

PROSECUTE; DON'T PERPETRATE

*Ending impunity for sexual
violence in armed conflict*

SUBMISSION TO THE REVIEW OF THE AMENDMENTS MADE BY THE AUSTRALIAN CITIZENSHIP AMENDMENT (CITIZENSHIP REPUDIATION) BILL 2023

Introduction

Prosecute; don't perpetrate is glad to provide this submission to the Joint Parliamentary Committee on Intelligence and Security. The purpose of this submission is to highlight how the revocation of citizenship prevents the prosecution of genocide, war crimes, and crimes against humanity (including through the use of sexual violence) that Australian foreign fighters perpetrated in Syria and Iraq. The submission will describe how and why these prosecutions are the responsibility of the Australian Government and share the insights of some of the Australian victim community on these issues.

This submission has been informed by a series of consultations with the Ezidi¹ community in Australia, who were most directly affected by the terrorism and international crimes perpetrated by people the individuals these legislative amendments pertain to. Over 4000 Ezidis have migrated to Australia since 2014.² Since arriving in Australia as refugees, many of these Ezidis have become Australian citizens themselves. They primarily live in regional centres of Wagga Wagga, Toowoomba, Armidale and Coffs Harbour. Some of these new Australians are the direct survivors of ISIS' crimes, having been held in sexual servitude themselves. Many had family members who were killed, and others have family members who are still missing. But genocide is a communal crime and has affected the entire community.

Context

We understand this bill is the latest in a series created to respond to the numbers of Australians who left this country to join ISIS and other extremist organisations fighting in Syria and Iraq from 2014. The revocation of citizenship as a response to Australian nationals joining extremist or other foreign militaries has had several incarnations since then. *Prosecute; don't perpetrate* has made several submissions and testified before the JPCIS about the various incarnations.³ When the High Court ruled Ministerial revocation of citizenship was unconstitutional in *Jones v Commonwealth of Australia & Ors*⁴, we hoped this practice would end.

It is estimated over 200 Australians travelled to Syria and Iraq to fight with ISIS and other extremist groups. They were among tens of thousands of foreign fighters from over 80 countries who undertook such journeys. Unlike other conflicts where the perpetration of sexual violence and other war crimes, crimes against humanity and genocide take place, in Syria and Iraq, many of the perpetrators came from countries with well-

¹ In Australia, the Ezidi community is often spelled Yazidi in administrative documents, but the community identifies with the spelling Ezidi.

² [https://www.abs.gov.au/articles/religious-affiliation-australia#:~:text=Yezidis%20\(or%20Yazidis\)%20are%20an,an%20increase%20of%206%2C444%25](https://www.abs.gov.au/articles/religious-affiliation-australia#:~:text=Yezidis%20(or%20Yazidis)%20are%20an,an%20increase%20of%206%2C444%25) (accessed 18 Sep 23)

³ <https://youtu.be/z2YFGye1jN0?si=Td4e2P3OFBjVX4o9> (accessed 18 Sep 23)

⁴ https://www.hcourt.gov.au/cases/case_b47-2022 (accessed 18 Sep 23)

developed justice systems that are States Parties to the Rome Statute of the International Criminal Court, obliging them to investigate and prosecute these crimes in their own court systems.

When sexual violence is perpetrated as part of an armed conflict, it is a war crime.⁵ When that violence is widespread or systemic, it is a crime against humanity.⁶ When it is used to destroy, in whole or in part, an ethnic, racial or religious group it is genocide.⁷ Under Australian law, these offences, their attempt, complicity, incitement or conspiracy is punishable with imprisonment for 25 years to life depending on the specifics of the charge.

Australian Parliamentary and policy context

Australia has a robust legal framework incorporating international public law into our domestic criminal code. War crimes, crimes against humanity and genocide were incorporated into Division 268 of the Commonwealth Criminal Code as part of our ratification of the Rome Statute of the International Criminal Court (ICC). We have also integrated slavery and trafficking offences into Division 270 of the Commonwealth Criminal Code. However, these sections of the criminal code have never been tested in a criminal court.

