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## TO CATCH THE BOOMERANG? SHOULD AUSTRALIA EXTRADITE, REPATRIATE AND PROSECUTE THEIR “RETURNING” FOREIGN TERRORIST FIGHTERS?

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**JCSP 46**

**Solo Flight**

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SOLO FLIGHT

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**By Lieutenant-Commander Jacqueline Swinton**

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# **TO CATCH THE BOOMERANG? SHOULD AUSTRALIA EXTRADITE, REPATRIATE AND PROSECUTE THEIR “RETURNING” FOREIGN TERRORIST FIGHTERS?**

*Violent extremist influences in Australia will be exacerbated by foreign fighters seeking to return from conflict zones in the Middle East. Some of these foreign fighters will seek to return with the skills, experience and a predisposition to violent action that will make them a significant risk to the community.*

— Australia’s Counter Terrorism Strategy (2015)

## **INTRODUCTION**

The Foreign Terrorist Fighter (FTF) threat is arguably one of the greatest international and state security challenges of the last decade, and is ongoing. As the Syrian conflict winds down, thousands of FTF have been returning to their home countries, including many Western countries, such as Australia. This paper explores the security challenge that returning FTF pose to their home countries and analyses Australia’s response, including the legislation and policy amendments undertaken to confront the ongoing threat. The paper argues that Australia has put more practical effort into measures depriving Australian FTF of their nationality and refusing entry back into Australia, than it has to extradite, repatriate and prosecute such offenders. It concludes that states have a responsibility, as well as it being in their national interest, to bring FTF home and carry out intelligence operations, criminal investigations and prosecutions, even where it is challenging to do so. There is no doubt that future foreign conflicts will draw FTF from Australia again. Therefore, Australia must equip itself with special investigative units, train niche prosecutors and test the legality of their amended legislation to ensure preventative measures and effective and efficient prosecution of FTF in years to come.

## INTERNATIONAL RESPONSE TO FOREIGN TERRORIST FIGHTERS

In 2014, the United Nations (UN) Security Council unanimously adopted Resolution 2178 (UNSCR) in response to the threat to international peace and security and international consternation caused by FTF.<sup>1</sup> The UN defines FTF as:

...individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.<sup>2</sup>

This paper concentrates solely on the threat of FTF using the UN definition, as distinctly separate from ‘home-grown’, ‘domestic’ terrorists or ‘religious extremists’. Not only did UNSCR 2178 define FTF, it was instrumental in targeting the FTF threat on a global level by obligating member states to put in place legislation criminalising actions associated with FTF, including travelling for terrorism purposes, recruiting, organizing, transporting, equipping, training or financing of FTFs.<sup>3</sup> Specifically, it called upon member states to ensure appropriate laws and regulations be available, so that prosecution and punishment could be taken consonant with the seriousness of the offence.<sup>4</sup> Many countries, including Australia, quickly responded to the UN’s demand, overhauling their legislation to ensure the availability of prosecutions of their nationals for becoming (or activities associated with) FTF. As of December 2016, over forty-seven states had created new or amended existing legislation in response to UNSCR 2178, to ensure an available, effective domestic response to address the FTF threat.<sup>5</sup> Many of these were directed toward bolstering criminal law

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<sup>1</sup> *United Nations Security Council Resolution 2178*, 7272<sup>nd</sup> meeting, (24 Sep 2014).

<sup>2</sup> *United Nations Security Council Resolution 2178*, 7272<sup>nd</sup> meeting, (24 Sep 2014).

<sup>3</sup> *United Nations Security Council Resolution 2178*, 7272<sup>nd</sup> meeting, (24 Sep 2014) operative para 5.

<sup>4</sup> *United Nations Security Council Resolution 2178*, 7272<sup>nd</sup> meeting, (24 Sep 2014) operative para 6.

<sup>5</sup> Christophe Paulussen & Kate Pitcher “Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges” (Jan 2018) Research Paper, *International Centre for Counter Terrorism*, The Hague p14.

measures to ensure avenues for prosecution of terrorist related crimes.<sup>6</sup> However, due to the many challenges of prosecutions (foreign evidence collection, location of witnesses, collection in conflict zones etc.), states also undertook other measures to address the FTF problem, the most controversial being the stripping of nationality of FTF to prevent them from returning to their home country.

## **THE COMPLEXITY OF THE FOREIGN TERRORIST FIGHTER THREAT**

The threat presented by FTF is not new, not even for Australia. Since 1998 Australian citizens have travelled to train and/or fight with terrorist organisations in conflicts in Afghanistan, Lebanon, Pakistan, Somalia and Yemen, to name a few.<sup>7</sup> However, the FTF threat today is different and unique, and provides an exceptional security concern to both the international community at large and individual states, including Australia. The recent Iraq and Syrian conflicts have seen an unprecedented number of individuals mobilise rapidly, in numbers estimated at over 38,000.<sup>8</sup> Mr Vladimir Voronkov, the Head of the UN Office of Counter-Terrorism, emphasised the seriousness of the returning FTF security threat when he advised the UN Security Council “[t]his is a truly global challenge that demands an urgent and concerted multilateral response”<sup>9</sup>.

Not only has the online terrorist recruitment and mobilisation reached such significant numbers, the propaganda has successfully manipulated a diversity of people from over 110

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<sup>6</sup> Christophe Paulussen & Kate Pitcher “Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges” (Jan 2018) Research Paper, *International Centre for Counter Terrorism*, The Hague p14.

<sup>7</sup> Chantal Azzam, “Australian Foreign Fighters: The Long Reach of the Syrian Conflict” Counter Terrorist Trends and Analyses, *International Centre for Political Violence and Terrorism Research*, Vol 6, no. 9 (October 2014), pp. 9-13.

<sup>8</sup> U.N. Secretary-General, Report of the Secretary General on the Threat Posed by ISIL (Da’esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat, 18, U.N. Doc. S/2016/501 (May 31, 2016).

<sup>9</sup> United Nations, Secretary Council 8116<sup>th</sup> meeting, “Greater Cooperation needed to tackle danger posed by returning foreign fighters, Head of Counter-Terrorism Office Tells Security Council”, (28 Nov 2017) SC/13097 [<https://www.un.org/press/en/2017/sc13097.doc.htm>]

countries<sup>10</sup>, including many from the West (estimated at well over 3,000 people).<sup>11</sup> For Australia, the numbers that quickly mobilised for the Syrian conflict were unmatched, with the Australian Security Intelligence Organisation (ASIO) estimating from 70 to over 200 Australian fighters were on the ground between 2012- 2013 alone.<sup>12</sup> As of July 2019, Australian Minister for Home Affairs, Peter Dutton reported that over 230 Australian FTF had travelled to Iraq and Syria, with 40 having returned home and over 80 remaining.<sup>13</sup>

The recruitment to the caliphate fight is not only larger and more multinational than ever before, but the recruits are younger (including child soldiers) and there is a significant gender dimension, with more than ten percent of FTF being female.<sup>14</sup> While these women are predominantly recruited for marriage and to produce “children of the caliphate”, many have taken up fighting roles, suicide missions and acted as poster girls for the Islamic State of Iraq and Syria (ISIS) propaganda.<sup>15</sup> Furthermore, ISIS has invested heavily in recruiting and training children, including over 2,000 boys aged 9-15 between 2014-2016 alone.<sup>16</sup> This has added to the complexity of the FTF phenomena and has provided an even tougher political challenge for states in returning FTF (and their children), home.

