

ACADEMY BRIEFING No. 7

Foreign Fighters under International Law

October 2014

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Introduction

Academy Briefings are prepared by staff at the Geneva Academy, in consultation with outside experts, to inform government officials, officials working for international organizations, non-governmental organizations (NGOs), and legal practitioners, about the legal and policy implications of important contemporary issues. This Academy Briefing addresses the status and regulation under international law of so-called 'foreign fighters', non-nationals who are involved in armed violence outside their habitual country of residence, including in armed conflict as defined under international humanitarian law (IHL).¹

Foreign fighters are not a new phenomenon: the Spanish civil war, the war in Afghanistan following the 1989 Soviet invasion, the Bosnian conflicts in the 1990s, and the violence in Chechnya and Dagestan² all attracted significant numbers of foreign fighters. However, the term and the phenomenon became prominent after the 9/11 attacks against the United States of America (USA), because of the presence of foreign fighters in the ranks of the Taliban and al-Qaeda in Afghanistan. Subsequently, foreign fighters came to be associated primarily with international terrorist networks, notably al-Qaeda, and as a result were perceived to be a major terrorist threat after returning to their state of nationality or habitual residence. The fear is that foreign fighters with experience of handling weapons and explosives may plan and carry out terrorist acts on return to their home countries, or may set up new terrorist cells, recruit new members, or provide funds for terrorist acts or movements. This threat is commonly known as 'blowback'.

Against this background, the unprecedented influx of foreign fighters to Islamic State³ in Syria and Iraq (see Section A) has repeatedly been described as one of the biggest terrorist threats

to Western states since 9/11.⁴ In response, in August and September 2014, the United Nations (UN) Security Council adopted two resolutions that require states to take measures against 'foreign terrorist fighters'.⁵ In these resolutions the Council uses the term 'foreign terrorist fighters', formally associating foreign fighters active in an armed conflict with (international) terrorist networks. From the perspective of international law, however, it is both simplistic and legally confusing to impose such an association, because different branches of international law govern armed conflict and the prevention and suppression of terrorism. This Briefing will look at the interrelationship between IHL and the legal framework governing terrorism with a focus on the issues raised by the involvement of foreign fighters.

IHL (also known as the law of armed conflict) regulates armed conflict, including the status of individuals who are affected by or participate in it. The involvement of foreign fighters raises the question of their status under IHL, which in turn makes it necessary to analyse the extent to which nationality is a salient factor (see Section B). In light of the widespread conflation of foreign fighters with terrorism and terrorist groups, it is also necessary to analyse how IHL addresses 'terrorist' groups and acts of terrorism in an armed conflict (see Section C).

To the extent that foreign fighters are deemed to pose a terrorism threat, that threat is addressed by a multi-layered legal framework for preventing and suppressing terrorism. There is no discrete international law of terrorism,⁶ but a variety of measures exist at international level to suppress and prevent acts of terrorism. (See Section D and, for the European counterterrorism framework, Section E).

¹ The Briefing does not review counter-radicalisation initiatives to deal with the phenomenon of foreign fighters, or operational measures to improve border security or information sharing.

² For an overview, see, for example, D. Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts*, Oxford University Press (OUP), 2013; and T. Hegghammer, 'The Rise of Muslim Foreign Fighters. Islam and the Globalization of Jihad', *International Security*, Vol. 35, No. 3 (Winter 2010/11), pp. 53–91.

³ Islamic State has also been known as Islamic State in Iraq and al-Sham (ISIS) and Islamic State in Iraq and the Levant (ISIL). In this Briefing, the name Islamic State will be used. On the history of the group and its role in the armed conflicts in Syria and Iraq, see Box 3.

⁴ See, for example, 'As Foreign Fighters Flood Syria, Fears of a New Extremist Haven', *New York Times*, 8 August 2013. At: www.nytimes.com/2013/08/09/world/middleeast/as-foreign-fighters-flood-syria-fears-of-a-new-extremist-haven.html?pagewanted%3Dall&_r=0.

⁵ UN Security Council Resolution 2170, adopted on 15 August 2014; Resolution 2178, adopted on 24 September 2014.

⁶ L. van den Herik and N. Schrijver, 'The Fragmented International Legal Response to Terrorism', in L. van den Herik and N. Schrijver (eds.), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, Cambridge University Press (CUP), 2013, pp. 20–2.

The involvement of foreign fighters in an armed conflict abroad also raises international legal issues relating to their state of nationality or permanent residency (see Section F). Does the relevant state have a duty to prevent the international movement of foreign fighters? What obligations are owed to captured foreign fighters? To what extent is it permissible to prosecute foreign fighters for acts committed abroad?

Finally, the past decade has shown that many measures adopted for the purpose of combating terrorism can undermine the rule of law and respect for human rights. Section G addresses the human rights implications of measures designed to deter individuals who have become, or seek to become foreign fighters: deprivation of citizenship; confiscation or suspension of passports; other administrative measures that limit an individual's freedom to leave his or her state.

Characterizing groups or individuals who are actors in an armed conflict as 'terrorist' may conflate the legal regimes that govern armed conflict and terrorism. This tendency is clearly visible in policies since the 9/11 attacks. A short section of conclusions considers the implications, concentrating on policies with regard to foreign fighters.

A. The phenomenon of foreign fighters

Many individuals have left their home countries to take part in armed conflicts abroad. Examples from the Spanish civil war or the 1948 Arab-Israeli War show that foreign fighters are not a uniquely Muslim phenomenon.⁷ However, the presence of foreign fighters for whom the main or exclusive link is religious affinity has been a salient feature in virtually all conflicts in the Islamic world since the Soviet invasion of Afghanistan.⁸ The conflicts in question include those in Afghanistan, Iraq, Mali, Nigeria, Somalia, Syria, and Yemen. Particularly since 9/11, the term ‘foreign fighter’ entered the public consciousness because many foreigners fought with both the Taliban and al-Qaeda, including some of Western origin (like the ‘Australian Taliban’ David Hicks, and the ‘American Taliban’ John Walker Lindh).⁹ The US-led invasion of Iraq further highlighted the phenomenon: foreign fighters associated with al-Qaeda were reported to have played an important role in fuelling insurgency both during and after the US occupation. Against this background, the term ‘foreign fighter’ is widely and unreflectively conflated with ‘Muslim’, ‘Islamist’, or ‘Jihadist’.¹⁰

Nonetheless, the phenomenon of ‘foreign fighters’, including ‘Muslim foreign fighters’, remains understudied. First, research on foreign fighters is necessarily limited by the scarcity and unreliability of available open-source data on their numbers, identity, trajectories, and motivations. Second, the term ‘foreign fighter’ is ambiguous and is variously understood; as David Malet points out, ‘foreign fighter’ is not an established term in political science literature.¹¹ Third, study of foreign fighters is largely confined to terrorism studies, where they are often conflated with al-Qaeda. One commentator accounts for this by remarking that ‘foreign fighters constitute an intermediate actor category lost between local rebels on the one hand, and international terrorists, on the other’.¹²

1. Terminology

Malet defines foreign fighters as ‘non-citizens of conflict states who join insurgencies during civil war’.¹³ He distinguishes them on two counts from mercenaries and from personnel of private military and security companies. First, in most instances mercenaries or private military and security companies are hired by state governments, not rebels, and, when they are hired by private entities such as transnational corporations, their recruitment is not prohibited by the state. Second, foreign fighters are not normally motivated by material gain.¹⁴ Hegghammer adopts a similar definition that in essence defines foreign fighters as individuals who join an insurgency abroad and whose primary motivation is ideological or religious rather than financial (see Box 1).

Other researchers who have focused on the terrorism threat posed by foreign fighters offer slightly different definitions. According to Cilluffo, Cozzens, and Ranstorp, “‘Western foreign fighters’ or simply “‘foreign fighters’” refers to violent extremists who leave their Western states of residence with the aspiration to train or take up arms against non-Muslim factions in jihadi conflict zones’.¹⁵ The International Centre for Counter-Terrorism concluded that the citizenship of foreign fighters is not a relevant criterion for being deemed a foreign fighter per se because ‘in many cases, these foreign fighters may be European citizens but will be part of a wider diaspora or generation of immigrants’.¹⁶ Hegghammer expressly departed from his own definition to include ‘[c]o-ethnic war volunteers (e.g. American-Iraqis going to Iraq)’ in his study on the terrorism threat posed by foreign fighters.¹⁷

7 B. Mendelsohn, ‘Foreign Fighters – Recent Trends’, *Orbis Journal of Foreign Affairs*, Vol. 55, No. 2 (Spring 2011), p. 189; Malet, *Foreign Fighters*, p. 4. Foreign fighters, including from European States, are reported to be fighting for both sides in the current Ukrainian conflict, which would be a contemporary example of non-Muslim foreign fighter mobilization. See ‘Ukraine War Pulls in Foreign Fighters’, *BBC News*, 31 August 2014. At: www.bbc.com/news/world-europe-28951324.

8 Hegghammer, ‘The Rise of Muslim Foreign Fighters’, p. 53.

9 D. Malet ‘Why Foreign Fighters? Historical Perspectives and Solutions’, *Orbis Journal of Foreign Affairs*, Vol. 54, No. 1 (Winter 2010), p. 108.

10 Malet, *Foreign Fighters*, p. 5; Mendelsohn, ‘Foreign Fighters’, p. 189; Hegghammer, ‘The Rise of Muslim Foreign Fighters’, p. 53.

11 Hegghammer, ‘The Rise of Muslim Foreign Fighters’, p. 54.

12 Hegghammer, ‘The Rise of Muslim Foreign Fighters’, p. 55.

13 Malet, *Foreign Fighters*, p. 9.

14 *Ibid.*, pp. 38–40.

15 F. J. Cilluffo, J. B. Cozzens, and M. Ranstorp, *Foreign Fighters: Trends, Trajectories & Conflict Zones*, Homeland Security Policy Institute, George Washington University, 2010, p. 3.

16 O. Hennessy, ‘The Phenomenon of Foreign Fighters in Europe’, Background Note, International Centre for Counter-Terrorism, The Hague, July 2012, p. 2.

17 T. Hegghammer, ‘Should I stay or Should I Go? Explaining Variation in Western Jihadists’ Choice between Domestic and Foreign Fighting’, *American Political Science Review*, Vol. 107, No. 1 (February 2013), p. 1.

Box 1. Definitions of ‘foreign fighter’

In *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, Hegghammer proposes a refined four-pronged definition of ‘foreign fighter’.

“I build on this formulation [Malet’s definition] and define a foreign fighter as an agent 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.

These four criteria set foreign fighters apart from other types of violent actors who cross borders. Criterion (4) excludes mercenaries, who are paid and follow the highest bidder. Criterion (3) excludes soldiers, who are usually salaried and go where their generals send them. Criterion (2) excludes returning diaspora members or exiled rebels, who have a preexisting stake in the conflict. This distinction, which disappears in Idean Salehyan’s term ‘transnational insurgent’ or John Mackinlay’s ‘global insurgent’, matters because ethnic or kinship links to insurgents presumably facilitate mobilization considerably. Finally, criterion (1) distinguishes foreign fighters from international terrorists, who specialize in out-of-area violence against noncombatants.”

To distinguish foreign fighters from other transnational actors, including terrorists and mercenaries, Hegghammer and Colgan adopt a slightly different definition which clarifies that foreign fighters may be paid, but payment is not their primary motivation.

“The distinguishing features of foreign fighters are that (a) they are not overtly state-sponsored; (b) they operate in countries which are not their own; (c) they use insurgent tactics to achieve their ends; (d) their principal objective is to overthrow a single government/occupier within a given territory; and (e) their principal motivation is ideological rather than material reward.”*

* Colgan and Hegghammer, ‘Islamic Foreign Fighters: Concept and Data’, Paper presented at the International Studies Association Annual Convention, Montreal, 2011, p. 6.

It is also significant that the term ‘foreign fighter’ is commonly used to designate individuals who fight or train on the side of insurgents in a country which is not their own; foreigners fighting on the side of a government are not considered ‘foreign fighters’.¹⁸ This exclusion raises different policy and legal issues – and also omits an intermediate category: foreign non-state armed groups that fight on the side of a government, as Hezbollah fought for the Assad regime in Syria.¹⁹

As Hegghammer points out, the (admittedly limited) information that is available does not currently support the claim that most foreign fighters travel abroad with the intention of training in order to carry out attacks at home²⁰ – though, as described below, foreign fighters who had intended to join an insurgency abroad may nevertheless be recruited and trained to carry out attacks ‘at home’, without having participated in combat abroad. Despite the

overlap and interaction between ‘foreign fighter’ as generally understood and ‘foreign-trained fighter’ (and the difficulty of distinguishing the two in practice), the phenomenon of foreign fighters should not be oversimplified by assimilating the notion of ‘foreign fighters’ to ‘fighters trained abroad’.²¹

This Briefing will adopt the following definition of ‘foreign fighter’:

A foreign fighter is an individual who leaves his or her country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who is primarily motivated by ideology, religion, and/or kinship.

This understanding covers individuals who have links in the conflict state, in the form of citizenship or kinship. The definition keeps the focus on foreign fighters as participants in an armed conflict: it states that their purpose is to join a non-state

¹⁸ Malet, *Foreign Fighters*, pp. 34–8.

¹⁹ The leader of Hezbollah, Hassan Nasrallah, confirmed in May 2013 that Hezbollah was fighting with the Assad regime. See, for example: ‘Hezbollah Commits to All-Out Fight to Save Assad’, *New York Times*, 25 May 2013. At: www.nytimes.com/2013/05/26/world/middleeast/syrian-army-and-hezbollah-step-up-raids-on-rebels.html?_r=0.

²⁰ Hegghammer, ‘Should I Stay or Should I Go?’, pp. 6–7.

²¹ Mendelsohn, ‘Foreign Fighters’, pp. 193–4; Colgan and Hegghammer, ‘Islamic Foreign Fighters’, pp. 14–15.

armed group in an armed conflict abroad. Though it accommodates the possibility that some individuals may be recruited and trained, directly or indirectly, to carry out terrorist attacks in their home state, the definition does not conflate ‘foreign fighters’ with ‘foreign-trained fighters’. Finally, it affirms that their primary motivation is ideology, religion, or kinship, not material gain; foreign fighters may be paid, but they are to be distinguished from mercenaries. (In fact, some armed groups, such as the Taliban²² and Islamic State,²³ pay their fighters relatively generously.)

2. Foreign fighter mobilization

It is important to understand how foreign fighters are mobilized, and in particular how they are recruited and the scale of recruitment and mobilization.

Recruitment

Few studies have analysed foreign fighter mobilization and recruitment across a range of conflicts.²⁴ The bulk of research to date focuses on individual conflicts, notably Afghanistan,²⁵ Chechnya,²⁶ Iraq,²⁷ and Somalia.²⁸ Focusing on Muslim foreign fighters, Hegghammer argues that a specific foreign fighter ideology emerged out

of pan-Islamism in the 1980s, which ‘produced a foreign fighter movement that still exists today as a phenomenon partly distinct from al-Qaida’ (see Box 2).²⁹ More concretely, Briggs and Frenett identify humanitarian, ideological, and identity narratives in messages that groups such as al-Nusra and al-Shabaab disseminate to recruit Western foreign fighters.³⁰ Counter-narratives may include fatwas (religious edicts) against fighting abroad. Leading Islamic scholars in the United Kingdom (UK) recently issued fatwas against Islamic State and its British foreign fighters, for example.³¹ Hoping to dissuade potential recruits, 126 Muslim scholars from all over the world published an open letter to al-Baghdadi and his fighters on 25 September 2014. The letter refutes their religious arguments and denounces their acts as prohibited in Islam.³²

Methods of recruitment also deserve mention. The recruitment of Western foreign fighters is widely presumed to occur mainly via social media platforms.³³ In fact, research indicates that recruitment is both localized and global. It is local in the sense that community institutions or key local figures, including former foreign fighters, recruit many foreign fighters.³⁴ Similarly, the unprecedented number of Tunisians fighting in Syria may be traced to the expansion of Salafist movements, such as Ansar al-Sharia, after the Jasmine revolution.³⁵

22 ‘Afghanistan’s Army’, *New York Times*, 4 December 2009. At: www.nytimes.com/2009/12/05/opinion/05sat1.html.

23 ‘Sunni Fighters Gain as They Battle 2 Governments, and Other Rebels’, *New York Times*, 14 June 2014. At: www.nytimes.com/2014/06/12/world/middleeast/the-militants-moving-in-on-syria-and-iraq.html?hp&_r=0. On the Islamic State, see Textbox 3: the Islamic State.

24 Hegghammer, ‘The Rise of Muslim Foreign Fighters’, p. 54.

25 For foreign fighters in Afghanistan after the Soviet invasion, see, for example, A. Davis, ‘Foreign Combatants in Afghanistan’, *Jane’s Intelligence Review*, Vol. 5, No. 7 (1995), pp. 327–31; V. Brown, ‘Foreign Fighters in Historical Perspective: the Case of Afghanistan’, Chapter 1 in B. Fishman (ed.), *Bombers, Bank Accounts and Bleedout: Al-Qa’ida’s Road In and Out of Iraq*, Harmony Project, 2008. At: www.ctc.usma.edu/wp-content/uploads/2011/12/Sinjar_2_FINAL.pdf. For Foreign Fighters in Afghanistan and Pakistan after 9/11, see A. Stenersen, ‘Al Qaeda’s Foot Soldiers: A Study of the Biographies of Foreign Fighters Killed in Afghanistan and Pakistan between 2002 and 2006’, *Studies in Conflict and Terrorism*, Vol. 34 (2011), pp. 171–98. On both Iraq and Afghanistan after 9/11, see C. Watts, ‘Beyond Iraq and Afghanistan: What Foreign Fighter Data Reveals about the Future of Terrorism’, *Small Wars Journal*, April 2008; and ‘Foreign Fighters: How Are They Being Recruited?’, *Small Wars Journal*, June 2008.

26 M. B. al-Shishani, ‘Rise and Fall of Arab Fighters in Chechnya’, Jamestown Foundation, Washington DC, 2006; L. Vidino, ‘The Arab Foreign Fighters and the Sacralization of the Chechen Conflict’, *Al-Nakhlah*, Spring 2006; C. Moore and P. Tumelty, ‘Foreign Fighters and the Case of Chechnya: A Critical Assessment’, *Studies in Conflict and Terrorism*, Vol. 31, No. 5 (2008), pp. 412–33.

27 J. Felter and B. Fishman, *Al-Qa’ida’s Foreign Fighters in Iraq: A First Look at the Sinjar Records*, Combating Terrorism Center, West Point, 2007; J. Felter and B. Fishman, ‘The Demographics of Recruitment, Finances, and Suicide’, Chapter 2 in Fishman (ed.), *Bombers, Bank Accounts and Bleedout*; C. Hewitt and J. Kelley-Moore, ‘Foreign Fighters in Iraq: A Cross-National Analysis of Jihadism’, *Terrorism and Political Violence*, Vol. 21, No. 2 (2009), pp. 211–20.

28 A. Black, ‘Recruitment Drive: Can Somalia Attract Foreign Fighters?’, *Jane’s Intelligence Review*, Vol. 19, No. 6 (2007), pp. 12–17; D. Shinn, ‘Al-Shabaab’s Foreign Threat to Somalia’, *Orbis Journal of Foreign Affairs*, Vol. 55, No. 2 (Spring 2011), pp. 203–15; and International Centre for the Study of Radicalisation, *Al-Shabaab’s Western Recruitment Strategy*, London, 2011.

29 Hegghammer, ‘The Rise of Muslim Foreign Fighters’, pp. 56–7.

30 R. Briggs and R. Frenett, *Foreign Fighters, the Challenge of Counter-Narratives*, Policy Briefing, Institute for Strategic Dialogue, 2014, pp. 8–9. At: www.strategicdialogue.org/Foreign_Fighters_paper_for_website_v0.6.pdf.

31 ‘Isis terror threat: Leading British Muslims issue fatwa condemning terror group’, *Independent*, 31 August 2014. At: www.independent.co.uk/news/uk/home-news/isis-terror-threat-leading-british-muslims-issue-fatwa-condemning-terror-group-9702042.html.

32 ‘Muslim scholars present religious rebuttal to Islamic State’, *Reuters*, 25 September 2014. At: <http://www.reuters.com/article/2014/09/25/us-syria-crisis-islam-scholars-idUSKCN0HK23120140925>. The full letter is available at: <http://lettertobaghdadi.com/>.

33 ‘Social media used to recruit new wave of British jihadis in Syria’, *Guardian*, 14 April 2014. At: www.theguardian.com/world/2014/apr/15/social-media-recruit-british-jihadis-syria-twitter-facebook.

34 Watts, ‘Beyond Iraq and Afghanistan’.

35 A. Y. Zelin, E. F. Kohlmann, and L. al-Khoury, *Convoy of Martyrs in the Levant: A Joint Study Charting the Evolving Role of Sunni Foreign Fighters in the Armed Uprising Against the Assad Regime in Syria*, June 2013, p. 4.

Box 2. Foreign fighter ideology

Based on an analysis of recruitment propaganda after the Soviet invasion of Afghanistan, in Bosnia and Herzegovina, and after the US-led invasion of Iraq, Hegghammer discerns the following foreign fighter ideology:

“The diagnosis is that the Muslim nation (umma) faces an existential external threat. The conflict for which volunteers are sought is but the latest and direst in a series of occupations of Muslim territory and massacres of Muslims. ... The prognosis is that Muslims fight back militarily in the area in question. Two types of reasons are usually provided. The most important is that Islamic law commands it. Documents cite scripture and classical jurists at length to show that the criteria for military jihad are met. The second oft-provided reason is pragmatic, namely that the situation is too dire and the enemy too wicked for any diplomatic solution to work. The rationale is that all able Muslim men worldwide join the fighting because Islamic law requires it. The responsibility for the defense of Muslim territory is shared by all Muslims and not limited to the residents of the contested area. Two types of arguments support the call for solidary action. The first emphasizes the unity of the Muslim nation. Victims are systematically referred to as ‘our brothers/sisters/ mothers/children’ as if they were blood relations of the prospective recruits. The second argument invokes Islamic law, declaring fighting an individual religious duty (fard ayn) for all Muslims.”

According to Hegghammer, the Sunni Islamic scholar Abdullah Azzam (who raised funds and recruited Arabs to fight against the Soviet Union in Afghanistan) was responsible for shaping this ideology. In particular, he introduced two features that are distinct from other Jihad doctrines of that time. First, it focused on the outside enemy rather than regime change at home. Second, it gave a direct authorization to fight abroad without the restrictions usually required by other mainstream Jihad doctrines, such as parental authorization.

Hegghammer, ‘The Rise of Muslim Foreign Fighters. Islam and the Globalization of Jihad’, *International Security*, Vol. 35, No. 3 (Winter 2010/11), pp. 73–7.

Global mobilization efforts using modern communications technology, in particular social media, apparently play a limited role in recruitment of foreign fighters from North Africa and the Middle East.³⁶ They may play a larger role in the recruitment of foreign fighters from Western states, notably to fight in Syria and for Islamic State (see Box 3). Islamic State, its supporters, and its (Western) foreign fighters³⁷ make expert use of social media (in several languages) to recruit new members and promote the group’s announced aim to build a caliphate based on a strict interpretation of Islamic law.³⁸ It should be recalled at the same time that social media can be used to spread counter-narratives; the recent ‘not in my name’ campaign against Islamic State is an example.³⁹

The scope of the phenomenon; typical states of origin and destination

As noted, reliable data on foreign fighters remain scarce, on their states of origin and number. Hegghammer reviews the profile of Muslim foreign fighters on the basis of available information for the period 1945–2010. This suggests that mobilization of Muslim foreign fighters started in the 1980s, with the arrival of significant numbers of foreign fighters in Afghanistan following the Soviet invasion. Only five of 16 armed conflicts since then have attracted more than 1,000 foreign fighters. They include Bosnia and Herzegovina (1,000–2,000), Afghanistan since 2001 (1,000–1,500), and Iraq since the 2003

³⁶ Watts, ‘Beyond Iraq and Afghanistan’. In their analysis of the Sinjar records, Felter and Fishman confirm that most foreign fighters were recruited locally, in particular by former foreign fighters, rather than via social media. See Felter and Fishman, ‘The Demographics of Recruitment, Finances, and Suicide’, pp. 45–6.

³⁷ A recent analysis of the social media activity of Western foreign fighters in Syria highlighted the important role of social media in disseminating information about the conflict and framing perceptions of it. Western foreign fighters both documented their involvement in the conflict, and obtained information and inspiration on social media. The same study identified new spiritual leaders who, via social media, inspired and guided European foreign fighters (though the authors cautioned that “[n]one of this should suggest that either individual is a member of ISIS or Jabhat al-Nusrah, nor should it be taken as indicating that they are involved in facilitating the recruitment of foreign fighters”). J.A. Carter, S. Maher and P.R. Neumann, *Greenbirds: Measuring Importance and Influence in Syrian Foreign Fighters Networks*, International Centre for the Study of Radicalisation, March 2014, p. 19. At: icsr.info/wp-content/uploads/2014/04/ICSR-Report-Greenbirds-Measuring-Importance-and-Influence-in-Syrian-Foreign-Fighter-Networks.pdf.

³⁸ Briggs and Frenett, *Foreign Fighters, the Challenge of Counter-Narratives*, p. 10; ‘ISIS Displaying a Deft Command of Varied Media’, *The New York Times*, 30 August 2014, at: www.nytimes.com/2014/08/31/world/middleeast/isis-displaying-a-deft-command-of-varied-media.html?_r=0.

³⁹ *Not in My Name*, Active Change Foundation. At: www.activechangefoundation.org/portfolio-item/notinmyname/.

US-led invasion (4,000–5,000).⁴⁰ These numbers indicate that Muslim foreign fighter mobilisation peaked twice in armed conflicts in Muslim states that involved non-Muslim states (namely Afghanistan after the Soviet invasion and Iraq after the US-led invasion).⁴¹ In addition, Somalia and Yemen were significant foreign fighter destinations after 2000.⁴² (During the early 1990s, fewer than 50 foreign fighters were active in the Somalia conflict; since 2006 some 200–400 have reportedly fought with al-Shabaab.⁴³)

In terms of states of origin, most come from Arab countries, in particular Saudi Arabia, although the number of non-Arab foreign fighters may be understated because most data sets draw extensively on Arab sources. Foreign fighters from European states and the USA were involved in the conflicts in Afghanistan, Bosnia and Herzegovina, Chechnya, and Iraq. Foreign fighters from South Asia (Pakistan) principally participated in the Afghan conflicts. In all cases, foreign fighters accounted for a relatively small percentage of the total number of fighters.⁴⁴

Despite the limited data, the research that is available suggests that the great majority of foreign fighters originate in Arab and North African countries, and that only a small proportion (including some high profile cases) are from Western countries. Against this background, the influx of foreign fighters into Syria stands out, because it has included a significant number of recruits from European countries. Before Syria, the main concern of Western countries was foreign fighters fighting in Somalia.⁴⁵

Foreign fighter mobilization for Syria

Reports of the number of foreign fighters in Syria vary widely. Estimates range from 3,000⁴⁶ to as many as 13,000.⁴⁷ Even on the lowest estimates, foreign fighter mobilization for Syria is notable for several reasons. First, their rate of entry into Syria is unprecedented; more foreign fighters have probably been active at the same time in Syria than in any other armed conflict.⁴⁸ According to Hegghammer, it may have attracted more European foreign fighters than all the armed conflicts between 1990 and 2010 combined.⁴⁹

Second, the breadth of geographic origin is unprecedented. Foreign fighters from at least 81 countries have been active in Syria during the conflict.⁵⁰ The conflict has attracted fighters from traditional states of origin, such as Saudi Arabia and Libya, and from countries that have not historically produced many foreign fighters, notably Tunisia.⁵¹ A large majority (approximately 70%) continue to be of Arab origin; the largest contingents come from Jordan, Lebanon,⁵² Libya, Saudi Arabia, and Tunisia.⁵³

The number of foreign fighters from Western European countries is much higher than in other conflicts and appears to have risen quickly. The Soufan Group estimated in June 2014 that about 3,000 Western foreign fighters had gone to Syria.⁵⁴ Both Hegghammer and Zelin report that the largest contingents in absolute terms are from France, Germany, and the United Kingdom. However, when adjustment is made for population size, the largest contingents proportionally are from Austria, Belgium, Denmark, the Netherlands, Norway, and Sweden.⁵⁵

40 Hegghammer, 'The Rise of Muslim Foreign Fighters', pp. 60–1.

41 Colgan and Hegghammer, 'Islamic Foreign Fighters', p. 16.

42 *Ibid.*, pp. 20–1.

43 *Ibid.*, p. 21.

44 Hegghammer, 'The Rise of Muslim Foreign Fighters', pp. 60–1.

45 In 2011, the London-based International Centre for the Study of Radicalisation reported that more than 40 Americans and dozens of Europeans were fighting with al-Shabaab. ICSR, *Al-Shabaab's Western Recruitment Strategy*, London, 2011.

46 A. Zelin, 'Foreign Jihadists in Syria: Tracking Recruitment Networks', The Washington Institute, Policy Watch, 19 December 2013. At: www.washingtoninstitute.org/policy-analysis/view/foreign-jihadists-in-syria-tracking-recruitment-networks.

47 In remarks to the Security Council when Resolution 2178 was debated, the UN Secretary-General estimated the number of foreign fighters at 13,000. See UN, 'Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters', Press Release, 24 September 2014. At: www.un.org/News/Press/docs/2014/sc11580.doc.htm.

