RECONCEPTUALISING THE LEGAL RESPONSE TO FOREIGN FIGHTERS

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Abstract The Syrian civil war has highlighted the phenomenon of foreign fighting, in which individuals leave their home State to join an armed conflict overseas. The predominant paradigm for regulating foreign fighting, centred on United Nations Security Council Resolution 2178, is based on counterterrorism, which in essence treats foreign fighting as a form of terrorism. This paradigm is largely reflective of the domestic legislation of the United Kingdom, United States, Canada and Australia. This article argues that this approach is problematic, and that an alternative paradigm based on the international law of neutrality and related domestic legislation provides a better means for regulating foreign fighting.

Keywords: public international law, foreign fighter, foreign terrorist fighter, foreign volunteer, United Nations Security Council Resolution 2178, terrorism, neutrality law.

I. INTRODUCTION

A member of a disfavoured religious group departs to fight overseas with an armed group composed of his co-religionists. He returns home an experienced fighter with specialised skills, which he subsequently employs in furtherance of a plot with other co-religionist conspirators to destroy various institutions of State—all with the ultimate aim of restoring his religious group to its rightful place of prominence.[1]

The 1605 gunpowder plot was of course thwarted; Guy Fawkes and his co-conspirators were either killed or executed. Guy Fawkes, as an individual who participated in an overseas conflict and then engaged in domestic terrorism upon return, can be understood as an early manifestation of a threat currently faced by Western security services.[2] The complication, however, is finding the potential domestic terrorists from among a large pool of foreign fighters, individuals who travelled to join both pro-government and rebel forces fighting in the Syrian civil war.

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[1] See C Andrew, *The Secret World* (Allen Lane 2018) 193–5.

[2] N Arielli, *From Byron to Bin Laden* (Harvard University Press 2018) 24–5.

[*ICLQ* vol 69, January 2020 pp 103–134] doi:10.1017/S0020589319000447

Being a foreign fighter is not a crime under international law;[3] nor is it per se criminal under the domestic law of most States to fight with an armed group in a foreign conflict.[4] Indeed, as noted in section II, foreign fighting lacks a settled legal definition. Nevertheless, the downstream security concerns resulting from the influx of foreign fighters to the Syrian conflict have resulted in a raft of legal responses. The centrepiece of the international legal response is United Nations Security Council Resolution 2178 (UNSCR 2178),[5] adopted in September 2014, which requires that member States ensure that their laws are sufficient to respond to the threat of foreign terrorist fighters. The approach taken by UNSCR 2178 is to treat foreign fighting as a form of terrorism, thereby conflating two distinct phenomena. The clearest illustration of this is UNSCR 2178's use of the term 'foreign terrorist fighter' (FTF). All three elements of the term are to some degree problematic, but none more so than the descriptor 'terrorist', which also anchors the response to foreign fighting under a counterterrorism paradigm.

While the international legal dimension is undoubtedly significant, the focus of this article is primarily on domestic law. Accordingly, section III provides a comparative law survey that outlines how the counterterrorism paradigm established by UNSCR 2178 has largely been replicated in the domestic legislation of the United Kingdom, United States, Canada and Australia.

In section IV, it is argued that this counterterrorism paradigm has significant shortcomings deriving from the difficulties of defining terrorism and terrorism's tendency to engender problematically illiberal countermeasures. Given these problems, it is argued in section V that an alternative paradigm based on neutrality law—the international law of neutrality and related domestic legislation—provides a better foundation than the predominant counterterrorism paradigm for dealing with foreign fighting. By directly targeting the phenomenon, and doing so irrespective of the nature of the particular group joined, a neutrality law-based paradigm provides a more coherent and rational means for regulating foreign fighting.

II. FOREIGN FIGHTING: BACKGROUND

A. Definitions

The term foreign fighter, and the related concept of foreign fighting, are not legal terms of art.[6] The definitions in the academic literature also

[3] R Heinsch, 'Foreign Fighters and International Criminal Law' in A de Guttry, F Capone and C Paulussen (eds), *Foreign Fighters under International Law and Beyond* (TMC Asser Press 2016) 165; C Ragni, 'International Legal Implications Concerning "Foreign Terrorist Fighters"' (2018) 101 Rivista di Diritto Internazionale 1052, 1062–3.

[4] S Krähenmann, 'The Obligations under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination' in A de Guttry, F Capone and C Paulussen (eds), *Foreign Fighters under International Law and Beyond* (TMC Asser Press 2016) 241.

[5] UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

[6] See C Forcese and L Sherriff, 'Killing Citizens: Core Legal Dilemmas in the Targeted Killing of Canadian Foreign Terrorist Fighters' (2017) 54 Canadian Yearbook of International Law 134,

vary.[7] Hegghammer defines a foreign fighter as someone 'who (1) has joined, and operates within the confines of, an insurgency, (2) lacks citizenship of the conflict state or kinship links to its warring factions, (3) lacks affiliation to an official military organization, and (4) is unpaid'.[8] Malet defines foreign fighters as simply 'noncitizens of conflict states who join insurgencies during civil conflicts'.[9]

From these can be derived certain core definitional elements. The first is traveling from one place (the home state) to another (the conflict state) while having a relationship of foreignness to the conflict state. While the status of being foreign suggests a categorical division, there are degrees of foreignness—citizenship, ethnicity and residence are all possible delimiting concepts. For Malet, citizenship demarcates foreignness.[10] But significant numbers of foreign fighters (so defined) will have some tie to the conflict—for instance, many citizens of European States who joined the Syrian conflict are part of diaspora communities.[11] Hegghammer excludes those with citizenship or kinship links; on his definition, 'returning diaspora members' are not foreign fighters.[12]

Second, the 'fighter' element invites consideration of whom the individual fights for and precisely what kind of activity fighting entails. Regarding the former, both Hegghammer and Malet's definitions refer to individuals joining an insurgency, which excludes fighting as part of a State's official armed forces, and perhaps pro-government groups as well. But there are broader definitions based around joining non-State armed groups, whatever their allegiance.[13] Regarding the latter, 'fighter' calls to mind international humanitarian law (IHL). Under the IHL applicable to non-international armed conflicts, a fighter is described by a variety of other terms, such as a member of an organised armed group, a person who directly participates in hostilities, and a civilian who directly participates in hostilities.[14] So understood, it is not clear

139; M Lloydd, 'Foreign Fighters under International Law and Beyond' (2017) 18 Melbourne Journal of International Law 95, 96.

[7] D Malet, 'Foreign Fighter Mobilization and Persistence in a Global Context' (2015) 27 Terrorism and Political Violence 454, 455–9.

[8] T Hegghammer, 'The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad' (2011) 35 International Security 53, 57–8.

[9] D Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford University Press 2013) 9.

[10] ibid 9.

[11] S Krähenmann, 'Foreign Fighters under International Law' (Geneva Academy of International Humanitarian Law and Human Rights, October 2014) <https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf > 5.

[12] Hegghammer (n 8) 58.

[13] See C Walker, 'Foreign Terrorist Fighters and UK Counter Terrorism Law' in D Anderson, 'The Terrorism Acts in 2015' (December 2016) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/12/TERRORISM-ACTS-REPORT-1-Dec-2016-1.pdf> 98; J Fritz and JK Young, 'Transnational Volunteers: American Foreign Fighters Combating the Islamic State' (2017) Terrorism and Political Violence <https://doi.org/10.1080/09546553.2017.1377075> 2–5.

[14] J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law Volume 1: Rules* (Cambridge University Press 2005) 13; Krähenmann (n 4) 240–1.

that all those who travelled to Syria are properly labelled as fighters.[15] Some did not fulfil any combat function, but performed supporting roles.[16]

The other element is motivation: foreign fighters are typically motivated by a desire to defend a religious, ideological, or ethnic kinship group.[17] Their primary motivation is thus some kind of cause rather than private gain, which distinguishes them from mercenaries.[18] Hegghammer's requirement that a foreign fighter be unpaid is overly restrictive—it suffices that the primary motivation is non-material.[19]

These three elements are evident in the definition employed by the leading legal text on the topic, which refers to foreign fighters as 'individuals, driven mainly by ideology, religion and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict'.[20] So defined, foreign fighting has no inherent link to terrorism or to Islam. Foreign fighters, or in older parlance, foreign volunteers, have a longer and broader history.[21] Nonetheless, as Sykes observes, foreign fighting has become 'a construct that is in practice used to refer to a group far smaller than its constituent terms suggest—namely those travelling abroad to fight with Islamic militant insurgencies'.[22] This conflation of foreign fighting with Islamic terrorism is explicable as an instance of salience bias: the prominent cases of foreign fighting in recent times have involved individuals leaving their home States to join Islamic terrorist groups. A case in point is the Syrian civil war, which saw foreign fighters flock to join groups such as ISIL (Islamic State of Iraq and the Levant).[23]

Perhaps unsurprisingly then, the United Nations Security Council Resolutions that respond to this phenomenon make an explicit connection between foreign fighting and terrorism by employing the term 'foreign terrorist fighter' (FTF). The term first appeared in United Nations Security

[15] Krähenmann (n 4) 241; AP Schmid and J Tinnes, 'Foreign (Terrorist) Fighters with IS: A European Perspective' (ICCT Research Paper, December 2015) <https://icct.nl/wp-content/uploads/2015/12/ICCT-Schmid-Foreign-Terrorist-Fighters-with-IS-A-European-Perspective-December2015.pdf> 13.

[16] For example, in ISIL's extensive media/propaganda operation: see M Sexton, 'What's in a Name?' (2017) 162 The RUSI Journal 34, 36.

[17] Arielli (n 2) 38.

[18] S Chesterman, 'Dogs of War or Jackals of Terror? Foreign Fighters and Mercenaries in International Law' (2016) 18 IntCLRev 389, 390; S Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press 2007) 56.

[19] Fritz and Young (n 13) 5.

[20] A de Guttry, F Capone and C Paulussen, 'Introduction' in A de Guttry, F Capone and C Paulussen (eds), *Foreign Fighters under International Law and Beyond* (TMC Asser Press 2016) 2. See also Ragni (n 3) 1052.

[21] See Arielli (n 2); Malet (n 9).

[22] P Sykes, 'Denaturalisation and Conceptions of Citizenship in the "War on Terror"' (2016) 20 Citizenship Studies 749, 750.

[23] One third of ISIL's fighting force was at one time reportedly comprised of foreign fighters. The majority came from the Middle East and Maghreb region, while 20 per cent came from Europe: Schmid and Tinnes (n 15) 11–12. See also 1267 Committee, 'Twenty-fourth Report of the Analytical Support and Sanctions Monitoring Team Submitted Pursuant to Resolution 2368 (2017) Concerning ISIL (Da'esh), Al-Qaida and Associated Individuals and Entities' (15 July 2019) S/2019/570 para 48.

Council Resolution 2170,[24] but lay undefined until UNSCR 2178, which defined FTFs as:[25]

> 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.

