in-response-to-the-return-of-female-isil-members-part-i/>>.

³⁸ *TRIAL International Make Way for Justice* 20.

³⁹ Ibid 41.

Syria after he posed with a crucified body and is charged with violating the personal dignity of war victims. He is also charged with terrorism offences.⁴⁰ These cases show that it is possible to adopt a strategy of prosecuting international crimes and terrorist crimes where the evidence is available and there has been substantial effort to obtain that evidence.

46. Although there have been more investigations and charges against low-level perpetrators from non-state armed groups such as ISIS in Europe, Germany and France have also sought high-level perpetrators. This has led to successful arrests of senior members of the Syrian intelligence apparatus involved in the systematic use of torture in Syrian prisons and the issuing of an arrest warrant for the head of the navy intelligence.⁴¹ This is important to note because there is a serious concern that accountability which focus solely on one faction and overlooks atrocities committed by other actors risks the perception of selective justice.⁴²

National prosecutions key to countering climate of impunity

47. National investigations and prosecutions of international crimes are becoming increasingly common around the world, particularly in European jurisdictions. They are widely seen as the only recourse for accountability for cases where political, legal and practical reasons prevent access to justice at the International Criminal Court (ICC) or other ad hoc initiatives.
48. Recognising the political and jurisdictional barriers to prosecutions for crimes committed in Syria, the UN Commission of Inquiry on Syria has noted the importance of national prosecutions to closing the impunity gap:

Currently national prosecutions provide the only path for accountability for victims of crimes committed in Syria. It is integral, therefore, that States

⁴⁰ Anthony Deutsch, 'Alleged Islamic State Fighter on Trial in Netherlands for War Crimes', *Reuters* (online, 8 July 2019) <<https://www.reuters.com/article/us-netherlands-syria-warcrimes-idUSKCN1U31JV>>.

⁴¹ European Centre for Constitutional and Human Rights (ECCHR) 'Torture in Syria: Another Milestone in the Fight Against Impunity' (Press Release, 13 February 2019) <https://www.ecchr.eu/fileadmin/user_upload/PR_Syria_torture_Arrest_FINAL.pdf>.

⁴² International Justice Monitor, *NGOs Challenge Sweden's Proposal for an ISIS-Only War Crimes Tribunal* (online, 3 June 2019) <<https://www.ijmonitor.org/2019/06/ngos-challenge-swedens-proposal-for-an-isis-only-war-crimes-tribunal/>>.

enact domestic laws against genocide, crimes against humanity and war crimes.⁴³

49. The challenges of atrocity crimes cannot be addressed by the creation of ad hoc tribunals or the ICC alone and there is a shared responsibility and obligation on countries to prosecute. Indeed, the Office of the Prosecutor of the ICC indicated there is a ‘risk of an impunity gap unless national authorities, the international community and the ICC work together to ensure that all appropriate means for bringing other perpetrators to justice are used’.⁴⁴

4 Implications arising from the failure to prosecute

Extradition and mutual legal assistance

The case of Neil Prakash

50. The Department of Home Affairs has admitted that the automatic revocation provisions ‘may impact other mechanisms, such as criminal justice process, that can be used to manage the level of risk an individual poses to the Australian community’. Furthermore, they state that it may impact on Australia’s broader bilateral relationships and equities.⁴⁵

51. Dr Sangeetha Pillai and Professor George Williams refer to the potential of negative consequences for international relations and national security and that the laws undermine the security objectives they are said to pursue. In addition, they say that it casts responsibility onto nations with fewer resources or capacity to deal with them and

⁴³ *Report of the UN Independent International Commission of Inquiry on the Syrian Arab Republic, ‘They Came to Destroy’: ISIS Crimes Against the Yazidis*, HRC, 32nd sess, Agenda Item 4, A/HRC/32/CRP.2 (15 June 15 2016) [200].

⁴⁴ Office of the Prosecutor of the International Criminal Court, *Paper on Some Policy Issues Before the Office of the Prosecutor* (September 2003) <https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf>.

⁴⁵ *DHA Submission to INSLM*, 9.

that nations such as Australia, the UK, Canada and others offload their unwanted or high-risk citizens onto other states.⁴⁶

52. The Australian Federal Police (**AFP**) has indicated that there are 39 arrest warrants currently in place.⁴⁷

53. Extradition can be a lengthy complicated legal process and produce a variety of procedural obstacles. Australia's standing can be further complicated where it has revoked the citizenship of an individual it is still seeking to extradite. Various departments and agencies have stated that the loss of citizenship is not a barrier to extradition and does not undermine the Australian government's capacity to pursue return of individuals under extradition processes, as a defence to criticism that the automatic revocation provisions impact on Australia's criminal justice processes.⁴⁸ However the practical and legal implications of relying on extradition whilst a person's citizenship has been revoked has been shown to have negative consequences for Australia's criminal justice processes in the case of Neil Prakash.