48 Zelin, 'Foreign Jihadists in Syria: Tracking Recruitment Networks'.

49 'Could Syria's Islamist Fighters Hit Europe?', *Washington Post*, 24 July 2014. At: www.washingtonpost.com/blogs/worldviews/wp/2014/07/24/could-syrias-islamist-fighters-hit-europe/.

50 R. Barrett, 'Foreign Fighters in Syria', *Soufan Group*, June 2014, p. 12.

51 Zelin, Kohlmann, and al-Khoury, *Convoy of Martyrs*, p. 4.

52 The number of foreign fighters from Lebanon does not include Hezbollah members fighting in Syria against armed opposition to the Assad regime.

53 A. Y. Zelin, 'Up to 11,000 Foreign Fighters in Syria', *ICSR Insight*, 17 December 2013. At: www.washingtoninstitute.org/policy-analysis/view/up-to-11000-foreign-fighters-in-syria-steep-rise-among-western-europeans.

54 Barrett, 'Foreign Fighters in Syria', p. 6.

55 Zelin, 'Up to 11,000 Foreign Fighters in Syria'; Hegghammer, 'Number of foreign fighters from Europe'.

The high numbers and wide geographic scope of foreign fighters in Syria's armed conflict are significant for several reasons.

First, as noted, foreign fighters, including former foreign fighters, drive mobilization. High numbers of foreign fighters act as a multiplying factor, widening and entrenching the phenomenon.

Second, the demographic of foreign fighters is very diverse. Some foreign fighters are certainly 'veterans' with frontline experience of other jihadist battlefields (like the Libyan 'Abu Sa'd al-Liby' who previously fought in Afghanistan and was reportedly killed in Syria); but many new volunteers have no previous battlefield experience, and some do not fit the presumed 'typical' profile of an Arab foreign fighter (young, male, either unemployed or a student, with few prospects, and lacking a purpose in life).⁵⁶ The profile of Western European foreign fighters is also diverse. They include Muslim Europeans of various ethnic Arab and South Asian backgrounds, and converts with no previous connection to Syria. Though most reported foreign fighters are male, it is known that women have travelled to Syria.⁵⁷

The average age seems to be mid-20s, but the conflict has apparently attracted large numbers of teenagers as well as older fighters. Though limited data are available, media reports suggest that many of those who have travelled to Syria were previously involved in criminal activities, in some cases crimes of an extremist nature. A number have previous connections to jihadist armed groups, like Slimanje Hadj Abderrahmane, a former Guantanamo detainee of Danish nationality who reportedly died in Syria.⁵⁸ Other fighters have no previous connection to extremism or jihadist armed groups.⁵⁹

Third, the diversity and number of foreign fighters increase the potential terrorist risk they pose on their return. Though only a small percentage of

foreign fighters eventually become involved in terrorism-related activities (see below), the sheer number of foreign fighters means that a historically high number, compared to previous conflicts, will pose a threat. Their geographic breadth also creates significant networking opportunities for terrorism-related activities across Europe. Nor is concern limited to fighters of Western European origin; it extends to those from countries and regions with large diaspora in Western Europe, such as Tunisia and the Balkans.

Which groups in Syria do foreign fighters join? States are particularly concerned about the official Syrian al-Qaeda offshoot Jabhat al-Nusra and the al-Qaeda breakaway group, Islamic State.⁶⁰ The UN Security Council Sanctions Committee (established under Resolutions 1267 (1999) and 1989 (2011) on al-Qaeda and associated entities) lists both as aliases for al-Qaeda. However, far from being a unified movement, the Syrian armed opposition is composed of a wide array of ideologically diverse armed groups⁶¹ that operate mostly at local level, as so-called 'brigades' or 'battalions'. Many of these groups form local alliances or profess their allegiance to a broader military alliance or umbrella movement, such as the Free Syrian Army (FSA). However, alliances are frequently shifting and short-lived, hinging to a significant extent on operational considerations rather than ideology.

Against this background, it is almost impossible to verify who is fighting with whom; foreign fighters may end up joining al-Nusra or Islamic State though they did not set out to do so.⁶² Based on analysis of the social media activity of 190 Western foreign fighters, the International Centre for the Study of Radicalization concluded that almost 55% belonged to Islamic State, and just under 14% to al-Nusra.⁶³ Some also reportedly joined the FSA.⁶⁴

⁵⁶ Zelin, Kohlmann, and al-Khoury, *Convoy of Martyrs*, p. 3.

⁵⁷ T. Hegghammer, 'Syria's Foreign Fighters', *Foreign Policy*, 9 December 2013. At: mideastafrica.foreignpolicy.com/posts/2013/12/09/syrias_foreign_fighters.

⁵⁸ Pantucci, 'Foreign Fighters'. Other former Guantanamo inmates have been arrested or charged with terror offences relating to the conflict in Syria, including Moazzam Begg (UK) and reportedly Lahcen Ikasrien (Spain). See 'Guantánamo detainee Moazzam Begg held again', *Guardian*, 2 March 2014, at: www.theguardian.com/world/2014/mar/02/guantanamo-moazzam-begg-detained-syria-terrorist-charges; and BBC, 'Spain arrests eight in "ISIS cell"', 16 June 2014, at: www.bbc.com/news/world-europe-27865046.

⁵⁹ For example, in a discussion on foreign fighters at Chatham House, Maher distinguished between two categories of fighter profiles in Syria: one includes individuals with previous known associations, and '[t]he second category, which is by far and away the largest category, is of people who actually don't have known association; they don't have an extremist background'. See, *Foreign Fighters in Syria: A Threat at Home and Abroad?*, Chatham House, 10 April 2014, p. 8.

⁶⁰ See Textbox 3.

⁶¹ For an overview, see BBC, 'Guide to the Syrian rebels', 13 December 2013. At: www.bbc.com/news/world-middle-east-24403003.

⁶² See for example the case of Eric Harroun, a US foreign fighter who first fought with the FSA and the al-Nusra, 'Ex-Soldier Charged with Aiding Terrorist Groups', *New York Times*, 28 March 2013. At: www.nytimes.com/2013/03/29/world/middleeast/american-ex-soldier-charged-with-aiding-terror-group.html.

⁶³ Carter, Maher, and Neumann, # *Greenbirds: Measuring Importance and Influence in Syrian Foreign Fighters Networks*, p. 11.

⁶⁴ R. Barrett, 'Foreign Fighters in Syria', p. 17.

Box 3. Islamic State – origins and development

The group that calls itself Islamic State emerged in Iraq after the US-led invasion in 2003. A group of former Afghan foreign fighters, led by the Jordanian-born al-Zarqawi, fuelled the insurgency, notably by igniting sectarian violence between Sunni and Shia. After al-Zarqawi formally pledged allegiance to al-Qaeda in the autumn of 2004, the group became known as al-Qaeda in Iraq (AQI). However, the relationship between al-Qaeda and AQI was fraught with tensions over ideology, tactics, and objectives. In particular, rather than focus on the ‘far enemy’ (Western states), AQI preferred to concentrate its fight on the ‘near enemy’, especially Shia leaders in Muslim countries, who prevented the establishment of a Sunni caliphate.

After al-Zarqawi’s death in June 2006, AQI merged with other jihadist groups and changed its name to Islamic State of Iraq (ISI). Since March 2010, it has been led by Ibrahim Awwad Ibrahim Ali al-Badri al-Samarrai, a purported Iraqi who is more commonly known as Abu Bakr al-Baghdadi.

The group has always recruited foreign fighters, although the degree to which the group and its leadership have been dominated by foreigners is disputed. During the Iraqi insurgency, the group relied on foreign fighters for suicide bombings. According to Felter and Fishman, foreign fighters accounted for about 75% of suicide bombers in Iraq between August 2006 and 2007. Syria was an important transit country for foreign fighters at that time. Fisher and Felter concluded that most, if not all, ISI foreign fighters arrived via local networks in Syria and that the ‘the Syrian government has willingly ignored, and possibly abetted, foreign fighters headed to Iraq’.

Largely defeated at the end of the Iraqi insurgency, ISI re-emerged during the last two years both in Syria and Iraq. In Syria, it reportedly helped to set up Jabhat al-Nusra, which announced its formation in January 2012. Al-Nusra’s leader Abu Mohammed al-Jawlani (or al-Joulani, or al-Golani) is believed to be a veteran of ISI. Long considered the Syrian affiliate of al-Qaeda because of its links with ISI, al-Jawlani formally pledged its allegiance to al-Qaeda in April 2013. However, he rejected ISI’s unilateral declaration of a merger, which was also criticised by al-Zawahiri, the leader of al-Qaeda.

Defying al-Zawahiri, al-Baghdadi expanded ISI operations into Syria and the group started operating under the name Islamic State of Iraq and al-Sham (ISIS), also known as Islamic State of Iraq and the Levant (ISIL). Reportedly, most foreign fighters in the al-Nusra front then defected to ISIS. ISIS rapidly assumed a high profile among Syrian armed groups and gained control over territory, sometimes at their expense. Al-Qaeda publicly disavowed ISIS after simmering tensions between ISIS and other Syrian armed groups, including al-Nusra, erupted into violent clashes from January 2014.

In parallel, ISIS re-emerged in Iraq. After waves of suicide bombings and a spectacular prison break that freed hundreds of its members in summer 2013, the group launched a major offensive against Fallujah in January 2014. By the end of June 2014, it controlled large swathes of territory in north-east Syria and north-west Iraq, largely erasing the border between the two countries. At the end of June 2014, al-Baghdadi proclaimed a caliphate over the territories ISIS controls in both countries. Since then ISIS has operated under the name Islamic State. With the consent of the Iraqi government, a US-led coalition started limited air strikes against the group in August 2014. The US expanded its campaign to attack Islamic State in Syria on 22 September 2014.

Various UN bodies, including the Office of the UN High Commissioner for Human Rights (OHCHR) and the International Commission of Inquiry for Syria, as well as NGOs, have reported credible allegations that Islamic State has committed widespread and systematic IHL and human rights violations in areas it controls in both Syria and Iraq. Crimes reported include: summary executions, torture, abductions, forced conversions, slavery, sexual violence, pillage, and persecution on grounds of ethnicity and religion. For example, the October 2014 report produced jointly by the UN Assistance Mission for Iraq (UNAMI) and the OHCHR documents a ‘staggering array’ of human rights abuses committed by Islamic State over a nine week period in Iraq that may amount to war crimes or crimes against humanity.

This textbox draws on information in Felter and Fishman, ‘The Demographics of Recruitment, Finances, and Suicide’; Zelin, ‘The War between ISIS and al-Qaeda’, Research Notes, Washington Institute for Near East Policy, June 2014; OHCHR and UNAMI, *Report on the Protection of Civilians in Armed Conflict in Iraq, 6 July-10 September 2014*, 2 October 2014.

However, the proclamation of the caliphate at the end of June 2014 seems to have increased Islamic State's appeal and since then the great majority of European foreign fighters have joined it.⁶⁵ Following its expansion into Iraq, Islamic State's foreign fighters are presumed to be operating in both Iraq and Syria.⁶⁶

3. Foreign fighters' influence in an armed conflict

It is an untested assumption that foreign fighters are particularly radical, lethal, and operationally effective, and have little regard for the local civilian population.⁶⁷ They have been considered responsible for 90% of the deadliest attacks in Iraq, although they represent 10% of insurgents.⁶⁸ An increase in the lethality of al-Shabaab, and its adoption of suicide bombing, have been traced to its foreign fighter contingent (most of whom have been veterans of the armed conflicts in Afghanistan and Iraq) and more generally to links with al-Qaeda.⁶⁹ Foreign fighters have also been considered responsible for the rapid expansion of Jabhat al-Nusra and Islamic State in Syria during 2013.⁷⁰

At the same time, foreign fighters can be a liability, particularly if they lack experience or cannot communicate with local people. And when foreign fighters use excessive force or ruthlessly promote their own agenda, they may alienate the local population and other insurgent groups.⁷¹ In several instances, rebel in-fighting has been traced to the

influence of foreign fighters. For example, Sunni tribes turned their back on AQI and formed the Awakening Councils to fight with coalition troops against their former ally;⁷² and after January 2014 Islamic State clashed with Syrian armed groups alienated by its aggressive policies.⁷³

4. 'Blowback': Foreign fighters as a terrorism threat

Foreign fighters are perceived as a major terrorist threat to their countries of origin (their state of nationality or habitual residence). It is feared that trained foreign fighters, experienced in handling weapons and explosives, may plan and carry out terrorist acts on return to their home countries, or set up new terrorist cells, recruit new members, or provide funds for terrorist acts or movements.⁷⁴

This fear can be traced back to two linked phenomena. First, the foreign fighters mobilized to fight in Soviet-occupied Afghanistan spawned al-Qaeda and like-minded groups such as Abu Sayyaf and the Algerian Armed Islamic Group. All these groups were established by veteran Afghan foreign fighters,⁷⁵ which probably explains at least to some extent why the study of foreign fighters tends to be subsumed in terrorism studies, notably of al-Qaeda.⁷⁶ Second, though most foreign fighters never become involved in acts of terrorism, foreigners fighting in armed conflicts are an important recruitment pool for terrorist groups. Some foreign fighters have carried out terrorist attacks after their return.⁷⁷ The term 'blowback'

65 'ISIS Displaying a Deft Command of Varied Media', *The New York Times*, 30 August 2014. At: www.nytimes.com/2014/08/31/world/middleeast/isis-displaying-a-deft-command-of-varied-media.html?_r=0.

66 A. Zelin, 'The Return of Sunni Foreign Fighters in Iraq', The Washington Institute, Policy Watch, 12 June 2014. At: www.washingtoninstitute.org/policy-analysis/view/the-return-of-sunni-foreign-fighters-in-iraq.

67 Malet 'Why Foreign fighters?', p. 97; D. Kovla, *Foreign Fighter Interdiction: Stability Operations as Countermeasures*, US Army War College, at: pksoi.army.mil/PKM/publications/relatedpubs/documents/Kolva_Foreign_Fighters.pdf.

68 D. Malet, 'What We Should Have Learned in Iraq', *Global Policy Journal*, 19 March 2013. According to Felter and Fishman, foreign fighters accounted for about 75% of suicide bombers in Iraq between August 2006 and 2007; Felter and Fishman, 'The Demographics of Recruitment, Finances, and Suicide', pp. 58–60.

69 D. Shinn, 'Al Shabaab's Foreign Threat to Somalia', *Orbis Journal of Foreign Affairs*, Vol. 55, No. 2 (Spring 2011), pp. 209ff.

70 S. Birke, 'How al-Qaida changed the Syrian War', *New York Review of Books*, 27 December 2013. At: www.nybooks.com/blogs/nyrblog/2013/dec/27/how-al-Qaida-changed-syrian-war.

71 Mendelsohn, 'Foreign Fighters – Recent Trends', pp. 195ff.

72 F. Ahmed, 'Sons of Iraq and Awakening Forces', Institute for the Study of War, February 2008. At: understandingwar.org/sites/default/files/reports/Backgrounder%20203%20Sons%20of%20Iraq%20and%20Awakening%20Forces.pdf.

73 J. Landis, 'The Battle between ISIS and Syria's Militia', *Syria Comment* (blog), 4 January 2014. At: www.joshualandis.com/blog/battle-isis-syrias-rebelmilitias/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+Syriacomment+%28Syria+Comment%29.

74 Mendelsohn, 'Foreign Fighters – Recent Trends', p. 197ff; Cilluffo et al., *Foreign Fighters. Trends, Trajectories and Conflict Zones*; Lavender, *Europe's Challenge: the Return of the Foreign Fighters*; and S. L. Cardash, F. J. Cilluffo and J.-L. Marret, 'Foreign Fighters in Syria: Still Doing Battle, Still a Multidimensional Danger', Note 24/14, Fondation pour la recherche stratégique, August 2013.

75 Brown, 'Foreign Fighters in Historical Perspective: the Case of Afghanistan', pp. 27 and 30–1; P. Bergen, 'Beyond Iraq: the Future of AQI', Chapter 5 in Fishman (ed.), *Bombers, Bank Accounts and Bleedout*, pp. 105–07; P. Bergen and A. Reynolds, 'Blowback Revisited. Today's Insurgents in Iraq are Tomorrow's Terrorists', *Foreign Affairs*, Vol. 82, No. 2 (2005), p. 8.

76 Hegghammer, 'The Rise of Muslim Foreign Fighters', p. 55.

77 *Ibid.*, p. 53.

refers to individuals who return to carry out attacks as a part of an externally-directed plot, and individuals who decide to launch an attack without being instructed to do so.⁷⁸

It is often presumed that foreign fighters in general, and foreign fighters of Western origin in particular, ultimately want to attack the West.⁷⁹ However, research has indicated that most foreign fighters either move on to other battlefields or lead largely ordinary lives, either in their country of origin or another country where they resettled.⁸⁰ In his systematic cross-conflict study,⁸¹ Hegghammer concludes that between 1990 and 2010⁸² ‘no more than one in nine foreign fighters returned to perpetrate attacks in the West’.⁸³ This ‘blowback rate’ cannot be extrapolated to other conflicts. The rate may be higher or lower, and is influenced by a variety of factors, including whether Western states have intervened in the conflict in question, and whether armed groups in that conflict seek to target Western countries.⁸⁴ Groups that do may recruit arriving foreign fighters for training and send them back to carry out terrorist attacks.

Although Hegghammer’s data suggested that most Western foreign fighters travel abroad to join an insurgency rather than train for a domestic attack, some may be enlisted to carry out attacks at home.⁸⁵ The case of Najibullah Zazi, arrested for a failed New York subway plot in 2009, illustrates this possibility.⁸⁶ The ‘no more than one in nine’ rate would still ‘make the foreign fighter experience one of the strongest predictors of individual involvement in domestic operations that we know’,⁸⁷ while the involvement of experienced foreign fighters would sharply increase the probability of success of terrorism plots, and their lethality.⁸⁸

Against this background, Western governments consider that Western foreign fighters are a significant security threat,⁸⁹ exacerbated by their unprecedented mobilization in Syria,⁹⁰ and the number who are reportedly joining Islamic State or al-Nusra.⁹¹ Indeed, several high-level government officials from Western states have described Islamic State and its foreign fighters as a serious, if not the biggest, terrorist threat to Western states.⁹² An attack against a Jewish Museum in Brussels

78 D. Byman and J. Shapiro, ‘Homeward Bound?’ Don’t Hype the Threat of Returning Jihadists’, *Foreign Affairs*, 30 September 2014. At: <http://www.foreignaffairs.com/articles/142025/daniel-byman-and-jeremy-shapiro/homeward-bound>. See also the intervention by Maher, *Foreign Fighters in Syria: A Threat at Home and Abroad?*, p. 13.

79 Hegghammer, ‘Should I stay or Should I Go?’, p. 1.

80 Byman and Shapiro, ‘Homeward Bound?’. See also J. de Roy van Zuijdewijn and E. Bakker, ‘Returning Western Foreign Fighters: The case of Afghanistan, Bosnia and Somalia’, ICCT Background Note, June 2014.

81 Many other studies focus on specific conflicts, rely on anecdotal evidence, fail to assess the blowback effect in relation to the overall mobilization of foreign fighters, or conflate foreign-trained fighters with foreign fighters. See, for example, Cilluffo *et al.*, *Foreign Fighters: Trends, Trajectories & Conflict Zones*; Bergen and Reynolds, ‘Blowback Revisited’; O. Hennessy, ‘The Phenomenon of Foreign Fighters in Europe’.

82 Hegghammer explicitly excluded from his dataset domestic terrorist prosecutions of individuals trying to leave to join an insurgent group abroad, on the grounds that the inclusion of these cases would generate an exaggerated estimate of domestic terrorist plots. See Hegghammer, ‘Should I stay or Should I Go?’, p. 2.

83 *Ibid.*, p. 10.

84 Hegghammer, testimony to the UK House of Commons’ Home Affairs Committee, 11 February 2014, responses to Q558 and Q561. At: www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/uc231-vii/uc23101.htm.

85 Hegghammer, ‘Should I stay or Should I Go?’, pp. 7 and 9–10.

86 ‘Guilty Plea Made in Plot to Bomb New York Subway’, *New York Times*, 22 February 2010. At: www.nytimes.com/2010/02/23/nyregion/23terror.html?_r=0.

87 Hegghammer, ‘Should I stay or Should I Go?’, p. 10.

88 *Ibid.*, p. 11, with references to other studies confirming similar results; Cilluffo and others, *Foreign Fighters*, p. 5.

89 On the dangers posed by UK nationals engaged with jihadist groups abroad, see, for example, D. Anderson QC, *The Terrorism Acts in 2012: Report of the Independent Reviewer of the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, July 2013, p. 29.

90 C. Lynch, ‘Europe’s New “Time Bomb” is Ticking in Syria’, *Foreign Policy*, 9 July 2013. At: www.foreignpolicy.com/articles/2013/07/09/european_fighters_jihadists_syria.

91 Several states designated these groups as terrorist organizations. For the UK list of proscribed terror organizations, see: www.gov.uk/government/publications/proscribed-terror-groups-or-organizations--2. For the US list, see: www.state.gov/j/ct/rls/other/des/123085.htm.

92 See, for example, ‘British jihadism in Syria poses lasting problem for UK security, says minister’, *Guardian*, 16 February 2014, at: www.theguardian.com/uk-news/2014/feb/16/british-jihadism-syria-uk-security-minister; ‘Eric Holder of US warns Europe over Syrian fighters’, *BBC*, 8 July 2014, at: www.bbc.com/news/world-us-canada-28214709; ‘Up to 400 British citizens may be fighting in Syria, says William Hague’, *Guardian*, 16 June 2014, at: www.theguardian.com/uk-news/2014/jun/16/400-uk-citizens-fighting-syria-isis-iraq-william-hague.

in May 2014 may be the first case of blowback⁹³ from the Syria war, since the suspected perpetrator is believed to have spent several months with Islamic State in Syria.⁹⁴ Others have warned against exaggerating the threat posed by foreign fighters in Syria⁹⁵ or adopting security measures that could become counter-productive.⁹⁶

⁹³ In addition, at the end of May 2014, two other uncovered plots, one in France and one in the UK, involved foreign fighters returning from Syria. See Barrett, 'Foreign Fighters in Syria', p. 31.

⁹⁴ 'Brussels Jewish Museum killings: Suspect "admitted attack"', *BBC*, 1 June 2014. At: www.bbc.com/news/world-europe-27654505.

⁹⁵ Several commentators have pointed out that foreign fighters' primary motivation is to fight in Syria rather than attack the West. See 'Overblown Fears of Foreign Fighters', *New York Times*, 29 July 2014, at: www.nytimes.com/2014/07/30/opinion/dont-fear-jihadists-returning-from-syria.html?_r=0; 'Islamist terror threat to West blown out of proportion – former MI6 chief', *Guardian*, 7 July 2014, at: www.theguardian.com/uk-news/2014/jul/07/islamist-terror-threat-out-proportion-former-mi6-chief-richard-dearlove.

⁹⁶ See, for example, the intervention by Maher, *Foreign Fighters in Syria: A Threat at Home and Abroad?*, Chatham House, p. 10.

B. The status of foreign fighters in armed conflicts

The protection that IHL affords to persons affected by armed conflict, and the legal consequences that flow from individual conduct, are essentially linked to a person's status. IHL distinguishes two types of armed conflict, international and non-international. The applicable legal regimes in each case are slightly different (see Box 4), not least with respect to the status of fighters. Accordingly, this section begins with a brief typology of armed conflicts. For the purpose of analysing foreign fighters under IHL, it focuses on whether and in what respects nationality or permanent residency is relevant in the context of an armed conflict. Highly controversial issues such as the notion of direct participation in hostilities are addressed tangentially. Finally, the section considers instances in which states have treated foreign fighters differently.

1. Typology of armed conflicts under IHL

IHL distinguishes between international and non-international armed conflicts. The identity of parties to a conflict is the main criterion distinguishing the two.⁹⁷

An **international armed conflict** (IAC) exists when one state uses any form of armed force against another. When one state or a multinational coalition uses force on the territory of another state with the latter's consent, it is not a case of IAC.⁹⁸

A **non-international armed conflict** (NIAC) is a situation of regular and intense armed violence between the armed forces of a state and one or more organized armed non-state groups, or between such groups.⁹⁹ Whether a given situation amounts to a NIAC under IHL is determined by a factual assessment that depends on two factors: the intensity of the armed violence and the organization of the parties to the conflict.¹⁰⁰

Many contemporary NIACs include an international or extraterritorial element, in the sense that the territorial state involved in conflict is supported in one form or another by a third state or a multinational coalition force. Despite the sometimes significant international components in such armed conflicts, they are classified as NIACs under IHL because the conflict is between a state and armed non-state groups, not between states. For example, the US airstrikes against Islamic State positions in Iraq, undertaken with the consent of the Iraqi government, do not alter the status of the conflict, which remains a NIAC. Other contemporary examples of armed conflicts that have had an international element include the current conflict in Mali (intervention by France), Afghanistan (NATO), and Somalia (AMISOM). The presence of foreign fighters in non-state armed groups does not alter a conflict's status either; it remains a NIAC between a non-state actor and a state.

Most foreign fighters are active in NIACs. Only in rare cases are foreign fighters involved in an IAC, although historically numerous Muslim foreign fighters were involved in the IAC that followed the Soviet invasion of Afghanistan. Afghanistan and Iraq, after their respective US-led invasions, provide other recent examples of foreign fighters in international conflicts. For the purposes of IHL, the status of both changed, from an IAC to a NIAC. The IAC in Afghanistan turned into a NIAC, arguably in 2002 when the Karzai government was elected and appointed.¹⁰¹ The IAC in Iraq became a NIAC in 2004, when the Coalition Provisional Authority transferred power to the transnational Iraqi administration.¹⁰²

Legal discussion of the foreign fighter phenomenon is currently strongly influenced by its association with al-Qaeda and associated groups, such as Islamic State. Although IHL prohibits acts of terrorism during armed conflicts (see Section C), its framework was

⁹⁷ J. K. Kleffner, 'Scope of Application of International Humanitarian Law', in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd edn, OUP, 2013, p. 59; International Committee of the Red Cross (ICRC), 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Report for the 31st Conference of the Red Cross and Red Crescent, 2011, pp. 7–12.

⁹⁸ J. K. Kleffner, 'Scope of Application of International Humanitarian Law', p. 44.

⁹⁹ *Ibid.*, p. 49.

¹⁰⁰ International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Judgment (Trial Chamber) (IT-94-1-T), 7 May 1999, §562.

¹⁰¹ A. Roberts, 'The Laws of War in the War on Terror', *Israel Yearbook of Human Rights*, Vol. 32 (2002), p. 193; J. Pejic, 'Terrorist Acts and Groups: A Role for International Law?', *British Yearbook of International Law*, Vol. 75 (2004), p. 76.

¹⁰² D. Turns, 'The International Humanitarian Law Classification of Armed Conflicts in Iraq since 2003', in R. A. Pedrazzo (ed.), *The War in Iraq: A Legal Analysis*, International Law Studies, Naval War College, 2010, p. 109.

Box 4. Sources of international humanitarian law

International armed conflicts

IACs are governed by the four 1949 Geneva Conventions, which are almost universally ratified. During armed conflicts, the four Conventions protect people who do not or no longer take part in hostilities. The first protects soldiers that are wounded and sick on land; the second protects military personnel that are wounded, sick and shipwrecked at sea; the third protects prisoners of war; the fourth protects civilians, including those in occupied territories. If applicable (that is, if relevant states parties have ratified it), the 1977 Additional Protocol I strengthens the protection of victims of IACs and provides rules on the conduct of hostilities.

Non-international armed conflicts

NIACs are governed by Common Article 3 of the 1949 Geneva Conventions. Covering all NIACs, Common Article 3 requires humane treatment of all persons who are not, or who are no longer, taking an active part in hostilities, and expressly prohibits murder, mutilation, torture, taking of hostages, and unfair trial. The 1977 Additional Protocol II further strengthens the protection of victims of NIACs and provides rules for the conduct of hostilities. Article 1(1) provides a higher threshold of application than Common Article 3. In particular, it requires that insurgents control territory and excludes conflicts that do not involve government forces.

Customary international law

In addition to treaty law, customary IHL applies to armed conflicts. According to the ICRC 2005 study of customary IHL, most customary IHL rules governing IACs apply also to NIACs.

not designed to consider a general ‘war on terror’. The US administration argues that the ‘conflict’¹⁰³ between ‘al-Qaeda and its associated forces’ and the USA qualifies as a global NIAC. The main reason for advancing this argument is that the rules governing use of force and detention of individuals for security reasons are generally less restrictive under IHL than under the law applicable to law enforcement.¹⁰⁴ Most legal authorities, including the International Committee of the Red Cross (ICRC), reject the view that a globalized NIAC, governed by IHL, is taking place. They favour a case-by-case approach which analyses and classifies individual situations of violence.¹⁰⁵

2. Foreign fighters versus mercenaries

As described in Section A, foreign fighters resemble mercenaries in some respects. Should foreign fighters be qualified as mercenaries under IHL?

Various definitions of ‘mercenary’ are set out in Article 47 of the 1977 Additional Protocol I (see Box 5), Article 1 of the 1987 UN Convention against the Recruitment, Use, Financing and Training of Mercenaries, and Article 1 of the 1972 Organisation of African Unity Convention for the Elimination of Mercenaries. These documents define mercenaries as individuals who directly participate in hostilities, but are not nationals of a party to the IAC in question, residents of territory controlled by a party, or members of the armed forces of a party. The definitions further specify that mercenaries are ‘motivated to take part in the hostilities essentially by the desire for private gain’ and thereby exclude individuals who are motivated primarily by ideology or religion. Mercenaries are not entitled to combatant or POW status under IHL.¹⁰⁶

According to these definitions, foreign fighters (as defined for the purpose of this assessment) do not meet the definition of mercenaries under international law.