This definition can be understood in terms of the three elements discussed above. UNSCR 2178 expresses the foreignness element as travelling to a State where one is neither a resident nor citizen. However, its scope remains unclear, particularly in the case of dual citizens and members of diaspora communities.[26] The fighter element is broadly conceived, and impliedly includes a range of conduct including receiving terrorist training. While persons who have travelled to a conflict zone and received training from a terrorist group may very well be among the most dangerous of potential returnees,[27] travelling to fight and travelling to receive terrorist training are not the same thing.[28] Accordingly, grouping together individuals who have travelled to a conflict zone and engaged in a range of activities under the umbrella term of 'fighter' may hinder efforts to formulate a rational and coherent response.[29] Notably, the definition of FTF in UNSCR 2178 does not actually require that an individual engage in terrorist training or terrorist activity—it is sufficient that the individual travels to the conflict State for the purpose of engaging in those activities. The 'terrorist' part of the FTF definition, then, might best be characterised as the motivation element.

The definition's various references to terrorism, together with the reference to armed conflict, suggest a conflating of foreign fighting and terrorism evident in the term FTF itself. This is further highlighted by UNSCR 2178 singling out FTFs associated with ISIL, the Al-Nusrah Front and groups derived from Al-Qaida as being of particular concern.[30] At the same time, despite its references to terrorist acts and terrorist training, UNSCR 2178 conspicuously lacks a definition of terrorism, a point which will be discussed further below.

B. The Threat of Returning Foreign Fighters

The concern for Western governments has been less about the consequences of the influx of foreign fighters to the Syrian conflict, and more about the consequences of the return of foreign fighters from that conflict. The issue is now all the more pressing with ISIL's military defeat and the attendant

[24] UNSC Res 2170 (15 August 2014) UN Doc S/RES/2170.
[25] UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178, preamble.
[26] Krähenmann (n 4) 236–7. [27] Sexton (n 16) 39. [28] ibid 35.
[29] Sexton suggests it is preferable to disaggregate and distinguish between different types of participation and tailor interventions and sanctions accordingly: ibid 40. See also Malet (n 7) 458–9. [30] UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178, preamble.

prospect of greater numbers of returnees.[31] The key question regarding these returnees is what risk some may pose to their home States as trained and experienced fighters, and as potentially radicalised individuals with links to transnational terrorist networks.[32]

The threat of returned foreign fighters turning to domestic terrorism is not fanciful. The 2004 Madrid bombings and 2005 London bombings, for example, both involved returned foreign fighters.[33] More recently, returnees from the Syrian conflict have been involved in several significant terrorist attacks in Europe, including the attack on the Jewish Museum of Belgium (May 2014),[34] and the attacks in Paris (November 2015) and Brussels (March 2016).[35] More systematic assessments of the threat posed by returnees vary based on two parameters: the blowback rate (the proportion of returned foreign fighters who pose a threat to their home States), and the presence or absence of a veteran effect (which posits that attacks involving foreign fighters are more dangerous). To some extent, the variation is explicable by differing time frames, coding of data, and differing definitions of foreign fighter.

Hegghammer's much-quoted figure regarding the blowback rate, based on a dataset covering the time period between 1990 and 2010, is less than one in 9. But even so, he found foreign fighting to be one of the strongest predictors of involvement in domestic terrorism.[36] Hegghammer and Nesser's subsequent work, based on a more recent dataset, found a lower blowback rate for returnees from the Syrian conflict (about one in 360).[37] This is roughly consistent with Vidino *et al.*, who identified 12 returned foreign fighters involved in

[31] See generally 1267 Committee (n 23) paras 1–8; R Barrett, 'Beyond the Caliphate: Foreign Fighters and the Threat of Returnees' (The Soufan Group, October 2017) <http://thesoufancenter.org/wp-content/uploads/2017/11/Beyond-the-Caliphate-Foreign-Fighters-and-the-Threat-of-Returnees-TSC-Report-October-2017-v3.pdf>.

[32] United Nations Counter-Terrorism Committee Executive Directorate, 'The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives' (CTED Trends Report, March 2018) <https://www.un.org/sc/ctc/wp-content/uploads/2018/04/CTED-Trends-Report-March-2018.pdf> 6. Of course, only a subset of those foreign fighters who return will constitute threats: see D Byman, 'The Jihadist Returnee Threat: Just How Dangerous?' (2016) 131 Political Science Quarterly 69, 84–91.

[33] Byman (n 32) 72–3.

[34] 1373 Committee, 'Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters' (14 May 2015) S/2015/338 para 23.

[35] F Ragazzi and J Walmsley, 'The Return of Foreign Fighters to EU Soil' (European Parliamentary Research Service, May 2018) <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf> 26. The Paris and Brussels attacks involved individuals who were specifically directed to return to Europe to launch such attacks: see Barrett (n 31) 21.

[36] T Hegghammer, 'Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting' (2013) 107 American Political Science Review 1, 10.

[37] T Hegghammer and P Nesser, 'Assessing the Islamic State's Commitment to Attacking the West' (2015) 9 Perspectives on Terrorism 14, 20.

terrorism from a pool of over 6000 (about one in 500).[38] These lower rates must, however, been seen in light of a much larger pool of potential returnees,[39] meaning that the absolute numbers of dangerous returnees remains considerable.

As for the veteran effect, Hegghammer found that the presence of a returned foreign fighter increased the chance of successful attack and doubled the chance of fatalities.[40] Conversely, Leduc concluded that the presence of foreign fighters did not increase the probability of successful execution or more casualties.[41] However, Vidino *et al.*'s findings, based on a dataset of terrorist attacks in the West between 2014 and 2017,[42] are consistent with a veteran effect, with the attacks involving foreign fighters on average found to cause considerably greater numbers of casualties than those not involving foreign fighters.[43]

All that said, it should be noted that the threat of returned foreign fighters represents only part of the threat picture.[44] Although the terrorist attacks involving returned foreign fighters noted earlier are no doubt salient, many recent attacks on Western targets have not involved foreign fighters. Certain perpetrators have been inspired to act by ISIL. Examples include the Orlando nightclub shooting in June 2016, the 2016 Bastille Day attack in Nice,[45] attacks in Ansbach and Wurzburg in July 2016, Berlin in December 2016, and the Westminster attack in March 2017.[46] In some cases, ostensibly self-radicalised 'lone wolf' attackers turn out to have received assistance or direction from ISIL via virtual planners operating remotely through encrypted messaging services[47]—the Ansbach and Wurzburg attacks reportedly involved such remote direction.[48]

[38] L Vidino, F Marone and E Entenmann, 'Fear Thy Neighbor: Radicalization and Jihadist Attacks in the West' (George Washington University's Program on Extremism, the Italian Institute for International Political Studies and the International Centre for Counter-Terrorism – The Hague, June 2017) <https://icct.nl/publication/fear-thy-neighbor-radicalization-and-jihadist-attacks-in-the-west/> 60–1.

[39] 1267 Committee, (n 23) para 83; 1267 Committee, 'Analysis and Recommendations with Regard to the Global Threat from Foreign Terrorist Fighters' (19 May 2015) S/2015/358 para 10.

[40] Hegghammer (n 36) 11. See also 1267 Committee (n 39) para 20.

[41] R 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) 17 Journal of Military and Strategic Studies 83. This is consistent with a study based on a dataset of plots of the United States: see CJ Wright, 'How Dangerous Are Domestic Terror Plotters with Foreign Fighter Experience? The Case of Homegrown Jihadis in the US' (2016) 10 Perspectives on Terrorism 32.

[42] Vidino, Marone and Entenmann (n 38) 38.

[43] ibid 61.

[44] United Nations Counter-Terrorism Committee Executive Directorate (n 32) 13.

[45] Vidino, Marone and Entenmann (n 38) 67–71.

[46] A Reed, J Pohl and M Jegerings, 'The Four Dimensions of the Foreign Fighter Threat: Making Sense of an Evolving Phenomenon' (ICCT Policy Brief, June 2017) <https://icct.nl/wp-content/uploads/2017/06/ICCT-Reed-Pohl-The-Four-Dimensions-of-the-Foreign-Fighters-Threat-June-2017.pdf> 7.

[47] See C Ellis, 'With a Little Help from My Friends: An Exploration of the Tactical Use of Single-Actor Terrorism by the Islamic State' (2016) 10 Perspectives on Terrorism 41, 42–5.

[48] T Mehra, 'Foreign Terrorist Fighters: Trends, Dynamics and Policy Responses' (ICCT Policy Brief, December 2016) <https://icct.nl/wp-content/uploads/2016/12/ICCT-Mehra-FTF-Dec2016-1.pdf> 13.

Notably, Nesser *et al.* observe a decline in the overall proportion of terrorist plots involving foreign fighters (from 75 per cent between 2001 and 2007 to 45 per cent between 2014 and 2016),[49] with this decrease likely due to the technological possibility of directing plots remotely, as well as 'an increased focus by security services on returning foreign fighters'.[50] This is unsurprising given that terrorist groups adapt,[51] and respond rationally to security efforts by substituting another modality of attack.[52] Consequently, even effectively countering the threat of returned foreign fighters—as the various measures discussed in the next section seek to do—will only ever represent a partial solution.

III. THE LEGAL RESPONSE TO FOREIGN FIGHTERS

As noted earlier, the concern over foreign fighters joining the Syrian conflict, and the threat they might pose upon their return, resulted in an international-level response in the form of UNSCR 2178. This resolution, made under chapter VII of the United Nations Charter, called upon member States to take a variety of steps, including ensuring that their domestic legal systems criminalised the activities of FTFs and those who fund or facilitate FTFs.[53] UNSCR 2178 precipitated another round of global security law-making,[54] as States sought to implement the Security Council's template in their domestic legal systems. Indeed, some States had already taken their own initiatives in advance of UNSCR 2178.[55] The resulting pattern is a set of domestic legal responses, clustered around 2014, which were either 'adopted in anticipation of, or to comply with' UNSCR 2178.[56]

[49] P Nesser, A Stenersen and E Oftedal, 'Jihadi Terrorism in Europe: The IS-Effect' (2016) 10 Perspectives on Terrorism 3, 9.

[50] ibid 10.

[51] L Zedner, 'Terrorism and Counterterrorism' in L Skinns, M Scott and T Cox (eds), *Risk* (Cambridge University Press 2011) 111–12.

[52] Reed, Pohl and Jegerings (n 46) 9. See generally W Enders and T Sandler, *The Political Economy of Terrorism* (2nd edn, Cambridge University Press 2011) 144.

[53] UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178, operative para 6. See generally A de Guttry, 'The Role Played by the UN in Countering the Phenomenon of Foreign Terrorist Fighters' in A de Guttry, F Capone and C Paulussen (eds), *Foreign Fighters under International Law and Beyond* (TMC Asser Press 2016).

[54] See F Ní Aoláin, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (3 September 2018) A/73/45453 paras 24–32; KL Scheppele, 'Global Security Law and the Challenge to Constitutionalism after 9/11' [2011] PL 353, 355–6.

[55] C Paulussen and E Entenmann, 'National Responses in Select Western European Countries to the Foreign Fighter Phenomenon' in A de Guttry, F Capone and C Paulussen (eds), *Foreign Fighters under International Law and Beyond* (TMC Asser Press 2016) 392.