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<sup>10</sup> *Ibid.*

<sup>11</sup> Andrew Zamit, “Australian foreign fighters: Risks and responses” (2015) *Lowy Institute for International Policy*, Sydney.

<sup>12</sup> Chantal Azzam, “Australian Foreign Fighters: The Long Reach of the Syrian Conflict” Counter Terrorist Trends and Analyses, *International Centre for Political Violence and Terrorism Research*, Vol 6, no. 9 (October 2014), pp. 9-13.

<sup>13</sup> ABC News, Matt Doran, “Peter Dutton wants to stop Australians Citizens with suspected terrorist links from returning Home” 23 July 2019, [accessed 29 March 2020] <https://www.abc.net.au/news/2019-07-23/temporary-exclusion-order-explainer/11330566>

<sup>14</sup> Sylvene See, “Counter Terrorist Trends and Analyses”, *International Centre for Political Violence and Terrorism Research*, Vol 10 no. 6 (June 2018), pp. 7-15.

<sup>15</sup> Harris Tan Nan An, “Tackling the Returning Foreign Fighter Threat: Hard or Soft Approach?” (2019) *Journal of the Singapore Armed Forces* Vol 45, No. 1.

<sup>16</sup> United Nations Office Drugs and Crime, Report, “Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia” (2018), Vienna.

## THE FOREIGN TERRORIST FIGHTER THREAT TO PEACE AND SECURITY

With the fall of held ‘caliphate territory’ and dismantling of the Syrian conflict in December 2019, the ongoing return of the remarkable number and diverse nationality of FTF to their home countries continues to pose a significant international and national security concern. While the intent of the returning FTF is not unanimous, it is understandable that states have grave concern that FTF will cause instability and insecurity in several ways. Returning with experience and ‘credibility’ may give them influence to radicalise others.<sup>17</sup> They may return and act as protagonists for propaganda, recruiters, teachers, mentors and distributors of violent terrorist organisation ideals, contrary to a peaceful and productive society’s laws and values.<sup>18</sup> Most notable, is the risk that returning, trained and experienced fighters may carry out terrorist attacks in their home country, against their own nationals and/or national infrastructure. The following three examples demonstrate the extreme threat FTF pose to national security.

On 13 November 2015, twenty male, radicalised ISIS supporters carried out coordinated suicide bomber attacks across Paris, killing 130 people and injuring many more.<sup>19</sup> Of these, six were Belgian and French nationals who had returned from fighting in Syria.<sup>20</sup> Similarly, three of the five ISIS members who carried out the coordinated terrorist attacks in Brussels in March 2016, killing 32 and injuring many more<sup>21</sup> had trained and fought in Syria and returned

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<sup>17</sup> Phil Gurski, “Western Foreign Fighters: The Threat to Homeland and international Security” (2017) Rowman & Littlefield, London.

<sup>18</sup> Harris Tan Nan An, “Tackling the Returning Foreign Fighter Threat: Hard or Soft Approach?” (2019) *Journal of the Singapore Armed Forces* Vol 45, No. 1.

<sup>19</sup> BBC News “Paris Attacks: French judge orders trial for 20 suspects” (16 Mar 2020) [www.bbc.com/news/world-europe-51915513](http://www.bbc.com/news/world-europe-51915513) and BBC News “Paris Attacks: Who were the Attackers” (27 April 2016) <https://www.bbc.com/news/world-europe-34832512>

<sup>20</sup> Georgia Holmer and Adrian Shtuni, “Returning Foreign Fighters and the Reintegration Imperative” United States Institute of Peace, Special Report No 402 (Mar2017).

<sup>21</sup> BBC News “Brussels explosions: What we know about airport and metro attacks” (9 April 2016) <https://www.bbc.com/news/world-europe-35869985>



home to Europe to create havoc.<sup>22</sup> The network headed by Belgian national Abdelhamid Abaaoud, carried out these connected attacks, demonstrating the deadly ability of the returning FTF to pool resources, share hideouts, weapons and logistics and to utilize their Syrian bomb making skills to carry out the lethal attacks against civilians.<sup>23</sup> A more recent example of returning FTF launching deadly terrorist attacks from home soil is the 2019 terrorist attacks in Sri Lanka which killed more than 250 people.<sup>24</sup>

Another risk to states is that returning FTFs have made substantial contacts and connections with those who wish to perpetuate violence against the West, thereby encouraging the spread of hateful violence, radicalised ideology and provision of material support for terrorist organisations among the community. For example, a surviving journalist who had been held hostage by the Al Nusra Front for two years in Syria explained that terrorist organisation motive for Westerners to join the conflict in Syria was so they could learn, connect with others and fight back in their Western home countries; not because they needed the additional man power in Syria.<sup>25</sup> Assuming they return home, FTF physical presence cannot only drum up support for violence, but could be a powerful motivator in increasing membership to terrorist organisations through recidivism of the disengaged or de-radicalised or through radicalisation of 'lone wolves'.<sup>26</sup>

Lastly, is the notion that the returning FTFs may cause instability through promoting their stories from the battlefield along with their ideals in person or online, in order to

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<sup>22</sup> Georgia Holmer and Adrian Shtuni, "Returning Foreign Fighters and the Reintegration Imperative" United States Institute of Peace, Special Report No 402 (Mar2017).

<sup>23</sup> Brian Michael Jenkins, "Options for Dealing with Islamic State Foreign Fighters Currently Detained in Syria" (May/June 2019) *Combating Terrorist Centre, Westpoint*, Vol 12. No 5: 11.

<sup>24</sup> Brian Michael Jenkins, "Options for Dealing with Islamic State Foreign Fighters Currently Detained in Syria" (May/June 2019) *Combating Terrorist Centre, Westpoint*, Vol 12. No 5: 11.

<sup>25</sup> Canada, Canadian Security Intelligence Service, Report from Workshop "The Foreign Fighters Phenomenon and Related Security Trends in the Middle East: Highlights from the workshop 28-29 October 2015" (Jan 2016)

<sup>26</sup> Harris Tan Nan An, "Tackling the Returning Foreign Fighter Threat: Hard or Soft Approach?" (2019) *Journal of the Singapore Armed Forces* Vol 45, No. 1: 1.

encourage violence from the disenfranchised or isolated minorities within western society.<sup>27</sup> ISIS is well known for its highly successful dissemination of extremist ideology propaganda and recruitment of ‘lone wolves’, and can do so online from anywhere in the world. Their material is highly influential and effective in mobilising civilians to do harm to ‘non-believers’. They have mastered social media platforms to disseminate propaganda on a new scale and enabled encrypted chat ability to build new networks and influence recruiting, plotting and executing of attacks.<sup>28</sup> Their ability to use Westerners to carry out attacks, create powerful online messages, spread their propaganda and recruit other Westerners further enhances their capability and effectiveness. For example, from 2014, many Australians<sup>29</sup> became infamous in ISIS propaganda and recruitment videos to influence others to join the Syrian conflict.<sup>30</sup> These videos have proven to be powerful tools for ISIS, demonstrating the diversity of membership, appealing to like-minded Australians or those that are vulnerable to recruitment or to carry out attacks.<sup>31</sup> The following recruitment propaganda resulted in an Attack on Australian soil. On 23 September 2014 in Melbourne city, a day after ISIS’s chief spokesperson, Abu Muhammad al-Adnani, disseminated the following message inciting violence across the world, an 18-year-old Melbourne man (and online supporter of ISIS), stabbed two police officers repeatedly in the head until he was shot dead<sup>32</sup>:

Do not let this battle pass you by wherever you may be... If you can kill a disbelieving American or European—especially the spiteful and filthy French—or an Australian, or a Canadian, or any other disbeliever from the disbelievers waging war, including the citizens of the countries that entered into a coalition against the Islamic State, then rely upon Allah, and kill him in any manner or

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<sup>27</sup> *Ibid.*

<sup>28</sup> United Nations Office Drugs and Crime, Report, “Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia” (2018), Vienna.