¹⁰³ Replies of the USA to the list of issues in relation to its fourth periodic report adopted by the Committee at its 107th session (11–28 March 2013), UN doc. CCPR/C/USA/Q/4/Add.1, 13 September 2013, §86.

¹⁰⁴ See, for example, J. F. Addicott, ‘Rightly Dividing the Domestic Jihadist from the Enemy Combatant in the “War Against Al-Qaeda” – Why It Matters in Rendition and Targeted Killing’, *Case Western Reserve Journal of International Law*, Vol. 45 (2012–13), pp. 259ff.

¹⁰⁵ ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, 2011, p. 10; M. Sassòli, ‘Transnational Armed Groups and International Humanitarian Law’, *HPCR Occasional Paper Series*, Winter 2006. See also C. Garraway, ‘Armed Conflict and Terrorist Organizations’, in van den Herik and Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order*, p. 452.

¹⁰⁶ K. Ipsen, ‘Combatants and Non-combatants’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, p. 84.

Box 5. The definition of mercenaries in the 1977 Additional Protocol I

Article 47: Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does, in fact, take a direct part in the hostilities;
 - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) is not a member of the armed forces of a Party to the conflict; and
 - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

3. Status of foreign fighters in an IAC

In the context of an IAC, IHL formally recognizes the status of combatants, civilians, and persons *hors de combat* (the wounded, sick and shipwrecked, and prisoners of war). These are technical terms in IHL, defined for its purposes. Civilians and persons *hors de combat* are granted special protection under the four 1949 Geneva Conventions. During an IAC, foreign fighters may be either combatants or civilians, albeit civilians directly participating in hostilities.¹⁰⁷

Foreign fighters as combatants

IHL does not directly define the term ‘combatant’, beyond recognizing that combatant status confers the ‘right’ to participate directly in hostilities.¹⁰⁸ Combatant status carries two important consequences. First, combatants are immune from criminal prosecution for belligerent acts they

commit that comply with IHL; they enjoy combatant ‘immunity’ or ‘privilege’.¹⁰⁹

Second, combatants are entitled to prisoner of war (POW) status if they fall into the hands of the enemy.¹¹⁰ The referent of ‘combatant’ is inferred from the definition of POW status under Article 4 of the 1949 Geneva Convention III and Article 44(1) of the 1977 Additional Protocol I. It includes only the regular armed forces of the state in question,¹¹¹ and ‘members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict’,¹¹² provided they fulfil certain conditions.¹¹³

US policy denied POW status to members of the Taliban and al-Qaeda during the invasion and occupation of Afghanistan, making it necessary to clarify whether individuals associated with terrorist groups or involved in acts of terrorism might qualify for POW status.¹¹⁴

With respect to the foreign fighter phenomenon, it suffices to note that nationality is irrelevant for

¹⁰⁷ On the concept of ‘direct participation in hostilities’, see the 2009 ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009 ICRC Interpretative Guidance).

¹⁰⁸ Art. 43(2), 1977 Additional Protocol I.

¹⁰⁹ Ipsen, ‘Combatants and Non-combatants’, pp. 82–3 and 103; M. Bothe, K. J. Partsch and W. Solf (eds.), *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, 1982, pp. 243–4; E. Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, OUP, 2010, pp. 52–3.

¹¹⁰ Art. 4, 1949 Geneva Convention III; Art. 44(1), 1977 Additional Protocol I.

¹¹¹ Art. 4(A)(1) and (3), 1949 Geneva Convention III.

¹¹² Art. 4(A)(2), 1949 Geneva Convention III. See also K. Del Mar, ‘The Requirement of “Belonging” under International Humanitarian Law’, *European Journal of International Law*, Vol. 21, No. 1 (2010), pp. 111–12, on the low threshold for the requirement of ‘belonging’.

¹¹³ The conditions set out in Art. 4(A)(2) (a)-(d) of the 1949 Geneva Convention III require that individuals must be commanded by a person responsible, have a fixed distinctive sign, carry arms openly, and conduct their operations in accordance with IHL. However, violations of IHL do not deprive a combatant of his status: see Art. 44(2) of the 1977 Additional Protocol I. See also Ipsen, ‘Combatants and Non-combatants’, p. 93.

¹¹⁴ For a general assessment of members of terrorist organizations in relation to Art. 4 of Geneva Convention III, see A. Bianchi and Y. Naqvi, *International Humanitarian Law and Terrorism*, Hart, 2011, pp. 287–90.

determining whether a particular person can be qualified as a combatant and hence is entitled to POW status¹¹⁵ (with the possible exception of nationals of the detaining power).¹¹⁶

Foreign fighters as civilians

As a category, civilians are defined negatively in relation to combatants; any person who does not fall under the definition of combatant/POW is considered a civilian.¹¹⁷ Whereas it is irrelevant to the POW status of combatants, nationality plays a role in determining whether civilians in the hands of the enemy are protected under Geneva Convention IV. Before turning to the nationality criteria set out in Article 4 (see Box 6), it is worth pointing out that civilians who have directly participated in hostilities remain protected by the Convention when they fall into the hands of the enemy.

Against the background of the so-called ‘war on terror’, the USA initially argued that members of al-Qaeda and the Taliban, in particular non-

Afghan Taliban,¹¹⁸ were ‘unlawful’ or ‘unprivileged’ combatants who fell outside the protective scope of the Geneva Conventions.¹¹⁹ However, the Commentary to the Conventions,¹²⁰ international jurisprudence,¹²¹ and a majority of commentators¹²² have stressed that there is no intermediate category or gap between the third and fourth Geneva Conventions. Civilians who directly participate in hostilities lose their immunity from attack during the time they do so.¹²³ Moreover, they may be prosecuted for such participation under domestic law,¹²⁴ although participation does not in itself violate IHL or constitute a war crime.¹²⁵ However, they remain protected civilians when they fall into the hands of the enemy, provided they fulfil the nationality criteria set out in Article 4.

The essential criterion in Article 4 of the 1949 Geneva Convention IV is that persons who fall into the hands of a party to a conflict are protected persons provided they are not nationals of that party. In addition, ‘nationals of a neutral State who find themselves in the territory of a belligerent

Box 6. The Definition of Protected Persons in the 1949 Geneva Convention IV

Article 4: Definition of Protected Persons

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

115 See the Commentary on the ICRC Customary IHL Study Rule 108 (on Mercenaries). It notes that nationality ‘is not a condition’ for POW status according to longstanding practice and Art. 4 of Geneva Convention III. At: www.icrc.org/customary-ihl/eng/docs/v1_rul_rule108. See also L. Vierucci, ‘Prisoners of War or Protected Persons *qua* Unlawful Combatants?’, pp. 296–7.

116 Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 291–3.

117 Art. 50, 1977 Additional Protocol I.

118 Li, ‘A Universal Enemy? “Foreign Fighters” and Legal Regimes of Exclusion and Exemption under the “Global War on Terror”’, p. 368.

119 For an overview of the evolution of the US position in this respect, see Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, pp. 55–60; K. Dörmann, ‘Unlawful Combatants’, in A. Clapham and P. Gaeta, *The Oxford Handbook of International Law in Armed Conflict*, OUP, 2014, pp. 620ff.

120 ICRC Commentary on Art. 4, 1949 Geneva Convention III, p. 51.

121 ICTY, *Prosecutor v. Delalić et al (Čelebići case)*, Judgment (Trial Chamber) (IT-96-21-T), 16 November 1998, §271.

122 See, for example, Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, pp. 60–1; Sassöli, ‘Transnational Armed Groups and International Humanitarian Law’, pp. 15–16; Pejic, ‘Terrorist Acts and Groups: A Role for International Law?’, pp. 79–80; Dörmann, ‘Unlawful Combatants’, pp. 607–11. For the contrary view, see, for example, A. Roberts, ‘The law of war in the war on terror’, in W. P. Heere (ed.), *Terrorism and the Military – International Legal Implications*, TMC Asser Press, The Hague 2003, p. 82; Sean D. Murphy, ‘Evolving Geneva Convention paradigms in the “war on terrorism”: applying the core rules to the release of persons deemed “unprivileged combatants”’, *George Washington Law Review*, Vol. 75 (2007), pp. 1105ff.

123 Art. 51(3), 1977 Additional Protocol I; H-P. Gasser and K. Dörmann, ‘Protection of the Civilian Population’, in Fleck (ed.), *The Handbook of International Humanitarian Law*, pp. 255–7.

124 2009 ICRC Interpretative Guidance, Section X, pp. 83–4; Dörmann, ‘Unlawful Combatants’, p. 616; Pejic, ‘Terrorist Acts and Groups: A Role for International Law?’, p. 79.

125 M. Sassöli, ‘Terrorism and War’, *Journal of International Criminal Justice*, Vol. 4, No. 5 (2006), pp. 969–70.

State, and nationals of a co-belligerent State¹²⁶ are excluded, provided their state of nationality has normal diplomatic representation in the state that holds them. These exclusions are based on the premise that nationals of neutral or co-belligerent states will be protected by their state of origin through normal diplomatic channels, including exercise of diplomatic protection (see Section F), and therefore do not need the additional protection provided by Geneva Convention IV. As a result, as it does not for POW status, nationality plays a certain role in determining whether foreign fighters who fail to qualify for POW status under Geneva Convention III are covered by Geneva Convention IV as civilians.

Addressing a context of ethnic armed conflict, the International Criminal Tribunal for the former Yugoslavia (ICTY) replaced the nationality standard in Article 4 by the concept of allegiance.¹²⁷ Arguably, a similar reasoning could apply to foreign fighters whose allegiance is not defined by nationality, but religion or ideology.¹²⁸ Such an approach might be especially relevant when states of origin show reluctance to exercise diplomatic protection on their behalf.¹²⁹

Finally, protected person status under Article 4 is not limited to permanent residents. It covers 'all who, at a given moment and in any manner whatsoever, find themselves' in the hands of the enemy. Based on a narrow reading of 'find themselves', during the occupation of Iraq¹³⁰ the USA excluded non-nationals and non-permanent residents (in other words, foreign fighters) from protection under Geneva Convention IV, in order to circumvent the

prohibition on transferring and deporting protected persons from occupied territory affirmed in Article 49.¹³¹ In a case concerning a Pakistani citizen who was captured by UK forces in Iraq, handed over to US forces and then transferred to Afghanistan, the UK Supreme Court repudiated such a narrow interpretation and held that his transfer and subsequent detention in Afghanistan were unlawful.¹³²

4. Status of foreign fighters in a NIAC

When considering NIACs, IHL does not make reference to 'combatants' or POW status,¹³³ or attach any other formal status to members of armed groups (itself an undefined term).¹³⁴ Similarly, there is no equivalent of the 'protected persons' regime set up by the four Geneva Conventions. Instead, IHL grants material protection to those who do not, or no longer, take an active part in hostilities.¹³⁵ In particular, it protects the civilian population and individual civilians,¹³⁶ though without expressly defining the terms. The lack of formal status in NIACs has caused controversy, not least regarding the relationships between the terms 'civilian', 'civilian directly participating in hostilities',¹³⁷ and 'members of organized armed groups' for the purpose of targeting.¹³⁸ Moreover, while Geneva Conventions III and IV foresee detailed regimes governing detention during IACs, the extent to which (and how) IHL authorizes and regulates detention during NIACs remains controversial.¹³⁹

¹²⁶ As the wording of Art. 4 indicates, nationals of neutral states in an occupied territory are protected persons: see ICRC Commentary on Art. 4, 1949 Geneva Convention III, p. 46.

¹²⁷ ICTY, *Prosecutor v. Tadić*, Judgment (Appeals Chamber) (IT-94-1-A), 15 July 1999, §§164–6.

¹²⁸ See Vierucci, 'Prisoners of War or Protected Persons *qua* Unlawful Combatants?', pp. 310ff.

¹²⁹ See Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, p. 302.

¹³⁰ J. Goldsmith III, 'Protected Person Status in Occupied Iraq Under the Fourth Geneva Convention: Memorandum Opinion for the Counsel to the President', 18 March 2004, pp. 22–3. At: www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20040318.pdf.

¹³¹ Li, 'A Universal Enemy?: "Foreign Fighters" and Legal Regimes of Exclusion and Exemption Under the "Global War on Terror"', pp. 402–12.

¹³² UK Supreme Court, *Secretary of State for Foreign and Commonwealth Affairs and Another (Appellants) v. Yunus Rahmatullah (Respondent)*, Judgment, 31 October 2012, §§34–6.

¹³³ S. Sivakumaran, *The Law of Non-International Armed Conflict*, OUP, 2012, p. 359.

¹³⁴ 2009 ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, p. 27.

¹³⁵ See, for example, Common Article 3 of the four 1949 Geneva Conventions, Art. 4(1), 1977 Additional Protocol II.

¹³⁶ See, for example, Arts. 13 or 17, 1977 Additional Protocol II.

¹³⁷ Art. 13(3), 1977 Additional Protocol II.

¹³⁸ Sivakumaran, *The Law of Non-International Armed Conflict*, pp. 359ff. The 2009 ICRC Interpretative Guidance argues that, in NIACs, the term civilian for the purpose of the rule of distinction covers 'all persons who are not members of State armed forces or organized armed groups of a party to the conflict'. They are 'entitled to protection against direct attack unless and for such time as they take a direct part in hostilities'. See Recommendation II.

¹³⁹ See in particular the case of *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB), concerning the detention of an Afghan detainee by UK forces in Afghanistan. See also Sivakumaran, *The Law of Non-International Armed Conflict*, pp. 301ff; J. B. Bellinger III and V. M. Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law', *American Journal of International Law*, Vol. 104 (2011), pp. 201ff; J. Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', *International Review of the Red Cross (IRRC)*, No. 858 (2005), pp. 375ff.

For the purpose of analyzing the foreign fighter phenomenon under IHL, however, it is not necessary to consider these controversies, because the criterion of nationality or permanent residency does not play a role. In NIACs, indeed, IHL explicitly states that it applies to all persons affected by an armed conflict without adverse distinction, including distinction based on nationality. At the same time, the absence of combatant status during a NIAC implies that individuals, including foreign fighters, may be punished for the mere fact of taking up arms or for acts that are potentially lawful under IHL.¹⁴⁰ In that context, governments may choose to punish foreign nationals more or less severely.¹⁴¹

During a NIAC, the interplay between IHL and domestic law results in an unequal legal situation where armed opposition fighters are liable under domestic law for acts that are lawful under IHL.¹⁴² Arguably, this situation undermines respect for IHL by armed opposition fighters who can be prosecuted and punished regardless of whether or not they respect IHL.¹⁴³

To remedy this imbalance, and hence provide an incentive to armed opposition fighters to comply with IHL, Article 6(5) of the 1977 Additional Protocol II recommends amnesties for the mere participation in hostilities, but not for war crimes, and other international crimes, such as torture.¹⁴⁴ The ICRC concluded that this is also a rule of customary international law.¹⁴⁵

Foreign fighters in NIACs involving a multinational force

An additional issue may arise when foreign fighters have the same nationality as one of the states of a multinational force that supports the territorial state. Foreign fighters may fight against forces from their state of nationality, as happened in Afghanistan or Iraq. One could argue that this is envisaged by IHL since 'traditional' NIACs pit state forces against armed groups composed of their own nationals, on national territory. When fighters engage in an armed conflict abroad against their own government, however, this may generate additional issues under their national laws, for example with respect to their constitutionally guaranteed human rights.¹⁴⁶

5. Transfer of foreign fighters: *non-refoulement*

As described, the USA excluded foreign fighters from protection under the 1949 Geneva Convention IV during the occupation of Iraq in order to circumvent the prohibition on transferring and deporting protected persons from occupied territory affirmed in Article 49.¹⁴⁷ Regardless of their status under IHL, foreign fighters are protected under human rights law, including its prohibition of *refoulement*. *Non-refoulement* prohibits transfer of individuals to another authority if there is a clear risk

140 J. D. Ohlin, 'Combatant's Privilege in Asymmetric and Covert Conflict', *Yale Journal of International Law*, July 2014, pp. 31ff.

141 See Commentary on Art. 3, 1949 Geneva Convention I, p. 54, and Commentary on 1977 Additional Protocol II, p. 1359.

142 ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 2011, p. 50.

143 Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, pp. 157–8; Ohlin, 'Combatant's Privilege', pp. 18ff; Sivakumaran, *The Law of Non-International Armed Conflict*, pp. 518ff.

144 ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 2011, p. 50; Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, pp. 109–11.

145 ICRC, Customary IHL, Rule 159, at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule159. For an overview of state practice, see also Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, pp. 105–09.

146 Similar issues may arise when foreign fighters fight against their own government during an IAC. See *Hamdi v. Rumsfeld*, 542 US 507 (2004), in which the US Supreme Court confirmed that US citizens detained as enemy combatants are entitled to due process rights.

147 Li, 'A Universal Enemy?: "Foreign Fighters" and Legal Regimes of Exclusion and Exemption Under the "Global War on Terror,"' pp. 402–12.

that the recipient state would violate fundamental human rights (freedom from torture and other cruel, inhuman, or degrading treatment; arbitrary deprivation of life; ‘flagrant breach’¹⁴⁸ of the prohibition on arbitrary detention; ‘flagrant denial of justice’¹⁴⁹). Both human rights law in general,¹⁵⁰ and the prohibition of *refoulement*, apply during armed conflicts.¹⁵¹ With respect to states that are party to the 1950 European Convention on Human Rights, the Grand Chamber of the European Court has confirmed that the prohibition of *refoulement* applies to in-state transfers of individuals detained abroad during an international military operation.¹⁵²

¹⁴⁸ European Court of Human Rights (ECtHR), *Othman (Abu Qatada) v. UK*, Judgment, 17 January 2012, §232.

¹⁴⁹ *Ibid.*, §285. See also ECtHR, *Babar Ahmad and Others v. United Kingdom*, Admissibility Decision, 6 July 2010; and *Al-Moayad v. Germany*, Admissibility Decision, 20 February 2007.

¹⁵⁰ J. K. Kleffner, ‘Scope of Application of International Humanitarian Law’, pp. 71–7.

¹⁵¹ E. Gillard, ‘There’s No Place Like Home: States’ Obligations in Relation to Transfers of Persons’, *IRRC*, No. 871 (2008), p. 703; C. Droege, ‘Transfers of Detainees: Legal Framework, *Non-Refoulement* and Contemporary Challenges’, *IRRC*, No. 871 (2008), p. 669.

¹⁵² ECtHR, *Al-Saadoon and Mufdhi v. UK*, Judgment, 2 March 2010. The case concerned an Iraqi detainee handed over to the Iraqi authorities by British forces. In its review of reports of the USA and the UK, the UN Committee against Torture adopted the same position. See Committee against Torture, Conclusions and Recommendations: UK, 10 December 2004, UN doc. CAT/C/CR/33/3, §§4(b) and 5(e); and Conclusions and Recommendations: USA, 26 July 2004, UN doc. CAT/C/USA/CO/2, §15.

C. Terrorism and international humanitarian law

States commonly label armed groups or acts committed by them as terrorist. Individual states and international organizations, such as the European Union (EU) or the UN (through the Security Council), maintain lists of terrorist groups. Yet such groups are often simultaneously parties to a NIAC.¹⁵³ In the context of the conflict in Syria, for example, the UN Security Council has listed both Islamic State and Jabhat al-Nusra,¹⁵⁴ referred generically to ‘foreign terrorist fighters’,¹⁵⁵ and condemned ‘terrorist acts’ by Islamic State¹⁵⁶ – though both Islamic State and Jabhat al-Nusra are clearly parties under IHL to the NIAC in Syria. We start by discussing the relevance of such qualifications when applying IHL. Subsequently, we consider how IHL, which governs the conduct of individuals and parties to a conflict,¹⁵⁷ prohibits and represses acts of terrorism during armed conflict.

1. Characterization of fighters, armed groups, and their acts

As described in Section B, IHL applies to international and non-international armed conflicts. The 9/11 attacks led to a debate about whether violence involving ‘terrorist’ groups may be qualified as an armed conflict, and in particular a NIAC.

It is clear, first of all, that the legal or political characterization of an armed group as terrorist, or as a criminal gang (or by other epithets), is irrelevant to assessing whether an armed conflict under

IHL is occurring. The UN Commission of Inquiry determined in 2006, for example, that an armed conflict existed between Hezbollah and Israel, regardless of Israel’s characterization of Hezbollah as a terrorist organization.¹⁵⁸

Second, the purported aim or ideological motivation of a group is also immaterial.¹⁵⁹ Parties to a conflict are not required to have a certain kind of political agenda,¹⁶⁰ or reason to engage in armed violence.¹⁶¹ In a situation that reaches the threshold of a NIAC, a ‘criminal’ group whose aim is purely lucrative or a ‘terrorist’ group whose ultimate aim is global jihad may be a party to the conflict. Unquestionably, Islamic State and al-Nusra (with their foreign fighters) are parties to the NIAC in Syria (and in the case of IS, Iraq).

Nor, third, does the legal status of an armed non-state group, as party to a conflict, depend on the group’s willingness to comply with IHL.¹⁶² Indeed, the lawfulness of the means and methods used by parties to an armed conflict are immaterial for the application of IHL,¹⁶³ including in cases where armed groups wage a campaign of terror against the civilian population.

Instead, the decisive factor is whether a group is sufficiently organized to possess the capacity to comply with IHL. Armed non-state groups that are responsible for patterns of violations of IHL may still be a party to an armed conflict because such patterns do not necessarily indicate that the group lacks the requisite degree of organization to be a party.¹⁶⁴ Accordingly, the ICTY determined that the

¹⁵³ Sivakumaran, *The Law of Non-International Armed Conflict*, pp. 204–05.

¹⁵⁴ List established by the Security Council Sanctions Committee pursuant to Resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities. At: www.un.org/sc/committees/1267/faq_sanctions_list.shtml.

¹⁵⁵ UN Security Council Resolutions 2170 (2014) and 2178 (2014).

¹⁵⁶ See, for example, UN Security Council Resolution 2170 (2014), §1.

¹⁵⁷ J. K. Kleffner, ‘Scope of Application of International Humanitarian Law’, p. 52.

¹⁵⁸ ‘Report of the Commission of Inquiry on Lebanon, pursuant to Human Rights Council Resolution S-2/1’, UN doc. A/HRC/3/2, 23 November 2006, §62.

¹⁵⁹ ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, 2011, p. 6. The same is true for IACs: the reason for going to war does not matter for the purposes of applying IHL, because this question is governed by *jus ad bellum*.

¹⁶⁰ ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, 2011, p. 11, in reference to organized crime.

¹⁶¹ ICTY, *Prosecutor v. Limaj et al.*, Judgment (Trial Chamber) (IT-03-66-T), 30 November 2005, §170. In consequence, the defence argument that Serbian forces intended to engage in ethnic cleansing rather than defeat the KLA is not relevant for the purpose of determining whether the situation amounted to an armed conflict.

¹⁶² C. Kress, ‘The International Legal Framework Governing Transnational Armed Conflicts’, *Journal of Conflict and Security Law*, Vol. 15, No. 2 (2010), p. 259.

¹⁶³ M. Sassòli with L. Rouillard, ‘La définition du terrorisme et le droit international humanitaire’, in *Revue québécoise de droit international*, Hors-série (2007), p. 31.

¹⁶⁴ ICTY, *Prosecutor v. Bošković and Tarčulovski* case, Judgment (Trial Chamber) (IT-04-82-T), 10 July 2008, §204.

Kosovo Liberation Army¹⁶⁵ and the (Macedonian) National Liberation Army¹⁶⁶ were parties to the armed conflicts in Kosovo and Macedonia, even though a number of states and the UN Security Council had condemned acts they had committed as ‘terrorist’.¹⁶⁷ Similarly, although the Special Court for Sierra Leone (SCSL) determined that the RUF/Armed Forces Revolutionary Council (AFRC) had undertaken a campaign of terror against the civilian population as its *primary* modus operandi to achieve its goals,¹⁶⁸ it did not question that the RUF/AFRC was a party to the conflict in Sierra Leone.

IHL governs such conduct, nevertheless, and members of such groups are liable to prosecution and punishment for war crimes.¹⁶⁹

2. The prohibition of terrorist acts in IHL and international criminal law

Without naming them in terms, IHL prohibits all acts that (outside the context of an armed conflict) are normally designated ‘terrorist’, including executions of civilians and persons *hors de combat*, hostage taking, and direct and deliberate attacks against civilians and civilian objects.¹⁷⁰ In armed conflicts, many of these acts are criminalized as war crimes. Suspected perpetrators of war crimes or other international crimes¹⁷¹ can be prosecuted for such acts, regardless of their status under IHL. In particular, neither combatant immunity nor POW status provide immunity for violations of IHL.¹⁷²

During armed conflicts, IHL qualifies acts as ‘terrorist’ in two instances. First, it prohibits attacks against the civilian population whose primary purpose is to spread terror, and threats of such attacks. Second, more generically, it prohibits acts of terrorism against persons who are not, or who are no longer, taking part in hostilities. Neither of these prohibitions is included among the war crimes listed in the 1998 Rome Statute,¹⁷³ though such acts may fall within other non-terrorism-specific war crimes.¹⁷⁴ However, the practice of both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) reveals that such acts of terror may be prosecuted as war crimes.¹⁷⁵

Prohibition of attacks with the primary purpose of spreading terror

The rule of distinction includes a prohibition on attacking the civilian population or individual civilians (who do not, or no longer participate directly in hostilities). The two 1977 Additional Protocols provide a particular form of this general prohibition.¹⁷⁶ They prohibit ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’.¹⁷⁷ Part of the framework that governs the conduct of hostilities, the rule protects civilians against the effects of hostilities. In that context, the term ‘acts of violence’ is to be understood as ‘attack’,¹⁷⁸ meaning combat action against the adversary, whether offensive or defensive in nature.¹⁷⁹ Put differently, the provisions prohibit attacks whose primary purpose is to spread

165 ICTY, *Prosecutor v. Limaj et al.*, Judgment (Trial Chamber), 2005, §134.

166 ICTY, *Prosecutor v. Bošković and Tarčulovski case*, Judgment (Trial Chamber), 2008, §291.

167 *Ibid.*, §192.

168 SCSL, *Prosecutor v. Charles Ghankay Taylor*, Judgment (Appeals Chamber) (SCSL-03-01-A), 26 September 2013, §300.

169 *Ibid.*, §205.

170 ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, 2011, p. 49; H.-P. Gasser, ‘Acts of terror, “Terrorism” and international humanitarian law’, pp. 559 and 562.

171 For a discussion of acts of terrorism as a crime against humanity, genocide, act of aggression or as a discrete crime under international law, see, for example, Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 247–85.

172 Gasser, ‘Acts of terror, “Terrorism” and international humanitarian law’, p. 560. See also Section B above.

173 Nor are they listed as ‘grave breaches’ under the 1949 Geneva Conventions and its 1977 Additional Protocol I.

174 R. Arnold, ‘Terrorism, war crimes and the International Criminal Court’, in Saul, *Research Handbook on International Law and Terrorism*, pp. 282ff.

175 The Statute of the International Criminal Tribunal for Rwanda (ICTR) also included acts of terrorism as a war crime, but no charges were brought under this heading. For an overview of past practice, namely cases dealing with terror as a method of warfare before both the International Military Tribunal at Nuremberg and national war crimes programmes, see Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 208–14.

176 ICTY, *Prosecutor v. Galić*, Judgment (Appeals Chamber) (IT-98-29-A), 30 November 2006, §98. The ICTY considers the ‘crime of terror’ as an ‘aggravated’, more serious form of unlawful attack on civilians. *Prosecutor v. (Dragomir) Milošević*, Judgment (Trial Chamber) (IT-98-29/1-T), 12 December 2007, §877.

177 Art. 51(2), Additional Protocol I and Art. 13(2), Additional Protocol II.

178 Art. 49(1), Additional Protocol I defines ‘attacks’ as ‘acts of violence against the adversary, whether in offence or defence’.

179 See Commentary on Art. 49, p. 602.

terror,¹⁸⁰ and threats of terror.¹⁸¹ This is a rule of customary IHL in both IACs and NIACs.¹⁸²

The prohibition covers direct attacks against the civilian population, and may include indiscriminate or disproportionate attacks, provided they were committed with the primary purpose of spreading terror.¹⁸³ Since most acts of violence, including acts that are lawful under IHL, are likely to spread terror in the civilian population, the Commentary clarifies that

[t]his is not the sort of terror envisaged here. This provision is intended to prohibit acts of violence or threats thereof the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage.¹⁸⁴

In other words, it is not the effect on the civilian population (terror) which is prohibited, but the launching of attacks with the specific purpose of producing terror among the civilian population.¹⁸⁵

The ICTY has described terror as ‘extreme fear’,¹⁸⁶ that is distinct and beyond the level of fear that inevitably accompanies warfare, ‘a fear calculated to demoralise, to disrupt, to take away any sense of security from a body of people who have nothing to do with the combat’.¹⁸⁷ On the basis of this understanding, the court pointed out that the concept of ‘terror’ must take into account the circumstances of a particular armed conflict, including the proximity of the civilian population to the operational theatre. Especially during hostilities in an urban environment, lawful attacks may lead to intense fear in and intimidation of the civilian

population: ‘to constitute terror, an intent to instil fear beyond this level is required’.¹⁸⁸ Examples of what may constitute such acts include the Bosnian Serb forces’ campaign of sniping and shelling during the siege of Sarajevo,¹⁸⁹ the Syrian government’s campaign of barrel-bombing city areas, and Islamic State’s practice of suicide and car bombing areas that are ‘by their very function gathering-points for civilians’, including schools.¹⁹⁰

The prohibition of attacks that have the primary purpose of spreading terror among the civilian population (and threats of such attacks) is not explicitly listed as a war crime either in the 1998 Rome Statute of the International Criminal Court or the Statutes of any of the *ad hoc* or special international criminal tribunals. Yet, the Bosnian Serb forces’ campaign of sniping and shelling during the siege of Sarajevo was prosecuted as the ‘crime of terror’ before the ICTY¹⁹¹ on the basis of Article 3 of the ICTY Statute. Article 3 provides for jurisdiction over ‘violations of the laws and customs of war’, which, in accordance with ICTY case law, include the ‘crime of terror’.