[56] C Paulussen and K Pitcher, 'Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges' (ICCT Research Paper, January 2018) <https://icct.nl/wp-content/uploads/2018/01/ICCT-Paulussen-Pitcher-Prosecuting-Potential-Foreign-Fighters-Legislative-Practical-Challenges-Jan2018-1.pdf> 14. The United States is a notable exception: see K Roach, 'The Continued Exceptionalism of the American Response to Daesh' in P Auriel, O Beaud and C

The domestic legal responses of the United Kingdom, United States, Canada and Australia—all States from which foreign fighters have travelled to the Syrian conflict[57]—exemplify this pattern. Additionally, they largely replicate UNSCR 2178's connecting of foreign fighting to terrorism, and thus represent a counterterrorism paradigm, whereby foreign fighting is conceived of and dealt with as a form of terrorism. The responses of these four States are outlined in more detail below, categorising them according to how they are imposed (administratively or through the criminal justice process), and when they apply (before or after departure from the home State).

A. Administrative Control Measures

1. Pre-departure

Passport control measures reduce the ease of travel to the conflict State for would-be foreign fighters. Such measures typically entail powers to revoke or cancel passports. Canada introduced an interim power in 2015 to 'cancel' a passport pending possible revocation,[58] a supplement to the existing ministerial power to decline to issue or revoke a passport on the grounds of security or preventing terrorism.[59] In the United Kingdom, the Home Secretary has the power under the royal prerogative to refuse or withdraw passports. The power's use has increased markedly since the guiding criteria were updated in 2013 to respond to the departure of foreign fighters.[60] A complementary power requiring the production of travel documents where a person is reasonably suspected of attempting to depart to participate in terrorism-related activity was introduced in 2015.[61] Similarly, in Australia, legislative amendments in 2014 created a power of temporary suspension where it is reasonably suspected that a person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country.[62] This power complements the existing ministerial power to cancel or refuse to issue a passport on the ground that the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign

Wellman (eds), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer 2018).

[57] 1373 Committee, 'Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters: Third Report' (29 December 2015) S/2015/975 10.

[58] Canadian Passport Order, SI/81-86, section 11.1(2). See generally C Forcese and K Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Irwin 2015) 182.

[59] Canadian Passport Order, SI/81-86, section 10.1.

[60] M Gower, 'Deprivation of British Citizenship and Withdrawal of Passport Facilities' (House of Commons Library, 4 September 2014) <http://www.parliament.uk/business/publications/research/briefing-papers/SN06820/deprivation-of-british-citizenship-and-withdrawal-of-passport-facilities> 7–9. J Blackbourn, D Kayis and N McGarrity, *Anti-Terrorism Law and Foreign Terrorist Fighters* (Routledge 2018) 73.

[61] Counter-Terrorism and Security Act 2015, section 1.

[62] Australian Passports Act 2005 (Cth), section 22A, as amended by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth), section 21.

country.[63] Both powers have been liberally employed. More than 30 passports were suspended in the first two years of the existence of the suspension power, while more than 130 passports—a marked increase from the historical baseline—were cancelled between 2014 and 2017.[64]

An unintended consequence of thwarting would-be foreign fighters from travelling is that they may direct their attention inward,[65] as has occurred in Canada and Australia.[66] Such cases may necessitate other control measures. In the United Kingdom, terrorism prevention and investigation measures (TPIMs), created by a 2011 Act of the same name, can be imposed on persons reasonably believed to be involved in terrorism-related activity. TPIMs can disrupt would-be foreign fighters by imposing obligations restricting their travel and requiring the surrender of their travel documents (which notably covers foreign passports). TPIMs can also be used as a control measure against thwarted foreign fighters by subjecting them to other restrictions such as curfew and electronic monitoring.[67] Amendments made in 2015 added two further options: forced relocation to a residence elsewhere in the country, and an obligation to attend appointments with specified persons,[68] which is intended to facilitate de-radicalisation.[69] Several TPIMs imposed subsequently have included these new obligations.[70]

The Canadian equivalent exists in the form of peace bonds, originally introduced as a counterterrorism measure in 2001. This device allows a would-be foreign fighter to be subject to various conditions, such as wearing a monitoring device, curfew and restrictions on possessing certain items.[71] Peace bonds can be imposed where there are reasonable grounds for fearing that a person may commit a terrorism offence—the standard having been lowered from 'will commit' in 2015.[72]

2. *Post-departure*

Certain administrative control measures are also applicable to returned foreign fighters. Peace bonds can be used to disrupt the activities of certain

[63] Australian Passports Act 2005 (Cth), section 14.

[64] Blackbourn, Kayis and McGarrity (n 60) 68.

[65] See Forcese and Roach (n 58) 185; N Hopkins and E MacAskill, 'UK "Vulnerable to Terror Attacks by Jihadis Unable to Reach Syria"' *The Guardian* (23 May 2017) <https://www.theguardian.com/uk-news/2017/may/23/uk-vulnerable-to-terror-attacks-by-jihadis-unable-to-reach-syria>.

[66] At least one and possibly both of the attackers who carried out the separate attacks in Canada in October 2014 were would-be foreign fighters: Forcese and Roach (n 58) 101–2. Similarly, an Australian who had his passport cancelled in 2014 to prevent his travelling to Syria later attacked two police officers in Melbourne: Byman (n 32) 82.

[67] See Terrorism Prevention and Investigation Measures Act 2011, Sch 1, Pt 1.

[68] Counter-Terrorism and Security Act 2015, sections 16 and 19.

[69] Blackbourn, Kayis and McGarrity (n 60) 53.

[70] ibid 54–5.

[71] Criminal Code, RSC 1985, c C-46, section 810.011. See generally Forcese and Roach (n 58) 214–19.

[72] See Anti-terrorism Act, SC 2015, c 20, Pt 3.

returnees,[73] and TPIMs have been used in this fashion in the United Kingdom.[74] The Australian equivalent is the control order regime.[75] Originally enacted as a counterterrorism measure after the 2005 London bombings,[76] a 2014 amendment extended the life of the regime, and expanded the grounds for granting control orders to cover engaging in 'hostile activity in a foreign country'.[77] Although this expansion of the scope of the regime was directed at the threat of dangerous returnees,[78] only a few control orders have been issued since the advent of the Syrian conflict, and as of 2018 none had relied on the recently introduced grounds.[79]

Another category of control measures disrupts the ease of travel of foreign fighters. For example, the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 requires otherwise exempt individuals to obtain a visa to enter the United States if they have travelled to Syria or Iraq.[80] Other measures specifically increase the barriers to entry for returning foreign fighters. In the United Kingdom, temporary exclusion orders (TEOs) were introduced in 2015. A TEO may be applied to an individual who is abroad and has the right of abode in the United Kingdom where the Home Secretary reasonably suspects that individual is or has been involved in terrorism-related activity, and reasonably considers a TEO necessary to protect the public from terrorism. Once imposed, the individual is prohibited from returning without a permit, the issuing of which can be made conditional.[81] This allows the government to control the circumstances of the individual's return.[82] More recently, in July 2019, Australia enacted a virtual carbon-copy of the British TEO scheme with its Counter-Terrorism (Temporary Exclusion Orders) Act 2019.

Whether TEOs are more a product of political posturing than a rational policy process is debatable. In the United Kingdom, TEOs have been used, at most, in a handful of cases,[83] which lends credence to the claim that they are meant to function primarily on a symbolic, expressive level.[84]

[73] C Forcese and A Mamikon, 'Neutrality Law, Anti-Terrorism and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies' (2015) 48 UBC Law Review 305, 332–3.

[74] See *EB v Secretary of State for the Home Department* [2016] EWHC 1970 (Admin) [22].

[75] Anti-Terrorism Act (No 2) 2005 (Cth), section 104.5(3).

[76] A Lynch, N McGarrity and G Williams, *Inside Australia's Anti-terrorism Laws and Trials* (NewSouth 2015) 171.

[77] Criminal Code Act 1995 (Cth), sections 104.2, 104.4 and 104.32, as amended by Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth), sections 71, 73 and 86. See generally F Davis, N McGarrity and G Williams, 'Australia' in K Roach (ed), *Comparative Counter-Terrorism Law* (Cambridge University Press 2015) 681.

[78] Lynch, McGarrity and Williams (n 76) 175.

[79] Blackbourn, Kayis and McGarrity (n 60) 47–8

[80] Pub L No 114–113.

[81] Counter-Terrorism and Security Act 2015, sections 2–5.

[82] See generally H Fenwick, 'Terrorism Threats and Temporary Exclusion Orders: Counter-Terror Rhetoric or Reality?' (2017) 2017 EHRLR 247; L Zedner, 'Citizenship Deprivation, Security and Human Rights' (2016) 18 EJML 222.

[83] Blackbourn, Kayis and McGarrity (n 60) 89.

[84] See Fenwick (n 82).

https://doi.org/10.1017/S0020589319000447 Published online by Cambridge University Press

At the most extreme, a foreign fighter may be barred from returning altogether through the deprivation of citizenship. In practice, this entails stripping foreign fighters who are dual nationals of citizenship on the theory that their conduct is incompatible with continued membership of the political community.[85] While citizenship deprivation is not novel, its use in the common law world was rare by the late twentieth century.[86] However, with the exception of the United States,[87] it has taken on renewed prominence as a response to foreign fighters.[88] In the United Kingdom, the use of the existing citizenship deprivation power increased markedly around 2013 and 2014.[89] Further, in 2014, that power was extended to naturalised citizens. This allows the Home Secretary to exercise the power where it is considered conducive to the public good on account of the person having engaged in conduct prejudicial to vital national interests, provided that the Home Secretary has reasonable grounds for believing that the person can become a citizen of another country or territory.[90]

Both Australia and Canada followed suit. The Allegiance to Australia Act 2015 prescribes the loss of citizenship where a person: engages in certain forms of conduct including various modalities of terrorism or facilitating terrorism, as well as foreign incursions;[91] serves in the armed forces of a country at war with Australia or a declared terrorist organisation; or is convicted of specified offences relating to terrorism and various crimes against the State.[92] Similarly, the Strengthening Canadian Citizenship Act 2014 permitted deprivation of citizenship on grounds such as service in an armed force or organised armed group engaged in armed conflict against Canada, and conviction for a terrorist offence.[93] However, these provisions were repealed in 2017 following a change in government.[94]

[85] See generally PT Lenard, 'Democratic Citizenship and Denationalization' (2018) 112 American Political Science Review 99.

[86] S Pillai and G Williams, 'Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations' (2017) 66 ICLQ 521, 525–31.

[87] Attempts to extend citizenship deprivation to cover involvement in terrorism have failed: L Van Waas, 'Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications' in A de Guttry, F Capone and C Paulussen (eds), *Foreign Fighters under International Law and Beyond* (TMC Asser Press 2016) 472. For explanations, see PJ Spiro, 'Expatriating Terrorists' (2014) 82 FordhamLRev 2169.

[88] See generally Pillai and Williams (n 86); Zedner (n 82). The United Nations Counter-Terrorism Committee casts doubt upon the legitimacy and effectiveness of such provisions: see 1373 Committee (n 34) para 52.

[89] Blackbourn, Kayis and McGarrity (n 60) 84–5.