<sup>29</sup> For example, Neil Prakash, Abdullah Elmir, Abu Yahya ash Shami, Abu Nour al-Iraqi, Tareq Kamleh and Jake Bilardi from Australian Strategic Policy Institute, “Gen Y Jihadists Preventing radicalisation in Australia”, Strategy, (2015), Canberra.

<sup>30</sup> Australian Strategic Policy Institute, “Gen Y Jihadists Preventing radicalisation in Australia”, Strategy, (2015), Canberra.

<sup>31</sup> *Ibid.*

<sup>32</sup> ABC News, “Terror Suspect Abdul Numan Haider Continued to Stab Fallen Officer: Inquest”, 3 October 2014; Hilary Whiteman, “Lone Wolf? Australian Police Shoot Dead Teen ‘Terror Suspect’, CNN World News, 25 September 2014.

way however it may be... If you are not able to find an IED or a bullet, then single out the disbelieving American, Frenchman, or any of their allies. Smash his head with a rock, or slaughter him with a knife, or run him over with your car, or throw him down from a high place, or choke him, or poison him....<sup>33</sup>

The threat of returning FTF cannot be underestimated. A study undertaken by Thomas Hegghammer (using statistics from 1990- 2010) attempted to quantify the threat posed by returning FTF at that time.<sup>34</sup> Hegghammer concluded that Western jihadists pose a low threat to the West, reasoning that they prefer to fight overseas and “only” one in nine foreign fighters return to plot or attempt an attack in the West.<sup>35</sup> Hegghammer also concluded that returning FTF that carry out attacks at home will be more effective, due to their training and experience, causing greater casualties.<sup>36</sup> These studies were used to show the FTF threat was not significant to the West, however this was prior to the ISIS phenomenon and record number of FTF that mobilised internationally to fight in Iraq and Syria.<sup>37</sup> Today, If we look at the sheer numbers who have become FTF alone and are returning, they pose a ‘statistical certainty’ as a risk of attack and are therefore a significant threat to the West.<sup>38</sup> A more recent study by senior research fellow at the US National Defense University, Kim Cragin, demonstrated FTF involvement to account for 50% of all attacks and plots in the West between 2014 - 2016.<sup>39</sup> Since then, the fact that Western countries assisted in the defeat of a Middle Eastern Caliphate

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<sup>33</sup> Canada, Canadian Security Intelligence Service, Report from Workshop “The Foreign Fighters Phenomenon and Related Security Trends in the Middle East: Highlights from the workshop 28-29 October 2015” (Jan 2016)

<sup>34</sup> Hegghammer, Thomas, “Should I Stay or Should I go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting,” (February 2013) *American Political Science Review*: 11

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Raphaël Leduc, “Are returning foreign fighters dangerous? Re-investigating Hegghammer’s assessment of the impact of veteran foreign fighters on the operational effectiveness of domestic terrorism in the West” (2016) *Journal of Military and Strategic Studies* Vol 17 No. 1: 83

<sup>38</sup> Elena Pokalova, “Returning Islamist Foreign Fighters: Threats and Challenges to the West” (2020) Palgrave Macmillan, Washington DC

<sup>39</sup> Kim Cragin, “The challenge of Foreign Fighter Returnees” (2017) *Journal of Contemporary Criminal Justice*, Vol. 33, No. 3; 292–312

in Syria, has incidentally given the FTF a common enemy and motive for reprisal.<sup>40</sup> This, coupled with ISIS' amended strategy that specifically calls for FTF to return and carry out attacks at home rather than continuing the fight for territory in Iraq and Syria, highlights that Hegghammer's dated study is no longer an accurate assessment of the real FTF risk.<sup>41</sup> The FTF threat is more dangerous than ever before, with the unprecedented number of returnees having the intent and capability to carry out attacks, especially against the West.

## **AUSTRALIA'S SECURITY SITUATION AND THE FOREIGN TERRORIST FIGHTER THREAT**

Australia was cognizant of the returning FTF as a significant 'game changer' for domestic and regional security and addressed it head on. Attorney General, George Brandis advised Parliament in September 2014 that "[t]he risk posed by returning foreign fighters is one of the most significant threats to Australia's national security in recent years."<sup>42</sup> By September 2014, Australia announced the FTF threat as its number one national security priority and raised the national terror threat level to 'high' for the first time since the 9/11 terrorist attacks.<sup>43</sup> The decision to increase the threat level was heavily based on the unprecedented numbers of Australian FTF fighting in Iraq and Syria, the threat of FTF returning home, as well as the increase in Australians supporting terrorist organisations and those remaining in Australia planning domestic terrorist attacks.<sup>44</sup> The national terror threat level continues to be influenced by the FTF threat (those that have returned and still returning),

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<sup>40</sup> Elena Pokalova, "Returning Islamist Foreign Fighters: Threats and Challenges to the West" (2020) Palgrave Macmillan, Washington DC

<sup>41</sup> *Ibid.*

<sup>42</sup> Lexie Henderson-Lancett, "The Foreign Fighter Legislation of 2014 Implications for the future of criminal jurisprudence?" (2016) *The Alternative Law Journal* Vol 41 No. 1; 49.

<sup>43</sup> Andrew Zamit, "Australian foreign fighters: Risks and responses" (2015) *Lowy Institute for International Policy*, Sydney, 19.

<sup>44</sup> Cat Barker, "Countering Terrorism and Violent Extremism", Parliament of Australia, Foreign Affairs, Defence and Security, Library Briefing Book, (2016) Canberra.  
[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BriefingBook45p/ViolentExtremism](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/ViolentExtremism)

and as of the time of writing is listed as ‘probable’.<sup>45</sup> ‘Probable’ means the Australian security agencies have credible intelligence to indicate individuals or groups, have the intent and capability to carry out a terrorist attack in Australia.<sup>46</sup> Those individuals and groups with intent and capability include many of Australia’s FTF who have returned back to Australia.

As well as continuing to impact the national threat level, the returning FTF threat persistently shapes Australia’s security scene. The most recent Defence White Paper identifies six key factors that influence Australia’s long-term strategic outlook, one of these being that returning FTF, specifically from the Iraq and Syrian conflicts, raise the risk of domestic instability and home-grown attacks.<sup>47</sup> Australia has seen this already with the attempted terrorist attack in July 2017 where two brothers attempted to load a home-made plastic explosives bomb on a passenger *Etihad* flight from Sydney, allegedly under direction of ISIS and in communication with another brother, an ISIS Commander operating in Syria.<sup>48</sup> Furthermore, in 2019 ASIO advised that Australia’s main terrorist threat originates from Islamist extremists, including returning FTF, who will continue to cause instability at home and abroad, for the foreseeable future:<sup>49</sup>

The primary terrorist threat in Australia comes from a small number of Islamist extremists who are committed to violence as part of their ideology. Although significant uncertainty exists about the future shape of the Islamic State of Iraq and the Levant (ISIL) and the future of the foreign fighters who joined it, we expect the legacy of ISIL and the networks it has built, in person or online, will continue to adversely affect both the global and Australian security environment for years to come.<sup>50</sup>

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<sup>45</sup> Australian Government, National Terrorism Advisory Threat System (accessed 22 Mar 2020) <https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx>

<sup>46</sup> *Ibid.*

<sup>47</sup> Australia, Department of Defence, Defence White Paper, (2016), Canberra, p 47.