The only times Australia's war crimes legislation has been tested in court have been in two civil cases: in the Captain Dragan case in the 1990s, and most recently in the Ben Roberts-Smith case. This had led to unacceptable shortcomings in the understanding the judiciary have of the legislative framework for the application of international criminal law in Australia. For example, a group of five women who were victims of Khaled Sharrouf sought access to victims of crime support through the NSW Civil and Administrative Tribunal.⁸ These survivors were denied access on the basis that the violence they experience 'was not in and of NSW', despite the fact the violence comprised genocide, which is a crime under Commonwealth law and has universal jurisdiction.

By 2018 both houses of the Australian Parliament had passed multi-party motions recognising ISIS' genocide of the Ezidi and calling for the government to investigate and prosecute Australians who perpetrated these crimes.⁹ This parliamentary recognition means a great deal to the Ezidi community. *Prosecute; don't perpetrate* had made budget submissions requesting funds for multi-agency workshops to remedy shortcomings in information sharing for the purposes of criminal accountability;¹⁰ and to sufficiently resource the relevant unit within the Australian Federal Police responsible for investigation and filing international public crimes with the Commonwealth Directorate of Public Prosecutions. Minister Dutton had publicly stated criminal investigations would be prioritised. But privately, the Minister of Home Affairs stood in the way of funding these activities and he and his department began revoking the citizenship of Australians who were known to have perpetrated these crimes.

Meanwhile, improving access to justice for conflict related sexual violence was incorporated as one of the four key outcomes of Australia's second whole-of-government National Action Plan (NAP) on Women, Peace and

⁵ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDA490736C1C1257F7D004BA0EC>

⁶ <http://legal.un.org/icc/statute/romefra.htm>

⁷ <http://www.preventgenocide.org/law/convention/text.htm>

⁸ <https://thelotusflower.org/blog1/2019/9/26/new-press-release-fury-as-tribunal-suggests-yezidi-slavery-and-rape-were-part-of-is-law?fbclid=IwAR0syX7FNuB1VTsA1SIPNEw9teDYzdu0VrXgGq6mU-rO0bD0kyhHXto8oos> (accessed 18 Sep 23)

⁹ <https://www.lowyinstitute.org/the-interpreter/pain-hearing-australia-s-parliament-recognises-yazidi-genocide> (accessed 18 Sep 23)

¹⁰ https://treasury.gov.au/sites/default/files/2019-03/prosecute_dont_perpetrate.pdf (accessed 7 Feb 24)

Security 2021-2031. This was the first time Home Affairs had implementation responsibility under our NAP. Unlike the previous NAP, coordination responsibility lay with the Department of Foreign Affairs and Trade (rather than the Office for Women, as had been the case previously). Defence and the Australian Federal Police also have implementation responsibilities under the NAP, but none of the agencies have undertaken the required interim reporting that was due last year.

Home Affairs appear to have abdicated much of their responsibilities under the NAP since the recent Machinery of Government and fail to see the ongoing importance of gender justice to their core business, including the issue of foreign fighters. The Australian Federal Police continue to deprioritise investigations into conflict related sexual violence perpetrated overseas, including that which is perpetrated as war crimes, crimes against humanity and genocide. For example, in the recent inquiry undertaken by the Foreign Affairs, Defence and Trade Sub Committee on Human Rights, it was very disappointing that neither the Australian Federal Police, nor the Department of Home Affairs referenced either the Second National Action Plan on Women, Peace and Security; nor the National Action Plan to Combat Modern Slavery in their submissions to this inquiry. There is a serious gap between the implementation of the Women, Peace and Security NAP, Australia's Modern Slavery policy and our obligations under UN Security Council resolutions on trafficking in situations of armed conflict.¹¹

ISIS' treatment of the Ezidis

Ezidis are a unique ethno-religious minority group who have resided in Armenia, Iraq, Turkey and Syria for millennia. Some Ezidis speak Arabic; some speak Kurmanji, a Kurdish dialect;¹² but some only speak Ezidi, a distinct language. The overwhelming majority of Ezidis identify as a separate ethnic and religious group to Kurds and feel very strongly about the Kurdish military's failure to protect them from the genocide.¹³ Their faith is one of the world's first monotheistic religions. Although they believe in the same God as Christians and Muslims, ISIS believed they worshiped the devil. Under Sharia law, they are not offered the same protections as the other Abrahamic faiths. Ezidis pray in the direction of the sun, not Mecca, and they believe God sent his favourite angel to earth in the form of a peacock. Ezidis have a similar relationship with this angel, called Tawusi Malek, that Catholics have to the Virgin Mary. But ISIS consider their prayers blasphemous and set out to destroy the Ezidis.