[90] British Nationality Act 1981 section 40, as amended by Immigration Act 2014, section 66. See also *R (on the application of Abdullah Muhammad Rafiqul Islam) v Secretary of State for the Home Department* [2019] EWHC 2169 (Admin).

[91] See text below (nn 220–23).

[92] Australian Citizenship Amendment (Allegiance to Australia) Act 2015, section 33AA. The first known use of the power was to strip Khaled Sharrouf, a dual national with Lebanon, of his Australian citizenship: see J Williams, 'ISIS Fighter's Australian Citizenship Is Revoked Under Antiterror Laws' *The New York Times* (13 February 2017) <https://www.nytimes.com/2017/02/13/world/australia/citizenship-isis-khaled-sharrouf.html>.

[93] Strengthening Canadian Citizenship Act, SC 2014, c 22, section 8.

[94] See An Act to amend the Citizenship Act and to make consequential amendments to another Act, SC 2017, c 14.

B. The Criminal Law

Administrative control measures are imposed with a lesser degree of due process, and for that reason alone, are generally regarded as problematic. By contrast, the criminal law appeals as the most procedurally legitimate and durable way for dealing with foreign fighters,[95] at least as far as coercive responses are concerned. Coercive responses do, however, need to be applied with care.[96] In any case, given the sheer number of returnees,[97] criminal prosecution will necessarily be selective. And it makes sense to decide whether to prosecute based on a returnee's discernible threat, bearing in mind the range of motivations for returning and the degree of participation in wrongful acts.[98] Once the decision to use the criminal law is made, there is the question of what offence to charge, given that being a foreign fighter is in general not an offence under international or domestic law.[99] In keeping with the counterterrorism paradigm, the hook is usually some conduct by the foreign fighter either before or after departure that amounts to an offence under counterterrorism law.

1. Conduct occurring in home state

Section 5 of the United Kingdom's Terrorism Act 2006 creates the offence of preparation for terrorist acts. This offence, which is worded broadly enough to capture a range of preparatory conduct, is the charge of choice for those who planned to leave but did not actually do so, as well as those who reached various stages of proximity to Syria.[100] The American equivalent is the offence of providing material support—a term capaciously defined to include various kinds of assistance, including providing 'oneself'[101]—to a designated foreign terrorist organisation (FTO), such as ISIL and Al-Nusrah. This means that any would-be foreign fighter intending to join those groups, knowing that they are designated FTOs or that they have engaged or engage in terrorist activity or terrorism,[102] can be prosecuted prior to departure for the inchoate versions of the material support offence.[103] As is the case more generally, the

[95] See Forcese and Roach (n 58) 315–16.

[96] United Nations Counter-Terrorism Committee, 'Madrid Guiding Principles' (23 December 2015) S/2015/939 18–19. See also C Lister, 'Returning Foreign Fighters: Criminalization or Reintegration?' (Brookings Institute Policy Briefing, August 2015) <http://www.brookings.edu/~/media/research/files/papers/2015/08/13-foreign-fighters-lister/en-fighters-web.pdf>.

[97] According to UN estimates, 30 to 40 per cent of the 5,000 to 6,000 FTFs from Europe have returned: see 1267 Committee (n 23) para 48. Another estimate of the average return rate for the EU is 22 to 24 per cent: see Ragazzi and Walmsley (n 35) 31–2.

[98] Barrett (n 31) 18–21.

[99] Krähenmann (n 4) 241; Heinsch (n 3).

[100] See for example *R v Mohammed Kahar and others* [2016] EWCA Crim 568. See generally Walker (n 13) 107–8.

[101] 18 USC Section 2339A(b). See also 18 USC Section 2339B(h).

[102] 18 USC Section 2339B(1).

[103] N Abrams, 'A Constitutional Minimum Threshold for the Actus Reus of Crime: MPC Attempts and Material Support Offenses' (2019) 37 Quinnipiac Law Review 199, 233–4. See also Center on National Security at Fordham Law, 'Case by Case: ISIS Prosecutions in the

material support offence has been a prosecutorial staple.[104] This is due in no small part to its broad scope of application and hefty penalty, particularly with the maximum having been raised to 20 years' imprisonment in 2015.[105] Indeed, the ready utility of the offence explains the lack of a broader legislative response by the United States.[106]

Canada created several specific offences in 2013 to deal with persons leaving or attempting to leave Canada to participate in terrorism.[107] These specific leaving offences, which have been charged several times,[108] clarify that travelling to engage in terrorism overseas is a crime, even though existing terrorism offences already covered the conduct.[109]

Australian law, as a result of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014, criminalises a broad range of acts preparatory to foreign incursion offences,[110] whether done in Australia or elsewhere. These preparatory acts include accumulating weapons, giving or receiving military training, and giving or receiving goods and services to promote the commission of a foreign incursion offence.[111] The preparatory offence is the most commonly prosecuted of the foreign incursion offences.[112]

2. *Conduct occurring in conflict state*

Foreign fighters who reach the theatre of armed conflict and return are potentially liable for prosecution for their conduct overseas. As noted earlier, this is typically on the basis that it constitutes some type of terrorism offence. For example, in the United Kingdom, section 5 of the Terrorism Act 2006 is again the prosecutorial mainstay.[113] Section 5 has been used in relation to persons who departed to fight against government forces in Syria, where they spent six months, during which time they received weapons training and engaged in armed patrols (although they were not found to have engaged in actual armed combat).[114] The Act further provides specific offences of training for terrorism (section 6) and attending a place for terrorist training

United States' (Center on National Security at Fordham Law, July 2016) <http://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/577c5b43197aea832bd486c0/1467767622315/ISIS+Report+-+Case+by+Case+-+July2016.pdf> 13.

[104] C Doyle, 'Terrorist Material Support: An Overview of 18 U.S.C. §2339A and §2339B' (Congressional Research Service, 8 December 2016) <https://fas.org/sgp/crs/natsec/R41333.pdf> 1.

[105] USA Freedom Act of 2015, Pub L No 114–23, section 704.

[106] 1373 Committee, 'Bringing Terrorists to Justice: Challenges in Prosecutions Related to Foreign Terrorist Fighters' (18 February 2015) S/2015/123 para 16. See also Roach (n 56) 86–7.

[107] Combating Terrorism Act, SC 2013, c 9, sections 6–8.

[108] Forcese and Roach (n 58) 104.

[109] See *R v Hersi* 2014 ONSC 4414. See also Forcese and Roach (n 58) 107.

[110] See text below (nn 220–52).

[111] Criminal Code Act 1995 (Cth), section 119.4.

[112] Lynch, McGarrity and Williams (n 76) 83.

[113] Walker (n 13) 108.

[114] *Sarwar v R* [2015] EWCA Crim 1886. See also Krähenmann (n 4) 243.

https://doi.org/10.1017/S0020589319000447 Published online by Cambridge University Press

(section 8). These offences apply extraterritorially, with full extraterritorial jurisdiction for the section 5 and 6 offences having been added in 2015.[115]

The material support offence applies extraterritorially, and therefore covers the relatively few American nationals who succeeded in travelling to Syria to join ISIL,[116] as well as those joining FTOs in Afghanistan and Somalia.[117] Also available is the specific offence of receiving military-style training from an FTO,[118] although in practice it is crowded out by the material support offence.[119]

In Canada, there is the possibility of prosecution for the offences created by the Anti-Terrorism Act 2001, for which extraterritorial jurisdiction exists in most cases.[120] Australia likewise provides for extraterritorial jurisdiction for terrorism offences.[121]

Additionally, the amendments resulting from Australia's Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 set out several foreign incursion offences applicable to conduct overseas.[122] Section 119.1 makes it an offence to engage in hostile activity in a foreign country, or to enter a country with the intent to engage in hostile activity there or elsewhere.[123] Section 119.2 creates a novel offence of entering or remaining in an area in a foreign country that has been subject to an executive declaration, which, per section 119.3, is made on the basis of a ministerial determination that a listed terrorist organisation is engaging in a hostile activity in that area. Proof of the offence is complete upon a showing that the person entered or remained in a declared area,[124] unless the person can show their sole purpose of travel fell within a range of legitimate purposes.[125]

With the recent enactment of the Counter-Terrorism and Border Security Act 2019, the United Kingdom now has an equivalent of the Australian declared area provision, namely the offence of entering or remaining in a designated area. The Secretary of State has the power to designate an area if satisfied that it is necessary to restrict British nationals or residents from entering or remaining in that area for the purpose of protecting the public from

[115] Serious Crime Act 2015, section 81.
[116] 18 USC sections 2339B(d)(1) and (d)(2). See also Doyle (n 104) 22.
[117] Krähenmann (n 4) 246.
[118] 18 USC section 2339D.
[119] Center on National Security at Fordham Law (n 103) 13.
[120] Criminal Code, RSC 1985, c C-46, sections 7(3.74)-(3.75).
[121] See for example Criminal Code Act 1995 (Cth), sections 15.4, 101.1(2), 101.2(4), 101.4(4), 101.5(4), 101.6(3).
[122] See Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth), section 110. See also text below (nn 220–252).
[123] Engaging in hostile activity is defined as conduct done with the intention of achieving certain violent objectives: see Criminal Code Act 1995 (Cth), section 117.1(1).
[124] The two areas designated were Mosul district in Iraq and al-Raqqa province, Syria. The first remains in force; the latter was revoked on 29 November 2017: see Department of Foreign Affairs and Trade (Australia), 'Syria' (Smartraveller.gov.au, 23 April 2018) <http://smartraveller.gov.au/countries/middle-east/pages/syria.aspx#summary>.
[125] Criminal Code Act 1995 (Cth), section 119.2(3).

terrorism.[126] Similar to its Australian counterpart, the offence requires only that a person enters or remains in a designated area,[127] although this is qualified by a list of certain permitted purposes (such as providing humanitarian aid or journalistic work) as well as a defence of reasonable excuse.[128]

C. International Crimes

As noted at the outset, international law does not criminalise foreign fighting in itself. However, a foreign fighter's particular conduct may render them liable for prosecution for war crimes or other international crimes.[129] War crimes are the most likely candidate given the numerous reports alleging their commission in the Syrian conflict. Conduct such as killing prisoners, indiscriminate attacks, attacking civilians or civilian objects, and various forms of prisoner mistreatment likely qualify as war crimes regardless of the classification of the armed conflict in Syria.[130] The alleged perpetrators in the vast majority of cases are forces loyal to the Syrian government, as well as groups such as ISIL. But anti-ISIL groups such as the YPG (People's Protection Units) and Peshmerga have also been accused of war crimes.[131]

Regarding the forum for trial, the Office of the Prosecutor of the International Criminal Court has stated that national authorities have the primary responsibility to prosecute.[132] But prosecutions for international crimes remain a rarity. British authorities have considered war crimes prosecutions, and one former rebel has been convicted and sentenced to life imprisonment for war crimes in Sweden.[133]

D. The Problem of Evidence

To date, relatively few returnees have been prosecuted.[134] A substantial part of the explanation lies in the practical difficulties of adducing sufficient evidence to

[126] Terrorism Act 2000, sections 58B–58C, as amended by the Counter-Terrorism and Border Security Act 2019, section 4.

[127] Terrorism Act 2000, section 58B(1).

[128] Terrorism Act 2000, section 58B(5) and 58B(2).