<sup>48</sup> United Nations Office Drugs and Crime, Report ,“Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia” (2018), Vienna.

<sup>49</sup> Australia, Australian Security Intelligence Organisation, Annual Report 2018-2019, 14 Sep 2019, Canberra

<sup>50</sup> *Ibid.*

## **AUSTRALIA'S RESPONSE TO THE FOREIGN TERRORIST FIGHTER THREAT**

Australia responded to the UN's call for action with its' full might, adopting new legislation from 2014 and amending the old to cover the FTF threat across both criminal and administrative spheres. As such, between 2014-2015, in the early days of responding to the FTF threat, Australia was internationally praised for its action, including by the UN Counter-terrorism Committee, who commended Australia on its ability to develop 'complex, nuanced approaches' to the problem.<sup>51</sup> Furthermore, Australia was seen as a leader in 'innovative' solutions for criminal law complications, including being able to charge and prosecute persons who travel to government banned 'declared areas', such as known terrorist locations.<sup>52</sup> Australian Minister for Foreign Affairs made al-Raqqa province in Syria (in effect from 5 Dec 2014- 29 Nov 2017) and Mosul district in Iraq (in effect from 3 Mar 2018- 19 Dec 2019) to be such 'declared areas' for stipulated times.<sup>53</sup> While both locations are now no longer 'declared areas', Australians who entered or remained in such areas during the effective time are still subject to investigation and prosecution.<sup>54</sup>

## **AUSTRALIA'S LEGAL FRAMEWORK TO TARGET CRIMES OF FOREIGN TERRORIST FIGHTERS**

Prior to 2014, Australia had significant legislation available for prosecution of FTF for the most heinous crimes been carried out in Iraq/Syria, including war crimes (torture, inhumane treatment) and crimes against humanity (rape, sexual slavery and persecution).<sup>55</sup> For example, notorious Australian FTF, Khaled Sharrouf and Mohamed Elomar (now deceased) were both

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<sup>51</sup> Jacinta Carroll, "The citizen as enemy combatant: dealing with foreign terrorist fighters" Australian National University Policy Options Paper, No 12, (May 2019).

<sup>52</sup> United Nations Office Drugs and Crime, Report, "Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia" (2018), Vienna.

<sup>53</sup> Australian Government, Australian National Security, 'Declared Area Offence' [accessed 4 Apr 2020] <https://www.nationalsecurity.gov.au/WhatAustraliaisdoing/Pages/DeclaredAreaOffence.aspx>

<sup>54</sup> *Ibid.*

<sup>55</sup> Australia, Commonwealth Criminal Code (1995) Division 268

reported to have been involved in the rape, forced marriage and slavery of captured Yazidi women in Syria, in addition to other numerous war crimes.<sup>56</sup> Many other surviving Australian nationals that have operated with terrorist organisations such as ISIS/Al Nusarah Front and Kurdish Peshmerga, some in leadership roles, may be responsible in the planning and/or execution of crimes on a large scale, such as ethnic cleansing.<sup>57</sup> It is fundamentally important that Australia takes responsibility for their nationals who contribute to or commit such heinous crimes, through investigation and prosecution of the most applicable offence, and not only rely on the new counter-terrorism provisions.<sup>58</sup>

In 2014, Australia passed the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act* which made extensive amendment to over 22 different pieces of legislation relevant to countering terrorism and address the FTF problem head on.<sup>59</sup> The Australian government advised that such extensive measures were ‘urgent and necessary’ to respond to the threat posed by returning FTF and those Australians supporting foreign conflicts from Australia through financing, facilitation or logistics.<sup>60</sup> These significant changes rapidly enabled the government to prevent Australians from travelling overseas to fight with terrorist organisations and created new criminal offences allowing for prosecution of Australians who did manage to travel overseas as FTF. Most notably, the *Commonwealth Criminal Code (1995)* was amended to include offences for Australians who travelled to ‘declared areas’<sup>61</sup> (a low threshold for prosecution, as the prosecutor need only prove the location in order to secure a

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<sup>56</sup> Gideon Boas & Pasccale Chifflet “Suspected War Criminals in Australia: Law and Policy” (2016) Melbourne University Law Review Vol 40 No. 1: 46-82

<sup>57</sup> *Ibid.*

<sup>58</sup> Gideon Boas & Pasccale Chifflet “Suspected War Criminals in Australia: Law and Policy” (2016) Melbourne University Law Review Vol 40 No. 1: 46-82

<sup>59</sup> Lexie Henderson-Lancett, “The Foreign Fighter Legislation of 2014 Implications for the future of criminal jurisprudence?” (2016) *The Alternative Law Journal* Vol 41 No. 1; 49

<sup>60</sup> Australia, Commonwealth, *Counter-Terrorism legislation Amendment (Foreign Fighters) Bill 2014*, Bills Digest No 34, 17 Oct 2014

[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1415a/15bd034#\\_Toc401304913](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1415a/15bd034#_Toc401304913)

<sup>61</sup> Australia, *Commonwealth Criminal Code (1995)*, section 119.2

conviction), offences for partaking in ‘hostile acts’<sup>62</sup> and widened the extrajudicial jurisdiction over citizens overseas.<sup>63</sup> Together with strengthening the laws of FTF crimes, Australia displayed a clear policy and intention for such prosecutions to occur. In the Counter-Terrorism Strategy of 2015 Australia stated that “[w]here possible, those who return will be prosecuted and imprisoned”.<sup>64</sup> However, with the end of the Syrian conflict and the FTF in custody awaiting repatriation (for example by the US, Turkey or Syria), there have been very few investigations or prosecutions carried out.<sup>65</sup> Instead, Australia, has chosen to use ‘citizenship as a weapon’<sup>66</sup> and prevent the entry of citizens back into the country. This shall be explored in more detail further along in the paper.

The 2014 Counter Terrorism amendments also included several changes to Australia’s civil legislation, including the *Migration Act (1958)* which enabled provision for the Immigration Minister to cancel visas on security grounds, including deciding the matter extraterritorially for persons outside Australia.<sup>67</sup> This allowed for visas to be cancelled in emergency circumstances (for example interim cancellation of a visa for 28 days where travel is imminent) and cancellation where an individual fails the ‘character test’ (for example where ASIO has provided an adverse security assessment).<sup>68</sup> Furthermore, amendments to the *Australian Passports Act (2005)* allowed the Minister to refuse to issue a new, or to cancel an existing, Australian passport on law enforcement and security grounds, where there is a likelihood that the person may engage in conduct which may prejudice the security of Australia

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<sup>62</sup> Australia, *Commonwealth Criminal Code (1995)*, section 119.1

<sup>63</sup> Muneer Hamaid “Foreign fighters: A Five Eyes Border Management Perspective” (2017) *Journal of Policing, Intelligence and Counter Terrorism*, Vol 12, No. 1, 47-65

<sup>64</sup> Australia, *Australia’s Counter Terrorism Strategy, Strengthening Our Resilience* (2015)

<sup>65</sup> For example, between Jul 2017- Jun 2018 there were no prosecutions of foreign fighters (from Australia, Commonwealth Department of Public Prosecutions Annual Report (24 Sep 2018) and between Jul 2018- Jun 2019, only one foreign fighter was prosecuted and sentenced see *R v Biber* [2018] NSWCCA 271 within Australia, Commonwealth Department of Public Prosecutions Annual Report (26 Sep 2019)