The prohibition on attacks with the primary purpose of spreading terror (hereafter, terror attacks) reflects customary IHL with respect to IACs and NIACs.¹⁹² Second, but more controversially,¹⁹³ such attacks in the course of IACs and NIACs have been deemed crimes under international criminal law.¹⁹⁴ The war crime of terror attacks consists of ‘acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population’ (*actus reus*) where the

¹⁸⁰ ICTY, *Prosecutor v. Galić*, Judgment (Appeals Chamber), 2006, §102.

¹⁸¹ For example, declarations threatening the civilian population with total destruction may constitute such threats. See Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 247–85.

¹⁸² ICRC Customary IHL, Rule 2, confirmed by the 2006 judgment of the ICTY in the *Galić* case, see Judgment (Appeals Chamber), 2006, §§87–90.

¹⁸³ ICTY, *Prosecutor v. Galić*, Judgment (Appeals Chamber), 2006, §102; *Prosecutor v. (Dragomir) Milošević*, Judgment (Trial Chamber), 2007, §877.

¹⁸⁴ Commentary on Article 51(2), p. 618. On the drafting history, see Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, p. 197.

¹⁸⁵ Bothe, Partsch and Solf (eds.), *New Rules for Victims of Armed Conflicts*, p. 342.

¹⁸⁶ ICTY, *Prosecutor v. Galić*, Judgment (Trial Chamber) (IT-98-29-T), 5 December 2003, §137.

¹⁸⁷ *Prosecutor v. (Dragomir) Milošević*, Judgment (Trial Chamber), 2007, §§885–6.

¹⁸⁸ *Ibid.*, §888. For a discussion of the concept of ‘terror’, see Bianchi and Y. Naqvi, *International Humanitarian Law and Terrorism*, pp. 224–8.

¹⁸⁹ ICTY, *Prosecutor v. Galić* (Appeals Chamber), 2006, §§87–90; ICTY, *Prosecutor v. (Dragomir) Milošević*, Judgment (Trial Chamber), 2007, §§873–913. For a discussion of ICTY jurisprudence, see Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, p. 215ff.

¹⁹⁰ Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic, Report to the Human Rights Council, 18 March 2014, §§90–1.

¹⁹¹ Namely in the case of *Stanislav Galić*, a Major-General of the Bosnian Serb army based around Sarajevo, and *Dragomir Milošević*, his chief of staff.

¹⁹² ICTY, *Prosecutor v. Galić*, Judgment (Appeals Chamber), 2006, §§87–90. See also Rule 2, ICRC Customary IHL Study.

¹⁹³ The Trial Chamber had established individual criminal responsibility on the basis of applicable treaty, avoiding a pronouncement on the customary law nature of the crime. The decision of the Appeals Chamber was taken by majority (Judge Schomburg dissenting on this issue). See also the dissenting opinion of Judge Nieto-Navia in this respect in the Trial Chamber Judgment (§§112–13); the dissenting opinion of Judge Liu to the judgment of the Appeals Chamber in (*Dragomir) Milošević*; and the discussion in Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 222–4.

¹⁹⁴ ICTY, *Prosecutor v. Galić*, (Appeals Chamber), 2006, §§91–8.

perpetrator ‘wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence’.¹⁹⁵ To meet the primary purpose requirement, the ICTY affirmed that the *mens rea* element of the international criminal offence (i.e. the requisite intent) was specific intent to spread terror.¹⁹⁶

ICTY practice, however, has left several issues open. First, none of its cases have alleged ‘threats of violence’. As a result, the ICTY has not ruled whether such threats amount to a serious violation of IHL attracting individual criminal responsibility.¹⁹⁷

Second, in *Dragomir Milošević*, the Appeals Chamber made clear that causing death or serious injury are possible modes of commission, but are not a required element of the crime of terror. For an offence to fall under Article 3, the violation must be ‘serious’, in the sense that it must ‘constitute a breach of the rule of fundamental value’ and the breach must involve ‘grave consequences’ for the victims.¹⁹⁸ For the ‘crime of terror’, such grave consequences include, but are not limited to, death or serious injury to body or health. On these grounds, the Appeals Chamber rejected a broader prosecution interpretation of the elements that constitute the ‘crime of terror’ (as ‘acts capable of spreading of terror’), but abstained from elaborating what other consequences might be grave enough because all the acts under review had resulted in death or serious injury.¹⁹⁹

Finally, one may wonder whether the crime of ‘terror attacks’ requires a systemic element. Both the Prosecution and the ICTY judgment itself referred frequently to a ‘campaign’ of sniping and shelling in Sarajevo.²⁰⁰ The Appeals Chamber subsequently pointed out that this was a ‘descriptive’ term, used

to illustrate that the crimes were a ‘pattern forming part of the military strategy in place’, but not part of the charges; it did not address the question whether a single act that was not part of such a campaign could amount to the crime of terror.²⁰¹

Generic prohibition of ‘acts of terrorism’

In addition to prohibiting attacks whose primary purpose is to spread terror, and threats of such attacks, IHL generally prohibits ‘acts of terrorism’.

Article 33 of the 1949 Geneva Convention IV prohibits ‘collective penalties and likewise all measures of intimidation or terrorism’ against protected civilians²⁰² (essentially civilians in the hands of the enemy²⁰³).

As part of the fundamental guarantees for persons who do not or longer directly participate in hostilities during a NIAC, Article 4(2)(d) prohibits ‘acts of terrorism’, a term that ‘covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect’.²⁰⁴ The wording of Article 4(2)(d) and its object and purpose imply that it also protects members of the armed forces or armed groups who are *hors de combat*, for example after capture by enemy forces.²⁰⁵ These provisions prohibit measures that terrorise the local population in order to impose obedience, and prevent certain hostile acts, for example collective punishments for alleged collaboration with or other forms of support to the enemy.²⁰⁶

The scope of these generic prohibitions of ‘acts of terrorism’ is potentially very large, but they have one

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*, §§103–04; see also *Prosecutor v. Galić*, Judgment (Trial Chamber), 2003, §133; and *Prosecutor v. Milošević*, Judgment (Trial Chamber), 2007, §875.

¹⁹⁷ ICTY, *Prosecutor v. Galić*, Judgment (Trial Chamber), 2007, §110 and §132.

¹⁹⁸ ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1999, §94.

¹⁹⁹ *Prosecutor v. (Dragomir) Milošević*, Judgment (Appeals Chamber) (IT-98-29/1-A), 12 November 2009, §33–4.

²⁰⁰ Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 227–8.

²⁰¹ *Prosecutor v. (Dragomir) Milošević*, Judgment (Appeals Chamber), 2009, §266.

²⁰² On the concept of protected civilians in Geneva Convention IV, see Section B above.

²⁰³ The term ‘in the hands of the enemy’ covers being in enemy hands directly, for example as a prisoner, and more generally being in territory under the control of the enemy. See Commentary on Art. 4, Geneva Convention IV, p. 47.

²⁰⁴ Commentary on Art. 4, 1977 Additional Protocol II, p. 4538.

²⁰⁵ A. Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, *Journal of International Criminal Justice*, Vol. 4, No. 5 (2006), p. 946. Considering Art. 4(2)(d) as an extension of Common Article 3, which applies as a minimum in any armed conflict, Cassese argues that the prohibition of acts of terrorism in this context applies also during IACs and protects combatants not engaged in active hostilities.

²⁰⁶ Bianchi and Y. Naqvi, *International Humanitarian Law and Terrorism*, p. 196; see also M. Sassòli, ‘Terrorism and War’, *Journal of International Criminal Justice*, Vol. 4, Issue 5 (2006), p. 967.

Box 7. Terror as an Operational Strategy: The *Taylor* case

“The Appeals Chamber concludes that the Trial Chamber reasonably found a consistent pattern of crimes against civilians in each of the periods reviewed above. In each period, the RUF/AFRC directed a widespread and systematic attack against the civilian population of Sierra Leone through the commission of crimes including killings, enslavement, physical violence, rape, sexual slavery, and looting against large numbers of civilian victims. Each and all of these crimes were horrific and shocked the conscience of mankind. ...

The Appeals Chamber concludes that in each period, the Trial Chamber’s findings demonstrate that crimes against civilians were directed to the achievement of the RUF/AFRC’s political and military goals. The Appeals Chamber notes that crimes against civilians continued to be used to achieve political and military goals even as those goals changed during the course of the conflict. Crimes of enslavement, sexual violence and conscription and use of child soldiers, as well as attending physical violence and acts of terror, were committed throughout the Indictment Period to support and sustain the RUF/AFRC and enhance its military capacity and operations. During the Junta Period, faced with a need to maintain its new-found authority, the RUF/AFRC committed crimes against civilians to minimise dissent and resistance and punish any support for President Kabbah [...] Following the Intervention and their defeat by ECOMOG, struggling to regroup and regain lost territory, the RUF/AFRC committed crimes against civilians to sustain itself, clear and hold territory, control the population, eradicate support for its opponents and attract the attention of the international community. During the Freetown Invasion, the RUF/AFRC devastated Freetown to secure the release of Sankoh and force the Government to the negotiating table. After the Freetown Invasion and Lomé Peace Accord, having achieved Sankoh’s freedom and a place in government through the commission of crimes against civilians, the RUF/AFRC committed further crimes against civilians to maintain itself as a fighting force and to ensure the continued supply of diamonds.

The Appeals Chamber is further satisfied that the Trial Chamber’s findings show that the RUF/AFRC used acts of terror as its primary modus operandi throughout the Indictment Period. The RUF/AFRC pursued a strategy to achieve its goals through extreme fear by making Sierra Leone ‘fearful.’ The primary purpose was to spread terror, but it was not aimless terror. Barbaric, brutal violence was purposefully unleashed against civilians because it made them afraid – afraid that there would only be more unspeakable violence if they continued to resist in any way, continued to stay in their communities or dared to return to their homes. It also made governments and the international community afraid – afraid that unless the RUF/AFRC’s demands were met, thousands more killings, mutilations, abductions and rapes of innocent civilians would follow. The conflict in Sierra Leone was bloody because the RUF/AFRC leadership deliberately made it bloody.”

Taylor case, Judgment (Appeals Chamber), 2013, §§297–300.

important, often overlooked²⁰⁷ caveat: their context and field of application show that they apply to individuals who are in the hands of a party to the conflict – either under its physical control when captured, or on territory it controls.²⁰⁸ By contrast the prohibition set out in Article 51(2) of the 1977 Additional Protocol I and Article 13(2) of the 1977 Additional Protocol II, on launching or threatening attacks directed against the civilian population with the primary purpose of spreading terror, protects

all civilians who are affected by such attacks in whatever territory,²⁰⁹ but does not cover persons who are in the hands of the enemy because the prohibition addresses the situation in an *attack* (a combat action during the conduct of hostilities).

The application of Article 33 of the 1949 Geneva Convention IV and Article 4(2)(d) of the 1977 Additional Protocol II is not limited to ‘attacks’, and may cover a broad range of measures that do not

²⁰⁷ See Sassòli with Rouillard, ‘La définition du terrorisme et le droit international humanitaire’, p. 34. They note that the ICTY seems to have overlooked this crucial distinction when it referenced Art. 33 as proof of the customary nature of the prohibition of terror attacks. The same criticism might be made of the ICRC customary law study, which refers to both Art. 33 and Art. 4(2)(d) to illustrate the customary nature of the rule. The SCSL also ignored this difference (see below).

²⁰⁸ ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, 2011, p. 49.

²⁰⁹ See Art. 49(2), 1977 Additional Protocol I.

involve the use of force, such as mass arrests which are intended to terrorize the local population.²¹⁰

'Acts of terrorism' may constitute war crimes,²¹¹ although the constituent elements of the crime are not entirely settled. Article 3 of the Statute of the SCSL, modelled on Article 4 of the 1977 Additional Protocol II,²¹² affirms that 'acts of terrorism'²¹³ and threats to commit them are war crimes.²¹⁴ All indictments before the Special Court included the crime of 'terrorizing the civilian population'.²¹⁵ Without entering into a detailed analysis of SCSL case law,²¹⁶ the following aspects of its practice are relevant to the theme of this Briefing.

First, from its very first judgment onwards, the Special Court affirmed that 'the prohibition and criminalisation of the intentional use of "terror violence" in armed conflict against a civilian population for strategic purposes is well settled in customary international law',²¹⁷ relying, among others, on the precedents set by war crime prosecutions in the aftermath of the Second World War, as well as the *Galić* case.²¹⁸

Second, in line with the broader scope of the prohibition of 'acts of terrorism' in Article 4(2)(d), the Court allowed that destruction of property might constitute an 'act of terrorism'.²¹⁹ Notwithstanding the explanation in the Commentary on Article 4(2)(d), the SCSL did not confine its analysis to destruction of property that caused victims as a side effect.²²⁰

Third, reversing the Trial Chamber's narrow interpretation, the Appeals Chamber clarified that

'acts of terrorism need not involve acts that are otherwise criminal under international criminal law'.²²¹ Because it is an act 'capable of spreading terror', the burning of houses may amount to 'acts of terrorism', even if it does not satisfy the elements of any other war crime, including pillage.²²² In other words, 'acts of terrorism' may be an independent and distinct war crime, separable from other war crimes.

Fourth, the SCSL conflated the prohibition of 'acts of terrorism' (set out in Article (4)(2)(d)) with the prohibition on launching or threatening attacks against the civilian population with the primary purpose to spreading terror (set out in Article 13(2)).²²³ In particular, the Court consistently held that the primary purpose of 'acts of terrorism' must be to spread terror among the civilian population,²²⁴ even though the primary purpose requirement is not explicitly included in the prohibition of 'acts of terrorism'.²²⁵ The Court argued, however, that 'certain acts of violence are of such a nature that the primary purpose can only be reasonably inferred to be to spread terror among the civilian population',²²⁶ namely amputations.²²⁷

Such inconsistencies in the case law of the Special Court demonstrate how difficult it is to distinguish between primary and secondary purposes, or the incidental effects of certain acts, notably in the context of a wider campaign of terror against a civilian population. Regardless of the individual criminal responsibility of the accused, the prosecutions of leaders of the ARFC, leaders of the RUF, and Charles Taylor, relied substantially

210 D. Kretzmer, 'Terrorism and the International Law of Occupation', in Saul, *Research Handbook on International Law and Terrorism*, p. 236.

211 Post-Second World War prosecutions for war crimes included such acts of (systematic) terrorism against people in occupied territories. See Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 210–14.

212 See 'Report of the Secretary-General on the establishment of a Special Court for Sierra Leone', UN doc. S/2000/915, 2000, §12.

213 Art. 3(d), Statute of the SCSL.

214 Art. 3(h).

215 Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, p. 228.

216 For such an analysis, see *ibid.*, pp. 228–42.

217 *Prosecutor v. A. T. Brima, B. B. Kamara and S. B. Kanu (AFRC Case)*, Judgment (Trial Chamber) (SCSL-04-16-T), 20 June 2007, §662.

218 *Ibid.*, §§663–6.

219 The elements of the crime specify that the crime of terrorism may consist of 'acts or threats of violence directed against persons or their property'. See SCSL, *AFRC case*, Judgment (Trial Chamber), 2007, §667; *Prosecutor v. M. Fofana and A. Kondewa (CDF case)*, Judgment (Trial Chamber) (SCSL-04-14-T), 2 August 2007, §170; *Prosecutor v. Charles G. Taylor*, Judgment (Trial Chamber) (SCSL-03-01-T), 18 May 2012, §403.

220 See the criticism by Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 232–4.

221 *CDF case*, Judgment (Appeals Chamber) (SCSL-04-14-A), 28 May 2008, §359; *Prosecutor v. I. H. Sesay, M. Kallon and A. Gbao (RUF case)*, Judgment (Trial Chamber) (SCSL-04-15), 2 March 2009, §115.

222 *CDF case* (Appeals Chamber), 2008, §359; see also *AFRC case* (Trial Chamber), 2007, §§757 and 1438. *RUF case* (Trial Chamber), 2009, §§202 and 455.

223 Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 229–32, 234–7.

224 *CDF case* (Trial Chamber), 2007, §170; *AFRC case* (Trial Chamber), 2007, §667; *RUF case* (Trial Chamber), 2009, §113; *Taylor case* (Trial Chamber), 2012, §403.

225 Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 230–1.

226 *AFRC case* (Trial Chamber), 2007, §1446; *Taylor case* (Trial Chamber), 2012, §1966.

227 *AFRC case* (Trial Chamber), 2007, §1464; *Taylor case* (Trial Chamber), 2012, §1969.

on the same underlying facts;²²⁸ but their legal characterization of ‘acts of terrorism’ differed.

In its first judgment, the *ARFC* case, the Trial Chamber assessed the primary purposes of the practices of enslavement, conscription, use of child soldiers, and sexual slavery in general. It concluded that their primary purpose was military or utilitarian, and that these practices did not amount to ‘acts of terrorism’.²²⁹ Two years later, in the *RUF* case, a different Trial Chamber held that the RUF/AFRC used sexual violence, including sexual slavery and forced marriages, to extend ‘their power and dominance over the civilian population by perpetuating a constant threat of insecurity that pervaded daily life and afflicted both women and men’,²³⁰ as ‘part of a campaign to terrorise the civilian population’.²³¹ It judged acts of sexual violence, including sexual slavery and forced marriage, on a case-by-case basis in various districts and concluded that these acts amounted to acts of terrorism.²³²

In the *Taylor* case, Trial Chamber II adopted the approach to sexual violence of Trial Chamber I.²³³ It consistently concluded that sexual violence, including sexual slavery and forced marriage, were acts of terrorism,²³⁴ but did not explain its departure from the judgments it had made in the *AFRC* case.²³⁵

In a similar manner, the first and second Trial Chamber reached different opinions on whether

‘enslavement’ is an act of terrorism. In both the *ARFC* case and the *Taylor* case, Trial Chamber II found categorically that enslavement was not an act of terrorism because its primary purpose was utilitarian or military, and was not to spread terror.²³⁶ In the *AFRC* case, Trial Chamber II explicitly stated that enslavement by the ARFC/RUF of an unknown number of civilians (to mine for diamonds at Cyborg Pit from 1 August 1997 to 31 January 1998) could not be considered an act of terrorism.²³⁷ In the *RUF* case, by contrast, Trial Chamber I undertook a case-by-case assessment of enslavement at various locations. Its conclusion (confirmed by the Appeals Chamber)²³⁸ was that the enslavement was an act of terrorism.²³⁹ However, its argument was based on somewhat tenuous factual distinctions,²⁴⁰ notably that terror had been a ‘side-effect’ of enslavements elsewhere (at other mine sites) that in themselves did not amount to acts of terrorism.²⁴¹

The Special Court concluded that unlawful killings, physical violence (in particular amputations), and the burning of property, were acts of terrorism (with the exception of certain acts in specific circumstances, when other reasons than spreading terror could be established).²⁴² It specified a number of factors when it inferred that the primary purpose of the acts was to spread terror. These included: the public nature²⁴³ of the acts;²⁴⁴ display of (mutilated) corpses;²⁴⁵ targeting of alleged or perceived supporters of the enemy,²⁴⁶ in particular

²²⁸ The SCSL had jurisdiction for serious violations of IHL and Sierra Leonean law committed in Sierra Leone since 30 November 1996. Both Charles Taylor and leaders of the RUF were indicted for acts after that date, in particular in Kailahun district, which was under RUF control. Yet all the charges against the leaders of the AFRC and most of the charges against Taylor and leaders of the RUF related to acts committed after the Coup on 25 May 1997, when the RUF and AFRC started to operate jointly. In many instances, acts could not be attributed conclusively to either of them.

²²⁹ *AFRC* case (Trial Chamber), 2007, §1450 (use of child soldiers), §1454 (enslavement, i.e. abductions and forced labour), §1459 (sexual slavery).

²³⁰ *RUF* case (Trial Chamber), 2009, §1350.

²³¹ *Ibid.*, §1352, and again §1356 on sexual slavery and forced marriage as acts of terrorism.

²³² *Ibid.*, §1353, §1355, §1493, §1602.

²³³ *Taylor* case, (Trial Chamber), 2012, §2035.

²³⁴ *Ibid.*, §§2037, 2053, and 2178.

²³⁵ The second Trial Chamber was composed of the same judges in both cases. See also K. Keith, ‘Deconstructing Terrorism as a War Crime: The *Charles Taylor* Case’, pp. 822, 823 and 826.

²³⁶ *AFRC* case (Trial Chamber), 2007, §1454; *Taylor* case (Trial Chamber), 2012, §1971.

²³⁷ *AFRC* case (Trial Chamber), 2007, §1309 (enslavement), and §1451 (not an act of terrorism); see also *Taylor* case (Trial Chamber), 2012, §1650–9 (enslavement), and §1971 (not an act of terrorism).

²³⁸ *RUF* case (Appeals Chamber) (SCSL-04-15-A), 26 October 2009, §§678–9.

²³⁹ *RUF* case (Trial Chamber), 2009, §2051.

²⁴⁰ Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, p. 239.

²⁴¹ *RUF* case (Appeals Chamber), 2009, §679.

²⁴² See, for example, *RUF* case (Trial Chamber), 2009, §1126 (killing of two individuals who attempted to stop the looting); §1344 (killing of a Nigerian woman suspected of supporting ECOMOG, given her nationality).

²⁴³ See also K. Keith, ‘Deconstructing Terrorism as a War Crime: The *Charles Taylor* Case’, pp. 822, 823, and 826.

²⁴⁴ *RUF* case (Trial Chamber), 2009, §§1606, 1354–5; *Taylor* case (Trial Chamber), §§710, 808, 876, 2180.

²⁴⁵ *AFRC* case (Trial Chamber), 2007, §§1475, 1539; *RUF* case (Trial Chamber), 2009, §§1033 and 1124; *Taylor* case (Trial Chamber), 2012, §§597, 603, 606, 610, 684, 692, 713, 716, 769; 792, 813.

²⁴⁶ *AFRC* case (Trial Chamber), 2007, §§1475, 1539, 1609; *RUF* case (Trial Chamber), 2009, §§1102 and 1125; *Taylor* case (Trial Chamber), 2012, §§599–600 and 2041.

prominent members of the community;²⁴⁷ revenge acts in the aftermath of defeat on the battlefield;²⁴⁸ tricking victims into showing support for enemy forces before killing them;²⁴⁹ mocking victims;²⁵⁰ the gruesome nature of certain acts;²⁵¹ and their large scale or indiscriminate nature.²⁵²

Finally, the SCSL did not address the question as to whether the war crime of ‘acts of terrorism’ includes a systemic element. It found that certain unlawful acts did not amount to an ‘act of terrorism’ because (in light of the particular circumstances) the primary purpose of the acts ‘was not to further the campaign of terrorism’.²⁵³ On the other hand, the Court repeatedly pointed out that many acts took place in the context of a campaign to terrorise the civilian population.²⁵⁴ In addition, when it confirmed the conviction of the former president of Liberia, Charles Taylor, for aiding and abetting in the crimes in Sierra Leone, including the war crime of acts of terrorism, the Appeals Chamber pointed out that the RUF/AFRC ‘used acts of terror as its primary *modus operandi*’ to achieve its political and military aims (see Box 7).²⁵⁵ At the same time, it highlighted that it ‘was not legally required’ to make a finding on the RUF/AFRC’s operational strategy to establish that the crimes had been committed and Taylor’s criminal responsibility in relation to them.²⁵⁶

Despite its conceptual flaws and inconsistencies, the SCSL’s case law illustrates that the war crime of ‘acts of terrorism’ may be carried out by a broad variety of means, including mass unlawful killings, amputations, enslavement, sexual violence and sexual slavery, and the deliberate burning of houses. Adding the war crime of ‘acts of terrorism’ contextualises these acts, takes into consideration the deliberate strategy of an armed group to terrorize the civilian population in its hands, and provides a more accurate reflection of the conflict.²⁵⁷ Moreover,

as the case of the deliberate burning of houses illustrates, ‘acts of terrorism’ can be a distinct war crime. In light of the widespread atrocities reportedly committed by Islamic State in Syria and Iraq against the people under its control, the case law of the Special Court is a useful precedent for analysing whether such acts may amount to the war crime of ‘acts of terrorism.’

Features of ‘terrorism’ in an armed conflict under IHL

This brief overview of acts qualified as ‘terrorist’ under IHL reveals that the notion of ‘terrorism’ under IHL carries a specific meaning, distinct in many respects from the notion of ‘terrorism’ outside an armed conflict.

First, the prohibition of attacks whose primary purpose is to spread terror, and threats of such attacks, is intimately connected to violations of the principle of distinction,²⁵⁸ which requires belligerents to distinguish at all times between lawful military objectives and unlawful targets, namely civilians and civilian objects.

Second, the broad generic prohibition of ‘acts of terrorism’ protects individuals who are not, or who are no longer, directly participating in hostilities and who are under the control of a party to the conflict. Outside an armed conflict, victims of terrorism will rarely be in the hands of terrorists,²⁵⁹ with the exception of hostage taking.

Third, since IHL governs the conduct of state and non-state actors, violence by state actors may qualify as ‘terrorism’ for the purposes of IHL.²⁶⁰ In contrast, the question of state terrorism outside armed conflicts is hotly debated and continues

247 *RUF case* (Trial Chamber), 2009, §§1035 and 1036; *Taylor case* (Trial Chamber), 2012, §624.

248 *Taylor case* (Trial Chamber), 2012, §§627 and 632.

249 *Ibid.*, §§670–2, 687.

250 *AFRC case* (Trial Chamber), 2007, §§1461–2; *RUF case* (Trial Chamber), 2009, §§1033, 1598; *Taylor case* (Trial Chamber), 2012, §§736, 2044–8.

251 *AFRC case* (Trial Chamber), 2007, §1475, §1525 and §1570 (burning alive); *RUF case*, (Trial Chamber), 2009, §1347 (gang rapes, rapes using objects); *Taylor case* (Trial Chamber), 2012, §698 (burning alive); §§703–4 (beheadings); §808 (ritualistic executions).

252 *AFRC case* (Trial Chamber), 2007, §1525; *RUF case*, (Trial Chamber), 2009, §§1032, 1341–2, 1491, 1600–04; *Taylor case* (Trial Chamber), 2012, §§710, 788, 2006.

253 See, for example, the *RUF case* (Trial Chamber), §1126 on the killing of two individuals who attempted to stop the looting.

254 *AFRC case* (Trial Chamber), 2007, §1445; *RUF case* (Trial Chamber), 2009, §1352.

255 *Taylor case* (Appeals Chamber), 2012, §300.

256 *Ibid.*, §257.

257 K. Keith, ‘Deconstructing Terrorism as a War Crime: The *Charles Taylor Case*’, p. 833.

258 E. Stubbins Bates *et al.* (eds.), *Terrorism and International Law*, p. 37; M. Lehoto, *State Responsibility for Terrorist Acts*, Martinus Nijhoff, 2009, p. 82.

259 Sassòli, ‘Terrorism and War’, p. 967.

260 Stubbins Bates *et al.* (eds.), *Terrorism and International Law*, p. 37.

to be one of the main obstacles that impede negotiation of a general comprehensive convention on international terrorism.²⁶¹

Fourth, in order to distinguish ‘terrorist’ acts from other acts of violence, definitions of ‘terrorism’ outside an armed conflict frequently include the idea that terrorist acts are designed to spread fear in the population in order to compel a state or international organization²⁶² to take some sort of action;²⁶³ in other words, they are acts directed against a government.²⁶⁴ No comparable element

is found in the IHL definition, which prohibits intimidation of the civilian population during an armed conflict. Indeed, in the *Taylor* case, the Trial Chamber expressly rejected a defence submission that ‘acts of terrorism’ in an armed conflict might include such an additional element.²⁶⁵ That the goals of the AFRC/RUF campaign to spread terror changed over time was not relevant to an assessment of whether or not particular acts amounted to ‘acts of terrorism’.

261 G. P. Fletcher, ‘The Indefinable Concept of Terrorism’, *Journal of International Criminal Justice*, Vol. 4, No. 5 (2006), p. 905; Mahmoud Hmoud, ‘Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention’, *Journal of International Criminal Justice*, Vol. 4, No. 5 (2006), pp. 1039ff; C. L. Lim, ‘The Question of a generic definition of terrorism under general international law’, in V. V. Ramraj *et al.* (eds.), *Global Anti-Terrorism Law and Policy*, CUP, 2005, p. 38.

262 See, for example, Art. 2, 1999 UN Convention for the Suppression of the Financing of Terrorism; and Art. 1, EU Framework Decision on Combating Terrorism. See also UN Security Council Resolution 1566 (2004), §3; M. Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN doc. E/CN.4/2006/98, 28 December 2005, §42; Special Tribunal for Lebanon, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Decision (Appeals Chamber) (Case No. SLT_11-01/1), 16 February 2011, §85.