The Ezidi community reported the threats faced to their community to the European Union and the United Nations Assistance Mission to Iraq on 4th December 2012, including when the spiritual leader of ISIS issued a Fatwa saying it was lawful to kill Ezidis. The United Nations visited Sinjar in on 25th of December 2013. Human Rights Watch was the first international organisation to report the genocide, in 2014.

The act of genocide is defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;

¹¹ <https://www.ohchr.org/sites/default/files/documents/issues/trafficking/statements/2022-07-29/2022-7-29-2022-World-day-against-trafficking-final-joint-statement.pdf> (accessed 6 Feb 24)

¹² <https://www.usip.org/sites/default/files/Yazidis-Perceptions-of-Reconciliation-and-Conflict-Report.pdf> (accessed 16 Oct 23)

¹³ [https://www.dhi.health.nsw.gov.au/transcultural-mental-health-centre-tmhc/resources/community-mental-health-profiles-and-information-resources/mental-health-of-syrian-conflict-refugees/yazidi-community#:~:text=Most%20Yazidis%20speak%20Kurmanji%20\(Northern,do%20not%20identify%20as%20Kurdish.](https://www.dhi.health.nsw.gov.au/transcultural-mental-health-centre-tmhc/resources/community-mental-health-profiles-and-information-resources/mental-health-of-syrian-conflict-refugees/yazidi-community#:~:text=Most%20Yazidis%20speak%20Kurmanji%20(Northern,do%20not%20identify%20as%20Kurdish.) (accessed 16 Oct 23)

e) Forcibly transferring children of the group to another group.

This definition comes from the Convention on the Prevention and Punishment of the Crime of Genocide, but has been included in article 6 of the Rome Statute of the International Criminal Court. Each of these individual acts is a specific criminal offence within Division 268 of the Commonwealth Criminal Code, Subdivision B—Genocide. Each act comes with a penalty of life imprisonment. The legislation specifies rape and sexual violence as examples of causing serious bodily or mental harm. It also includes the expulsion of people from their homes as an example of deliberately inflicting conditions of life calculated to bring about physical destruction.

For the Ezidis, ISIS' genocide is ongoing. It is ongoing in their displacement from their homeland; thousands of Ezidis remain missing; bodies remain unidentified, unclaimed and therefore not properly buried. Children from the community have been lost, they were stolen and forced to fight or convert to Islam, so the community feels the living absence of the next generation. Many of the kidnapped women remain in the hands of captors across the region. Ongoing offensive operations by Turkey and other countries mean Ezidi villages are subject to bombing and other air strikes. Ezidi areas continue to be littered with unexploded ordinance. Dire conditions in IDP camps provide little opportunity or hope for education or other futures for those remaining in northern Iraq.

Young people in the community explained that the ongoing genocide affects people who weren't even in Shengal when ISIS came. It makes them feel sad, angry and disappointed all the time because they are unsure how to start a new life. They remain unsure about the people from the community who allowed the genocide to occur, and who perpetrated the genocide against them, so they are afraid to return to their old houses. For the Ezidi, having their story told is very important, being heard and having the time and space to tell people what was done to them is a common need in the community.

Revocation of citizenship

Prosecute; don't perpetrate does not support the revocation of citizenship as a response to individuals who have joined ISIS and other violent extremist groups in Syria and Iraq. We agree with the other submission prepared by Professor George Williams that it is not an effective measure to improve international peace and security. It contravenes Australia's obligations to prevent and punish the crime of genocide under the Genocide Convention of 1948; our obligations to investigate and prosecute international crimes as States Parties to the Rome Statute of the International Criminal Court; and the obligations laid out under the suite of Security Council resolutions on Women, Peace and Security.