[129] Heinsch (n 3) 163–6; Ragni (n 3) 1065–6.

[130] J Pejic, 'Armed Conflict and Terrorism: There is a (Big) Difference' in A Salinas de Frías, K Samuel and ND White (eds), *Counter-terrorism: International Law and Practice* (Oxford University Press 2012) 173; B Saul, 'Terrorism and International Humanitarian Law' in B Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 225–6.

[131] H Tuck, T Silverman and C Smalley, '"Shooting in the Right Direction": Anti-ISIS Foreign Fighters in Syria & Iraq' (Institute for Strategic Dialogue, 2016) 47 <https://www.isdglobal.org/wp-content/uploads/2016/08/ISD-Report-Shooting-in-the-right-direction-Anti-ISIS-Fighters.pdf> 47.

[132] Office of the Prosecutor, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS' (8 April 2015) <https://www.icc-cpi.int/legalAidConsultations?name=otp-stat-08-04-2015-1>. See generally Heinsch (n 3) 179–80.

[133] Walker (n 13) 116; B McKernan, 'Sweden Jails Syrian Rebel who Fled Idlib after Killing Assad Soldiers' *Independent* (17 February 2017) <http://www.independent.co.uk/news/world/middle-east/weden-jails-syrian-rebel-assad-soldiers-killed-murders-a7586071.html>.

[134] See Walker (n 13) 109; Blackbourn, Kayis and McGarrity (n 60) 16–21.

satisfy the criminal standard of proof.[135] This is not an issue regarding conduct occurring in the home State, since the usual set of investigative tools will be available. So, for example, United States authorities rely extensively on the evidence of informants and undercover agents to prosecute would-be foreign fighters,[136] a tactic generally employed in counterterrorism investigations.[137]

However, the sufficiency of evidence is a substantial challenge when the charges relate to conduct occurring in the conflict State because there are limited ways of proving (or even knowing) what the person concerned did there. Some returnees never disclose any information about their activities; some may do so via social media,[138] although posing with weapons and combat gear is not in itself sufficient proof. Mutual legal assistance is also not a viable option given that the situation in Iraq and Syria is such that local police forces cannot realistically help with collecting evidence.[139] Assuming also that governments will have to make use of information derived from intelligence sources, there will be challenges in converting intelligence into admissible evidence.[140] One such issue, if the desired information comes from an allied foreign intelligence service, is that conditions may be imposed on the sharing of that intelligence which precludes its use as evidence in open court.[141]

In sum, the availability of evidence is likely to be a key consideration in deciding whether to prosecute.[142] Despite all of these challenges, there have been successful prosecutions of returned foreign fighters. Sometimes evidence becomes available by chance (for example, refugees providing accounts of what happened in Syria), is shared on social media, is found in an incriminating video or computer file in possession of a returned foreign fighter, or is found by surveillance.[143]

IV. ISSUES WITH THE COUNTERTERRORISM PARADIGM

Most of the domestic legal responses outlined above operate under a counterterrorism paradigm in that they deal with foreign fighting principally in the context of terrorism. That this should be so is unsurprising given the influence exerted by UNSCR 2178, and, in particular, its use of the term FTF, which explicitly links foreign fighting and terrorism. UNSCR 2396, the 2017 follow-up to UNSCR 2178 that calls for a further consolidation of

[135] United Nations Counter-Terrorism Committee, 'Addendum to the Guiding Principles on Foreign Terrorist Fighters' (28 December 2018) S/2018/1177 para 44.

[136] Paulussen and Pitcher (n 56) 29; E Lichtblau, 'F.B.I. Steps Up Use of Stings in ISIS Cases' *The New York Times* (7 June 2016) <http://www.nytimes.com/2016/06/08/us/fbi-isis-terrorism-stings.html>.

[137] But not unproblematically: see T Aaronson, *The Terror Factory* (Ig Publishing 2014).

[138] 1373 Committee (n 106) paras 26–27.

[139] K Hardy, 'Why Is It So Difficult to Prosecute Returning Fighters?' (*The Conversation*, 5 June 2017) <https://theconversation.com/why-is-it-so-difficult-to-prosecute-returning-fighters-78596>; Mehra (n 48) 18.

[140] 1373 Committee (n 106) para 24.

[141] Hardy (n 139).

[142] See generally Walker (n 13) 109.

[143] Paulussen and Pitcher (n 56) 26–9.

https://doi.org/10.1017/S0020589319000447 Published online by Cambridge University Press

countermeasures, continues in the same vein: FTF is used as a subset of 'terrorist' throughout.[144] The competing term, foreign fighter, is used as well. It appears, for example, in certain official British documents.[145] Sometimes, the two terms are mixed together.[146] The European Union uses foreign fighter and FTF interchangeably,[147] as does the record of the meeting at the time of UNSCR 2178's adoption.[148] Consequently, the link between foreign fighting and terrorism is either explicit (as in the FTF language of Security Council resolutions), or at least implicit, with foreign fighting almost invariably associated with terrorism.[149]

There are a number of problems with the counterterrorism paradigm's treatment of foreign fighting as a form of terrorism. First, it relies on the deeply contested term of terrorism as the trigger for a range of draconian legal responses. Second, foreign fighting and terrorism are not synonymous. Treating them as interchangeable conflates two distinct phenomena. Foreign fighting does not necessarily involve terrorism; terrorism does not necessarily involve foreign fighting.[150] Therefore, regulating foreign fighting as a form of terrorism will inevitably have blind spots. Third, conflating foreign fighting and terrorism also runs the risk of collapsing the boundaries between two different legal regimes, namely counterterrorism law and IHL.

A. Vague Trigger for a Draconian Response

It is a well-worn truism that terrorism is difficult to define;[151] formulating an internationally accepted definition has proven intractably difficult.[152] Nonetheless, terrorism can be conceptually distinguished from other forms of violence such as guerrilla warfare and insurgency. Guerrilla warfare entails irregular military operations (skirmishes, hit-and-run raids) that target military objectives, with the goals being the enemy's military defeat and the

[144] UNSC Res 2396 (21 December 2017) UN Doc S/RES/2396.

[145] Walker (n 13) 97. See also HC Deb 1 September 2014, vol 585, cols 23–27; Home Affairs Committee, *Counter-terrorism: foreign fighters* (HC 2014–15, 933).

[146] B Boutin *et al.*, 'The Foreign Fighters Phenomenon in the European Union' (ICCT Research Paper, April 2016) <http://icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf> Annex 1: Methodology.

[147] A Reed and J Pohl, 'Disentangling the EU Foreign Fighter Threat: The Case for a Comprehensive Approach' (RUSI Newsbrief, 10 February 2017) <https://rusi.org/sites/default/files/nb_vol.37_no1_pohl_and_reed.pdf> 1; Boutin *et al.* (n 146) 13.

[148] UNSC, '7272 Meeting' (24 September 2014) UN Doc S/PV.7272 <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7272>.

[149] See for example HC Deb 1 September 2014, vol 585, cols 23–27; Home Affairs Committee (n 145).

[150] See also J de Roy van Zuijdewijn, 'The Foreign Fighters' Threat: What History Can (not) Tell Us' (2014) 8 Perspectives on Terrorism 59, 61.

[151] See generally B Hoffman, *Inside Terrorism* (3rd edn, Columbia University Press 2017) 21–36.

[152] See generally B Saul, 'Defining Terrorism: A Conceptual Minefield' in E Chenoweth *et al.* (eds), *The Oxford Handbook of Terrorism* (Oxford University Press 2019).

control of territory.[153] An insurgency refers to 'a protracted politico-military struggle focused on weakening the control and legitimacy of government'.[154] Insurgents will conduct guerrilla warfare,[155] but in order to achieve regime change, will typically engage in additional activities such as information and psychological warfare to mobilise popular support.[156] By contrast, terrorism can be understood as 'deliberately and violently targeting civilians for political purposes'.[157] Terrorists will be numerically few, and for that reason, typically do not engage in direct military combat or hold territory like guerrillas, nor do they engage in political mobilisation efforts like insurgents.[158]

However, although these forms of violence are conceptually distinct, they can be difficult to disentangle in reality. Groups that might plausibly be classified as guerrillas or insurgents often engage in terrorism as well;[159] terrorist groups can also engage in guerrilla warfare and insurgency.[160] As Hoffman notes, one third of the groups considered by the United States to be FTOs could equally be described as guerrillas.[161] Al Qaida and ISIL, in particular, exemplify the difficulty of classification. Al Qaida, a group indelibly associated with modern terrorism, has also been engaged in insurgencies through various regional affiliates. ISIL, in addition to facilitating and directing terrorist attacks elsewhere, undertook large-scale military operations in Syria and Iraq.[162] Indeed, ISIL—with its size, military capability and ability to hold territory—might have been better described in its heyday as 'a pseudo-state led by a conventional army'.[163]

The issue caused by terrorism eluding an easy definition is that it is the trigger for the application of the counterterrorism paradigm. Uncertainty about the definition of terrorism means uncertainty about the reach of that paradigm. And uncertainty here is consequential, because of what the application of the counterterrorism paradigm entails. As outlined in the previous part, States have enacted a range of counterterrorism measures as a response to the problem of foreign fighters joining the Syrian conflict, many of which significantly impact upon the rights of individuals, often on a preventive basis.[164] Locating the response to foreign fighting in the domain of counterterrorism law therefore has serious implications for affected individuals.

[153] L Richardson, *What Terrorists Want* (Random House 2006) 6; Hoffman (n 151) 36–7.

[154] K Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (Oxford University Press 2016) 180.

[155] ibid 191.

[156] Hoffman (n 151) 37.

[157] Richardson (n 153) 4.

[158] Hoffman (n 151) 37.

[159] R English, *Terrorism: How to Respond* (Oxford University Press 2009) 12; Watkin (n 154) 190.

[160] AK Cronin, 'What Is Really Changing? Change and Continuity in Global Terrorism' in H Strachan and S Scheipers (eds), *The Changing Character of War* (Oxford University Press 2011) 139.

[161] Hoffman (n 151) 37.

[162] See Watkin (n 154) 197–208; Hoffman (n 151) 38.

[163] AK Cronin, 'ISIS Is Not a Terrorist Group: Why Counterterrorism Won't Stop the Latest Jihadist Threat' (2015) 94 Foreign Affairs 88.

[164] This is characteristic of counterterrorism legislation more generally: see A Ashworth and L Zedner, *Preventive Justice* (Oxford University Press 2014) 171–95.