54. The AFP issued a warrant for Neil Prakash's arrest and extradition for terrorism related charges in 2015.⁴⁹ He was caught in Turkey in 2016 in what was said to be an 'international tug-of-war' and the AFP had been tracking his movements.⁵⁰ It is clear that the AFP was keen on his extradition and had spent considerable resources and energy on tracking him. At the time he remained an Australian citizen and Australia - including comments from Prime Minister Malcolm Turnbull - was confident the Turkish authorities would agree to his extradition to Australia.⁵¹

⁴⁶ Sangeetha Pillai and George Williams, 'The Utility of Citizenship Stripping Laws in the UK, Canada and Australia', *Melbourne University Law Review*, (2017) 41(2), 888.

⁴⁷ Evidence to INSLM, Canberra, 27 June 2019, (AFP Deputy Commissioner Leanne Close AMP).

⁴⁸ Evidence to INSLM, Canberra, 27 June 2019, (Sarah Chidgey – Attorney-General's Department) and (James Larsen – Department of Foreign Affairs).

⁴⁹ Carly Crawford, 'Warrant Issued for Islamic State Recruiter Neil Prakash', *The Herald Sun* (online, 19 August 2015) <<https://www.heraldsun.com.au/news/warrant-issued-for-islamic-state-recruiter-neil-prakash/news-story/e6baca708051256d627f6d57ba786418>>.

⁵⁰ Rachel Olding and Michael Bachelard, 'Australian Terrorist Neil Prakash May Have Been Tracked by Social Media Posts', *The Sydney Morning Herald* (online, 28 November 2016) <<https://www.smh.com.au/national/australian-terrorist-neil-prakash-may-have-been-tracked-by-social-media-posts-20161128-gsyz5w.html>>.

⁵¹ Monique Ross, 'Neil Prakash: Islamic State Recruiter to be Extradited Within Months, Malcolm Turnbull Says', *ABC News* (online, 17 May 2017) <<https://www.abc.net.au/news/2017-05-12/islamic-state--neil-prakash-to-be-extradited-in-months-pm-says/8519958>>.

55. It was reported that Neil Prakash was stripped of his Australian citizenship in late December 2018.⁵² He currently remains in prison in Turkey on appeal following his sentencing for membership of a terrorist organisation. This was welcome news to Prakash who expressed that he did not wish to return to Australia to face terrorism charges.⁵³ It has also been reported that Prakash might benefit from ‘remorse laws’ in Turkey and have his sentence reduced because he had expressed remorse for his membership with ISIS. He has appealed his sentence and the process could take another two years.
56. It was said that Australia’s stripping of his citizenship caused confusion to the court in Turkey.⁵⁴ Turkey rejected Australia’s extradition request in July 2018⁵⁵ and Prime Minister Malcolm Turnbull at the time vowed to press for Prakash’s extradition to face charges in Australia. Minister for Home Affairs Peter Dutton was keen for Prakash to no longer be an Australian problem.⁵⁶
57. Other than his role as an ISIS member and recruiter, Neil Prakash is said to have been a supervisor whilst stationed in Mosul, Iraq. Australian journalist Michael Bachelard, spoke to an Iraqi man from Mosul who witnessed Prakash walking around the town with body guards and seeing that punishments were meted against the Mosul civilian population.⁵⁷ These punishments included having one’s hands cut off for stealing, being beheaded for involvement in Iraq’s army, or being thrown off an eight-story building for homosexual

⁵² Eric Tlozek, ‘Neil Prakash, Islamic State Terrorist, Stripped of Australian Citizenship’, *ABC News* (online, 29 December 2018) <<https://www.abc.net.au/news/2018-12-29/neil-prakash-stripped-of-australian-citizenship/10672806>>.

⁵³ Adam Harvey and Beybin Somuk, ‘Islamic State Terrorist Neil Prakash is ‘OK’ with Revoked Australian Citizenship’, *ABC News* (online, 21 February 2019) <<https://www.abc.net.au/news/2019-02-21/is-terrorist-neil-prakash-ok-with-revoked-citizenship/10831832>>.

⁵⁴ Eric Tlozek, ‘Australian Islamic State Recruiter Neil Prakash Sentenced to Jail in Turkey’, *ABC News* (online, 15 March 2019) <<https://www.abc.net.au/news/2019-03-16/neil-prakash-sentenced-to-jail-in-turkey/10907510>>.

⁵⁵ Sean Rubinsztein-Dunlop, ‘Neil Prakash: Turkish Court Rejects Request to Extradite Australian Islamic State Terrorist’, *ABC News* (online, 20 July 2018) <<https://www.abc.net.au/news/2018-07-20/islamic-state-terrorist-neil-prakash-could-be-released-from-jail/10016444>>.

⁵⁶ SBS News, ‘“Rot in Jail”: Dutton Vows to Keep Australian IS Terrorist Neil Prakash Behind Bars’ (online, 20 July 2018) <<https://www.sbs.com.au/news/rot-in-jail-dutton-vows-to-keep-australian-is-terrorist-neil-prakash-behind-bars>>.