263 Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, p. 937.

264 T. Wiegand, ‘The Universal Terrorist: The International Community Grappling with a Definition’, *Journal of International Criminal Justice*, Vol. 4, No. 5 (2006), p. 914.

265 *Taylor* case (Trial Chamber), 2012, §§408–10.

D. Foreign fighters under the UN counterterrorism framework

Various parts of the UN system are involved in the UN's counterterrorism effort.²⁶⁶ This Briefing focuses on the UN's normative framework, which consists of two main components: treaties and Security Council resolutions.²⁶⁷

A number of treaties on terrorism have been negotiated and adopted under the auspices of the General Assembly.²⁶⁸ These have been supplemented by a series of binding Security Council resolutions, in particular since 9/11, which have established a range of preventive and cooperative measures, and bodies to monitor their implementation. In August and September 2014, the UN Security Council adopted two wide-ranging resolutions (2170 and 2178) to deal with the threat posed by 'foreign terrorist fighters'. Even before their adoption, however, the UN counterterrorism framework addressed issues raised by foreign fighters, notably when they joined groups that the Security Council had listed as al-Qaeda associates.

Prior to 9/11, terrorism had largely been considered a national phenomenon, to be addressed at national level. As terrorism acquired an overtly international dimension, responses to it became international as well.²⁶⁹ In parallel, the approach changed, from regulation by means of international treaties that outlaw specific acts of terrorism, to a broader

prevention policy led by the Security Council.²⁷⁰ The contemporary counterterrorism framework is largely a response to the emergence of al-Qaeda and its affiliates and the global terrorism threat they represent.²⁷¹ Policy with respect to foreign fighters focuses primarily on their potential recruitment by al-Qaeda and like-minded groups. The terrorism threat represented by returning foreign fighters illustrates a different aspect of the same concern, though the same tools used to combat international terrorist groups can be used to deter or prosecute foreign fighters.

1. International conventions to combat terrorism

No comprehensive convention on terrorism has yet been adopted, largely because it has been difficult politically to agree on a legal definition of terrorism,²⁷² and its scope of application.²⁷³ In particular, the relationship between IHL and a convention on terrorism is contentious. States and legal scholars disagree whether and to what extent acts by armed groups may constitute acts of terrorism during an armed conflict,²⁷⁴ especially when fighting for self-determination.²⁷⁵ In addition, the question of 'state terrorism' outside an armed conflict remains hotly debated.²⁷⁶

²⁶⁶ E. Rosand, 'The UN-Led Multilateral Response to Jihadist Terrorism: Is A Global Counterterrorism Body Needed?', *Journal of Conflict and Security Law*, Vol. 11, No. 3 (2006), p. 406.

²⁶⁷ The UN General Assembly is also active, and has promulgated a series of strategies. See, for example, N. Quéniwet, 'You are the Weakest Link and We will Help You! Comprehensive Strategy of the United Nations to Fight Terrorism', *Journal of Conflict and Security Law*, Vol. 11, No. 3 (2006). The UN Secretary General set up a Counter-Terrorism Implementation Task Force in 2005 to improve the coordination and coherence of UN counterterrorism efforts.

²⁶⁸ On relevant treaties and resolutions, see J. Boulden, 'The United Nations General Assembly and Terrorism', in Saul, *Research Handbook on International Law and Terrorism*, pp. 555ff.

²⁶⁹ Quéniwet, 'You are the Weakest Link and We will Help You! Comprehensive Strategy of the United Nations to Fight Terrorism', pp. 373–7.

²⁷⁰ *Ibid.*, p. 384.

²⁷¹ Rosand, 'The UN-Led Multilateral Response to Jihadist Terrorism: Is A Global Counterterrorism Body Needed?', p. 400.

²⁷² In a controversial decision, the Appeals Chamber of the Special Tribunal for Lebanon (STL) held that an international crime of terrorism in time of peace exists under customary international law, having three elements: (i) perpetration of a criminal act such as murder, kidnapping, hostage-taking, and arson, or threatening such an act; (ii) intent to spread fear among the population (which would generally entail creating a public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element. STL, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Decision (Appeals Chamber) (Case No. SLT_11-01/1), 16 February 2011, §85. For a criticism of the decision, see Kai Ambos and Anina Timmermann, 'Terrorism and Customary International Law', in Saul, *Research Handbook on International Law and Terrorism*, pp. 28ff.

²⁷³ Rosand, 'The UN-Led Multilateral Response to Jihadist Terrorism: Is A Global Counterterrorism Body Needed?', p. 407; D. Blöcher, 'Terrorism as an international crime. The definitional problem', *Eyes on the ICC*, Vol. 8, No. 1 (2011/12), p. 107.

²⁷⁴ Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism', pp. 1036–7; Olson, 'Prosecuting Suspected Terrorists: The "War on Terror" Demands Reminders about War, Terrorism and International Law', pp. 488–90.

²⁷⁵ Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism', pp. 1035–6; Lim, 'The Question of a Generic Definition of Terrorism under General International Law', pp. 41–3; T. Wiegand, 'The Universal Terrorist', pp. 921–2.

²⁷⁶ Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism', pp. 1039–41; Lim, 'The Question of a Generic Definition of Terrorism under General International Law', pp. 38–41.

Box 8. The 1997 Terrorist Bombings Convention: Core Offences

Article 2

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:
 - (a) With the intent to cause death or serious bodily injury; or
 - (b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.
2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.
3. Any person also commits an offence if that person:
 - (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 2 of the present article; or
 - (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 of the present article; or
 - (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

Instead, a series of international legal instruments deal with specific acts of terrorism such as aircraft hijacking, hostage-taking, bombings, nuclear terrorism, or financing of terrorist acts or organizations. In general, these instruments criminalize certain forms of conduct and seek to ensure that perpetrators of such terrorist acts are not able to escape trial and punishment by absconding to another country.²⁷⁷ They do so by providing an international legal basis for states to extend their national jurisdiction to crimes that have not been committed in whole or in part on their territory, or that have been committed without the involvement of one of their nationals. They typically contain compulsory universal jurisdiction clauses (*aut dedere aut judicare*), requiring states to prosecute or extradite alleged offenders found within their territory.²⁷⁸ They also create arrangements for judicial cooperation and mutual legal assistance.²⁷⁹

Since this normative framework is designed for acts of terrorism that have an international or transnational component, it is generally well suited to address foreign fighters as a terrorism threat. The conventions require states parties to criminalize and punish perpetration or participation in terrorist acts, including certain preparatory acts, in their domestic law. The most far-reaching obligations in this respect are found in the 1997 Suppression of Terrorist Bombings Convention (see Box 8), the 1999 Convention on Terrorist Financing, and the 2005 Convention for the Suppression of Acts of Nuclear Terrorism.²⁸⁰ These all cover contribution to the defined offences 'by a group acting with a common purpose', but prosecute only specific acts. Therefore, they do not criminalize mere membership of a terrorist group or the fact of receiving terrorist training.

²⁷⁷ *Ibid.*, pp. 45–7.

²⁷⁸ M. A. Newton, 'Terrorist Crimes and the *aut dedere aut judicare* obligation', in van den Herik and Schrijver (eds.), *Counter-Terrorism Strategies*, p. 68.

²⁷⁹ Most of these counterterrorism treaties have been widely ratified. But while they offer important tools of state to state cooperation, their effectiveness hinges on domestic implementation, in particular translation of judicial cooperation provisions into workable laws, policies, and practices. A. du Plessis, 'A snapshot of international criminal justice cooperation against terrorism since 9/11', in van den Herik and Schrijver (eds.), *Counter-Terrorism Strategies*, p. 51.

²⁸⁰ For a discussion, see, e.g., S. Witten, 'The International Convention for the Suppression of Terrorist Bombings', in Saul, *Research Handbook on International Law and Terrorism*, pp. 140–1.

Box 9. The 1997 Terrorist Bombings Convention: Exclusion of Acts during Armed Conflict

Article 19

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

Exclusion clauses for acts governed by IHL

Counterterrorism treaties that cover acts that may occur during an armed conflict typically include provisions which *exclude* acts governed by IHL.²⁸¹ This is true of the 1979 Hostages Convention (Article 12), the 1997 Terrorist Bombings Convention (Article 19: see Box 9), the 1999 Terrorist Financing Convention (Article 21), and the 2005 Nuclear Terrorism Convention (Article 4). Indeed, referring to these Conventions, the ICTY ‘notes a growing tendency in international law to distinguish between terror in times of peace and terror in situation of armed conflicts as understood in international humanitarian law’.²⁸²

For example, the 1997 Terrorist Bombings Convention and the 2005 Nuclear Terrorism Convention exclude ‘activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law’. Some affirm that the term ‘armed forces’ does not include non-state armed actors.²⁸³ In fact, it should be

understood to refer to state *and* non-state actors.²⁸⁴

The same provision uses a different term (‘military forces of a State’) when referring exclusively to state forces. Second, in an IAC, under both treaty and customary law, the term ‘armed forces’ in Article 43 of the 1977 Additional Protocol I covers all persons who fight on behalf of a party to a conflict and who subordinate themselves to its command, including militia and other irregular armed units.²⁸⁵ Since, formally, no combatant privilege or POW status is recognized in NIACs, the treaty texts do not define armed forces in the context of a NIAC. Arguably, the reference to ‘members of armed forces’ in Common Article 3²⁸⁶ includes armed forces of the state and armed forces of the non-state party.²⁸⁷

In conclusion, while UN counterterrorism treaties tend to exclude acts by armed forces that are committed during an armed conflict, many of the measures adopted by the Security Council blur the distinction between armed conflict and terrorism, notably in respect of designated terrorist groups that are at the same time a party to an armed conflict.

²⁸¹ Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 40–1; K. Trapp, ‘The Interaction of the International Terrorism Suppression Regime and IHL in Domestic Criminal Prosecutions: the UK Experience’, in D. Jinks et al. (eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, TMC Asser Press, 2014, pp. 170–5; for a contrary view, see Kretzmer, ‘Terrorism and the international law of occupation’, pp. 239–44.

²⁸² *Prosecutor v. (Dragomir) Milošević*, Judgment (Trial Chamber), 2007, §877.

²⁸³ For examples of such state practice, see Mancini, ‘Defining Acts of International Terrorism in Time of Armed Conflict’, pp. 143–5; see also Sassòli with Rouillard, ‘La définition du terrorisme et le droit international humanitaire’, p. 44.

²⁸⁴ A. Gioia, ‘The Definition of Terrorism in International Criminal Law’, in W. P. Heere (ed.), *From Government to Governance. The Growing Impact of Non-State Actors on the International and European Legal Systems*, TMC Asser Press, 2004, p. 344; D. O’Donnell, ‘International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces’, *IRRC*, Vol. 88, No. 864 (December 2006), pp. 868ff; Trapp, ‘The Interaction of the International Terrorism Suppression Regime and IHL’, p. 173.

²⁸⁵ See, for example, the 2009 ICRC Interpretative Guidance. Kretzmer (‘Terrorism and the international law of occupation’, pp. 240–1) argues that during an occupation the Terrorism Bombings Convention would not apply to armed groups that meet the criteria for POW status, but would apply to bombings by individuals who do not belong to such groups.

²⁸⁶ See Common Article 3(1): ‘Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause...’.

²⁸⁷ 2009 ICRC Interpretative Guidance, p. 28. The guidance defines organized armed groups as ‘the armed forces of a non-State party to the conflict’. *Ibid.*, Recommendation II, the concept of civilian in non-international armed conflict, p. 16, and commentary, pp. 27ff.

Box 10. The Global Counterterrorism Forum and ‘Foreign Terrorist Fighters’

Launched on 22 September 2011, the GCTF is an informal, multilateral platform composed of 29 member states plus the EU. The GCTF focuses on capacity building to support the implementation of the UN Global Counterterrorism Strategy. It adopted a series of declarations and memoranda on good practices, for example on kidnapping for ransom or countering violent extremism. The GCTF has no authority to take legally binding decisions. Member states are encouraged to consider good practices. The GCTF and its working groups promote implementation of its memoranda at national and international level.

In September 2013, the GCTF launched the ‘Foreign Terrorist Fighters (FTF) Initiative’. Led by Morocco and the Netherlands, the initiative resulted in ‘The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon’, adopted at the ministerial plenary in New York in September 2014. At the same time, the GCTF set up a Working Group for implementation of the Hague – Marrakech Memorandum.

The Hague – Marrakech Memorandum on FTFs sets out a series of good practices to detect and intervene against

- a) radicalisation to violent extremism.
- b) recruitment and facilitation.
- c) travel and fighting.
- d) return and reintegration.

The good practices set out in the Hague Marrakech Memorandum played an important role in shaping Security Council Resolution 2178. Resolution 2178 expressly refers to the GCTF memorandum on ‘foreign terrorist fighters’ in its preambular paragraphs.

The Hague Marrakech Memorandum and information on the Working Group on ‘foreign terrorist fighters’ are available on the website of the GCTF: <https://www.thegctf.org/web/guest/foreign-terrorist-fighters>.

2. UN Security Council measures

Before 9/11, the issue of international terrorism was generally under the purview of the UN General Assembly. The Security Council only adopted resolutions in response to particular acts of international terrorism, such as the Lockerbie bombing.²⁸⁸ Since 9/11, however, the Security Council has emerged as a leading actor. It has established a detailed and complex normative framework in support of counterterrorism, and related oversight bodies.

Sanctions regime against al-Qaeda and its associates: Resolution 1267 (1999)

When the Security Council adopted Resolution 1390 (2002) after the fall of the Taliban regime, it

expanded the reach of Resolution 1267 (1999) and its oversight body (the 1267 Sanctions Committee) to deal with the global threat from al-Qaeda. In contrast to earlier resolutions on Afghanistan, Resolution 1390 did not refer to any particular state and has an open-ended character. It turned the 1267 sanctions regime into a general sanctions regime designed to deal with al-Qaeda and its associates, without time limits and wherever these were located.²⁸⁹

The 1267 sanctions regime requires states to freeze assets, impose a travel ban, and deny weapons to individuals or entities associated with the Taliban or al-Qaeda. The 1267 Sanctions Committee monitors implementation of these sanctions and maintains a list of individuals and entities to which the sanctions apply. The listing and de-listing process gradually changed with a series of Security Council resolutions.²⁹⁰ Under Resolution 1988 (2011), the sanctions regime and its associated lists were divided to distinguish between the Taliban on one

²⁸⁸ K. W. Stiles, ‘The Power of Procedure and the Procedures of the Powerful: Anti-Terror Law in the United Nations’, *Journal of Peace Research*, Vol. 43, No. 1 (2006), pp. 39–40.

²⁸⁹ L. Ginsberg, ‘The United Nations Security Council’s Counter-terrorism Al-Qaida Sanctions Regime: Resolution 1267 and the 1267 Committee’, in Saul, *Research Handbook on International Law and Terrorism*, pp. 609–11.

²⁹⁰ UN Security Council Resolutions 1204 (2009), 2038 (2012), and 2161 (2014).

hand, and al-Qaeda and associated entities on the other. Various Security Council resolutions provide guidance on the application of terms ('individuals', 'entities', 'associated with'). For example, Resolution 1989 (2011) provides that

[A]cts or activities indicating that an individual, group, undertaking or entity is associated with Al-Qaida include

- (a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
- (b) supplying, selling or transferring arms and related materiel to;
- (c) recruiting for; or otherwise supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof.²⁹¹

The requirements set out in paragraph (a) 'apply to financial and economic resources of every kind, including but not limited to those used for the provision of Internet hosting or related services, used for the support of Al-Qaida and other individuals, groups, undertakings or entities associated with it'.²⁹²

With respect to the foreign fighter phenomenon, these broad criteria cover individuals who travel or intend to travel to Syria to fight with Islamic State and al-Nusra, each of which has been listed by the Council as an alias for al-Qaeda in Iraq.²⁹³ The criteria also cover those who recruit such individuals or facilitate their travel. Both the leader of al-Nusra, Abu Mohammed al-Jawlani, and the leader of Islamic State, Ibrahim Awwad Ibrahim Ali al-Badri al-Samarrai (more commonly known as Abu Bakr al-Baghdadi), are listed. Indeed, the Council confirmed in Resolutions 2170 and 2178 that 'foreign terrorist fighters', and those associated with their recruitment, financing, or travel, are eligible for inclusion on the sanction list.²⁹⁴ In a

deviation from normal procedure, the Council added six individuals linked to al-Nusra or Islamic State when it adopted Resolution 2170.²⁹⁵ Pursuant to the resolution, the 1267 Sanctions Committee added two entities and fourteen individuals, including two French foreign fighters, to the al-Qaeda sanctions list on 23 September 2014.²⁹⁶

The 1267 Sanctions Committee, an executive organ of the UN, determines which entities and individuals associated with al-Qaeda are listed. The listing serves a specific function,²⁹⁷ namely to impose non-criminal sanctions. These limit the ability of a listed group or individual to act, and therefore do harm.²⁹⁸ In itself, therefore, the listing process determines neither individual criminal status nor the status of a group outside this specific context.²⁹⁹ Moreover, the association criteria are inevitably applied broadly because association with al-Qaeda is the single essential condition for being subjected to the general sanctions regime; no other general sanctions regime against groups labelled as terrorist exists on the global level. Islamic State continued to be listed even after al-Qaeda expressly repudiated the group.

Other groups commonly labelled as 'terrorist' are listed in the context of UN sanctions regimes relating to particular countries. For example, al-Shabaab is on a list of individuals and entities subject to sanctions imposed by Security Council Resolutions 751 (1992) and 1907 (2009) with respect to Somalia and Eritrea. Individual countries and regional organizations hold various lists of terrorist groups, but these do not bind other states.

Attempts to broaden Security Council action to encompass other terrorist groups that are not associated with al-Qaeda have stalled because it has been inherently difficult to reach consensus on a definition of terrorism, and by extension, on terrorist groups. In the aftermath of the Beslan hostage crisis, the Security Council adopted Resolution 1566 (2004), which, among other actions, established a working group to

²⁹¹ UN Security Council Resolution 1989 (2011), §4.

²⁹² *Ibid.*, §5.

²⁹³ The list can be accessed at: www.un.org/sc/committees/1267/AQList.htm#alqaedaent.

²⁹⁴ Security Council Resolutions 2170 (2014), §7; and 2178 (2014), §20.

²⁹⁵ Security Council Resolution 2170 (2014), §719 and Annex I.

²⁹⁶ Pursuant to Resolution 2170 (2014), the 1267 Sanctions Committee added two entities and fourteen individuals, including two French foreign fighters, to the al-Qaeda sanctions list on 23 September 2014.

²⁹⁷ Robert Kolb points out that the various definitions (broader and narrower in scope) serve different legal functions. For example, provisions dealing with terrorist financing usually adopt a broader scope than those dealing with prosecution of acts of terrorism where the principle of *nullum crimen sine lege* imposes more stringent conditions. See R. Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism*, Hart, 2004, p. 234.

²⁹⁸ E. Carisch, S. Eckert, L. Rickard-Martin, 'High Level Review of UN Sanctions', Background Paper, Watson Institute for International Studies, Brown University, 2014, p. 12. At: www.comcapint.com/pdfs/20140706_HLR_Background.pdf.

²⁹⁹ E. Bakker, C. Paulussen, and E. Entenmann, 'Dealing with European Foreign Fighters in Syria: Governance Challenges and Legal Implications', Research Paper, International Centre for Counter-Terrorism, December 2013, p. 11.

consider and submit to the Security Council practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities, other than those designated by the Al-Qaida/Taliban Sanctions Committee, including more effective procedures considered to be appropriate for bringing them to justice through prosecution or extradition, freezing of their financial assets, preventing their movement through the territories of Member States, preventing supply to them of all types of arms and related material, and on the procedures for implementing these measures.³⁰⁰

Unable to reach agreement on groups that should be considered terrorist, the Working Group has yet to produce meaningful recommendations.³⁰¹

Finally, although the objectives of the sanctions are preventive, their open-ended nature, and the absence of appeal mechanisms that permit individuals and entities to challenge inclusion on the list, render them more punitive in character.³⁰² It can be argued that the Security Council and the 1267 Sanctions Committee exercise quasi-judicial powers in this context, while refusing to grant affected individuals and entities their due process rights and using a low evidentiary standard.³⁰³ For these reasons, the 1267 sanctions regime has been sharply criticized on human rights grounds, principally for failing to include due process guarantees and independent judicial oversight in its listing and de-listing process.³⁰⁴

Despite some improvements, most notably the appointment of an Ombudsperson under Security Council Resolution 1904 (2009), the regime still

falls short of complying with international human rights standards.³⁰⁵ The European Court of Human Rights,³⁰⁶ the European Court of Justice,³⁰⁷ and the Human Rights Committee³⁰⁸ have all criticized European states for their failure to safeguard human rights when implementing the 1267 sanctions regime. Criticism has not seemed to deter the Security Council or the 1267 Sanctions Committee from regularly adding individuals to the list. Recent Security Council resolutions explicitly encouraged member states to submit the names of individuals and entities associated with al-Qaeda to the 1267 Sanctions Committee.³⁰⁹ At the same time it:

requests that Member States and relevant international organizations and bodies encourage individuals and entities that are considering challenging or already in the process of challenging their listing through national and regional courts to seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson.³¹⁰

Although every delisting request made since the establishment of the Office of the Ombudsperson has resulted in delisting, the system still falls short of constituting an effective review mechanism because the Ombudsperson's recommendations on delisting can be overturned by a simple decision of the 1267 Committee.³¹¹ In addition, the process still lacks transparency because the petitioner receives only summary reasons given by the Committee in delisting cases and has no access to the recommendation and comprehensive report of the Ombudsperson.³¹²

³⁰⁰ UN Security Council Resolution 1566 (2004), §9.

³⁰¹ Rosand, 'The UN-Led Multilateral Response to Jihadist Terrorism: Is A Global Counterterrorism Body Needed?', p. 414.

³⁰² A. Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion', *European Journal of International Law*, No. 17 (2006), pp. 905–06.

³⁰³ Ginsberg, 'The United Nations Security Council's Counter-terrorism Al-Qaida Sanctions Regime', p. 611.

³⁰⁴ Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion', pp. 905–10; Ginsberg, 'The United Nations Security Council's Counter-terrorism Al-Qaida Sanctions Regime', pp. 612–25; I. Johnstone, 'The UN Security Council, Counterterrorism and Human Rights', in A. Bianchi and A. Keller (eds.), *Counterterrorism: Democracy's Challenge*, Hart, 2008, pp. 342–3.

³⁰⁵ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Guarantees While Countering Terrorism, UN doc. A/67/369, 26 September 2012, §§12–58.

³⁰⁶ ECtHR, *Nada v. Switzerland*, Judgment, 12 September 2012.

³⁰⁷ European Court of Justice, *Kadi and Al Barakaat International Foundation v. Council of the EU and Commission of the EC*, Judgment (joined Cases C-402/05 P & C-415/05 P), 3 September 2011; *European Commission and the Council of the European Union v. Yassin Abdullah Kadi*, Judgment (joined Cases C-584/10 P, C-593/10 P and C-595/10 P), 18 July 2013.

³⁰⁸ Human Rights Committee, *Nabil Sayadi and Patricia Vinck v. Belgium*, Views, 29 December 2008.

³⁰⁹ See Security Council Resolutions 2083 (2012), §10, and 2161 (2014), §30.

³¹⁰ Security Council Resolution 2083 (2012), §15.

³¹¹ Eighth report of the Office of the Ombudsperson, pursuant to §20(c) of Annex II to Security Council Resolution 2161 (2014), UN doc. S/2014/533, 31 July 2014, §34.

³¹² For a detailed review of the current delisting system and its conformity with human rights standards, see Ginsberg, 'The United Nations Security Council's Counter-terrorism Al-Qaida Sanctions Regime', pp. 617–25. Security Council Resolution 2161 (2014) provides for a 60-day deadline for the transmittal of reasons by the Committee to the Ombudsperson.

General counterterrorism regime: Resolution 1373 (2001)

The second pillar of the UN Security Council sanctions regime is the framework generated by Security Council Resolution 1373 (2001). Under Chapter VII of the UN Charter, Resolution 1373 famously and controversially³¹³ established a general regulatory framework to combat terrorism, without defining terrorism, terrorist acts, or designating particular groups as 'terrorist'. Limited neither in time nor to a particular situation, it imposes general obligations on all states. In that sense, it has a legislative character.³¹⁴

First, Resolution 1373 requires states to criminalize, prosecute, and punish the financing of terrorist acts, and other acts connected to terrorism. States are asked to:

ensure that any person who participated in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations.³¹⁵

This obligation is considerably broader than similar obligations in international treaties governing specific terrorist offences, but the exact contours of the obligation are to be particularized in domestic law. In addition, Resolution 1373 establishes a duty to extradite and prosecute alleged perpetrators of terrorist acts in order to deny them a 'safe haven'.

Second, the resolution imposes sweeping obligations in addition to the adoption of criminal law measures. Several are particularly relevant to foreign fighters. States are asked to adopt measures:

- To freeze assets of terrorists.
- To deny travel facilities and safe haven to terrorists, including by establishing effective border controls and controls on the issue of identity papers and travel documents,

and measures to combat fraudulent travel documents.

- To prevent recruitment of terrorists.
- To cooperate with other states over sharing of information and matters of criminal justice.

Some of these measures are already contained in the international conventions against terrorism. For example, the provisions on preventing financing of terrorism are modelled on the UN Terrorism Financing Convention. However, Resolution 1373 set out uniform legally binding obligations for all UN member states whereas the counterterrorism treaties only bound states that had ratified them. It also extended their content.³¹⁶ For example, the Terrorism Financing Convention required states to criminalize intentional funding of acts of terrorism, whereas Resolution 1373 requested states to prohibit indirect funding of terrorist acts as well.³¹⁷ Finally, Resolution 1373 omitted various safeguards that were incorporated in the international conventions. For example, in contrast to the UN Terrorism Financing Convention, it included neither fair trial guarantees nor an exclusion clause with respect to acts governed by IHL. When implementing Resolution 1373, some states created broadly defined offences that criminalized 'association with' or the provision of 'support' or 'services' to groups or individuals designated as terrorist, descriptions which could be interpreted to apply to many humanitarian activities during an armed conflict.³¹⁸

Despite imposing far-reaching obligations on states to combat acts of terrorism, the Security Council has also abstained from defining terrorism. Resolution 1566 reiterates the obligation to deny safe haven to individuals involved in acts of terrorism, and in doing so, to prevent and punish acts that are

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons,

³¹³ See, for example, L. M. Hinojosa-Martinez, 'A Critical Assessment of United Nations Security Council Resolution 1373', in Saul, *Research Handbook of International Law and Terrorism*, pp. 629–31; Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion', pp. 885–9.

³¹⁴ I. Johnstone, 'The UN Security Council, Counterterrorism and Human Rights', pp. 336–7.

³¹⁵ Security Council Resolution 1373 (2001), §2(e).

³¹⁶ For a detailed assessment, see L. M. Hinojosa-Martinez, 'A Critical Assessment of United Nations Security Council Resolution 1373', in Saul, *Research Handbook of International Law and Terrorism*, pp. 627–9.

³¹⁷ Resolution 1373 (2001), §1(d).

³¹⁸ The UN Special Rapporteur on Human Rights and Counterterrorism criticized the CTC for showing 'little, if any interest, in the definition of terrorism at the national level', problematic because 'the CTC may end up being understood as encouraging the application of measures designed to implement resolution 1373(2001) in respect of anything that under national law qualifies as "terrorism", however defined'. See Report of the of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN doc. E/CN.4/2006/98, 28 December 2005, §62.

Box 11. Resolution 2178 (2014): Prevent and suppress the flow of 'foreign terrorist fighters'

1. Condemns the violent extremism, which can be conducive to terrorism, sectarian violence, and the commission of terrorist acts by foreign terrorist fighters, and demands that all foreign terrorist fighters disarm and cease all terrorist acts and participation in armed conflict;

5. Decides that Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of 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, and the financing of their travel and of their activities;

6. Recalls its decision, in resolution 1373 (2001), that all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and decides that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense:

(a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories 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;

(b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of 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; and,

(c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of 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;

7. Expresses its strong determination to consider listing pursuant to resolution 2161 (2014) individuals, groups, undertakings and entities associated with Al-Qaida who are financing, arming, planning, or recruiting for them, or otherwise supporting their acts or activities, including through information and communications technologies, such as the internet, social media, or any other means;

8. Decides that, without prejudice to entry or transit necessary in the furtherance of a judicial process, including in furtherance of such a process related to arrest or detention of a foreign terrorist fighter, Member States shall prevent the entry into or transit through their territories of any individual about whom that State has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit through their territory for the purpose of participating in the acts described in paragraph 6, including any acts or activities indicating that an individual, group, undertaking or entity is associated with Al-Qaida, as set out in paragraph 2 of resolution 2161 (2014), provided that nothing in this paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals or permanent residents;

10. Stresses the urgent need to implement fully and immediately this resolution with respect to foreign terrorist fighters, underscores the particular and urgent need to implement this resolution with respect to those foreign terrorist fighters who are associated with ISIL, ANF and other cells, affiliates, splinter groups or derivatives of Al-Qaida, as designated by the Committee, and expresses its readiness to consider designating, under resolution 2161 (2014), individuals associated with Al-Qaida who commit the acts specified in paragraph 6 above.

intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitutes offences within the scope of and as defined in the international conventions and protocols relating to terrorism.³¹⁹

But the resolution does not purport to restrict the scope of the obligations imposed by Security Council resolution 1373 to such acts of terrorism. The failure to define terrorism created difficulties in implementing Resolution 1373. For example, some states made use of the resolution to adopt extremely broad definitions of terrorism or proscribe, in similarly broad terms, association with groups or individuals designated as terrorist.³²⁰ A number of national terrorism laws cover acts committed by armed groups that are lawful under IHL,³²¹ or proscribe³²² designated terrorist groups, including groups that are parties to an armed conflict, making it a terrorist offence for individuals to be involved in certain specified ways with such a proscribed organization. While the detrimental effect on human rights of broad terrorism definitions in national criminal law is widely recognized, including by the CTC and CTED,³²³ less attention has been paid to the potential overlap between IHL and national terrorism legislation.