B. Terrorist Designation and Blind Spots

To some degree, these problems of defining terrorism can be masked by reliance on the process of terrorist listing or designation, whereby a group is identified as a terrorist group via an administrative process, which then typically triggers a range of measures designed to starve that group of support and visibility. While classifying groups such as ISIL and al Qaida as terrorist groups might be uncontroversial, there is considerable variation in terrorist designation practices beyond these core cases. Even amongst the United States, the United Kingdom, Canada and Australia—States that cooperate on matters of security and terrorism—there are marked differences in the number of designated terrorist organisations, and only 16 groups are designated as terrorist in all four jurisdictions.[165]

As far as foreign fighting is concerned, the pivotal question will be whether the group a foreign fighter joins is a designated terrorist group.[166] Here, the definitional issues discussed above matter—for example, an armed group engaged in an insurgency may be considered to be a terrorist group and designated accordingly. Once the terrorist label is applied through the designation process, participation in the activities of that group will be an offence.[167] More specifically, travelling to fight for such a group will make one simultaneously a foreign fighter as well as a participant in a terrorist group, and hence liable to prosecution for a terrorist offence regardless of one's motivations for participating in the conflict or conduct in the conflict State.[168] If, on the other hand, an individual joins a group that is not a designated terrorist group, then the prosecution will need to prove the commission of a specific wrongful act (such as preparation for a terrorist act, or receiving terrorist training).[169]

Relying on terrorist designation, then, has blind spots—notably, in relation to persons who travel to fight on behalf of the Syrian government, and persons who travel to join armed groups that are not designated as terrorist.[170] The 300-odd Western foreign fighters who joined armed groups fighting against ISIL provide a useful illustration.[171] The most common destinations for such fighters were

[165] See generally L Jarvis and T Legrand, 'The Proscription or Listing of Terrorist Organisations: Understanding, Assessment, and International Comparisons' (2018) 30 Terrorism and Political Violence 199, 201. [166] Krähenmann (n 4) 240. [167] Saul (n 130) 213.
[168] Krähenmann (n 11) 63.
[169] The messy reality of a zone of armed conflict further complicates matters. The allegiances of an individual might shift—for example, United States Army veteran Eric Harroun originally joined the undesignated Free Syria Army but later joined al-Nusra, a designated FTO: see Krähenmann (n 4) 247.
[170] D Richemond-Barak and V Barber, 'Foreign Volunteers or Foreign Fighters? The Emerging Legal Framework Governing Foreign Fighters' (*Opinio Juris*, 6 May 2016) <http://opiniojuris.org/2016/05/06/foreign-volunteers-or-foreign-fighters-the-emerging-legal-framework-governing-foreign-fighters/>. See also Forcese and Mamikon (n 73) 309.
[171] Tuck, Silverman and Smalley (n 131) 8. Of those with known employment backgrounds, a significant number previously served in national militaries: ibid 10.

two Kurdish groups, the YPG and the Peshmerga, while a smaller number fought under the aegis of groups such as the Kurdistan Workers' Party (PKK).[172] The choice of group is consequential. The PKK is considered a terrorist group by the United States, Canada, the United Kingdom, and Australia,[173] and a foreign fighter who fought with the PKK would face prosecution by virtue of that act alone.[174] By contrast, for a foreign fighter who fought with the YPG, the terrorist designation-based legal architecture is inapplicable,[175] meaning that prosecution would require proof of particular conduct that amounts to a crime.

C. The Expanding Empire of Counterterrorism Law

In addition to terrorism, insurgency and guerrilla warfare blending into one another as an empirical matter, terrorism has become such a broadly defined concept in law that it now encompasses activity traditionally the domain of IHL. More specifically, what in the past might have been understood as violence by guerrillas or insurgents in the course of armed conflict that fell to be regulated by IHL now threatens to be subsumed under the label of terrorism.

Both terrorism and armed conflict entail violence. But while certain acts of properly conducted and targeted violence are lawful under IHL, the same is not true of terrorist violence, which is categorically unlawful.[176] This distinction is reflected in pre-9/11 international treaties concerning terrorism, which leave hostile acts in the course of an armed conflict to be regulated by IHL.[177] But this distinction, based on the understanding that IHL already prohibited the kinds of acts that would be considered terrorism if done in peacetime,[178] has unravelled in recent times, leading to an expansion of counterterrorism law's domain. UNSCR 2178, as Krähenmann explains, exemplifies this trend:[179]

> [T]he Resolution unreflectively extends the concepts of 'terrorism' to situations of armed conflict, without considering the fundamental differences between terrorism and armed conflict, and the legal consequences flowing therefrom. Instead, the Resolution apparently presumes that engaging in acts of violence

[172] ibid 10.
[173] ibid 16.
[174] The United States (18 USC Section 2339B), Canada (Criminal Code, section 83.18(1)) and Australia (Criminal Code, section 102.7(1)) have applicable offences based on providing support to a terrorist group. In the United Kingdom, the likely offence would be section 5 of the Terrorism Act 2006, which does not depend on links to a terrorist group: see for example *R v Mohammed Kahar and others* (n 100) [129]–[144].
[175] One possible complicating factor is that the YPG has affiliations with the PKK: see Paulussen and Pitcher (n 56) 25.
[176] Krähenmann (n 11) 61; M Sassòli, 'Terrorism and War' (2006) 4 JICJ 959, 959.
[177] Saul (n 130) 230; Ragni (n 3) 1066–7.
[178] J Pejic, 'Terrorist Acts and Groups: A Role for International Law?' (2005) 75 BYBIL 71, 73.
[179] Krähenmann (n 4) 238.

during an armed conflict abroad amounts to a terrorist offence, at least when fighting with certain groups.

The turning point was United Nations Security Council Resolution 1373,[180] passed by the Security Council in the aftermath of the terrorist attacks of 11 September 2001, which required States to criminalise terrorist acts, but did not define terrorism. This lacuna in effect delegated the matter to individual States.[181] Predictably, a variety of domestic legal definitions resulted, including definitions of terrorism that encompass acts during an armed conflict that are not prohibited by IHL.[182] The paradigmatic example is the influential definition in section 1 of the United Kingdom's Terrorism Act 2000.[183] Terrorism is defined as: (1) the use or threat of certain harmful acts; (2) intended to influence a government or to intimidate the public; (3) for the purpose of advancing certain ideological causes. As the United Kingdom Supreme Court acknowledged in *R v Gul*, the definition is expansive, perhaps even overly so.[184]

This expansiveness stems from several features of the definition, the cumulative effect of which is to capture the activities of foreign fighters.[185] The first is the choice of language. The 'designed to influence a government' threshold is low in comparative terms,[186] and would be readily met by an act of violence directed against government armed forces by insurgents.[187] Second, the definition's scope is transnational. Conduct that seeks to influence a foreign government or intimidate an overseas public can amount to terrorism, and the underlying harmful acts can be committed domestically or overseas.[188] As Saul notes, in effect '[d]omestic political violence, hitherto largely the concern of the affected State, has been reclassified and elevated to an international security concern that demands transnational criminal repression'.[189] Moreover, foreign governments or all kinds, authoritarian or

[180] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

[181] B Saul, 'The Legal Death of Rebellion: Counterterrorism Laws and the Shrinking Legal Freedom of Violent Political Resistance' in L Lazarus and B Goold (eds), *Security and Human Rights* (2nd edn, Hart 2019) 332.

[182] Ní Aoláin (n 54) para 47.

[183] See K Roach, 'The post-9/11 Migration of Britain's Terrorism Act 2000' in S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006). See also A Greene, 'Defining Terrorism: One Size Fits All?' (2017) 66 ICLQ 411.

[184] *R v Gul* [2013] UKSC 64 [61]–[62].

[185] The United Nations Counter-Terrorism Committee has cautioned against reliance on overly broad definitions of terrorism to fulfil obligations under UNSCR 2178: see 1373 Committee (n 34) para 73. See also United Nations Counter-Terrorism Committee (n 135) Guiding Principle 41.

[186] D Anderson, 'The Terrorism Acts in 2013' (July 2014) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2014/07/Independent-Review-of-Terrorism-Report-2014-print2.pdf> [10.36].

[187] Even putting aside section 1(3), which provides that where the use or threat of action involves the use of firearms or explosives, the requirement that the action be designed to influence a government or intimidate the public is deemed to be met. See also *R v F* [2007] QB 960 [28].

[188] Terrorism Act 2000, section 1(4). The same is true of the Canadian and Australian definitions: see Criminal Code, RSC 1985, c C-46, section 83.01(1)(b); Criminal Code Act 1995 (Cth), section 100.1.

[189] Saul (n 181) 324. See also Greene (n 183) 426–7.

otherwise, are covered by the definition—that is, the section 1 definition is indifferent to claims of just cause or noble terrorism.[190] Finally, the section 1 definition does not provide an exception for acts done during armed conflict.[191] As the United Kingdom Supreme Court indicated in *Gul*, the section 1 definition encompasses attacks against armed forces by a non-State armed group in the course of a non-international armed conflict.[192]

In sum, even conduct that is permitted under IHL—such as a lawful attack against a legitimate military target—will qualify as terrorism for the purposes of domestic counterterrorism law. This means that foreign fighters who engage in such acts overseas commit terrorist offences,[193] which in turn undermines the incentive to comply with IHL.[194] At this point, as Saul contends, counterterrorism law threatens to displace IHL completely:[195]

> The consequence of this approach is that all armed resistance to state forces, as well as fighting between non-state armed groups, becomes 'terrorism', regardless of how the fighting occurs or whether those involved respect IHL. It makes armed resistance to authoritarian regimes *ipso facto* illegal, regardless of means.

In addition to threatening to collapse distinctions between different forms of violence and their applicable legal regimes, the breadth of the section 1 definition creates a large space for prosecutorial discretion to operate.[196] The significance of this can again be illustrated by the treatment of anti-ISIL foreign fighters. Among this group were foreign fighters who fought against ISIL with a Kurdish militia group, the YPG. These fighters have generally not faced legal jeopardy upon returning home (whether to Australia, Canada, the United States or the United Kingdom),[197] suggesting a reluctance to prosecute these particular foreign fighters.[198] However, as Blackbourn *et al.* observe regarding the United Kingdom specifically, the approach to anti-ISIL fighters lacks consistency and is politically contingent[199]—something illustrated by the prosecution in 2018 of two YPG returnees for terrorism offences.[200]

[190] *R v F* (n 187) [32]; *R v Gul* (n 184) [26]. Accordingly, the argument raised by two returnees that their activities against Syrian government forces as part of the Free Syria Army was 'noble cause terrorism' was rejected: see *Sarwar v R* (n 114) [41]–[43].

[191] Australia's definition is the same in this respect: see Saul (n 181) 336. Canada's definition does include an armed conflict exception: Criminal Code, RSC 1985, c C-46, section 83.01(1). In the case of ISIL at least, the requirement of showing compliance with IHL presents a significant obstacle: see Forcese and Mamikon (n 73) 329–30. As for the United States, none of the various definitions of terrorism and similar terms relevant to the material support offences explicitly mention armed conflict: see 18 USC Section 2339B(g)(6) (defining 'terrorist organization'), 22 USC Section 2656f(d)(2) (defining 'terrorism') and 8 USC Section 1182(a)(3)(B)(iii) (defining 'terrorist activity').

[192] *R v Gul* (n 184).

[193] Krähenmann (n 4) 243.

[194] Sassòli (n 176) 971; Pejic (n 178) 75.

[195] Saul (n 181) 337.

[196] *R v Gul* (n 184) [33]. See also Greene (n 183) 430–1.

[197] Paulussen and Pitcher (n 56) 24–5; Richemond-Barak and Barber (n 170).

[198] Paulussen and Pitcher (n 56) 24.

[199] Blackbourn, Kayis and McGarrity (n 60) 24.