<sup>66</sup> Adam K. Webb, “Swanning Back In”? Foreign Fighters and the Long Arm of the State”, (2017) *Citizenship Studies*, Vol. 21 No. 3; 291-308

<sup>67</sup> Muneer Hamaid “Foreign fighters: A Five Eyes Border Management Perspective” (2017) *Journal of Policing, Intelligence and Counter Terrorism*, Vol 12, No. 1, 47-65

<sup>68</sup> *Ibid.*



or a foreign country, endanger the health or physical safety of persons, or interfere with the rights or freedoms of others.<sup>69</sup> These changes were relied upon heavily by the Australian government to prevent the travel of attempted FTF, and between Jun 2014 and Jul 2015, forty-five passports were cancelled due to security reasons, up from only eighteen year before.<sup>70</sup>

## **THE REMOVAL OF AUSTRALIAN CITIZENSHIP AND PREVENTING THE RETURN OF FOREIGN TERRORIST FIGHTERS**

Despite Australia's initial resolve to bring FTF home and prosecute them, in practice this has not occurred.<sup>71</sup> As of Jun 2017, only 2 of the 40 returned FTF had been prosecuted.<sup>72</sup> Instead, Australia enacted legislation targeting FTF citizenship. On 1 Dec 2015, the *Australian Citizenship Amendment (Allegiance to Australia) Act* was passed, providing for the automatic loss of Australian citizenship by dual nationals aged 14 and over on national security grounds, including fighting in a foreign war or for a terrorist organisation.<sup>73</sup> The Government advocated that the reason for this legislation was the safety of the Australian people and to remove the potential domestic security threat if FTF return to Australia.<sup>74</sup> Building on the 2015 legislation, on 28 Nov 2018, further measures were introduced into Parliament to make it easier to strip dual citizens of their Australian nationality to prevent returning FTF under the *Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018*. Prime Minister Scott Morrison, argued that 'robust measures' were needed to 'protect our community'

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<sup>69</sup> *Ibid.*

<sup>70</sup> Andrew Zamit, "Australian foreign fighters: Risks and responses" (2015) *Lowy Institute for International Policy*, Sydney, 19

<sup>71</sup> For example, between Jul 2017- Jun 2018 there were no prosecutions of foreign fighters (from Australia, Commonwealth Department of Public Prosecutions Annual Report (24 Sep 2018) and between Jul 2018- Jun 2019, only one foreign fighter was prosecuted and sentenced see *R v Biber* [2018] NSWCCA 271 within Australia, Commonwealth Department of Public Prosecutions Annual Report (26 Sep 2019).

<sup>72</sup> Kieran Hardy, "Why is it so difficult to prosecute returning fighters?". *The Conversation*, 4 June 2017, [accessed 4 Apr 2020] <https://theconversation.com/why-is-it-so-difficult-to-prosecute-returningfighters-78596>

<sup>73</sup> Sangeetha Pillai, and George Williams, "The Utility of Citizenship Stripping Laws in the UK, Canada and Australia" *Melbourne University Law Review* Vol 41(2017): 845.

<sup>74</sup> Australia, Australian Parliament, "Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018, Bills Digest No 59, 2018-2019. [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1819a/19bd059](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1819a/19bd059)

from ‘battle-hardened extremists returning here’.<sup>75</sup> Around that time, Minister for Home Affairs, Peter Dutton assessed that 50 dual citizens may lose their citizenship under the 2015 provisions and many more could be effected with the new 2018 provisions.<sup>76</sup> While these new changes were never realised due to lapsed dissolution of Parliament, as of 11 February 2019, the government used the existing powers to strip many dual nationals of their citizenship due to their involvement with terrorist groups overseas.<sup>77</sup>

Instead of pouring efforts into removing citizenship, the author argues that Australia should be taking the lead in investigating and prosecuting FTF. As Canadian government intelligence analyst Phil Gurski argues, citizenship removal is simply displacing the problem, not solving it.<sup>78</sup> Infamous Australian ISIS fighter Neil Prakash is an example of the damage that can be done in international relations and reputation when Australia resorts to citizenship removal rather than prosecution. In 2017, attempts were made by the Australian government to have Prakash (who was being held in a maximum-security jail in Turkey) extradited to Australia to face charges of ‘membership of a terrorist organisation’, ‘advocating terrorism’, ‘providing support too a terrorist organisation’ and ‘incursions into foreign countries with the intention of engaging in hostile activities’.<sup>79</sup> However, in December 2018, Minister of Home Affairs announced that Neil Prakash’s Australian citizenship had been removed due to his involvement with ISIS, causing international tensions between Australia and Fiji, due to Australia relying

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<sup>75</sup> Australia, Media Release, “Combatting Australian Terrorists” Prime Minister, Scott Morrison, and Minister for Home Affairs, Peter Dutton, Media Release 22 November 2018.

<sup>76</sup> Australia, Joint Media Release, “Combatting Australian Terrorists” Prime Minister Scott Morrison, and Minister for Home Affairs Peter Dutton, 22 November 2018.

<sup>77</sup> Australia, Prime Minister Scott Morrison, Speech, “Our Plan for Keeping Australians Safe and Secure”, National Press Club, 11 February 2019, Canberra <https://www.pm.gov.au/media/national-press-club-address-our-plan-keeping-australians-safe-and-secure>

<sup>78</sup> Phil Gurski, “Western Foreign Fighters: The Threat to Homeland and international Security” (2017) Rowman & Littlefield, London p122.

<sup>79</sup> ABC News, Rubinsztein-Dunlop, Sean “ Neil Prakash: Turkish Court Rejects request to extradite Australian Islamic State Terrorist”, 20 July 2018 [accessed 28 Mar 2020] <https://www.abc.net.au/news/2018-07-20/islamic-state-terrorist-neil-prakash-could-be-released-from-jail/10016444>

on Prakash continuing to have Fijian nationality and pushing the problem onto the small island nation (as well as Turkey who is left to either prosecute or set him free).<sup>80</sup>

While many Western states (for example UK, Canada and Australia) moved to strengthen their deprivation of citizenship laws to prevent the return of FTF,<sup>81</sup> there has been a renewed international call for repatriation and prosecution. In December 2017, UNSCR 2396 was passed stressing the importance of information sharing, best practice/technical expertise-sharing in efforts to assist all states in the necessary repatriation and prosecution of FTF for crimes committed on the battlefield.<sup>82</sup> On 8 May 2019, President Donald Trump stressed the urgency for states, in particular UK, France and Germany to take back their FTF and put them on trial, “[w]e have an expectation that every country will work to take back their foreign fighters and continue to hold those foreign fighters, we think that is essential” in response to Kurdish and Syrian rebels threatening the release of over 800 FTF in custody.<sup>83</sup> Australia should be leading by example, returning its FTF and carrying out investigations and prosecutions. Australia has an opportunity to be a world leader in this regard, comply with its UN international obligations and strengthen its relations with its number one security partner, the USA.