‘Foreign Terrorist Fighters’ in Syria and Iraq: Resolution 2170 (2014)

Against the background of foreign fighter mobilization and associated terrorism threat, and the rapid expansion of Islamic State in Iraq and Syria (see Section A), on 15 August 2014 the Council adopted Resolution 2170.³²⁴ It condemned the ‘terrorist acts of ISIL [IS] and its violent extremist ideology, and its continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law’,³²⁵ and, acting under Chapter VII, imposed three main duties on states.

First, it reiterated the obligation set out in Resolution 1373 on the duty to prevent and suppress the financing of terrorism. Since both Islamic State and al-Nusra apparently control oil fields in Syria and Iraq, this includes an obligation to refrain from trading with them.³²⁶

Second, as mentioned, the Council confirmed that to the 1267 sanctions list might be added ‘those recruiting for or participating in the activities of ISIL, ANF [al-Nusra front], and all other individuals, groups undertaking and entities associated with Al-Qaida under the Al-Qaida sanctions regime, including through financing or facilitating, for ISIL or ANF, of travel of foreign terrorist fighters’.³²⁷ At adoption of the resolution, it added to the al-Qaeda sanctions list six individuals linked to Islamic State or al-Nusra.³²⁸

Third, and most important for this Briefing, the Council condemned recruitment of ‘foreign terrorist fighters’ by Islamic State, al-Nusra, and other entities associated with al-Qaeda, and required all ‘foreign terrorist fighters with ISIL and other terrorist groups’ to withdraw. To suppress the recruitment of ‘foreign terrorist fighters’, states are required to:

- Take national measures to suppress the flow of ‘foreign terrorist fighters’ to Islamic State, al-Nusra, and others associated with al-Qaeda.
- Bring to justice ‘foreign terrorist fighters’ of Islamic State, al-Nusra, and others associated with al-Qaeda.

The Council abstained from defining ‘foreign terrorist fighter’, but the content of the resolution makes clear that it referred to foreign fighters of Islamic State, al-Nusra, and entities associated with al-Qaeda. Whereas the conflation of terrorism and

³¹⁹ Security Council Resolution 1566 (2004), §3.

³²⁰ A. Bianchi, ‘Assessing the Effectiveness of the UN Security Council’s Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion’, *European Journal of International Law*, No. 17 (2006), pp. 899–900; L. M. Hinojosa-Martinez, ‘A Critical Assessment of United Nations Security Council Resolution 1373’, p. 638; Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN doc. E/CN.4/2006/98, §§26–50.

³²¹ B. Saul, ‘Terrorism and International Humanitarian Law’, in *Research Handbook of International Law and Terrorism*, pp. 230–1. See also *R. v. Mohammed Gul* [2012] EWCA Crim 280.

³²² This is the case in Australia, Canada, the UK, and the USA, for example.

³²³ CTC, ‘Global Survey of the Implementation of Security Council Resolution 1373 (2001) by Member States’, UN doc. S/2011/463, 2011, pp. 281–90; CTED, ‘Thematic discussion of the CTED on the human rights aspects of counter-terrorism in the context of resolution 1373 (2001)’, Background Paper, 2010, at: www.un.org/en/sc/ctc/docs/2010/2010_10_07_thematic-humanrights.pdf2.

³²⁴ Security Council Resolution 2170 (2014).

³²⁵ *Ibid.*, §1.

³²⁶ *Ibid.*, §7.

³²⁷ *Ibid.*, §19 and Annex I.

³²⁸ *Ibid.*, §§18–21. The EU amended its own list accordingly by means of Commission Implementing EU Regulation No. 914/2014 of 21 August 2014.

armed conflict in Council resolutions is not new³²⁹ (the ‘terrorist’ label has regularly been employed to express condemnation and abhorrence), the Council’s use of the term ‘foreign terrorist fighters’ overtly and explicitly associates the fighters with particular groups and with terrorism.

Legislation to prosecute ‘foreign terrorist fighters’: Resolution 2178 (2014)

On 24 September 2014, at a high-level summit chaired by US President Barack Obama, the Council adopted Resolution 2178 (see Box 11). Based on a draft resolution submitted by the USA,³³⁰ and building upon the GCTF ‘Memorandum for a More Effective Response to the Foreign Terrorist fighter Phenomenon’ (see Box 10), it focused exclusively on ‘foreign terrorist fighters’, defining them as:

individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.³³¹

The reference to ‘including in connection with an armed conflict’ plainly calls acts governed by IHL ‘terrorist acts’, without confining the term to acts prohibited by IHL, such as attacks against civilians or execution of persons *hors de combat*. In addition, it asserts that joining an entity that is both party to an armed conflict and designated a terrorist group may amount to ‘receiving terrorist training’, notwithstanding the fact that IHL rules may apply.

The operative paragraphs confirm that the Council was treating ‘foreign terrorist fighters’ as actors in an armed conflict. First, under Chapter VII, the Council ‘demands that all foreign terrorist fighters disarm and cease all terrorist acts and participation

in an armed conflict’.³³² Second, it stipulates that states shall suppress and prevent recruitment, organization, transport and equipment of such ‘foreign terrorist fighters’, but in accordance with their obligations under international human rights law (HRL), international refugee law, and IHL. To do so, the Council requests states to adopt the legislation required to prosecute:

- Their nationals and other individuals who travel or attempt to travel abroad to perpetrate, plan, prepare or participate in terrorist acts or to provide or receive terrorist training.
- Wilful provision or collection of funds (by any means, direct or indirect) by their nationals or in their territories with the intention or knowledge that these funds will be used to finance the travel of ‘foreign terrorist fighters’.
- Wilful organization, or other facilitation, including by acts of recruitment, by their nationals or others in their territory, of ‘foreign terrorist fighters’.³³³

The Security Council thus requires states to criminalize terrorism-related conduct beyond what is provided for in any universal treaty on terrorist offences, without providing a definition of ‘terrorism’.³³⁴ Although generally sympathetic to the aim of the resolution, legal scholars emphasize that Resolution 2178 carries a significant risk of abuse.³³⁵ One argues that it ‘wipes out the piecemeal progress made over 13 long years in introducing protections of human rights and the rule of law into the highly problematic manner in which the Security Council exercises its supranational powers’.³³⁶

The resolution significantly blurs the lines between terrorism and armed conflicts, not just rhetorically, but by creating legal consequences for ‘foreign terrorist fighters’ who intend to travel abroad. Without defining terrorism, but specifically

³²⁹ See, for example, Resolution 2139 (2014), §14, on ‘terrorist attacks’ committed by groups associated with al-Qaeda in Syria; Resolution 2160 (2014), preambular §2, on ‘terrorist activities by Taliban, al-Qaida and other violent and extremist groups’; and Resolution 2158 (2014), §7, on ‘terrorist acts’ committed by al-Shabaab in Somalia.

³³⁰ ‘U.N. Security Council plans to suppress foreign extremist fighters’, *Reuters*, 9 September 2014. At: www.reuters.com/article/2014/09/09/us-iraq-crisis-un-idUSKBN0H408E20140909.

³³¹ Resolution 2178, preambular §8.

³³² *Ibid.*, §1.

³³³ *Ibid.*, §6(a)-(c).

³³⁴ M. Scheinin, ‘A Comment on Security Council Resolution 2178 (Foreign Terrorist Fighters) as a “Form” of Global Governance’, *Just Security*, 6 October 2014. At: <http://justsecurity.org/15989/comment-security-council-res-2178-foreign-fighters-form-global-governance>. See also K. Ambos, ‘Our terrorists, your terrorists? The United Nations Security Council urges states to combat “foreign terrorist fighters”, but does not define “terrorism”’, *EJIL Talk*, 2 October 2014. At: <http://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/>.

³³⁵ M. Scheinin, ‘Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters’ *Verfassungsblog/On Matters Constitutional*, 25 September 2014. At: <http://www.verfassungsblog.de/en/back-post-911-panic-security-council-resolution-foreign-terrorist-fighters>.

³³⁶ M. Scheinin, ‘Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters’, *Just Security*, 23 September 2014. At: <http://justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>.

including acts associated with an armed conflict, the resolution's intended effect³³⁷ is to criminalize travel, or attempted travel, by foreign fighters to join groups condemned as terrorist groups.

The resolution expressly refers to 'foreign terrorist fighters' recruited by Islamic State, al-Nusra, and other groups associated with al-Qaeda that are listed under the 1267 sanctions regime.³³⁸ It requires states (at the very least) to criminalize travel or attempts to travel abroad to join any of the listed groups, and recruitment for such groups. At the same time, the obligations it creates are not limited to fighters of such groups. Other groups not listed

as al-Qaeda associates under the 1267 sanctions regime may be included.³³⁹ In short, it affirms as a matter of international law that the act of joining or attempting to join a group that engages in terrorism, including during an armed conflict, becomes a serious offence.

The non-retroactivity of criminal law must be stressed, of course: any offence, defining the crime of travelling or attempting to travel to engage in terrorist acts or terrorist training abroad, must not criminalize conduct that occurred prior to its entry into force.

³³⁷ 'U.N. Security Council plans to suppress foreign extremist fighters', *Reuters*, 9 September 2014. At: <http://www.reuters.com/article/2014/09/09/us-iraq-crisis-un-idUSKBN0H408E20140909>.

³³⁸ Resolution 2178, §10.

³³⁹ Attempts to travel to Ukraine, by both pro-Russian and pro-government foreign fighters may be covered, for example. See 'Ukraine War Pulls in Foreign Fighters', *BBC*, 31 August 2014. At: www.bbc.com/news/world-europe-28951324.

E. Foreign fighters under the European counterterrorism framework

Regional frameworks supplement the global counterterrorism frameworks. In Europe, the framework has two main pillars:³⁴⁰ first, the EU Framework Decision on Combating Terrorism and the EU Framework Decision on the European Arrest Warrant; second, the Council of Europe's 1977 Convention for the Suppression of Acts of Terrorism and its 2005 European Convention for the Prevention of Acts of Terrorism.

1. The EU Framework Decision on Combating Terrorism

The EU has implemented the obligations set out in Security Council Resolution 1373 by three means: a Framework Decision on Combating Terrorism, a Framework Decision on the European Arrest Warrant, and a targeted sanctions system.³⁴¹ The first of these is the cornerstone.³⁴²

Article 1 of the Framework Decision on Combating Terrorism defines 'terrorist offences' as 'intentional acts' that

given their nature or context, may seriously damage a country or an international organisation where committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilizing or

destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.³⁴³

It goes on to list acts that constitute terrorist offences under the definition. The list includes attacks upon life and hostage taking, but also 'causing extensive destruction ... to a public place or private property ... likely to result in major economic loss'.³⁴⁴ The definition has been criticized as overly broad, a concern that is compounded by the fact that the definition provides criteria for criminalizing a wide range of ancillary and preparatory acts.³⁴⁵ These include many acts that are relevant to the status and treatment of foreign fighters: 'offences relating to a terrorist group' (Article 2), 'offences linked to terrorist activities' (Article 3), incitement, complicity (aiding and abetting), and attempts in relation to such offences (Article 4).

In 2008, a new Framework Decision amended Articles 3 and 4.³⁴⁶ The amended Article 3 significantly expanded the provision's scope, to include the crimes of 'public provocation to commit a terrorist offence',³⁴⁷ 'recruitment for terrorism',³⁴⁸ and 'training for terrorism'. The latter refers to training for the purpose of committing a terrorist offence when it is known that training is provided for this purpose;³⁴⁹ receipt of training is not itself criminalized. A terrorist offence does not need to have been committed for these acts to be punishable.³⁵⁰ Given the wide range of ancillary and preparatory acts, many individuals may become

³⁴⁰ For an overview of legislative and policy action taken at European level, see Murphy, 'The Legal Response to Terrorism of the European Union and Council of Europe', in Saul, *Research Handbook of International Law and Terrorism*, pp. 685ff.

³⁴¹ See A. Reinisch, 'The Action of the European Union to Combat International Terrorism', in Bianchi (ed.), *Enforcing International Law*, pp. 125–9.

³⁴² For a review of obligations in the Framework Decision and their implementation, see E. J. Husabø and I. Bruce, *Fighting Terrorism through Multilevel Criminal Legislation, Security Council Resolution 1373, the EU Framework Decision on Combating Terrorism and their Implementation in Nordic, Dutch and German Criminal Law*, Martinus Nijhoff, 2009.

³⁴³ Article 1, EU Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism.

³⁴⁴ *Ibid.*, Article 1(1)(d).

³⁴⁵ T. Wiegand, 'The Universal Terrorist', pp. 930–1; E. Symeonidou-Kastanidou, 'Defining Terrorism', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 12, No. 1 (2004), pp. 23ff.

³⁴⁶ Decision 2008/919/JHA of 28 November 2008 Amending Framework Decision 2002/475/JHA on Combating Terrorism.

³⁴⁷ New Art. 3(1)(a): "Public provocation to commit a terrorist offence" shall mean the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed'.

³⁴⁸ New Art. 3(1)(b): "recruitment for terrorism" shall mean soliciting another person to commit one of the offences listed in Article 1(1)(a) to (h), or in Article 2(2)'.

³⁴⁹ New Art. 3(1)(c): "training for terrorism" shall mean providing instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of committing one of the offences listed in Article 1(1)(a) to (h), knowing that the skills provided are intended to be used for this purpose'.

³⁵⁰ New Art. 3 (3).

punishable 'long before anyone has committed any overt act defined as terroristic'.³⁵¹

The Framework Decision requires broader extraterritorial jurisdiction than any UN counterterrorism treaty, and includes active jurisdiction (for nationals and residents), passive jurisdiction, and protective jurisdiction. It removed the traditional condition of double criminality.³⁵² As with relevant UN treaties, the preamble of the Framework Convention excludes from its scope of application 'actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law'.³⁵³ The preamble also specifies that the Framework Decision does not intend to reduce or restrict human rights.³⁵⁴

Although terrorism, as defined under national law, is just one of 32 offences to which the EU Framework Decision on the European Arrest Warrant applies, it is an important tool of judicial cooperation.³⁵⁵ It abolishes the traditional system of extradition for suspected or convicted criminals and replaces it by mutual recognition of arrest warrants issued by EU states.

The EU's targeted sanctions system is another important, and controversial, area of EU action. First, the EU gave effect to the Security Council's sanctions (under Resolution 1267) by simply reproducing the list maintained by the 1267 Sanctions Committee.³⁵⁶ Second, to implement Security Council Resolution 1373, the EU created a separate autonomous or discretionary sanctions

list.³⁵⁷ At its own discretion, it lists and delists groups and individuals that are subject to sanctions. Listed entities include some groups that are parties to an armed conflict, such as the New People's Army in the Philippines, Hamas, the military wing of Hezbollah, the PKK, and the FARC.³⁵⁸ Both regimes have been successfully challenged before the European Court of Justice³⁵⁹ (notably in the leading case of *Kadi* on EU implementation of Security Council Resolution 1267³⁶⁰), *inter alia* for failing to comply with due process guarantees.

2. Council of Europe counterterrorism treaties

The 1977 European Convention on the Suppression of Acts of Terrorism is a 'traditional' counterterrorism treaty in the sense that it establishes mutual criminal cooperation, in particular by facilitating extradition, with respect to acts defined as terrorist by other international conventions.³⁶¹ More noteworthy, and more relevant for the foreign fighter phenomenon, is the 2005 European Convention for the Prevention of Acts of Terrorism. In contrast to the EU Framework decision, the 2005 Convention does not define terrorism. It declares instead that 'terrorist offences' means any of the offences within the scope of the international treaties listed in its annex.³⁶²

The Convention focuses on criminalizing activities that may facilitate, provoke, or incite acts of terrorism. In particular, it requires states to criminalize intentional acts of 'public provocation

³⁵¹ Wiegand, 'The Universal Terrorist', p. 931. See also M. Kaiafa-Gbandi, 'Terrorismusbekämpfung in der Europäischen Union und das vor-präventive Strafrecht: Neue Vorgaben für strafbare Taten nach dem Rahmenbeschluss 2008/919/JI', in F. Herzog and U. Neumann (ed.), *Festschrift für Winfried Hassemer*, C.F. Müller Verlag (2010), p. 1161.

³⁵² Art. 9, EU Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism.

³⁵³ *Ibid.*, preambular 11.

³⁵⁴ *Ibid.*, preambular 10. When adding the offence of incitement to terrorism, an article was also introduced to safeguard freedom of expression. See Framework Decision 2008/919/JHA of 28 November 2008.

³⁵⁵ For an assessment of the European Arrest Warrant, see, e.g., V. Glerum, K. Rozemond, and E. van Sliedregt, 'Lessons of the European Arrest Warrant', in van den Herik and Schrijver (eds.), *Counter-Terrorism Strategies*, p. 181.

³⁵⁶ Council Regulation 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama Bin Laden, the Al-Qaida network and the Taliban, and repealing Regulation No. 467/2001 prohibiting export of certain goods and services to Afghanistan, strengthening the flight ban, and extending the freeze of funds and other financial resources in respect of the Afghan Taliban.

³⁵⁷ Council Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

³⁵⁸ Implementing Regulation 790/2014 of 22 July 2014 implementing Art. 2(3) of Regulation 2580/2001 on specific restrictive measures against certain persons and entities with a view to combating terrorism, and repealing Implementing Regulation 125/2014. At: eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0790&from=EN.

³⁵⁹ For a detailed analysis, see C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, OUP, 2009, pp. 221–302 (UN List) and pp. 303–71 (autonomous EU list).

³⁶⁰ ECJ, *Kadi and Al Barakaat International Foundation v. Council of the EU and Commission of the EC*, Judgment, 2011; *European Commission and the Council of the European Union v. Yassin Abdullah Kadi*, Judgment, 2013.

³⁶¹ See C. Murphy, 'The Legal Response to Terrorism of the European Union and Council of Europe', p. 686.

³⁶² Art. 1.

to commit a terrorist offence' (Article 5),³⁶³ 'recruitment for terrorism' (Article 6),³⁶⁴ and 'training for terrorism' (Article 7).³⁶⁵ As in the amended EU Framework Decision, providing training for the purpose of committing a terrorist act is criminalized, but receiving training is not.³⁶⁶ Article 8 states that, for acts to constitute an offence, an act of terrorism does not need to be committed. Article 9 covers a range of ancillary offences, namely complicity, direction, organization, and contribution.

In terms of jurisdiction, the Convention's jurisdiction is less broad than that of the EU Framework Convention. Article 14 requires states to establish jurisdiction on the basis of territoriality and active nationality (without referring to residency). Finally, the Convention excludes the activities of armed forces in armed conflicts that are governed by IHL.³⁶⁷

Its most controversial provision was the new offence of public provocation to commit terrorist offences, because it covers both direct and indirect forms of incitement, raising the fear that it might stymie freedom of expression.³⁶⁸ To mitigate these fears, Article 12 of the European Convention requires states parties to ensure that Articles 5–7 and 9 are implemented in a manner that respects their human rights obligations. More generally, Article 26(4) stipulates that the Convention does not affect states' other obligations under international law, including with respect to refugee law.³⁶⁹

363 Art. 5: "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed'.

364 Art. 6: "recruitment for terrorism" means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group'.

365 Art. 9: "training for terrorism" means to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose'.

366 Although it is clear from the text of the convention, the Explanatory Report to the Convention states explicitly that: 'This provision does not criminalize the fact of receiving such know-how or the trainee'. See Explanatory Report, §116. At: conventions.coe.int/Treaty/EN/Reports/Html/196.htm.

367 Art. 26(5).

368 For an in-depth discussion of the provision, see A. Hunt, 'The Council of Europe Convention on the Prevention of Terrorism', *European Public Law*, Vol. 12, No. 4 (2006), p. 603.

369 See Explanatory Report, §§116, 277–80. At: conventions.coe.int/Treaty/EN/Reports/Html/196.htm.

F. State of nationality or habitual residence of foreign fighters

The presence of foreign fighters in an armed conflict raises a series of issues for third states (states that are not a party to the armed conflict, but may find themselves implicated on account of the participation of foreign fighters). First, the question arises whether the states of nationality or permanent residency, but also states of transit, have a duty under general international law to prevent the movement of foreign fighters. Second, returning foreign fighters may face prosecution for acts committed abroad. The association between the mobilization of foreign fighters and terrorism, and the characterization of some of the groups they join as ‘terrorist’, cause states to consider their obligations under international law to prevent and suppress terrorism. The question of terrorism-specific obligations is discussed briefly in this section and is addressed in more detail in Section D. Third, when foreigners, including fighters in armed conflict, are captured and detained during an armed conflict, their home state may be expected to exercise diplomatic protection on their behalf.

1. Preventing the movement of fighters

Whenever foreign fighters are present in an armed conflict, the state on whose territory the conflict occurs, and (if applicable) its state allies, may call on the states of nationality of foreign fighters, and transit states, to take measures to prevent them from joining the battlefield. A state that does not respond adequately may be accused of failing to prevent the influx of foreign fighters, or actively

encouraging them (or even sending them) in order to advance its own interests. Syria was accused of fuelling the Iraqi insurgency against the US-led coalition forces after the invasion of Iraq in 2003, for example, because it allowed foreign fighters, arms, and money to transit through Syria into Iraq.³⁷⁰ From the outset of its current armed conflict, Syria has repeatedly submitted the names of captured or deceased foreign fighters to the UN Security Council, and has accused their states of origin, and states of transit, of unlawfully interfering in Syria by actively fostering civil unrest and terrorism.³⁷¹ The question thus arises whether states are required by international law to take measures to prevent their own nationals from joining an armed conflict abroad and to prevent the passage across their territory of foreign fighters from other states.

The law of neutrality

Before the UN Charter, the issue of foreign fighters was mainly addressed by means of the law of neutrality, which regulates the legal rights and duties of a state that is not party to an armed conflict.³⁷² A state that failed to exercise due diligence in preventing its nationals from participating in an armed conflict abroad jeopardised its standing as a neutral state.³⁷³ However, the law of neutrality is widely believed to apply only to IACs.³⁷⁴ Despite attempts to apply it to NIACs (for example to justify detention of rebels who cross international borders³⁷⁵ or define who is an ‘unlawful enemy combatant’ in the ‘war on terror’ for the purposes of detention³⁷⁶), the law of neutrality seems ill-suited to address NIACs. In particular, it requires equal

³⁷⁰ See, for example, ‘Border Clashes as U.S. pressures Syria over Iraq’, *New York Times*, 15 October 2005. At: query.nytimes.com/gst/fullpage.html?res=9D0DE3D9143FF936A25753C1A9639C8B63&pagewanted=2. See also J. Felter and B. Fishman, ‘The Demographics of Recruitment, Finances, and Suicide’, pp. 32ff.

³⁷¹ See, for example, Letter dated 18 June 2014 from the Permanent Representative of Syria to the UN addressed to the Secretary-General, UN doc. S/2014/426, 20 June 2014, and Statement of the Representative of Syria during the discussion of the Report of the Secretary-General on the implementation of Security Council Resolution 2139 (2014), pp. 4–5.

³⁷² For an overview of the law of neutrality, see P. Seger, ‘The Law of Neutrality’, in A. Clapham and P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, OUP, 2014, pp. 248ff.

³⁷³ I. Brownlie, ‘Volunteers and the Law of War and Neutrality’, *International and Comparative Law Quarterly*, Vol. 5 (1956), p. 5.

³⁷⁴ M. Bothe, ‘The Law of Neutrality’, in Fleck (ed.), *The Handbook of International Humanitarian Law*, p. 578; Seger, ‘The Law of Neutrality’, p. 253. This is the position of Switzerland. *Swiss Neutrality*, 4th rev. edn, DDPS and DFAE, Bern, 2004.

³⁷⁵ Notably, states have wanted to do this in the context of refugee law, to intern rebels who join refugee flows in order to cross borders. See, e.g., S. Jaquemet, *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or Non-International Armed Conflict Become an Asylum Seeker?*, UNHCR Department of International Protection, PPLA/2004/01, 2004; and R. Da Costa, *Maintaining the Civilian and Humanitarian Character of Asylum*, UNHCR, Department of International Protection, PPLA, 2004.

³⁷⁶ See, for example, K. S. Chan, ‘Enemy Status and Military Detention in the War Against Al-Qaeda’, *Texas International Law Journal*, Vol. 47 (2011), p. 1; T. Bridgeman ‘The Law of Neutrality and the Conflict with Al Qaeda’, *New York University Law Review*, Vol. 85, No. 4 (2011), p. 1186.

treatment of all parties to a conflict.³⁷⁷ Symmetrical application is unlikely to be feasible wherever NIACs oppose a sovereign state and an armed group. The principle of non-intervention is more normally applied instead.³⁷⁸

Non-intervention

The customary law principle of non-intervention³⁷⁹ requires states to abstain from intervening in the internal or external affairs of other states, by using force³⁸⁰ or other coercive measures, including political or economic measures. Military support for armed opposition groups during a NIAC may amount to such unlawful intervention. According to the ICJ, this certainly occurs when it constitutes an 'indirect form of support for subversive or terrorist armed activities within another State'.³⁸¹

The 1970 UN Declaration on Friendly Relations specifies that, in accordance with the principle of non-intervention, 'no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State'.³⁸² In consequence, the principle of non-intervention covers provision of support by a state to armed groups or individuals that engage in subversive, terrorist, or armed activities abroad, but also toleration of the activities of such armed groups and individuals within its territory.³⁸³

The latter imposes a standard of due diligence.³⁸⁴ The duty is breached only if the territorial state fails to show due diligence in preventing such activities by armed groups or individuals.³⁸⁵

A long established principle of customary law that asserts that no state 'allow knowingly its territory to be used for acts contrary to the rights of other States'³⁸⁶ also imposes a standard of due diligence.³⁸⁷

Traditionally, the due diligence standard was applied when states harboured, or were unable to act against, armed groups operating in a neighbouring state or launching terrorist acts abroad³⁸⁸ (al-Qaeda in Afghanistan, Hezbollah in Lebanon). Since 9/11, some states have argued that such 'harbouring' or inability to act entitles other states to resort to force in self-defence.³⁸⁹ For instance, the US recently justified the expansion of its air strikes against Islamic State and groups associated with al-Qaeda on the grounds that the Syrian government was unable to act against them.³⁹⁰

Given the broad scope of the principle of non-intervention, including the duty of states to prevent harm emanating from their territory, it can be argued that states have an obligation to prevent the movement of foreign fighters.³⁹¹ The argument might be strengthened by analogy, since states already have a duty to prevent the financing, recruitment,

³⁷⁷ Seger, 'The Law of Neutrality', p. 257.

³⁷⁸ R. Kolb, *Ius in bello*, Helbing Lichtenhahn, Bruylant, 2009, p. 441.

³⁷⁹ International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)*, Judgment (Merits), 27 June 1987, *ICJ Reports 1986*, §202.

³⁸⁰ The prohibition of the use of force is a particular application of the principle of non-intervention, but the latter's scope is broader. See UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), 1970. See also M. Jamnejad and M. Wood, 'The Principle of Non-intervention', *Leiden Journal of International Law*, Vol. 22, No. 2 (June 2009), p. 349.

³⁸¹ *Nicaragua case*, §205.

³⁸² UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, third principle (non-intervention). As part of the principle prohibiting the use of force (first principle), the same declaration uses more restrictive terms, namely requiring states to 'refrain from instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts'.

³⁸³ Jamnejad and Wood, 'The Principle of Non-intervention', p. 361.

³⁸⁴ R. Pisillo Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', *German Yearbook of International Law*, Volume 35, 1992, p.34.

³⁸⁵ ICJ, *Nicaragua case*, §§154-8.

³⁸⁶ ICJ, *The Corfu Channel Case*, Judgment (Merits), 9 April 1949, *ICJ Reports 1949*, p. 22.

³⁸⁷ K. Trapp, *State Responsibility for International Terrorism*, OUP, 2011, p. 64.

³⁸⁸ Y. Dinstein, 'Terrorism as an International Crime', *Israel Yearbook of Human Rights*, Vol. 19 (1989), p. 66.

³⁸⁹ A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', *European Journal of International Law*, Vol. 12, No. 3 (2001), p. 997; R. S. Schöndorf, 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?', *New York University Journal of International Law and Politics*, Vol. 37 (2004-05), p. 22; K. Trapp, 'Back to Basics: Necessity, Proportionality and the Right to Self-Defence against Non-State Terrorist Actors', *International and Comparative Law Quarterly*, Vol. 56, No. 1 (2007), pp. 153ff.; Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 14-17.

³⁹⁰ Letter from the Permanent Representative of the USA to the UN to the UN Secretary-General, 23 September 2014, UN doc. S/2014/6095. At: www.cbsnews.com/htdocs/pdf/00_2014/09-2014/USlettertoSecretaryGeneral092314.pdf.