[200] The prosecution of James Matthews was dropped for lack of evidence. In the other case, the trial judge directed that Aidan James be acquitted of preparation of terrorist acts, and the jury was unable to reach a verdict on other charges: see L Dearden, 'Aidan James: British Man Who Fought

Hence, prosecutorial discretion is ultimately an unreliable protection against a broad definition of terrorism. Moreover, as the United Kingdom Supreme Court observed in *Gul*, reliance on prosecutorial discretion is problematic from a rule of law standpoint, as it leaves individuals unable to ascertain 'whether or not their actions or projected actions are liable to be treated by the prosecution authorities as effectively innocent or criminal'.[201]

V. TOWARDS A NEUTRALITY LAW-BASED PARADIGM

Dealing with foreign fighting through the lens of counterterrorism is problematic for the reasons canvassed above. In this section, it is argued that a better way of regulating foreign fighting that avoids (or at least mitigates) these problems is to deal with foreign fighting on its own terms by employing a neutrality law-based paradigm. This entails the reinvigoration of so-called neutrality laws, domestic laws designed to ensure a State's neutrality, and making criminal the act of travelling to and participating in an armed conflict overseas, irrespective of the group joined or acts done in the theatre of armed conflict.

A. Neutrality Law

The international law of neutrality, a body of law applicable during international armed conflicts,[202] requires that neutral States not involve themselves in the conflict (abstention), and not favour one belligerent over the other (impartiality).[203] Although individuals of a neutral State volunteering for one of the belligerent States (that is, engaging in foreign fighting) does not implicate the responsibility of the neutral State,[204] some States nonetheless chose to enact laws whose rationale was to ensure the preservation of neutrality. These laws—variously referred to as neutrality laws or foreign enlistment laws—restricted individuals from engaging in foreign military service, and in some cases exceeded what international law required.[205]

against Isis in Syria Faces Retrial on Terror Charges' *Independent* (16 April 2019) <https://www.independent.co.uk/news/uk/crime/aidan-james-trial-isis-syria-court-old-bailey-pkk-islamic-state-a8872221.html>.

[201] *R v Gul* (n 184) [36].

[202] P Seger, 'The Law of Neutrality' in A Clapham and P Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 253.

[203] E Chadwick, 'Neutrality Revised' (2013) 22 NottLJ 41, 41; Seger (n 202) 249. K Wani, *Neutrality in International Law: From the Sixteenth Century to 1945* (Taylor & Francis 2017) 33–4.

[204] Seger (n 202) 258; L Oppenheim, *International Law. A Treatise. Volume II (of 2): War and Neutrality* (2nd edn, Longmans 1912) 376. See generally I Brownlie, 'Volunteers and the Law of War and Neutrality' (1956) 5 ICLQ 570, 570–1.

[205] CG Fenwick, *The Neutrality Laws of the United States* (Carnegie Endowment for International Peace 1913) 11–12. See also Oppenheim (n 204) 375–7.

While the association between citizenship and military service in the Western tradition dates back to ancient Greece and Rome,[206] laws restricting foreign military service, which entail the State seizing from individuals 'the authority to decide when, where, and why to use violence in the international system',[207] were rare prior to the nineteenth century. It took until the late eighteenth century for nationalism and the power of the State to develop to a point where it became feasible for the State 'to demand a monopoly over the military service of its citizens'.[208] As a result, foreign enlistment laws became increasingly common during the nineteenth century,[209] and by 1938, 70 per cent of States then in existence had enacted laws restricting foreign military service.[210]

The first such law was the United States' Neutrality Act of 1794,[211] the underlying purpose of which was to make the power to wage war a governmental rather than private matter; it constituted a legal assertion by the State to the exclusive authority to make war.[212] Among other matters, the Act prohibited citizens accepting a commission to serve a foreign prince or State, any person from enlisting or recruiting others to enlist in the service of a foreign prince or State, and any person from beginning or preparing a hostile military expedition against a foreign prince or State with whom the United States was at peace.[213] Notably, however, the law did not prevent an individual from leaving the United States with the intent of enlisting, although it did prohibit recruiting an individual in the United States to undertake that course of action.[214]

The British law, the Foreign Enlistment Act 1870, is the successor to an earlier 1819 Act modelled on the American law.[215] The 1870 Act, applicable to all British subjects, prohibits enlisting in the military 'of any foreign state at war with any foreign state at peace with Her Majesty',[216] as well as leaving Her Majesty's dominions with the intent of enlisting in a foreign military 'of any foreign state at war with a friendly state'.[217] Under those same provisions, recruiting another person to do either of those two acts is also prohibited. Canada also has a Foreign Enlistment Act,[218] which was enacted in 1937 as a response to the Spanish Civil War. The Act replaced the

[206] A Carter, 'Liberalism and the Obligation to Military Service' (1998) 46 Political Studies 68, 70; H Irving, *Citizenship, Alienage, and the Modern Constitutional State: A Gendered History* (Cambridge University Press 2016) 115.

[207] JE Thomson, *Mercenaries, Pirates, and Sovereigns* (Princeton University Press 1994) 82.

[208] Arielli (n 2) 27.

[209] Wani (n 203) 60.

[210] JE Thomson, 'State Practices, International Norms, and the Decline of Mercenarism' (1990) 34 International Studies Quarterly 23, 34.

[211] Act of June 5, 1794, ch 50, 1 Stat 381. See also Malet (n 9) 35.

[212] J Lobel, 'Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy, The' (1983) 24 HarvIntlLJ 1, 24–5; Thomson (n 207) 88.

[213] See Fenwick (n 205) 174–5 (reproducing the 1794 Act). The current provisions are now found in 18 USC sections 958–960.

[214] ibid 62. See also MR Garcia-Mora, 'International Law and the Law of Hostile Military Expeditions' (1958) 27 FordhamLRev 309, 315.

[215] Thomson (n 210) 39.

[216] Foreign Enlistment Act 1870, section 4.

[217] ibid section 5. See also Fenwick (n 205) 128.

[218] Foreign Enlistment Act, RSC 1985, c F-28.

previously applicable Foreign Enlistment Act 1870, and it retains a similar set of prohibitions.[219]

Australia's equivalent was the Crimes (Foreign Incursions and Recruitment Act) 1978, which set out several foreign incursion offences: engaging in hostile activity in a foreign State, entering a foreign State with the intention of engaging in hostile activity, and engaging in acts preparatory to either of the first two heads.[220] The Act also made it an offence to recruit persons to join organisations involved in hostile activity against foreign States or to recruit persons to join a foreign military.[221]

B. Neutrality Law Redux

Australia's enactment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 is at the heart of recent discussions about adopting a neutrality law paradigm to deal with foreign fighting.[222] This legislation repealed the Crimes (Foreign Incursions and Recruitment Act) 1978, but substantially replicated the foreign incursion offences in Part 5.5 of the Criminal Code,[223] thereby making unsanctioned foreign fighting by Australians a criminal offence. The 2014 Act also established the declared area offence, which makes it criminal for an individual to enter or remain in a certain area deemed off limits by the government.[224] As noted above, the United Kingdom recently followed Australia's example and enacted a similar offence of entering or remaining in a designated area.[225] In effect, these offences amount to a total ban on fighting (and any type of non-exempted activity) in the specified area, and correspond to what a strict, abstention-based conception of neutrality would require.[226]

The declared area and designated area offences sweep considerably broader than the foreign incursion offences, which in essence require proof of at least an

[219] ibid sections 3–5. See also T Wentzell, 'Canada's Foreign Fighters: The Foreign Enlistment Act and Related Provisions in the Criminal Code' (2016) 63 CrimLQ 102, 108.

[220] Crimes (Foreign Incursions and Recruitment Act) 1978 (Cth), sections 6–7 (repealed).

[221] ibid sections 8–9 (repealed).

[222] See Forcese and Mamikon (n 73); Wentzell (n 219) 121–2; D Anderson, 'The Terrorism Acts in 2014' (September 2015) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/09/Terrorism-Acts-Report-2015-Print-version.pdf> [8.21]. An alternative view is that pure foreign fighting ought not be regulated by the home State at all: see AK Webb, '"Swanning back in"? Foreign Fighters and the Long Arm of the State' (2017) 21 Citizenship Studies 291, 304.

[223] See Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth), section 110.

[224] Criminal Code Act 1995 (Cth), section 119.2–119.3, as amended by Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth), section 110.

[225] Terrorism Act 2000, sections 58B–58C, as amended by the Counter-Terrorism and Border Security Act 2019, section 4.

[226] M Lloydd, 'Retrieving Neutrality Law to Consider "Other" Foreign Fighters Under International Law' (European Society of International Law 2017 Research Forum, 29 September 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3045274> 17. See also Department of Foreign Affairs and Trade (Australia) (n 124).

act preparatory to the waging of private war.[227] Indeed, the prophylactic nature of the declared area and designated area offences entails penalising what would otherwise be an innocent act of travelling to a particular place with up to ten years' imprisonment.[228] These offences therefore implicate a range of rights, including freedom of movement and the presumption of innocence.[229] Whether these offences can be said to be proportionate and justified limitations on these rights turns on issues of detail. Different review bodies have expressed differing views about this in relation to the Australian declared area offence, with some considering it a necessary and proportionate response,[230] and others not.[231]

Here it is also worth noting that the Australian declared area offence is stricter than its British counterpart. Entering or remaining in a declared area is an offence unless the individual is solely in the area for a specified legitimate purpose. In order to rely on one of the specified legitimate purposes (which include providing humanitarian aid, performing official duties or working as a journalist), the individual must be able to satisfy an evidential burden.[232] And despite concerns that the offence is unduly burdensome on the innocent traveller, there has been little receptiveness to suggestions that the list of specified purposes should be expanded or supplemented by a procedure allowing for ad hoc ministerial authorisation.[233]

As originally proposed by the government, the parameters of the United Kingdom's designated area offence were similar to the Australian declared area offence. Entering or remaining in a designated area exposed an individual to punishment, subject only to a defence of reasonable excuse. There was also a one-month grace period to allow people time to leave the area before the offence took effect.[234] Further amendments were added by the

[227] See Criminal Code Act 1995 (Cth), section 119.1(4).

[228] See Joint Committee on Human Rights, *Second Legislative Scrutiny Report: Counter-Terrorism and Border Security Bill* (2017–19, HL195, HC 1616) [64].

[229] See J Renwick, 'Sections 119.2 and 119.3 of the Criminal Code: Declared Areas' (September 2017) <https://www.inslm.gov.au/sites/default/files/files/declared-areas.pdf> [5.32]–[5.33]; Parliamentary Joint Committee on Intelligence and Security, *Review of the 'Declared Area' Provisions* (February 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/DeclaredArea/Report> [2.77]–[2.79]; Joint Committee on Human Rights (n 228) [58]–[66].

[230] Renwick (n 229) [9.7]; Parliamentary Joint Committee on Intelligence and Security (n 229) [2.80].

[231] Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Bills introduced 30 September–2 October 2014 Legislative Instruments received 13–19 September 2014* (October 2014) <http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2014/14_44/14th%20report%20FINAL.pdf> [1.204], [1.182].

[232] See Criminal Code Act 1995 (Cth), sections 119.2(3).