⁵⁷ Michael Bachelard, ‘I Saw Australian Neil Prakash at Islamic State’s Medieval Punishments: Witness,’ *The Sydney Morning Herald* (online, 2 March 2017) <<https://www.smh.com.au/national/i-saw-aussie-neil-prakash-at-islamic-states-medieval-punishments-20170227-gum183.html>>.

acts. All of these acts give rise to war crimes against the civilian population and other criminal acts which could amount to crimes against humanity. Furthermore, a case in relation to his role in recruiting and inciting violence and death in light of ISIS's genocidal violence against the Yazidi people could amount to incitement to genocide.⁵⁸

Implications of pursuing a terrorism only prosecutorial strategy

58. There are serious concerns with a prosecutorial strategy that favours the convenience of resorting to terrorism charges and overlooks international crimes offences. Whilst it is acknowledged that terrorism charges are much easier to prosecute because prosecutors only have to prove a connection between the accused and the terrorist membership or activity, the crime of terrorism only does not accurately reflect the extent of the crimes the foreign fighters committed.

59. A prosecutorial strategy which prioritises terrorist crimes risks the perception that Australian authorities are only interested in combating domestic threats. Human Rights Watch has stated:

The use of terrorism charges without significant efforts to pursue prosecutions for war crimes or crimes against humanity, where there is indication that such international crimes were committed, could send the message that the authorities' only focus is to combat domestic threats. Efforts to pursue terrorism charges can and should go hand in hand with efforts and resources to investigate and prosecute war crimes, crimes against humanity, and genocide.⁵⁹

60. In addition, the use of terrorism charges 'could send a signal that the authorities' rightful determination to tackle domestic threats eclipses their responsibility to deliver accountability for other serious international crimes'.⁶⁰

⁵⁸ Section 11.4 in connection with subdivision B of Division 268, and also section 80.2D of the Criminal Code.

⁵⁹ *HRW These Are the Crimes We Are Fleeing* 4.

⁶⁰ *Ibid* 39.

61. A counterterrorism strategy that refuses to engage with international criminal law is a strategy that fails to properly understand terrorist organisations and their commission of international crimes:

The German public prosecutor general stated that situations like those in Syria and Iraq show that terrorism and other serious international crimes are increasingly intertwined as terrorist organizations are new actors in these conflicts. He explained that to fully register the unlawfulness of these acts and provide appropriate retribution, international criminal law must not be neglected. Referring to Syria he noted: '[T]he character of the terrorist organizations involved in the conflict, as well as the nature of the specific single acts, can only be fully grasped if they are viewed not only through the lens of counterterrorism, but also viewed in the context of international criminal law.'⁶¹

62. Failure to ensure significant efforts are undertaken to prosecute international crimes entrenches the climate of impunity.

Challenges and lessons from MH17 joint investigation

63. International crimes investigations and prosecutions are challenging and can be difficult to investigate. Some of the acknowledged standard challenges include:

- the crimes were usually committed many years ago and in overseas territory;
- the crime scenes may no longer exist or are different to the scene at the time of the crime;
- the individuals required to be interviewed are usually in the countries where the crimes took place or have sought refuge in other countries meaning that major parts of the investigation must be conducted abroad;
- the crimes are usually committed in the context of an armed conflict and the conflict may still be ongoing; and
- a contextual analysis of the crime requires complex evaluation of a set of facts and legal analysis.

⁶¹ Ibid.

64. However, these should not be barriers to conducting genuine investigations and prosecutions for persons who are believed to be responsible for international crimes. There are solutions to these challenges and these are challenges Australia should and can meet and has shown to have experience in these types of complex investigations.
65. Australia is adept and successful in its investigations and cooperation efforts with other types of transnational crimes abroad, whether it for terrorism, drug or organised crimes offences, human trafficking, slavery or child exploitation offences.
66. More relevantly Australia is an active participant in the investigative efforts of the downing of Flight MH17. The AFP provided significant personnel (more than 500)⁶² and resources to the investigation and Australia has contributed \$50 million to the efforts,⁶³ which are ongoing. Earlier last month, the Joint Investigations Team announced a major breakthrough with charges being laid against four suspects alleged to have criminal liability who are now the subject of international arrest warrants.⁶⁴ The team is being led by the Netherlands and involves Australia, Belgium, Malaysia and Ukraine.
67. This built-up experience together with the strong political will and dedicated resources provided is evidence of the specialised investigative training that Australia has already committed to, and should expand to undertake investigations and prosecutions of international crimes more broadly so that it can better engage with its international obligations.

⁶² Australian Federal Police, 'MH17 Five Year Anniversary' (Media Release, 17 July 2019) <<https://www.afp.gov.au/news-media/media-releases/mh17-five-year-anniversary>>.

⁶³ Marty Silk, 'MH17 Charges Just the Beginning: AFP', *The Canberra Times* (online, 20 June 2019) <<https://www.canberratimes.com.au/story/6227380/mh17-charges-just-the-beginning-afp/?cs=14232>>.

⁶⁴ Netherlands Public Prosecution Service, 'Prosecution of Four Suspects for Downing Flight MH17' (Media Release, 19 June 2019) <<https://www.om.nl/onderwerpen/mh17-crash/@106096/prosecution-four/>>.