## **THE IMPORTANCE OF PROSECUTING FOREIGN TERRORIST FIGHTERS**

Leaving FTF in conflict areas overseas exacerbates the international and national security threat to states, and promotes international instability. FTF may wish to denounce terrorist organisations and come home peacefully, however when left with no other choice or means to return home, they may be forced to continue-on and fuel further violence, including against

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<sup>80</sup> Australia, Media Release, Minister for Home Affairs, Peter Dutton “Neil Prakash stripped of Australian citizenship”, 29 December 2018 <https://minister.homeaffairs.gov.au/peterdutton/Pages/Neil-Prakash-stripped-of-Australian-citizenshp.aspx>

<sup>81</sup> Sangeetha Pillai and George Williams, “The Utility of Citizenship Stripping Laws in the UK, Canada and Australia” *Melbourne University Law Review* Vol 41(2017): 845.

<sup>82</sup> United Nations Security Council Resolution 2396, 8148th meeting, 21 December 2017

<sup>83</sup> United States, Secretary of State, Mike Pompeo, *Reuters Article* “US expects every country to take back foreign fighters”, Speech, London, UK (8 May 2019)

Western countries. Secondly, rather than turn themselves in, FTF may use desperate channels to sneak back into Western countries, such as pretending to be refugees, and escape the potential security screening and monitoring by law enforcement they would have otherwise undergone.<sup>84</sup> Thirdly, if not stopped, veteran FTF may continue training and preparing for future conflicts, including follow on generations, thereby perpetuating further mobilisation of FTF, potentially on a grander scale than seen in the Iraq and Syrian conflicts.<sup>85</sup> While bringing FTF home for prosecution may not be a politically favourable option, it manages and reduces the threat of FTF to states and the international community in the long term.

There are many reasons why prosecuting FTF should be a priority of all states. Apart from the argument that states are internationally obligated pursuant to UNSCR 2178 and 2396, it would ensure criminals are held responsible for their actions, bring justice to the victims and provide a strong deterrence to other would-be FTF. From a retributive justice perspective, prosecution of FTF provides the ability to appropriately punish FTF for their crimes.<sup>86</sup> Restorative justice also has a place within the prosecution framework, with the implementation of de-radicalisation programs, community and family outreach packages to ensure FTF can re-enter society when their sentences are complete.<sup>87</sup> Jacinta Carroll, the Director of the National Security Policy at Australian National University stresses the importance of repatriation and prosecution of FTF below:

It's vital to the global counter-terrorism effort that IS members and supporters face the consequences of their actions, and that this is demonstrably well-known. They must also be provided the opportunity—should they wish— to

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<sup>84</sup> Elena Pokalova, "Returning Islamist Foreign Fighters: Threats and Challenges to the West" (2020) Palgrave Macmillan, Washington DC

<sup>85</sup> *Ibid.*

<sup>86</sup> Elena Pokalova, "Returning Islamist Foreign Fighters: Threats and Challenges to the West" (2020) Palgrave Macmillan, Washington DC.

<sup>87</sup> There is much literature on the success of restorative justice, de-radicalisation and other programs and the author accepts such programs would play a large part in the multifaceted response however, for the purposes of this paper I have solely concentrated on arguments for prosecution.

disengage from terrorism and reintegrate into society. This supports the legal principle of just punishment while providing general deterrence.<sup>88</sup>

Melinda Rankin, from the Australian Department of International Relations, argues Australia has much broader strategic reasons for prosecuting its FTF. Firstly, she argues that if Australia is to advocate for ‘promoting a stable, rules-based global order’<sup>89</sup>, then it must practice what it preaches and instigate action for international laws, end impunity against international crimes and promote accountability and human rights.<sup>90</sup> Secondly, she suggests that because Australia was a party to the hostilities in Iraq and Syria, and had over 200 Australian FTF fighting in such battle zones, that it has an overriding responsibility to ensure FTF are returned to Australia and prosecuted for their crimes.<sup>91</sup> She argues that very little has been done in practice with Australia demonstrating “limited capacity ‘to strengthen accountability measures’ for those suspected of grave breaches of international criminal law in Syria and Iraq”.<sup>92</sup>

It is understandable that states may be deterred from instigating investigation and prosecution of FTF because of the unique challenges facing such actions. Noting the geographical battlefields where many war crimes, crimes against humanity and terrorist offences take place, evidence collection is practically difficult, often requires international cooperation and due to the often-classified nature, certain evidence may be inadmissible in court.<sup>93</sup> However, these days, with the sizeable online nature of terrorist campaigns, through filming of crimes such as beheadings, and recruiting propaganda, much of the evidence is of a

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<sup>88</sup> Carroll, Jacinta, “The citizen as enemy combatant: dealing with foreign terrorist fighters” Australian National University Policy Options Paper, No 12, (May 2019).

<sup>89</sup> Australia, Department of Defence, Defence White Paper, (2016), Canberra.

<sup>90</sup> Rankin, Melinda “Australia’s responsibility to prosecute? Bridging the gap of international criminal law in Syria and Iraq”, (2018), Australian Journal of International Affairs, Vol 72 No. 4: 322-328

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid* at 324

<sup>93</sup> Christophe Paulussen & Kate Pitcher, “Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges” (Jan 2018) Research Paper, International Centre for Counter Terrorism, The Hague P23

digital nature and could be attainable and admissible through investigation of “social media accounts, electronic devices, telecommunication intercepts and other online activity”<sup>94</sup>. The Netherlands has demonstrated leadership in this regard, providing a clear strong message to FTF that “[t]hese people think they have said farewell to our legal system, but we have not said farewell to them”. In 2017, the Netherlands commenced criminal investigations for extraterritorial offences against the 190 Dutch remaining in Iraq and Syria, including in their absence, demonstrating prosecutions of challenging extraterritorial offences achievable.<sup>95</sup> Sweden also successfully prosecuted two of its FTF, sentencing them to life in prison for decapitating detained persons in Aleppo, of which video-evidence was used of the decapitation that they had uploaded to social media.<sup>96</sup> Just because prosecution is complex and problematic, does not mean Western countries such as Australia should avoid such action, nor does it negate their responsibility to try.

Stripping citizens of their nationality rather than taking responsibility, investigating and prosecuting crimes, places the burden back on the international community or the states where FTF are located who may not have the resources, legal framework, ability or capacity to punish the crimes.<sup>97</sup> It promotes impunity and allows FTF to wander freely, continuing to spread their ideals, join in the next terrorist conflict wherever it may rise-up and undertake more heinous acts (such as systemic rape, beheadings and mass killings). Osama Bin Laden and Syman al Zawahiri, founders of Al Qaeda were stripped of their Saudi and Egyptian citizenships and left to their own devices in Afghanistan, therefore demonstrating the danger to the international

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<sup>94</sup> *Ibid.*

<sup>95</sup> Christophe Paulussen & Kate Pitcher, “Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges” (Jan 2018) Research Paper, International Centre for Counter Terrorism, The Hague p23.

<sup>96</sup> Elena Pokalova, “Returning Islamist Foreign Fighters: Threats and Challenges to the West” (2020) Palgrave Macmillan, Washington DC.