Yazidi community view

There isn't consensus within the Ezidi community about the issue of citizenship revocation, but most of the community do not support the revocation of citizenship as a response to Australians who travelled overseas and fought with ISIS and other extremist groups in Syria and Iraq. Ezidis are more aware than anyone how dangerous these individuals can be. They have personally lived through the terror and violence they have inflicted. Some community members were scared, especially having seen the Australian Government bring back ISIS wives from Al Hol camp in Syria. In their experience, the women of ISIS were often just as culpable as the men. Community members provided specific experiences where ISIS wives would prepare Ezidi women to be raped, and beat the women who were slaves in the house. They also did not want to have to bump into one of these people on the street. An example was provided of the case of Mariam Raad, one of the ISIS brides who was repatriated from Al Roj and now lives in Young, very close to the Wagga based Yazidi community. Raad was currently subject to investigation by a joint counter terrorism team.¹⁴

¹⁴ <https://www.theguardian.com/australia-news/2023/jan/06/nsw-woman-mariam-raad-granted-bail-after-being-charged-with-entering-islamic-state-territory> (accessed 7 Feb 24)

The broad view of the community was they wanted these people in jail. During processing periods, as victims of crime, they wanted restrictions on their movement so these people would not be moving freely around areas where the Yazidi communities are concentrated.

Why in Australia?

Several reasons were provided by the Ezidi community for not revoking the citizenship of these individuals. Several of the reasons align with those *prosecute; don't perpetrate* has provided to this committee before, but some provide a new perspective. It is important to note that Iraq has not recognised the genocide perpetrated against the Ezidis, genocide is not a crime in Iraq, and Iraq is not State Party to the Genocide Convention. Members of the Ezidi community spent several months discussing the implications of this legislation on their community and their hopes for justice. They specifically told *prosecute; don't perpetrate* that because the foreign fighters who would be subject to the proposed legislative amendment are citizen of this country, and they came from here, they have to be punished here. "Those people who went overseas and people who went overseas and perpetrated these crimes are citizens should be punished under Australian law. If Australia takes their citizenship away, the Australian government would be running from their responsibility to punish them," one workshop participant said.

Another participant explained that "the Quran requires Muslims to stand beside their brother Muslims, so a judge will support a Muslim over a Ezidi. Because Iraq is an Islamic country, everything has to be done according to Islam." If Australia cancels the citizenship of these people and "they are allowed to stay in the Middle East, where judges apply religious law, they may be released because they do not consider what happened to the Yazidis a crime." This participant continued, explaining, "We don't want the government to send the ISIS people overseas again because the minority Yazidis and Christians are still in danger, if the fighters are set free, they will be able to keep hurting those minorities... we know there will be danger for our family members, they are 100% more dangerous in Iraq" than in Australia.

This question of Australia having better resources to monitor extremist elements and maintain detention orders, is a common factor raised by other government agencies in earlier inquiries of this committee on this issue, showing that citizenship repudiation is not in the interests of national or international peace and security.

Barriers to justice

Revocation of citizenship is just one practical barrier being imposed preventing justice for the sexual violence and other war crimes, crimes against humanity and genocide perpetrated by Australians who joined ISIS and other extremist groups. The main reason why citizenship revocation poses a barrier to justice is because prosecutions for these crimes cannot be carried out in absentia. The perpetrator must be in the custody of the Australian Federal Police. Although Australia has jurisdiction over these crimes, they would not have the same authority to gather evidence, nor would they have the same impetus under the social contract to enforce these laws once they are no longer citizens.

However, even when an individual who was publicly recognised as having committed an act in breach of Division 268 of the Commonwealth Criminal Code, state police have often only compiled a file of terrorism-based offences against the individual concerned, never the gender-based offences under international law. This occurred when the arrest warrant was issued for Neil Prakash for terrorism offences, but not genocide related offences.¹⁵ Investigations into all these crimes need to be undertaken in conjunction with the terrorism related offences. This is the case even for individuals like Mariam Raad. Indeed, one of jurisprudentially