³⁹¹ See also T. Ruys, 'Of Arms, Funding and "Non-lethal Assistance" – Issues Surrounding Third-State Intervention in the Syrian Civil War', p. 49, who notes that '[i]t is open to discussion, for instance, ... whether they are legally obliged to take steps to prevent persons under their jurisdiction from joining one of the warring parties to the conflict'.

and transit of mercenaries;³⁹² and by the fact that foreign fighters have come to be mobilized on a large scale and in an organized manner (so that their movement is no longer sporadic, unorganised, and individual). An obligation to prevent the movement of foreign fighters would be a due diligence obligation, subject to states' knowledge of such activities.³⁹³ In addition, any measures taken to prevent movement must comply with international human rights (see below Section G).

The scope of a state's due diligence obligation to prevent harm abroad depends on its other international obligations, including those related to the fight against terrorism.³⁹⁴ Measures adopted by the Security Council in the aftermath of 9/11 impose more stringent requirements on states to prevent acts of terrorism.³⁹⁵ They include an obligation to deny travel to suspected terrorists and to prevent recruitment for terrorist purposes (see Section D above). In the case of foreign fighters in Syria, these measures impose an obligation on states to prevent the movement of foreign fighters to armed groups which the UN Security Council has declared are entities of al-Qaeda (Islamic State, al-Nusra). Security Council Resolutions 2170 (2014) and 2178 (2014) confirmed and further developed this obligation.

2. Prosecution of foreign fighters

States have several options if they decide to take criminal law measures to punish their nationals who join an armed insurgency abroad.

First, returning foreign fighters may be prosecuted when they return to their home country if they are suspected of committing or being involved in war crimes or other international crimes while they participated in an armed conflict abroad. As we have seen, IHL governs the conduct of non-state actors during an armed conflict, regardless of their nationality or permanent residency status (see Sections B and C). In Europe, all EU member states as well as Switzerland and Norway have ratified the Rome Statute of the ICC and have the necessary implementing legislation to enable them to exercise jurisdiction over war crimes, crimes against humanity, and genocide, including over crimes committed during an armed conflict abroad. The prosecution of returning foreign fighters for war crimes or other international crimes would face few jurisdictional obstacles, because states could rely on active nationality rather than the more controversial principle of universal jurisdiction.

NGOs,³⁹⁶ the UN Commission of Inquiry on Syria,³⁹⁷ and the OHCHR³⁹⁸ have reported that, during the current conflicts in Syria and Iraq, Islamic State and its fighters have been responsible for grave and widespread violations of IHL, which may amount to war crimes or crimes against humanity.³⁹⁹ The crimes cited include: executions of civilians and other persons no longer participating in hostilities, hostage-taking, ill-treatment and torture of detainees, sexual and gender-based violence, and recruitment of children.⁴⁰⁰ Foreign fighters who fought with Islamic State may have been involved in such acts and may face prosecution for their involvement,⁴⁰¹ regardless of whether or not they

³⁹² UN General Assembly Resolution 36/103: Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, 1981, §II(g).

³⁹³ K. Trapp, *State Responsibility for International Terrorism*, OUP, 2011, pp. 65–6; Jamnejad and Wood, 'The Principle of Non-intervention', p. 361.

³⁹⁴ See Trapp, *State Responsibility for International Terrorism*, p. 65. He points out that a 'state's obligation to prevent international terrorism (as a particular type of harm that might emanate from a state's territory) is a specific instantiation of this general obligation'.

³⁹⁵ *Ibid.*, pp. 75–82; R. P. Barnidge, 'States' Due Diligence Obligations with regard to International Non-State Terrorist Organisations Post-11 September 2001: the Heavy Burden that States Must Bear', *Irish Studies in International Affairs*, Vol. 16 (2005), p. 103.

³⁹⁶ See, for example, Amnesty International, 'Gruesome Evidence of Ethnic Cleansing in Northern Iraq as Islamic State Moves to Wipe Out Minorities', 2 September 2014, at: www.amnesty.org/en/news/gruesome-evidence-ethnic-cleansing-northern-iraq-islamic-state-moves-wipe-out-minorities-2014-0; Amnesty International, 'Rule of Fear: ISIS Abuses In Detention In Northern Syria', 19 December 2013, at: www.amnesty.org/en/library/asset/MDE24/063/2013/en/32d380a3-cc47-4cb6-869f-2628ca44cb99/mde240632013en.pdf.

³⁹⁷ See Commission of Inquiry on Syria reports. At: www.ohchr.org/en/hrbodies/hrc/licisyrria/pages/independentinternationalcommission.aspx.

³⁹⁸ OHCHR and UNAMI, 'Report on the Protection of Civilians in Armed Conflict in Iraq', 6 July–10 September 2014, 2 October 2014.

³⁹⁹ 'UN "may include" Isis on Syrian War Crimes List', *BBC*, 26 July 2014. At: www.bbc.com/news/world-middle-east-28498661.

⁴⁰⁰ See, for example, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 13 August 2014, UN doc. A/HRC/27/60.

⁴⁰¹ Foreign fighters have reportedly been involved in the execution of prisoners and hostages. See 'Tunisians Implicated in Iraq War Crimes', Human Rights Watch, 25 June 2014, at: www.hrw.org/news/2014/06/25/tunisians-implicated-iraq-war-crimes; 'British jihadist could face war crimes after alleged boasts over prisoner executions', *Daily Telegraph*, 3 August 2014, at: www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11009096/British-jihadist-could-face-war-crimes-after-alleged-boasts-over-prisoner-executions.html; 'ISIS Video Showing the Execution of David Cawthorne Haines, British Aid Worker', *New York Times*, 13 September 2014, at: www.nytimes.com/2014/09/14/world/middleeast/islamic-state-says-it-has-executed-david-cawthorne-haines-british-aid-worker.html?_r=0.

held senior positions within Islamic State.⁴⁰² To date, however, no investigations of returning foreign fighters for war crimes or other international crimes have been reported.

Second, foreign fighters may be prosecuted for ordinary crimes. In most states, it is not in itself illegal to travel to and participate in an armed conflict abroad. The recently adopted Security Council resolution 2178 (2014) requires states to criminalise travel and attempted travel of 'foreign terrorist fighters' (see above, section D). Already, before the adoption of this resolution, several countries are believed to have amended their criminal law to prevent such travel and to counter the mobilization of foreign fighters in Syria. The government of Saudi Arabia has reportedly prohibited its citizens from participating in unlawful military action⁴⁰³ abroad. It has also prohibited calls by clerics to donate money to Syria's armed opposition groups or to wage jihad in Syria. However, the law does not seem to be enforced effectively. Saudis constitute one of the largest groups of foreign fighters in Syria.⁴⁰⁴ In Russia, where the law already prohibited participation in unlawful armed groups within Russia, an amendment to the Criminal Code broadened the prohibition to include participation abroad with the aim of harming Russian interests.⁴⁰⁵ The same amendment increased the maximum penalty for the offence to six years. In January 2014, a Chechen man who had allegedly joined the Syrian insurgency in July 2013 was charged in absentia with participating in the activities of illegal armed forces abroad.⁴⁰⁶

Whether or not they craft specific laws to address the phenomenon, many states can use their regular criminal law framework to prosecute outgoing and returning foreign fighters. During a NIAC, domestic

law and IHL have always applied in parallel; and domestic law has generally criminalized use of force against the state.⁴⁰⁷ As a result, foreign fighters in NIACs can be prosecuted under national criminal laws, even for acts that do not violate IHL, such as lawful and proportionate attacks against military objectives (see Section B).

If domestic fighters flee abroad, they may escape prosecution because the jurisdiction of national law in most states does not extend to acts committed by foreigners abroad⁴⁰⁸ (with the possible exception of war crimes and other international crimes, such as torture). If foreign fighters return home, however, national law frequently has jurisdiction on the basis of the active nationality principle. Foreign fighters may therefore face prosecution for acts committed during an armed conflict abroad. For example, the UK investigated and arrested several British citizens accused of involvement in the kidnapping of journalists in Syria.⁴⁰⁹ In addition, ordinary criminal law may be used to prosecute potential foreign fighters for acts they take to prepare to commit such crimes. A Dutch Court convicted two prospective foreign fighters for preparing to commit murder and arson.⁴¹⁰ IHL recommends amnesty for individuals who merely participate in hostilities and commit acts during NIACs that are lawful under IHL. Arguably, the same recommendation could apply to the states of origin/citizenship of foreign fighters, which may not be involved in any way in the relevant armed conflict.⁴¹¹

Finally, foreign fighters who join or attempt to join an armed group that has been officially listed as a terrorist organization may be investigated and prosecuted on the basis of domestic terrorism legislation. In fact, most reported investigations and prosecutions of foreign fighters returning from

⁴⁰² In contrast, the widely-reported UK initiative to collect evidence of war crimes and other international crimes committed by Islamic State focuses on senior officials. See 'UK Paying Experts to Build Islamic State War Crimes Case', *BBC*, 3 September 2014. At: www.bbc.com/news/world-middle-east-29052475.

⁴⁰³ It is not known how this is defined. See 'Jail for Saudis who Join Foreign Conflicts', *Aljazeera*, 4 February 2014. At: www.aljazeera.com/news/middleeast/2014/02/jail-terms-saudis-who-join-foreign-fights-20142411202563202.html.

⁴⁰⁴ 'Saudis Back Syrian Rebels Despite Risks', *New York Times*, 7 January 2014, at: www.nytimes.com/2014/01/08/world/middleeast/saudis-back-syria-rebels-despite-a-lack-of-control.html; 'Saudi steers citizens away from Syrian "Jihad"', *Chicago Tribune News*, 12 September 2013, at: articles.chicagotribune.com/2012-09-12/news/sns-rt-us-saudi-syria-jihadbre88b0xy-20120912_1_saudi-fighter-saudi-arabia-syrian-government.

⁴⁰⁵ Amendment No. 302 to Article 208 of the Russian Criminal Code, 2 November 2013. Unlawful armed groups are groups that are not authorized by Russian federal law, or the laws of the country in which they operate.

⁴⁰⁶ 'First Probe Launched Against Russian Citizens Fighting in Syria', *Radio Free Europe Radio Liberty*, 9 January 2014. At: www.rferl.org/content/russia-chechnya-syria-fighters/25225033.html.

⁴⁰⁷ L. Olson, 'Prosecuting Suspected Terrorists: The "War on Terror" Demands Reminders About War, Terrorism, and International Law', *Emory International Law Review*, Vol. 24 (2010), p. 482ff.

⁴⁰⁸ A. W. Dahl, 'The Legal Status of the Opposition Fighter in International Armed Conflict', *Military Law and the Law of War Review*, Vol. 43, Nos. 3-4 (2004), p. 141.

⁴⁰⁹ R. Pantucci, 'British Foreign Fighters Joining the War in Syria', *CTC Sentinel*, Vol. 6, No. 2 (February 2013), p. 11.

⁴¹⁰ C. Paulussen, 'The Syrian Foreign Fighter Problem: A Test Case from the Netherlands', *International Centre for Counter-Terrorism Commentaries*, 2 December 2013. At: icct.nl/publications/icct-commentaries/the-syrian-foreign-fighters-problem-a-test-case-from-the-netherlands.

⁴¹¹ *Ibid.*

Syria and (above all) individuals planning to travel to Syria, as well as individuals associated with their recruitment, appear to be based on domestic terrorism legislation, reflecting the fact that most foreign fighters have reportedly joined or intended to join Islamic State or al-Nusra. The UK reported a surge in Syria-related terrorism arrests and charges during 2014.⁴¹² Similarly arrests and prosecutions for Syria related-terrorism offences were reported in many Western countries, including Australia,⁴¹³ Belgium,⁴¹⁴ France,⁴¹⁵ Germany,⁴¹⁶ Spain,⁴¹⁷ and the USA.⁴¹⁸

3. Diplomatic protection of captured foreign fighters

When foreigners, including fighters in an armed conflict, are captured and detained by a third state, their home government faces significant political pressure to intervene on their behalf, including by exercising diplomatic protection. Under international law, diplomatic protection is not an established individual right, but an entitlement

that belongs to the state.⁴¹⁹ However, national legislation⁴²⁰ and judicial decisions⁴²¹ support the view that states have a certain level of obligation, either under national or international law, to at least consider exercising diplomatic protection on behalf of their nationals. In its draft articles on diplomatic protection, the International Law Commission recommends that states 'give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred'.⁴²²

Regardless of any legal obligation, public opinion may pressure governments to intervene on behalf of their nationals, or long term residents. Public pressure,⁴²³ including litigation that requested the exercise of diplomatic protection,⁴²⁴ forced Western states to intervene to secure the transfer from Guantanamo Bay of their nationals or long-term residents. The UK secured the transfers of their nationals in 2004⁴²⁵ and 2005,⁴²⁶ although one long-term UK resident is still detained there.⁴²⁷

Australia did not oppose the trial of the Australian Taliban David Hicks before a military commission, but, under intensifying public pressure, negotiated

⁴¹² 'Syria terrorism cases on rise, CPS says', *Guardian*, 4 September 2014. At: www.theguardian.com/politics/2014/sep/04/syria-terrorism-cases-cps-jihadist.

⁴¹³ 'Two men charged with terrorism offences over alleged Syria conflict links', *Guardian*, 10 September 2014. At: www.theguardian.com/world/2014/sep/10/terrorism-arrests-made-in-logan-amid-alleged-links-to-syria-conflict.

⁴¹⁴ 'Belges en Syrie: plusieurs perquisitions à Bruxelles et dans les environs', *La Libre*, 24 February 2014. At: www.lalibre.be/actu/belgique/belges-en-syrie-plusieurs-perquisitions-a-bruxelles-et-dans-les-environs-530b172e35708d729d80cba5.

⁴¹⁵ 'French Police Arrested 6 Suspected Syria Jihadists', *Associated Press*, 13 May 2014, at: bigstory.ap.org/article/french-police-arrest-6-suspected-syria-jihadists; 'Fearing Converts to Terrorism, France Intercepts Citizens Bound for Syria', *New York Times*, 2 June 2014, at: www.nytimes.com/2014/06/03/world/europe/france-intercepts-jihadis-bound-for-syria.html?_r=0.

⁴¹⁶ 'Islamic State: Germany Struggles to Deal with Returning Fighters', *Spiegel Online*, 17 September 2014. At: www.spiegel.de/international/germany/germany-faces-challenges-in-putting-islamic-state-radicals-on-trial-a-991744.html.

⁴¹⁷ 'Spanish Police Break up Alleged Jihadist Recruitment Network', *Wall Street Journal*, 16 June 2014. At: online.wsj.com/articles/eight-suspected-jihadists-arrested-by-spanish-police-1402903932.

⁴¹⁸ 'Judge Rules Against Veteran Who Fought Alongside Syrian Rebels', *New York Times*, 8 April 2013. At: www.nytimes.com/2013/04/09/world/eric-harroun-who-fought-with-syrian-rebels-loses-a-court-fight.html?pagewanted=all.

⁴¹⁹ See the 2006 ILC Draft Articles on Diplomatic Protection, in particular Art. 2 (Right to exercise diplomatic protection) and Art. 19 (Recommended Practice).

⁴²⁰ J. R. Dugard, 'First Report on Diplomatic Protection', 2000, UN doc. A/CN.4/506, §§80–6.

⁴²¹ UK Court of Appeal – Civil Division, *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, 2 November 2002, EWCA Civ. 1598 (2003). In *Boumediene and others v. Bosnia and Herzegovina* (Admissibility Decision, 18 November 2008), the European Court of Human Rights left the question open because the Bosnian authorities had intervened on behalf of applicants who were subjected to extraordinary rendition from Bosnia and Herzegovina to Guantanamo Bay. Among the applicants were several former foreign fighters in the Bosnian conflicts.

⁴²² 2006 ILC Draft Articles on Diplomatic Protection, in particular Art. 2 (Right to exercise diplomatic protection), and Art. 19 (Recommended Practice).

⁴²³ BBC, 'UK's 'Forgotten' Cuba Detainees', 25 January 2005, at: news.bbc.co.uk/2/hi/uk_news/4205989.stm; 'Canada: Intervene On Behalf of Canadian Citizen at Guantanamo', Human Rights Watch, 2 February 2008, at: www.hrw.org/news/2008/02/01/canada-intervene-behalf-canadian-citizen-guantanamo; 'Verlassen in Guantánamo', *Zeit Online*, 5 December 2005, at: www.zeit.de/2005/50/Titelei_Kurnaz/komplettansicht.

⁴²⁴ UK Court of Appeal – Civil Division, *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, 2 November 2002, EWCA Civ. 1598 (2003); British nationals; UK Court of Appeal – Civil Division, *Al Rawi and Others v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, 12 October 2006, EWCA Civ. 1279 (2006): Long-term British residents.

⁴²⁵ 'Jack Straw's Statement on Guantanamo Bay Prisoners', *Guardian*, 19 February 2004. At: www.theguardian.com/world/2004/feb/19/guantanamo.usa1.

⁴²⁶ 'British Detainees to be Released from Guantanamo', *Guardian*, 11 January 2005. At: www.theguardian.com/world/2005/jan/11/politics.september11.

⁴²⁷ 'Case file – Shaker Aamer', *Reprieve*. At: www.reprieve.org.uk/cases/shakeraamer/.

his transfer to Australia to serve his sentence.⁴²⁸ In 2010, David Hicks filed a complaint against Australia for, among others, its complicity in his unlawful detention in Guantanamo Bay, and his unfair trial and conviction, in violation of the principle of legality.⁴²⁹ An inquiry by the Inspector-General of Intelligence and Security in 2010 criticised the Australian government's handling of the case of Mahmoud Habib, another Australian citizen detained in Guantanamo Bay and released without charges, for 'insufficient regard to the fact that Mr Habib – an Australian citizen – was held without charge and without access to any legal process for a significant period of time. Mr. Habib's best interests should have been the subject of more attention and action by Australian government agencies.'⁴³⁰

Governments are likely to face similar pressure over the fate of captured foreign fighters in Syria. For example, civil society organizations pressed the Tunisian government to enter into negotiations with Syria over the fate of Tunisians captured during the conflict there.⁴³¹ After a British doctor, who was not believed to be a foreign fighter, died in Syrian custody, his family accused the British government of failing to intervene on his behalf in a timely manner.⁴³²

⁴²⁸ 'Australian Critics See Politics in Detainee Deal', *New York Times*, 1 April 2007. At: www.nytimes.com/2007/04/01/world/asia/01australia.html?_r=0.

⁴²⁹ See Communication to the Human Rights Committee submitted by Dr. B. Saul on behalf of D. Hicks in August 2010. At: thejusticecampaign.org/wordpress/wp-content/uploads/2011/06/UN-Communication.pdf.

⁴³⁰ *Inquiry into the Actions of Australian Government Agencies in Relation to the Arrest and Detention Overseas of Mr. Mamadou Habib from 2001-2005*, Inspector-General of Intelligence and Security, December 2011, §23. At: www.igis.gov.au/inquiries/docs/habib-inquiry.pdf.

⁴³¹ 'Tunisia: Government Is Ready to Send a Plane to Syria for Tunisian Detainees' Return – Hédi Ben Abbès', *AllAfrica*, 7 June 2013. At: allafrica.com/stories/201306090056.html.

⁴³² 'Family of British Surgeon Who Died in Syria Criticise UK Government', *Guardian*, 18 December 2013. At: www.theguardian.com/politics/2013/dec/18/family-surgeon-abbas-khan-syria-uk-government.

G. Foreign fighters, counterterrorism, and human rights

States not only have a right but a duty under international human rights law to protect individuals within their territory and jurisdiction against acts of terrorism. At the same time, measures taken to fulfil this obligation must be exercised in a manner consistent with their obligations under human rights law, IHL, and refugee law. The corrosive effect of many counterterrorism measures on respect for human rights has been well documented.⁴³³ Rather than providing a general overview of such effects, this chapter focuses on anti-terrorism measures designed to deter individuals who have become, or seek to become foreign fighters. First, many foreign fighters are reportedly dual nationals and states may decide to revoke their citizenship. Second, to prevent individuals from joining an insurgency abroad, states may limit their freedom of movement, notably by cancelling passports and other travel documents.

1. Deprivation of citizenship

States may revoke citizenship on what may be termed broadly national security grounds. Under French law, a dual national convicted of terrorist offences may be stripped of his or her French nationality.⁴³⁴ Under Swiss law, the citizenship of dual nationals may be revoked if their conduct seriously prejudices Swiss interests or Switzerland's

reputation (though this sanction is not envisaged except in extremely serious cases, such as conviction for war crimes).⁴³⁵

In general, such powers seem to be associated with criminal convictions or (if formulated broadly) are rarely implemented.⁴³⁶ However, against the background of the terrorism threat associated with foreign fighters, revocation of citizenship has become increasingly common. For example, after 9/11, under US pressure, Bosnia and Herzegovina revoked the citizenship of many foreign fighters who had settled in the country, and they were deported to their countries of origin; one at least was handed over to the USA and transferred to Guantanamo Bay.⁴³⁷

In June 2014, the Canadian government passed legislation increasing its power to cancel citizenship,⁴³⁸ and several countries are debating similar legislation (Austria,⁴³⁹ Australia,⁴⁴⁰ France,⁴⁴¹ the Netherlands,⁴⁴² Norway⁴⁴³).

These initiatives are largely inspired by the UK, where the government has assumed broad executive powers to remove citizenship, largely in response to the threat that British foreign fighters are believed to pose. The Home Secretary is entitled to revoke the citizenship of individuals if 'that deprivation is conducive to the public good'.⁴⁴⁴ Decisions do not require previous judicial approval

⁴³³ See, for example, International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurist Panel on Terrorism, Counter-terrorism and Human Rights, 17 February 2009. At: www.justice.org.uk/data/files/resources/34/Assessing-Damage-Urging-Action-Full-17-February-2009.pdf.

⁴³⁴ See Art. 25, *Code civil français*.

⁴³⁵ See Art. 49, Federal Act on the Acquisition and Loss of Citizenship.

⁴³⁶ For a general survey on trends in European states, see G.-R. de Groot and M. P. Vink, *Loss of citizenship: Trends and regulations in Europe*, European University, 2010. At: eudo-citizenship.eu/docs/loss_paper_updated_14102010.pdf. For a general overview of grounds, not limited to national security, that may lead to loss of nationality, see *Human Rights and Arbitrary Deprivation of Nationality*, Report of the UN Secretary-General, UN doc. A/HRC/25/28, 19 December 2013.

⁴³⁷ Li, 'A Universal Enemy?: "Foreign Fighters" and Legal Regimes of Exclusion and Exemption Under the "Global War on Terror"', p. 382; see also ECtHR, *Boumediene and others v. Bosnia and Herzegovina*, *Admissibility Decision*, 18 November 2008, in respect of six individuals who were handed over to the USA.

⁴³⁸ See Bill C-24, Strengthening Canadian Citizenship Act, which makes it possible to remove the citizenship of dual nationals who are convicted of terrorist offences or fought with the armed forces of a state or a non-state armed group in an armed conflict against Canada.

⁴³⁹ 'Jihadisten aus Österreich: Gesetzesverschärfungen "noch heuer"', *Der Standard*, 16 July 2014. At: derstandard.at/2000003072966/Heimische-Jihadisten-Gesetzesverschärfungen-noch-heuer.

⁴⁴⁰ 'Dual-national jihadists may lose Aussie citizenship', *Australian*, 20 June 2014. At: www.theaustralian.com.au/national-affairs/foreign-affairs/dualnational-jihadists-may-lose-aussie-citizenship/story-fn59nm2j-1226960614534?nk=a5f07a70824438ce05c3a290d2ab918d#.

⁴⁴¹ 'Djihadistes déçus de leur nationalité?', *Le Figaro*, 11 March 2013. At: www.lefigaro.fr/flash-actu/2013/03/11/97001-20130311FILWWW00605-les-djihadistes-dechus-de-leur-nationalite.php.

⁴⁴² 'The Netherlands: New law proposed to revoke Dutch Citizenship for citizens who participate in Jihadist activities', *EU Digest*, 19 August 2014. At: eu-digest.blogspot.ch/2014/08/the-netherlands-new-law-proposed-to.html.

⁴⁴³ 'Norway "to Make Citizens Fighting for Isis Stateless"', *International Business Times*, 27 August 2014. At: www.ibtimes.co.uk/norway-make-citizens-fighting-isis-stateless-1462776.

⁴⁴⁴ S. 40(2), 1981 British Nationality Act: 'The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good'.

and take immediate effect. They may be appealed to the Immigration and Asylum Tribunal, or (if the decision relies on information that the Home Secretary believes should not be made public) a Special Immigrations Appeals Commission.

This power was introduced by an amendment of the British Nationality Act in March 2006 in direct response to the case of the 'Australian Taliban' David Hicks, who was eligible for UK citizenship. The British Courts had ordered that Hicks should be registered as a UK national, considering that he could not be denied citizenship under the previous rule that allowed the Home Secretary to deprive a person of citizenship if that person had acted in a manner that seriously prejudiced the vital interests of the UK or a UK overseas territory.⁴⁴⁵ After passing the amendment, the courts registered Hicks as a UK citizen, and the Home Secretary immediately deprived him of citizenship. Since 2010, this power has been used in 24 cases against individuals linked to terrorism.⁴⁴⁶

In many of these cases, the government reportedly revoked citizenship when the individuals in question were abroad. In 2010, the Home Secretary revoked the citizenship of two British nationals with alleged links to al-Shabaab while they were in Somalia; they were subsequently killed by US drone strikes. It is suspected that the UK government is motivated by the fact that it has no obligation towards individuals whose citizenship has been revoked, even if they face attack, extraordinary rendition, arbitrary deprivation of liberty, or torture.⁴⁴⁷ A number of British fighters in Syria have reportedly

been stripped of their citizenship,⁴⁴⁸ but no official information is available.⁴⁴⁹

In the past, it was possible only to revoke the citizenship of dual nationals.⁴⁵⁰ As part of the 2014 Immigration Act, the British government pushed through a controversial amendment⁴⁵¹ that permits the Home Secretary to remove the citizenship of a nationalised mono-national if the minister 'has reasonable grounds for believing' that the person in question might acquire citizenship of another country. This amendment was largely in response to the case of the Iraqi-born UK citizen Hilal al-Jedda who acquired British nationality in 2000.⁴⁵² After his return to Iraq in 2004, Mr al-Jedda was detained on security grounds. Shortly before his release in December 2007, the Home Secretary revoked his UK citizenship. The decision rendered him stateless because Iraq bans dual citizenship and he had lost his Iraqi nationality when he became a British citizen. On these grounds, the UK Supreme Court ruled in October 2013 that he could not be deprived of his UK citizenship and obliged the government to reinstate it.⁴⁵³ In November 2013, the Home Secretary stripped Mr al-Jedda once again of his UK citizenship after introducing a legislative amendment that allowed revocation even if the consequence was to render a person stateless.⁴⁵⁴

In principle, each state determines the rules that regulate acquisition and deprivation of its nationality.⁴⁵⁵ However, international law determines whether decisions are opposable to other states,⁴⁵⁶ for example because they affect those states' rights and obligations.⁴⁵⁷ Human rights law additionally

445 C. Walker, 'The Treatment of Foreign Terror Suspects', *Modern Law Review*, Vol. 70, No. 3 (2007), p. 440.

446 See House of Commons, Home Affairs Committee, *Counter-terrorism, Seventeenth Report of Session 2013-04*, May 2014, p. 37. At: www.publications.parliament.uk/pa/cm201314/cmselect/cmhaaff/231/231.pdf.

447 'British terror suspects quietly stripped of citizenship... then killed by drones.', *Independent*, 28 February 2013; 'Britain increasingly Invokes Power to Disown Its Citizens', *New York Times*, 9 April 2014. At: www.nytimes.com/2014/04/10/world/europe/britains-power-to-disown-its-citizens-raises-questions.html?_r=0.

448 'Citizenship Revoked. Rise in Citizenship-stripping as Government Cracks Down on UK fighters in Syria', *Independent*, 23 December 2013. At: www.independent.co.uk/news/uk/politics/exclusive-no-way-back-for-britons-who-join-the-syrian-fight-says-theresa-may-9021190.html.

449 House of Commons Home Affairs Committee, *Counter-terrorism, Seventeenth Report of Session 2013-04*, May 2014, p. 37.

450 S. 40(4), 1981 British Nationality Act: 'The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless'.

451 For an overview of the debates, see C. Paulussen and L. Van Waas, 'UK Measures Rendering Terror Suspects Stateless: A Punishment More Primitive Than Torture', *ICCT Commentaries*. At: www.icct.nl/publications/icct-commentaries/uk-measures-rendering-terror-suspects-stateless-a-punishment-more-primitive-than-torture.

452 'Britain expands Power to Strip Citizenship from Terrorism Suspects', *New York Times*, 14 May 2014. At: www.nytimes.com/2014/05/15/world/europe/britain-broadens-power-to-strip-terrorism-suspects-of-citizenship.html?_r=0.

453 *Secretary of State for the Home Department v. al-Jedda* [2013] UKSC 62, 9 October 2013.

454 'Al Jedda: the man mentioned 11 times by Home Office as it tried to change Immigration Bill', *Bureau of Investigative Journalism*, 11 July 2014. At: www.thebureauinvestigates.com/2014/07/11/al-jedda-the-man-mentioned-11-times-by-home-office-as-it-tried-to-change-immigration-bill/.

455 ICJ, *Nottebohm Case (Liechtenstein v. Guatemala)*, Judgment, 6 April 1955, *ICJ Reports* 1955, p. 20.

456 *Ibid.*, p. 21.