<sup>97</sup> Gideon Boas, & Pasccale Chifflet, “Suspected War Criminals in Australia: Law and Policy” (2016) Melbourne University Law Review Vol 40 No. 1: 46-82.

community as well as specific countries, such as the USA, when FTF are not returned and prosecuted.<sup>98</sup>

Australia has the legal framework, personnel and resources available to investigate and prosecute their FTF citizens, should national policy permit. Australia has a responsibility to do so rather than leave it to the governments of the geographical locations of the individuals, (in Iraq, Syria or Turkey) and would be assuring those individuals compliance with human rights. Pursuing a prosecution policy, Australia would benefit from a dedicated war crimes entity with mandate for the investigation, expatriation and prosecution of war crimes and other serious, international criminal breaches.<sup>99</sup> Australia could be taking the lead and building a special international counter-terrorism/criminal cell specialising in online and international investigation of FTF crimes, including war crimes and crimes against humanity.<sup>100</sup> Such a specialist body could sit within the Department of Home Affairs and have the benefit of cross-jurisdiction among justice, immigration and law enforcement areas. Not only would the development of such a specialised cell demonstrate leadership and responsibility in building this niche experience and capability, but Australia could then assist other states in their own investigations and prosecutions and strengthen regional security. There is no doubt that sharing such relevant capability and capacity building in the region would prove beneficial for Australia's diplomatic relationships and overall international reputation. Stripping citizenship and leaving other states to prosecute is damaging Australia's relationships and reputation, as the case of Neil Prakash and Fiji has shown.

Many of the FTF are finished with the conflict, are no longer supportive of ISIS and their return and close management could be used as a powerful weapon for information

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<sup>98</sup> Lydia Khalil, "The case to prosecute 'Jihadi brides' at Home" (27 Mar 2019) The Interpreter, Lowy Institute, <https://www.lowyinstitute.org/the-interpreter/case-prosecute-jihadi-brides-home>.

<sup>99</sup> Rankin, Melinda "Australia's responsibility to prosecute? Bridging the gap of international criminal law in Syria and Iraq", (2018), Australian Journal of International Affairs, Vol 72 No. 4: 322-328.

<sup>100</sup> *Ibid.*

dissemination and countering ISIS propaganda.<sup>101</sup> Such returnees would be more persuasive spokespeople to would-be terrorist supporters/recruits in defeating the ISIS narrative, than police or other government authorities.<sup>102</sup> For example Germany's Harry Safro, a returned ISIS FTF, was happy to assist the government in sharing his personal story in the hope it would dissuade others from making the 'same mistake'.<sup>103</sup> Returning FTF could also be willing to share important intelligence to assist in the global fight against terrorism. ASIO could gain credible, useful intelligence in interviewing returning FTF either through their willingness to cooperate or through plea-bargaining in cooperation with the Commonwealth Department of Public Prosecutions in reducing potential prison sentences.

Many argue that prosecution leading to imprisonment of returning FTF is counter-productive and exacerbates the threat to national security, because jails known to be exploited by terrorist organisations. FTF could use their incarceration time to proactively recruit, network, indoctrinate, radicalise and train those susceptible.<sup>104</sup> For example, Al Qaeda has provided specific instruction to its imprisoned members to stay active behind bars and organise and manage other inmates. Such patterns of behaviour have been observed taking place in Australia's maximum security prisons.<sup>105</sup> The author agrees that prison environments are heavily susceptible to radicalisation in any form, and that this is a real risk that must be addressed by the national security framework. Some effective tools to counter such exploitation includes undertaking risk assessments of FTF, distributing them across the prison systems and dispersal within the prisons themselves, maintaining close watch on interactions and potential recruiting, ongoing engagement and implementation of specialised de-radicalisation

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<sup>101</sup> Dr David Mallet, "ISIS Foreign Fighters: Keep your Enemies Closer", Australian Outlook 25 Dec 2019.

<sup>102</sup> *Ibid.*

<sup>103</sup> Elena Pokalova, "Returning Islamist Foreign Fighters: Threats and Challenges to the West" (2020) Palgrave Macmillan, Washington DC.

<sup>104</sup> Pokalova, Elena "Returning Islamist Foreign Fighters: Threats and Challenges to the West" (2020) Palgrave Macmillan, Washington DC

<sup>105</sup> *Ibid.*



programs.<sup>106</sup> It is also important resources are used toward reformation of imprisoned FTF, preparing them for reintegration and living peacefully in society upon release.<sup>107</sup> The risk of terrorist groups exploiting prisons should not be a roadblock to FTF extradition, repatriation and prosecution. Like all other risks, such needs to be appreciated and mitigated. However, the risk of not taking positive control over FTF (with the extradition, repatriation, investigating, prosecuting and ongoing monitoring of them) poses a much higher threat, not only to individual states but also the international community for the plethora of reasons raised above.

## CONCLUSION

The FTF threat has been one that has greatly affected the international community at large, and most states individually. The Iraq and Syrian conflicts aroused an unprecedented level of mobilisation and participation of FTF, including from Western states. The after-effects continue with an ongoing increase in online networking, recruiting and attacks by terrorist organisations and returning FTF across the globe. While the investigation and prosecution of FTF is extraordinarily challenging, it is an obligation that all states must assume to ensure positive control, accountability for crimes, punish FTF appropriately and prevent them from further participation in conflicts. Repatriation, investigation and prosecution (as well as counselling and reintegration), will also maximise intelligence gathering and information sharing in order to provide the best chance at disengagement/de-radicalisation and countering-terrorist organisations in a multi-faceted approach. Sadly, Australia has taken a political approach, focussing on removing citizenship from FTF in order to prevent their return home, instead of prosecution. This paper has shown the benefits for Australia should it amend its approach towards investigation and prosecution and become a world leader in this field. This

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<sup>106</sup> *Ibid.*

<sup>107</sup> Because of the limited nature of this paper, the author has chosen not to go further in depth on reformatory justice.

would greatly assist toward international and regional security as well as improve Australia's diplomatic relationships and international reputation. While the Syrian conflict has officially ended, ISIS and other terrorist organisations are not dissipating in their desire for a Caliphate territory. Similar future conflicts are inevitable with Australian citizen FTF involvement, and Australia should be investing heavily in the resources, manning and capability to investigate and prosecute international FTF crimes now and into the future.

## BIBLIOGRAPHY

- Australia, Australia's Counter Terrorism Strategy, Strengthening Our Resilience, Canberra (2015)
- Australia, Department of Prime Minister and Cabinet, Review of Australia's Counter Terrorism Machinery, Canberra (2015)
- Australia, Department of Foreign Affairs and Trade. Foreign Policy White Paper (2017) <https://www.fpwhitepaper.gov.au/>
- Australia, Department of Defence, Defence White Paper, (2016), Canberra
- Australia, National Counter-Terrorism Plan, Australia and New Zealand Counter Terrorism Committee, 4<sup>th</sup> edition 2017, <https://www.nationalsecurity.gov.au/Media-and-publications/Publications/Documents/ANZCTC-National-Counter-Terrorism-Plan.PDF>
- Australia, Council of Australian Governments (COAG), *Australia's counter-terrorism strategy*, COAG, 2015 <https://www.nationalsecurity.gov.au/Media-and-publications/Publications/Documents/Australias-Counter-Terrorism-Strategy-2015.pdf>
- Australia, Australian Security Intelligence Organisation, Annual Report 2018-2019, 14 Sep 2019, Canberra
- Australian Strategic Policy Institute, "Gen Y Jihadists Preventing radicalisation in Australia", *Strategy*, (2015), Canberra
- Australia, Commonwealth Department of Public Prosecutions, Annual Report 2017-2018 (24 Sep 2018)
- Australia, Commonwealth Department of Public Prosecutions, Annual Report 2018-2019 (26 Sep 2019)
- Arraf, Rawan, "Australian citizenship revocation provisions & Australia's duty to prosecute international crimes" Submission to the Parliamentary Joint Committee on Intelligence and Security *Australian Centre for International Justice* (19 July 2019)
- Azzam, Chantal, "Australian Foreign Fighters: The Long Reach of the Syrian Conflict" (October 2014), Counter Terrorist Trends and Analyses, *International Centre for Political Violence and Terrorism Research*, Vol 6, no. 9; 9-13
- Baker-Beall, Christopher "The threat of the 'returning foreign fighter': The securitization of EU migration and border control policy" (2019) *Security Dialogue* Vol. 50 no. 5; 437-453
- Barker, Cat, "Australian Government measures to counter violent extremism: A Quick Guide", Australian Parliament Library, Research Paper Series, 2014-2015, Foreign Affairs, Defence and Security Section, (dated Feb 2015)
- Barker, Cat, "Countering Terrorism and Violent Extremism", Parliament of Australia, Foreign Affairs, Defence and Security, Library Briefing Book, (2016), Canberra