¹⁵ <https://www.lowyinstitute.org/the-interpreter/neil-prakash-more-just-terrorist> (accessed 19 Sep 23)

groundbreaking genocide cases in Germany was against a woman who was married to an ISIS fighter but was found culpable of genocide for holding an Ezidi woman in servitude, facilitating her abuse.¹⁶

There remain bureaucratic resourcing and multi-agency cooperation issues regarding who can and should be doing what to bring about justice for these crimes. The monitoring of the individuals who travelled to proscribed areas and joined ISIS and other extremist groups is undertaken by a range of government agencies that may not gather that information for the purposes of criminal investigation. That needs to change if Australia is going to meet its obligations to end impunity for conflict related sexual violence; prevent and punish the crime of genocide; and meet its commitment as State Party to the ICC. Furthermore, Australia's judicial organisations need to be better trained in the implementation of international law in our domestic courts. This may require updates and training based on the modern slavery and other policy developments including the National Action Plan on Women, Peace and Security.

Conclusion

The 47th Parliament should not pass this bill allowing the repudiation of citizenship. Revoking citizenship acts as a barrier to justice for the many international crimes many of these individuals have committed but have not yet been charged with. Members of the Ezidi community in Australia eloquently described how sexual violence is so often treated as less of a crime, but for the women who experienced sexual violence as a war crime, crime against humanity or genocide at the hands of ISIS, "they die every day." Australia has layers of policy and law which state that we should be prosecuting these crimes and providing victims with their day in court, providing them with access to justice, not leaving extremists out in the world, in fragile countries where there is little in the way of governance and policing to prevent them carrying out further atrocities.

The victims of Australian terrorists are around the world. The women who survived time with Khaled Sharrouf, sought refuge in Germany. A recent investigation by ABC's Foreign Correspondent identified women who identified Mohammed Ahmad (a.k.a Abu Omar) as the Australian man who held them in sexual servitude while he and his son were foreign fighters with ISIS.¹⁷ Yazda and the UN Investigative Team for Accountability for Da'esh (UNITAD) and other organisations have records of Australian perpetrators.¹⁸ The government needs to fund an independent international crimes unit within the Australian Federal Police that would be dedicated to the investigation and prosecution of crimes like this.¹⁹

Recommendations for the committee

1. Do not recommend the passing of this bill that allows the repudiation citizenship of individuals who may have perpetrated conflict related sexual violence, in order that they may be arrested by Australian authorities and prosecuted for these crimes.
2. Undertake training and awareness raising for state and federal police working on terrorism and other international criminal cases to ensure that conflict related sexual violence is included in files for prosecution and extradition.

¹⁶ <https://www.doughtystreet.co.uk/news/german-court-delivers-third-genocide-verdict-against-isis-member-enslavement-and-abuse-yazidi#:~:text=In%20a%20milestone%20decision%2C%20the,eradicate%20the%20Yazidi%20religious%20minority.> (accessed 7 Feb 24)

¹⁷ <https://www.internationalaffairs.org.au/australianoutlook/the-fight-for-justice-for-isis-victims-in-australia/> (accessed 18 Sep 23)

¹⁸ <https://www.unitad.un.org/> (accessed 1 Feb 24)

¹⁹ <https://acij.org.au/our-work/policy-and-law-reform/permanent-specialised-international-crimes-unit/> (accessed 2 Feb 23)

3. Recommend the government fund a specialised International Crimes Unit within the Australian Federal Police.

Attachments

Motion 1 – Lower House: Sexual Violence in Armed Conflict

Motion 2 – Upper House: War Crimes

Motion 3 – Lower House: Yazidi People

Sexual Violence in Armed Conflict

I move that this House:

(1) notes that:

- a) the use of sexual violence in armed conflict is a war crime; and
- b) the use of sexual violence as part of a widespread or systematic attack directed against any civilian population is a crime against humanity;

(2) acknowledges that Islamic State:

- a) is perpetrating war crimes and crimes against humanity against minority Muslim groups, Christians, Yazidis and other religious and ethnic minorities in Iraq and Syria;
- b) has perpetrated acts of sexual violence amounting to war crimes and crimes against humanity; and
- c) has dedicated infrastructure for the kidnap, trafficking and sale of sex slaves; and

(3) calls on the Australian Government to:

- a) investigate, prosecute and hold to account Australians who have committed crimes, according to domestic or international law, as members of Islamic State or other recognised international terrorist groups; and
- b) support international efforts to gather evidence, investigate and prosecute those responsible for international crimes perpetrated by Islamic State or other recognised international terrorist groups.