[233] Renwick (n 229) [8.32]; Parliamentary Joint Committee on Intelligence and Security (n 229) [2.83]–[2.88].

[234] Joint Committee on Human Rights, (n 228) [59]–[61]; R Taylor, 'Counter-Terrorism and Border Security Bill HL Bill 131 of 2017–19' (House of Lords Library Briefing, 3 October 2018) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2018-0097> 7–8.

House of Lords and subsequently accepted by the government.[235] As a result, in addition to the defence of reasonable excuse and one-month grace period,[236] the designated area offence expressly excludes travel to a designated area exclusively for or in connection with one or more specified legitimate purposes (such as providing humanitarian aid, performing official duties or working as a journalist),[237] which pares back the scope of the offence considerably.

C. Why a Neutrality Law Paradigm?

Regulating foreign fighting under a neutrality law paradigm differs from regulating it under a counterterrorism paradigm in several respects. On balance, it is suggested that these differences make it the preferable means for regulating foreign fighting.

First, unlike the counterterrorism paradigm, an approach based on neutrality law targets foreign fighting directly, rather than treating it as a variant of terrorist activity; foreign fighting per se is the concern, not just the subset of returning foreign fighters who pose a risk of becoming domestic terrorists. Accordingly, the neutrality law paradigm gives greater recognition to the harm that foreign fighters can cause by exacerbating the armed conflict in the conflict State.[238] This aligns with the traditional focus of neutrality law, which prioritised harm to a foreign State ahead of harm to the home State.[239] By contrast, the counterterrorism paradigm is focused on ascertaining who from among thousands of foreign fighters have the requisite mix of ideological radicalisation and battlefield experience to constitute a terrorist threat to the home State. This fixation on the interests of the home State is perhaps most starkly illustrated by citizenship deprivation measures, whereby the home State's security is furthered (at least in the short run) by barring a foreign fighter's return, making that individual a problem for another State to deal with.[240]

Second, since foreign fighting no longer needs to be forced through a counterterrorism framework,[241] the complexities of proof are also reduced. The State can be neutral, in the traditional liberal sense of the term, as between justified and unjustified causes for foreign fighting or between

[235] See HL Deb 15 January 2019, vol 795, col 137; HC Deb 22 January 2019, vol 653, col 167.
[236] Terrorism Act 2000, sections 58B(2), 58B(3)(b).
[237] Ibid, section 58B(4)–(6). Interestingly, the government stated that adding this list of legitimate purposes for travel 'would not materially affect the operation of the offence', and that there was little difference in police investigating whether an individual might be able to rely on a defence of reasonable excuse or whether one of the exclusions to the offence might apply: see HL Deb 15 January 2019, vol 795, col 137.
[238] See 1373 Committee (n 34) para 2; Independent International Commission of Inquiry on the Syrian Arab Republic, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (5 February 2015) A/HRC/28/69 paras 125–127.
[239] Lloydd (n 226) 23. [240] ibid 23–4. [241] Forcese and Mamikon (n 73) 357.

'good' and 'bad' armed groups. It does not matter whether the particular group a foreign fighter joined was a terrorist group or a group resisting the terrorist group. It also does not need to be shown that the individual or group engaged in specific conduct amounting to terrorism. In rough terms, for the foreign incursion offence, what matters is that the individual committed violent acts in the conflict State outside of the command structure of a State military.[242] The declared area and designated area offences require even less—in essence, illicit travel to or presence in the off-limits area suffices.

That said, some issues of proof remain. Both the declared area and designated area offences will in practice likely still require proof that the individual's presence in the banned area was for illegitimate reasons.[243] And prosecutors attempting to prove these elements, or that an individual engaged in hostile activity in a foreign State, or entered a foreign State with the intention of engaging in hostile activity, will still face many of the evidential difficulties discussed earlier.

Third, the neutrality law paradigm can in theory create a blanket ban on foreign fighting. Of course, this presupposes a prior choice between subjecting foreign fighting to a blanket prohibition, or restricting it to certain instances, with regulation being discretionary and subject to pragmatic considerations. There are attractions to each. One rationale for a blanket approach—that is, prohibiting all foreign fighting, no matter for which side or for whatever motivation—is that waging war is properly the prerogative of the State rather than private individuals.[244] With no need to distinguish permissible from impermissible foreign fighting, this approach has the advantage of clarity and simplicity. This carries through to the message being communicated to potential foreign fighters: foreign fighting is illegal, as opposed to the more convoluted message at present that foreign fighting is inadvisable, and potentially illegal, depending on the group joined and the activities done in the conflict State.[245]

Conversely, under a discretionary approach, as Lloydd explains, 'States turn a blind eye to citizens who fight overseas when it suits their foreign policy, when there is little threat to the home State, when the person's allegiance is not in question and the causes are considered just.'[246] This approach has the advantage of preserving a State's flexibility, and allowing consideration of the merits of the individual case. It might be that in particular circumstances an absolute prohibition on foreign fighting is contrary to a State's foreign policy interests;[247] it might be that the individual fighter is fighting for a just

[242] See text below (nn 251–53).

[243] In the case of the Australian offence, this assumes that the defendant succeeds in discharging the evidential burden and is able to rely on one of the specified legitimate purposes.

[244] Lloydd (n 226) 4. [245] Forcese and Mamikon (n 73) 359. [246] Lloydd (n 226) 4.

[247] Forcese and Mamikon (n 73) 359; J Blackbourn and C Walker, 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 79 MLR 840, 856.

cause, or that the fighter has a particularly compelling motivation, such as that of a dual national rallying to defend their homeland.[248]

Assuming that a blanket ban is thought desirable, then a neutrality law-based approach is superior. The Australian declared area offence, in particular, has the greatest potential to achieve something close to a blanket ban. Once a ministerial declaration is in place, it prohibits fighting for any party (or indeed engaging in any other non-exempted activity) in the declared area, since mere presence in that area presumptively constitutes an offence. Those same features, however, make it the most problematic from a rights standpoint.

By contrast, as discussed in section IV, the counterterrorism paradigm cannot achieve anything close to a blanket ban on foreign fighting without creating other problems. This is because the counterterrorism paradigm is based on the contested notion of terrorism. As such, it relies on the ipse dixit of the imperfect terrorist designation process, and expansive definitions of terrorism that can be so broad as to make fighting in an armed conflict, whether in compliance with the rules of IHL or not, a terrorist offence. In practice, prosecutorial discretion is needed to constrain the facially expansive reach of the counterterrorism paradigm.

To be clear, whilst relying on a neutrality law-based paradigm to create a blanket ban on foreign fighting avoids some of the issues associated with the counterterrorism paradigm, it does not eliminate all space for discretion to operate. Prosecutorial discretion is available in general, including in relation to the foreign incursion offences or the offence of being present in an area declared off-limits by the government. As of February 2018, there were no known prosecutions for the Australian declared area offence.[249] As for the foreign incursion offences, Lloydd observes that returned foreign fighters who fought for the right side (that is, against ISIL) have in practice either been 'released without charge after police interviews, or had foreign incursion charges dropped through prosecutorial or Attorney-General discretion'.[250]

Australia's foreign incursion provisions include another site for higher-level political discretion to operate as well. In addition to service in a foreign military being exempt from the general prohibition on foreign incursions, the Australian government can formally exempt service in specified armed forces where this is in the national interest.[251] This in effect allows the Australian government to sanction service in any armed group on an ad hoc basis,[252] and provides another formal avenue for the rigour of a blanket ban to be tempered by pragmatic foreign policy considerations.[253]

[248] Tuck, Silverman and Smalley (n 131) 49–50. In which case, it is arguable that the person is not actually 'foreign' to the conflict: see text above (nn 10–12).
[249] Parliamentary Joint Committee on Intelligence and Security (n 229) [2.19].
[250] Lloydd (n 226) 11. [251] Criminal Code Act 1995 (Cth), sections 119.1(4) and 119.8.
[252] Lloydd (n 226) 18.
[253] Which Forcese and Mamikon suggest are properly 'matters of executive judgment': Forcese and Mamikon (n 73) 359.

There is continuity here with the domestic neutrality and foreign enlistment laws discussed earlier, which in practice have been sparingly enforced. For example, the stringency of the United States' neutrality laws on paper has not been matched by stringency of enforcement, at least in the twentieth century.[254] Similarly, there has not been a single prosecution for illegal enlistment or recruitment under the United Kingdom's Foreign Enlistment Act 1870,[255] nor is there any record of convictions under its Canadian equivalent.[256] As Arielli observes, the application of these laws has 'always been subject to domestic considerations of political expediency'.[257] In the end, discretion, and hence the influence of pragmatic considerations, is inescapable.

The fourth and final reason for preferring the neutrality law paradigm to the counterterrorism paradigm is that it provides a better general justification for limiting the rights of would-be foreign fighters. While the need to protect the public from terrorism is a familiar mantra trotted out by politicians, it applies less readily to foreign fighters who lack any connection to a terrorist group or terrorist acts. Such individuals are subject to the counterterrorism paradigm on the basis that they cannot be readily distinguished from other foreign fighters who join the likes of ISIL, some of whom may eventually return and constitute a threat to their home State.

Under a neutrality law paradigm, the rationale for restricting rights is different. As discussed above, earlier neutrality laws imposed restrictions on foreign enlistment, which in turn was based on what is often considered a defining characteristic of the State—its monopoly on violence. And the notion that the State, and not individuals within it, decides on when force shall be deployed externally is defensible, at least in the case of a functioning democracy with proper channels of political and electoral accountability. This rationale, namely the State's need to control externally-directed private violence by its citizens, applies with equal force to the foreign fighter who intends only to fight against terrorist groups and the foreign fighter who intends on joining a terrorist group with a view to transitioning to domestic terrorism in the future.

VI. CONCLUSION

This article set out to map and discuss the legal response of the United Kingdom, the United States, Canada and Australia to one particular instance of the phenomenon of foreign fighting. These legal responses vary as to when they

[254] See A Layeb, 'Mercenary Activity: United States Neutrality Laws and Enforcement' (1989) 10 NYL Sch J Int'l & Comp L 269, 293; LC Green, 'The Status of Mercenaries in International Law' (1979) 9 ManitobaLJ 201, 212–13.

[255] Blackbourn and Walker (n 247) 855.

[256] Forcese and Mamikon (n 73) 353. The explanation lies in the archaic nature of the British and Canadian legislation, which reflects a dated view of international relations and war, particularly civil war: see *Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries* (Cm 6569, 1976) [26]; Forcese and Mamikon (n 73) 352.

[257] Arielli (n 2) 125.

apply and how they are imposed. But, for the most part, they operate under a paradigm based on counterterrorism law. However, dealing with foreign fighting through the lens of counterterrorism is problematic. Foreign fighting may overlap with terrorist activity, but not necessarily so. Moreover, terrorism is a particularly vexed concept on which to base a framework of regulation. Rather than working through the proxy of counterterrorism, it is suggested that a better approach is to deal with foreign fighting directly by adopting a paradigm based on neutrality law. A neutrality law paradigm avoids some of the pitfalls associated with the counterterrorism paradigm and provides a more stable and defensible means for regulating foreign fighting, which, if history is any guide, will remain a recurring phenomenon.