[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BriefingBook45p/ViolentExtremism](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/ViolentExtremism)

- Bell, Kristin “Looking Outward: Enhancing Australia’s Deradicalisation and Disengagement Programs” (2015) *Security Challenges*, Vol. 11, No. 2; 1-19
- Boas, Gideon & Chifflet, Pascale “Suspected War Criminals in Australia: Law and Policy” (2016) *Melbourne University Law Review* Vol 40 No. 1: 46-82
- Canada, Canadian Security Intelligence Service, “The Foreign Fighters Phenomenon and Related Security Trends in the Middle East: Highlights from the workshop 28-29 October 2015” (Jan 2016)
- Carne, Greg "Reviewing the Reviewer: The Role of the Parliamentary Joint Committee on Intelligence and Security - Constructing or Constricting Terrorism Law Review," *Monash University Law Review* 43, No. 2 (2017): 334-385
- Carroll, Jacinta, “The citizen as enemy combatant: dealing with foreign terrorist fighters” Australian National University Policy Options Paper, No 12, (May 2019)
- Cragin, Kim “The challenge of Foreign Fighter Returnees” (2017) *Journal of Contemporary Criminal Justice*, Vol. 33, No. 3; 292–312
- Gurski, Phil “Western Foreign Fighters: The Threat to Homeland and international Security” (2017) Rowman & Littlefield, London
- Hamaid Muneer “Foreign fighters: a five eyes border management perspective” (2017) *Journal of Policing, Intelligence and Counter Terrorism*, Vol 12, No. 1; 47-65
- Hardy, Kieran “Why is it so Difficult to Prosecute Returning Fighters?”, *The Conversation* (4 June 2017)
- Henderson-Lancett, Lexie, “The Foreign Fighter Legislation of 2014 Implications for the future of criminal jurisprudence?” (2016) *The Alternative Law Journal* Vol 41 No. 1; 49
- Hegghammer, Thomas, “Should I Stay or Should I go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting,” (February 2013) *American Political Science Review*: 11
- Holmer, Georgia and Shtuni, Adrian “Returning Foreign Fighters and the Reintegration Imperative” United States Institute of Peace, Special Report No 402 (Mar2017)
- Jayaraman, Shiva “International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters” (2016) *Chicago Journal of International Law* Vol.17 No.1: 178
- Jenkins, Brian Michael “Options for Dealing with Islamic State Foreign Fighters Currently Detained in Syria” (May/June 2019) *Combating Terrorist Centre, Westpoint*, Vol 12. No 5: 11
- Jenkins, Brian Michael “When Jihadis Come Marching Home: The Terrorist Threat Posed by Westerns Returning from Syria and Iraq” (2014) *Perspectives*, RAND National Security Research Division,

- Karska Elzbieta & Karski Karol, "The Phenomenon of Foreign Fighters and Foreign Terrorist Fighters," *International Community Law Review* 18, no. 5 (2016): 377-388
- Khalil Lydia, "The case to prosecute 'Jihadi brides' at Home" *The Interpreter*, Lowy Institute, (27 Mar 2019) <https://www.lowyinstitute.org/the-interpreter/case-prosecute-jihadi-brides-home>
- Kopitzke Cory "Security Council Resolution 2178 (2014): An Ineffective Response to the Foreign Terrorist Fighter Phenomenon" (Winter 2017) *Indiana Journal of Global Legal Studies* Vol. 24, No.1 309
- Leduc, Raphaël "Are returning foreign fighters dangerous? Re-investigating Hegghammer's assessment of the impact of veteran foreign fighters on the operational effectiveness of domestic terrorism in the West" (2016) *Journal of Military and Strategic Studies* Vol 17 No. 1: 83
- Mallet, David Dr, "ISIS Foreign Fighters: Keep your Enemies Closer", Australian Institute of International Affairs, *Australian Outlook*, 25 Dec 2019
- Obe, Rachel Briggs and Silverman, Tanya "Western Foreign Fighters: Innovations in Responding to the Threat", Institute for Strategic Dialogue, (2014)
- Paulussen, Christophe & Pitcher, Kate, "Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges" (Jan 2018) Research Paper, International Centre for Counter Terrorism, The Hague
- Pillai, Sangeetha and Williams, George "The Utility of Citizenship Stripping Laws in the UK, Canada and Australia" *Melbourne University Law Review* Vol 41(2017): 845
- Pokalova, Elena "Returning Islamist Foreign Fighters: Threats and Challenges to the West" (2020) Palgrave Macmillan, Washington DC
- Rankin, Melinda "Australia's responsibility to prosecute? Bridging the gap of International Criminal law in Syria and Iraq" (2018) *Australian Journal of International Affairs*, Vol 72 No. 4, 322
- See, Sylvene, "Counter Terrorist Trends and Analyses", *International Centre for Political Violence and Terrorism Research*, Vol 10 no. 6 (June 2018): 7-15
- Sexton Mark "What's in a Name?" (2017) *The RUSI Journal*, Vol 162 No. 5: 34-43
- Shanahan, Roger, "Typology of Terror- the Backgrounds of Australian Jihads", Lowy Institute, Report (21 Nov 2019)
- Sumpter, Cameron, "Returning Indonesian Extremists: Unclear Intentions and Unprepared Responses", (July 2018) *International Centre for Counter-Terrorism*, Policy Brief, The Hague
- Tan Nan An, Harris, "Tackling the Returning Foreign Fighter Threat: Hard or Soft Approach?" (2019) *Journal of the Singapore Armed Forces* Vol 45, No. 1: 1
- United Nations Security Council Report "The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives" (Mar 2018) Counter Terrorism Committee Executive Directorate

United States, Secretary of State, Mike Pompeo, *Reuters Article* “US expects every country to take back foreign fighters”, Speech, London, UK (8 May 2019)

United Nations Secretary-General, Report of the Secretary General on the Threat Posed by ISIL (Da’esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat, 18, U.N. Doc. S/2016/501 (May 31, 2016)

United Nations, Secretary Council 8116<sup>th</sup> meeting, “Greater Cooperation needed to tackle danger posed by returning foreign fighters, Head of Counter-Terrorism Office Tells Security Council”, (28 Nov 2017) SC/13097  
<https://www.un.org/press/en/2017/sc13097.doc.htm>

United Nations Office Drugs and Crime, Report, “Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia” (2018), Vienna

Webb, Adam K. “Swanning Back In? Foreign Fighters and the Long Arm of the State”, (2017) *Citizenship Studies*, Vol. 21 No. 3; 291-308

Wilson, Guy “Will Islamic extremism in Indonesia affect Australia’s security in the next ten years?” *Indo-Pacific Strategic Papers* (May 2016)

Zamit, Andrew, “Australian foreign fighters: Risks and responses” (2015) *Lowy Institute for International Policy*, Sydney