Debate adjourned.

Moved by Ms Brodtmann (Member for Canberra), seconded by Ms Claydon (Member for Newcastle), supported by Mr Leeser (Member for Berowra), Mr Falinski (Member for Mackellar), Dr Kelly (Member for Eden-Monaro), and Mr Wallace (Member for Fisher).

6:14pm, 4 September 2017

War Crimes

I move that the Senate -

(a) notes that:

- i. genocide is a crime under both international and Australian law,
- ii. the use of sexual violence and other acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group constitutes genocide,
- iii. the use of sexual violence in armed conflict is a war crime,
- iv. the use of sexual violence, as part of a widespread or systematic attack, directed against any civilian population is a crime against humanity, and
- v. international sex trafficking is a crime under Australian law;

(b) acknowledges that members of Da'esh:

- i. have perpetrated genocide against the Yazidi people,
- ii. are perpetrating war crimes and crimes against humanity against Muslims, Christians, Yazidis and other religious and ethnic minorities,
- iii. have perpetrated acts of sexual violence amounting to war crimes, crimes against humanity and genocide in Iraq and Syria, and
- iv. have dedicated infrastructure for the kidnap, trafficking and sale of sex slaves in Iraq and Syria; and

(c) calls on the Government to:

- i. condemn the genocide perpetrated against the Yazidi people by Da'esh,
- ii. investigate Australians who have allegedly perpetrated war crimes, crimes against humanity and genocide, including through the use of sexual violence, and prosecute them as appropriate, and
- iii. support international efforts to gather evidence, investigate and prosecute those responsible for international crimes perpetrated by Da'esh in Iraq and Syria.

Question agreed to.

3.45pm, 15 November 2017

Moved by Senator Moore (Queensland) also on behalf of Senators Reynolds (Western Australia), McKim (Tasmania), Lambie (Tasmania) and Kakoschke-Moore (South Australia).

Yazidi People

I move that this House:

- 1) notes that:
 - a. genocide is a crime under international law, which has been enacted into Australian law through Division 268 of the Australian Criminal Code; and
 - b. the Iraqi Council of Ministers, United Nations institutions, and many parliaments have recognised that ISIL's crimes against the Yazidis constitute genocide;
- 2) welcomes the Government's decisive action in resettling Yazidi refugees;
- 3) condemns the genocide perpetrated against Yazidis by ISIL;
- 4) calls for continued support for the Global Coalition to Defeat ISIL and efforts to liberate Yazidis in ISIL captivity;
- 5) recognises the importance of justice for Yazidi victims and survivors of ISIL and calls on the Government to continue to support accountability for the perpetrators of serious international crimes against the Yazidis, including, where appropriate, in Australian courts and in other jurisdictions, where these are consistent with international standards;
- 6) calls on the Government to continue supporting the formation of an Investigative Team pursuant to United Nations Security Council Resolution 2379 (2017) and, once established, to support it in the collection, preservation and storage of evidence of acts that may amount to war crimes, crimes against humanity and genocide; and
- 7) supports the:
 - a. continued efforts to defeat ISIL militarily and ideologically via de-radicalisation and countering violent extremism programs;
 - b. continued consideration of the plight of the Yazidis in the development of Australian humanitarian policies and programs;
 - c. continued provision of psychological and other social support services for Yazidi refugees living in Australia;
 - d. right of the Yazidis and all minorities to live in peace, safety and freedom in Syria and Iraq and to participate in relevant political processes; and
 - e. protection of Yazidis, Christians and other minorities in Iraq, under United Nations supervision and in cooperation with relevant authorities and minorities.

Moved by Mr Crewther (Member for Dunkley), seconded by Ms Brodtmann (Member for Canberra), and supported by Dr Aly (Member for Cowan), Mr Zimmerman (Member for North Sydney), and Dr Kelly (Member for Eden-Monaro).

4:45pm, 26 February 2018