457 For an overview of how decisions to deprive mono-nationals of their citizenship may affect the rights and obligations of other states, see G. S. Goodwin-Gill, *Mr Al-Jedda, Deprivation of Citizenship, and International Law*, Information paper submitted to the UK parliament, 2014. At: www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf.

limits states' discretion,⁴⁵⁸ by prohibiting arbitrary deprivation of nationality and *refoulement*, restricting deprivation of citizenship that may result in statelessness, guaranteeing the right to enter one's own country, and protecting the right to family and private life.

Prohibition of arbitrary deprivation of nationality

Everyone has the right to a nationality, although there is no right to a specific nationality.⁴⁵⁹ This is a fundamental right⁴⁶⁰ because curtailment of the right of nationality harms enjoyment of other human rights.⁴⁶¹

The right to a nationality implies the right to retain a nationality,⁴⁶² which entails the prohibition of its arbitrary deprivation.⁴⁶³ International law recognizes that conduct 'seriously prejudicial to the vital interests of the State'⁴⁶⁴ may be a ground for depriving an individual of citizenship, but such a decision must fulfil certain conditions if it is not to be arbitrary:⁴⁶⁵ it must be in accordance with domestic law; serve a legitimate purpose; be the least intrusive measure possible to achieve that purpose; be proportionate to the legitimate purpose; and install procedural guarantees, in particular the opportunity to challenge decisions (in substance) before an independent body.⁴⁶⁶ The International Law Commission has stated that the deprivation

of nationality for the 'sole purpose' of expulsion is 'abusive, indeed arbitrary within the meaning of article 15, paragraph 2 of the Universal Declaration of Human Rights'.⁴⁶⁷

With respect to foreign fighters, decisions to revoke the citizenship of dual nationals may infringe the prohibition of arbitrary deprivation of nationality. First, revocation may result in individuals being deported or expelled (which may be the intended purpose of the measure). As noted, Bosnia and Herzegovina deported an unknown number of former foreign fighters after revoking their citizenship in 2006,⁴⁶⁸ and recent changes in the UK's legal framework may have been motivated by the desire to expel such individuals.⁴⁶⁹ If desire to expel is the only motive for revoking citizenship, the decision is arbitrary.

With respect to procedural safeguards, foreign fighters may not be given a full explanation following a decision to expel them for reasons of national security, which may impede their ability to challenge the decision.⁴⁷⁰ If the decision is taken while they are abroad, foreign fighters may find it impossible to challenge⁴⁷¹ and may also miss the deadline to file their appeal.⁴⁷² Further, if the decision has immediate effect (as in the UK), they will not be able to appeal from within the country.⁴⁷³ Finally, procedural safeguards may be inadequate if the standard of review grants a wide margin of discretion to the executive. In the UK, the only

⁴⁵⁸ *Human Rights and Arbitrary Deprivation of Nationality*, Report of the UN Secretary-General, UN doc. A/HRC/13/34, 14 December 2009, §20.

⁴⁵⁹ Art. 15 of the Universal Declaration of Human Rights. See also Art. 4 of the European Convention on Nationality, ratified by 20 states of the Council of Europe. For an overview of the legal framework governing the right to nationality, see *Human Rights and Arbitrary Deprivation of Nationality*, Report of the UN Secretary-General, 2009, §§3–18.

⁴⁶⁰ Human Rights Council Resolution 10/13: Human rights and arbitrary deprivation of nationality, 26 March 2009, §1.

⁴⁶¹ For detailed analysis, see 'Human Rights and Arbitrary Deprivation of Nationality', Report of the UN Secretary-General, UN doc. A/HRC/19/13, 11 December 2011.

⁴⁶² *Human Rights and Arbitrary Deprivation of Nationality*, Report of the UN Secretary-General, 2009, §21.

⁴⁶³ Art. 15, Universal Declaration of Human Rights; Art. 4, European Convention on Nationality, ratified by 20 states of the Council of Europe.

⁴⁶⁴ Art. 8 (3)(a)(ii), 1961 Convention on the Reduction of Statelessness; Art. 7(1)(d), European Convention on Nationality.

⁴⁶⁵ See also Art. 8(4), 1961 Convention on the Reduction of Statelessness, which specifies that states shall not deprive an individual of his or her nationality 'except in accordance with the law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body'. See also Art. 12, European Convention on Nationality.

⁴⁶⁶ 'Human Rights and Arbitrary Deprivation of Nationality', Report of the UN Secretary General, UN doc. A/HRC/25/28, 19 December 2013, 31–4.

⁴⁶⁷ Commentary to article 8 of the Draft Articles on the Expulsion of Aliens, adopted on second reading by the International Law Commission in 2014, ILC Report of the 66th session, 2014, UN doc. A/69/10, p. 32.

⁴⁶⁸ Li, 'A Universal Enemy?: "Foreign Fighters" and Legal Regimes of Exclusion and Exemption Under the "Global War on Terror"', p. 382.

⁴⁶⁹ Goodwin-Gill, *Mr Al-Jedda, Deprivation of Citizenship, and International Law*, p. 11.

⁴⁷⁰ *Arbitrary Deprivation of Nationality. Submission of the Immigration Law Practitioners' Association to the UN Office of the High Commissioner for Human Rights*, Immigration Law Practitioners Association, 14 February 2013.

⁴⁷¹ *Ibid.*

⁴⁷² *L1 v. Secretary of State for the Home Department* [2013] EWCA Civ 906, 29 July 2013 where the Court of Appeals expressed its concern that the Home Secretary deliberately postponed the decision in order to obstruct the right of appeal or make it more difficult to exercise (§5).

⁴⁷³ *G1 v. Secretary of State for the Home Department* [2012] EWCA Civ 867, 4 July 2012.

successful challenges against revocations of citizenships have been made when individuals were rendered stateless.⁴⁷⁴

Statelessness

Because statelessness has severe effects on enjoyment of rights, states are prohibited from depriving an individual of citizenship if doing so would render him or her stateless. Limited exceptions are permissible under Article 8 of the 1961 Convention on the Reduction of Statelessness: it may be legitimate where conduct is ‘seriously prejudicial to the vital interests of the State’.⁴⁷⁵ The European Convention on Nationality prohibits deprivation of nationality even on this ground if it renders the individual stateless,⁴⁷⁶ and the justifications should always be interpreted narrowly, as an exception to the general rule.⁴⁷⁷

UK legislation sets a lower standard,⁴⁷⁸ namely conduct that is not ‘conducive to the public good’ rather than ‘seriously prejudicial to the vital interests of the State’.⁴⁷⁹

The considerations that apply to the arbitrary prohibition of citizenship also apply to deprivation of citizenship that results in statelessness, arguably more stringently because of the serious consequences of such a decision. In a 2013 report, the UN Secretary-General pointed out that ‘[g]iven the severity of the consequences where statelessness results, it may be difficult to justify loss or deprivation resulting in statelessness in terms of proportionality’.⁴⁸⁰

Non-refoulement

Any individual who is subject to removal from the territory of a state (including nationalised individuals who have lost their citizenship) is protected by the

principle of *non-refoulement*, regardless of whether or not their loss of citizenship qualifies as ‘arbitrary’. The principle of *non-refoulement* prohibits the transfer of individuals to another state if there is a clear risk that the recipient state would violate their fundamental human rights. Risks explicitly listed include: torture and other forms of cruel, inhuman, or degrading treatment; arbitrary deprivation of life; a ‘flagrant breach’ of the prohibition on arbitrary detention; or ‘a flagrant denial of justice’. *Non-refoulement* is unconditionally prohibited when there is a risk of torture or inhuman treatment.⁴⁸¹ Several states have recently challenged the absolute scope of this prohibition, arguing that, in view of the threat posed by terrorism, risk of torture should be balanced against national security considerations.⁴⁸² The European Court of Human Rights has forcefully rejected this argument and upheld the absolute nature of the prohibition.⁴⁸³

Right to family and private life

Although the European Convention on Human Rights does not explicitly affirm the right to citizenship, its deprivation may interfere with human rights protected by the Convention, notably the right to family and private life. This right may be infringed if individuals are expelled or unable to return,⁴⁸⁴ or because the deprivation of citizenship has an effect on enjoyment of other rights and entitlements.⁴⁸⁵

Second, taking a decision to revoke citizenship while an individual is abroad does not remove the individual from the jurisdiction of the state for the purpose of their human rights protection. The jurisprudence of the European Court, albeit under different circumstances, confirms that the European Convention applies extraterritorially to individuals under the authority and control of the state.⁴⁸⁶ In addition, measures must be subject to some form of review before an independent body,

⁴⁷⁴ Namely in the case of *Al-Jedda and Abu Hamza v. Secretary of State for the Home Department*, Special Immigrations Appeals Commission, Appeal No. SC/23/2003, 5 November 2010.

⁴⁷⁵ Art. 8(3)(a)(ii), 1961 Convention on the Reduction of Statelessness; Art. 7(1)(d), European Convention on Nationality.

⁴⁷⁶ Article 7(3).

⁴⁷⁷ ‘Human Rights and Arbitrary Deprivation of Nationality’, Report of the UN Secretary-General, 2013, §12.

⁴⁷⁸ See Walker, ‘The Treatment of Foreign Terror Suspects’, p. 440; and Goodwin-Gill, *Mr Al-Jedda, Deprivation of Citizenship, and International Law*, p. 6.

⁴⁷⁹ Goodwin-Gill, *Mr Al-Jedda, Deprivation of Citizenship, and International Law*, p. 6.

⁴⁸⁰ *Human Rights and Arbitrary Deprivation of Nationality*, Report of the UN Secretary-General, 2013, §4.

⁴⁸¹ ECtHR, *Chahal v. the United Kingdom*, Judgment, 15 November 1996.

⁴⁸² ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism’, 2007, UN doc. A/62/263, §§50–1.

⁴⁸³ ECtHR, *Saadi v. Italy*, Judgment, 28 February 2008.

⁴⁸⁴ See, for example, ECtHR, *Al-Nashif v. Bulgaria*, Judgment, 20 June 2002; *Slivenko v. Latvia*, Judgment, 9 October 2003.

⁴⁸⁵ Indeed, the European Court accepted that the reverse situation, refusal to grant citizenship, may also amount to an interference. See *Karashev and family against Finland*, Admissibility Decision, 12 January 1999; *Kurić and Others v. Slovenia*, Judgment, 13 July 2010, §354.

⁴⁸⁶ See, for example, ECtHR, *Al-Skeini and Others v. the United Kingdom*, Judgment (Grand Chamber), 7 July 2011, §137; ECtHR, *Hirsi Jamaa and others v. Italy*, Judgment (Grand Chamber), 23 February 2012, §74.

and individuals must be given reasons and be able to challenge the measure.⁴⁸⁷ Failure to provide the possibility of challenge may infringe the right to an effective remedy.⁴⁸⁸

The right to enter one's own country

The right to freedom of movement is enshrined in Article 12 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and includes the 'right to enter one's own country' (see Box 12), a broader entitlement than to enter one's 'country of' nationality.⁴⁸⁹ According to the Human Rights Committee, the entitlement covers: 'at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have been stripped of their nationality in violation of international law.'⁴⁹⁰ In addition, it may include long-term residents.⁴⁹¹

This judgement implies that, under human rights law, foreign fighters whose citizenship or permanent residency permit is revoked while they are abroad still have the right to return. Limits on this right must be lawful, required for a legitimate purpose, and proportionate to the interest protected.⁴⁹² The Human Rights Committee has pointed out that 'there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.⁴⁹³

2. Freedom of movement

A number of states have taken or are taking measures to limit the freedom of movement of individuals who intend to travel abroad for the purpose of fighting in an armed conflict. If the British Home Secretary decides, for example, that it is 'undesirable' for an individual to have a UK passport, he or she may remove it.⁴⁹⁴ Other states are considering whether to increase their power to revoke or suspend passports. Although the US President already has the authority to revoke passports, the House of Representatives recently considered a bill that empowers the administration to deny or revoke the passport of individuals who are members of a designated FTO.⁴⁹⁵ The Australian government has announced broader temporary suspension powers;⁴⁹⁶ under the current Australian regime, 60 passports have been suspended.⁴⁹⁷ France recently unveiled legislation that allows the government, by administrative decision, to prohibit individuals from leaving France for six months, renewable indefinitely, if there are serious reasons to believe that he or she intends to participate in terrorist activities abroad.⁴⁹⁸

Travel bans, and the cancellation of passports,⁴⁹⁹ amount to interference with the right to freedom of movement, set out in Article 12 of the ICCPR and Article 2 of the 1963 Protocol 4 to the 1950 European Convention (see Box 12). The right to freedom of movement includes the right to

⁴⁸⁷ *Ibid.*, §§122–6.

⁴⁸⁸ ECtHR, *De Souza Ribeiro v. France*, Judgment (Grand Chamber), 13 December 2012.

⁴⁸⁹ Human Rights Committee, General Comment No. 27: Freedom of movement, 1999, §20.

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.*

⁴⁹² For an overview of how this has been interpreted in human rights law, notably in a terrorism context, see L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, pp. 71–9.

⁴⁹³ General Comment No. 27, §21.

⁴⁹⁴ See House of Commons, Home Affairs Committee, Counter-terrorism, Seventeenth Report of Session 2013–04, May 2014, pp. 35–6. Noting the lack of external scrutiny, the Committee 'recommends that the Home Secretary report quarterly on its use to the House as is currently done with TPIMs [Terrorism and Prevention Investigation Measures] and allow the Independent Reviewer of Terrorism Legislation to review the exercise of the Royal Prerogative as part of his annual review'. At: www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/231/231.pdf.

⁴⁹⁵ P. Spiro, 'ISIL Foreign Fighters: You Can't Take Their Citizenship. Can You Take Their Passports?', *Opinio Juris*, 23 September 2014. At: opiniojuris.org/2014/09/15/isil-foreign-fighters-cant-take-citizenship-can-take-passports/.

⁴⁹⁶ S. Pillai, 'Foreign fighter passports and prosecutions in government's sights', 6 August 2014. At: theconversation.com/foreign-fighter-passports-and-prosecutions-in-governments-sights-30197. A recommendation for such temporary suspensions was made by the Independent National Security Legislation Monitor in his Annual Report 2014, pp. 46–48. At: www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20140328.pdf.

⁴⁹⁷ See statement of Tony Abbott, Prime Minister of Australia, on the occasion of the Security Council summit leading to the adoption of Resolution 2178. At: www.un.org/News/Press/docs/2014/sc11580.doc.htm.

⁴⁹⁸ See 'Gauche et droite à l'unisson contre les djihadistes', *Le Monde*, 13 September 2014. At: http://www.lemonde.fr/societe/article/2014/09/13/gauche-et-droite-a-l-unisson-contre-les-djihadistes_4487031_3224.html.

⁴⁹⁹ ECtHR, *Stamose v. Bulgaria*, Judgment, 27 November 2012, §30.

Box 12. Freedom of Movement

Article 12, 1966 International Covenant on Civil and Political Rights

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 2, 1963 Protocol 4 to the 1950 European Convention on Human Rights

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

leave one's own country. It may be restricted, but limitations must be lawful, pursue a legitimate aim, and be necessary to achieve that aim. The latter condition includes the principle of proportionality,⁵⁰⁰ which requires that restrictions must be 'appropriate to achieve their protective function', the least intrusive instrument of those that might achieve the desired result, and proportionate to the interest that needs protection.⁵⁰¹ The Human Rights Committee has held that a travel ban imposed on two residents of Belgium (in the course of implementing the 1267 Security Council sanctions regime) was not necessary on national security grounds, because a criminal investigation against the two had been dismissed, and the government itself had tried to remove their names from the sanction list.⁵⁰²

Any interference with the right to freedom of movement must take into account the particular situation of the individual concerned, which means that general and automatic restrictions, for which reasons are not given, are unjustified.⁵⁰³ Individuals must also be able to appeal such decisions effectively, meaning that the appeal process should assess not only the formal validity of the decision, but the underlying substantive reasons that gave rise to it.⁵⁰⁴

⁵⁰⁰ *Ibid.*, §32.

⁵⁰¹ Human Rights Committee, General Comment No. 27, §§11–16.

⁵⁰² Human Rights Committee, *Nabil Sayadi and Patricia Vinck v. Belgium*, Views, 29 December 2008.

⁵⁰³ ECtHR, *Stamose v. Bulgaria*, Judgment, 27 November 2012, §32.

⁵⁰⁴ *Ibid.*, §51.

Conclusions: Foreign fighters, terrorism, and armed conflict – the conflation of legal regimes

The review of the international legal framework governing various aspects of the foreign fighter phenomenon revealed a particular theme: hardly surprising in light of the linkages between foreign fighters and terrorism, recent responses to the phenomenon of foreign fighters highlight the interrelationship between the legal regimes governing armed conflicts and terrorism.

Terrorism and armed conflict appear to be linked because both involve violence. Based on their different underlying purposes, however, the legal regimes governing armed conflict and terrorism are fundamentally different in the way they regulate armed violence. IHL acknowledges and exists because of acts of violence, but seeks to limit such acts. Under IHL, discriminate acts of violence are lawful, including proportionate attacks against enemy forces and military objectives, but other acts are unlawful, namely attacks against civilians and civilian objects.

In contrast, there is no such dichotomy between lawful and unlawful acts of violence under international norms governing terrorism. Any act legally qualified as ‘terrorist’ is always unlawful.⁵⁰⁵ As we have seen, IHL comprehensively prohibits acts of terrorism. For this reason, the ICRC concluded that there is little added value in designating violations of IHL as ‘terrorist’ beyond the narrow circumstances in which IHL expressly designates them as such (see Box 13). The drawbacks of doing so are considerable. In particular, designating armed groups and their acts as ‘terrorist’ may aggravate a situation that is already unfavourable to armed groups, on account of the inherent tension between domestic law and IHL.⁵⁰⁶ During a NIAC, armed opposition fighters may be prosecuted and punished under domestic law for taking up arms

against the state, and for acts that are lawful under IHL. Similarly, civilians who directly participate in hostilities during an IAC do not benefit from combatant immunity and may be punished under domestic law. As a result, armed opposition fighters have little legal incentive to comply with IHL.⁵⁰⁷ Ultimately, labelling armed groups and their acts as ‘terrorist’ may render peace negotiations more difficult,⁵⁰⁸ not least by excluding critical groups or individuals designated as terrorists,⁵⁰⁹ and making it difficult to grant amnesties at the end of hostilities.⁵¹⁰

On these grounds, acts committed in the course of an armed conflict that are not prohibited under IHL should not be considered as terrorist under international law. International treaties that seek to prevent and suppress acts of terrorism, such as terrorist bombings or hostage-taking, should adopt this stance. Arguably, making the acts of non-state armed actors subject to international terrorism treaties while excluding the acts of state armed forces undermines the principle of belligerent equality.⁵¹¹ Most counterterrorism treaties, at least those adopted prior to 9/11, have recognized the need to exclude acts that are lawful under IHL.⁵¹²

It generates confusion to refer to ‘terrorist acts’, ‘terrorist groups’, or ‘terrorist fighters’ in a manner that does not distinguish in specific terms between the different legal regimes that are applicable. In this respect, certain measures by the Security Council since 9/11 have significantly blurred the lines between the law governing armed conflicts and the law governing terrorism, both at international and domestic level.

First, Security Council Resolution 1390 expanded the reach of the sanctions regime based on Resolution 1267, to cover al-Qaeda and its

⁵⁰⁵ ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, 2011, p. 50.

⁵⁰⁶ *Ibid.*, p. 50.

⁵⁰⁷ Sassòli, ‘Terrorism and War’, p. 970.

⁵⁰⁸ ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, 2011, p. 51; M. Sossai, ‘The Internal Conflict in Colombia and the Fight against Terrorism’, *Journal of International Criminal Justice*, Vol. 3, No. 1 (2005), p. 261.

⁵⁰⁹ Geneva Academy, *Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors*, October 2011, p. 16.

⁵¹⁰ C. Martin, ‘Terrorism as a crime in international and domestic law: open issues’, in van den Herik and Schrijver (eds.), *Counter-terrorism strategies in a fragmented international legal order*, p. 651.

⁵¹¹ Sassòli with Rouillard, ‘La définition du terrorisme et le droit international humanitaire’, pp. 42–4.

⁵¹² Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, p. 956; B. Broomhall, ‘State Actors in an International Definition of Terrorism from a Human Rights Perspective’, *Case Western Reserve Journal of International Law*, Vol. 36, No. 2 (Spring 2004), p. 436.

Box 13. The ICRC position on the term ‘terrorist act’ in the context of armed conflict

“In sum, it is believed that the term ‘terrorist act’ should be used, in the context of armed conflict, only in relation to the few acts specifically designated as such under the treaties of IHL. It should not be used to describe acts that are lawful or not prohibited by IHL. While there is clearly an overlap in terms of the prohibition of attacks against civilian objects under both IHL and domestic law, it is believed that, overall there are more disadvantages than advantages to additionally designating such acts as ‘terrorist’ when committed in situations of armed conflict (whether under the relevant international legal framework or under domestic law). Thus, with the exception of the few specific acts of terrorism that may take place in armed conflict, it is submitted that the term ‘acts of terrorism’ should be reserved for acts of violence committed outside of armed conflict.”

ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, 2011, p. 51.

associates wherever they were located, not just in Afghanistan. Groups on the 1267 sanctions list are universally branded as ‘terrorist’ groups. While states fighting insurgencies have routinely designated insurgents as terrorists (Syria’s President Assad has always claimed he is fighting terrorists, for example), the 1267 sanction regime has internationalized the practice. Even though it is irrelevant for the purposes of IHL, universal condemnation of particular armed groups as ‘terrorist’ forestalls the possibility of engaging with such groups, or factions of them, in peace negotiations. Illustrating the problem, in June 2011 (based on a resolution co-sponsored by the USA),⁵¹³ the Security Council delinked the Taliban from the al-Qaeda sanctions regime in an attempt to support the Afghan government’s reconciliation efforts.⁵¹⁴

Second, with the adoption of Resolution 1373, the Council imposed on states a series of obligations, including a requirement to criminalize terrorist acts and their financing. Yet the resolution does not define terrorism or declare how these obligations apply in an armed conflict.⁵¹⁵ Though modelled on the 1999 UN Terrorist Financing Convention, Resolution 1373 notably omitted the Convention’s exclusion clause for acts governed by IHL. Later resolutions assert that states must implement their obligations in compliance with their obligations under IHL,⁵¹⁶ however, a general safeguard clause

is of limited value because IHL does not prohibit states from criminalizing and prosecuting violent acts as ‘terrorist’.

Third, the attacks on 9/11 and Security Council Resolution 1373 prompted states to adopt new terrorism laws, with wider extraterritorial reach, that defined ‘terrorist’ and ‘terrorism’ in broad terms and prohibited a variety of ancillary and preparatory acts. These national regimes accelerated the trend to blur the lines between IHL and laws to suppress terrorism. First, some national anti-terrorist laws do not exclude from their purview acts that are committed during an armed conflict governed by IHL, and some apply anti-terrorism laws to acts that are lawful under IHL.⁵¹⁷ Moreover, when interpreting IHL in the context of national terrorism legislation, some domestic courts have applied a different standard to the conduct of non-state armed actors in an armed conflict than to the conduct of state forces.⁵¹⁸ For this reason, experts have suggested that, following the example of international treaties on acts of terrorism, national counterterrorism laws should exclude from their remit acts that are committed during an armed conflict.⁵¹⁹

Fourth, while it was not new to list groups, including groups party to an armed conflict, after 9/11 internationally agreed lists (notably those of the Security Council and the EU) have been used far

⁵¹³ Official Records of the Security Council, UN doc. S/PV.6557, 17 June 2011.

⁵¹⁴ UN Security Resolution 1988 (2011).

⁵¹⁵ C. Martin, ‘Terrorism as a crime in international and domestic law: open issues’, p. 644.

⁵¹⁶ See, for example, Resolution 1566 (2004), preamble, and Resolution 1624 (2005), preamble and para. 4.

⁵¹⁷ Saul, ‘Terrorism and International Humanitarian Law’, in *Research Handbook of International Law and Terrorism*, pp. 230-1.

⁵¹⁸ See Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, pp. 200-01; and M. Mancini, ‘Defining Acts of International Terrorism in Time of Armed Conflict: Italian Case Law in the Aftermath of September 11, 2001 Attacks’, *Italian Yearbook of International Law*, Vol. XIX (2009), p. 136, in respect of the practice of the Italian Court of Cassation.

⁵¹⁹ See *Annual Report of the Independent National Security Legislation Monitor*, submitted to the Australian government on 20 December 2012, at: www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220.docx; *Council of Australian Governments Review of Counter-Terrorism Legislation*, 2013, at: www.coagctreview.gov.au/Report/Documents/Final%20Report.PDF.

more extensively to target groups and individuals. Several countries also maintain their own lists.⁵²⁰ In consequence, individuals associated with listed groups may face criminal prosecution under domestic law.

Under these national laws, fighting or attempting to fight in certain groups abroad becomes in itself a terrorist offence, regardless of initial motivation or actual conduct abroad, even though fighting in an insurgency abroad is not itself a crime. Previously, the use (and misuse), by states fighting insurgencies, of domestic terrorism legislation to prosecute and punish rebels was the main area of legal and political concern. Since 9/11 an international dimension has been added: third states have applied new legislation to prosecute and punish their nationals (or residents) for having participated or attempted to participate in an armed conflict abroad with a 'terrorist' group. Moreover, the current approach imposes different legal consequences on those who join (or attempt to join) armed groups, depending on the group they join. This may generate inconsistencies of treatment where (as in Syria) alliances between numerous armed factions shift frequently, and foreign fighters can become attached to new groups unexpectedly or involuntarily as a result.⁵²¹

Fifth, recent Security Council resolutions taken in response to the 'foreign fighter phenomenon' have further conflated the legal regimes applied to terrorism on one hand, and armed groups in the context of IHL on the other. The term 'foreign terrorist fighters' (in Security Council Resolution 2170) associated foreign fighters with a terrorism context (not an armed conflict). Resolution 2178 on 'foreign terrorist fighters' went a step further: it described acts governed by IHL as 'terrorist acts' but did not confine this description to acts that are unlawful under IHL or designated 'terrorist' under IHL. The effect of the resolution is to criminalize the travel, or attempted travel, by foreign fighters to 'terrorist groups' that are also parties to an armed conflict. Although it must be incorporated in domestic law, this obligation is based in international law, namely a Security Council resolution; but it is inconsistent with IHL. As a result, IHL and the international legal framework that governs the prevention and

suppression of terrorist acts are in collision. IHL does not criminalize participation in hostilities by individuals without combatant immunity; now, in the absence of a definition of terrorism, joining an armed group and acquiring the skills to use explosives and weapons during an armed conflict may be considered to amount to participating in terrorist acts or receiving terrorist training.

It can be argued that the armed groups affected by such measures do not intend to comply with IHL. Even assuming this to be true, conflating the legal regimes governing terrorism and IHL brings important disadvantages.

First, designating armed groups as 'terrorist' undermines humanitarian engagement. Conflict states that are unwilling to allow humanitarian access, notably to areas controlled by armed groups, may use the terrorist designation to justify their position, to the detriment of civilians. (The Syrian government has argued, in this manner, that it would violate international law to provide humanitarian aid in Syria in coordination with 'terrorist organizations that have been included on the terrorism lists of the vast majority of world States'.⁵²²) For humanitarian actors, current anti-terrorist frameworks not only impede their ability to raise funds, but potentially criminalize a wide range of their activities.⁵²³

Second, framing armed groups, their fighters and their acts as 'terrorist', in indiscriminate terms, obscures the legal fact that such groups and individuals are (often) parties to an armed conflict and, when this is so, their conduct is governed by IHL. We have seen that violations of IHL cover every conceivable form of 'terrorist' act in a situation of armed conflict, and may be prosecuted as war crimes. Prosecuting the acts in question under national terrorism laws may not address violations under IHL adequately.

That this is so can be demonstrated by the approach taken to foreign fighters. During the conflicts in Syria and Iraq, it has been credibly alleged that Islamic State and its fighters have been responsible for massive and widespread violations of IHL. Reportedly, Islamic State fighters may be included on a list of war crimes suspects compiled by the

⁵²⁰ They include Australia, Canada, the UK, and the USA.

⁵²¹ See for example the case of Eric Harroun who first joined the FSA and then ended up fighting with al-Nusra, 'Judge Rules against Veteran who Fought Alongside Syrian Rebels', *New York Times*, 8 April 2013. At: www.nytimes.com/2013/04/09/world/eric-harroun-who-fought-with-syrian-rebels-loses-a-court-fight.html?pagewanted%3Dall&r=0.

⁵²² See Letter dated 18 June 2014 from the Permanent Representative of Syria to the UN addressed to the UN Secretary-General, UN doc. S/2014/426, 20 June 2014, p. 3. See also Statement of the Syrian representative during the discussion of the Report of the Secretary-General on the implementation of Security Council Resolution 2139 (2014), UN doc. S/PV.7212, 26 June 2014, pp. 4–5. The Syrian representative questioned the report because, inter alia, it referred 'to certain organizations, classified by the Security Council as terrorist groups, as "armed opposition" groups in Syria', and failed to acknowledge the widespread presence of foreign fighters.

⁵²³ ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 2011, pp. 51–3.

UN Commission of Inquiry for Syria.⁵²⁴ Anecdotal evidence further suggests that foreign fighters may have been involved in such violations.⁵²⁵ Assuming these circumstances, it would not be controversial if states of origin prosecuted such individuals for war crimes. Yet almost all reported domestic investigations and prosecutions against returning foreign fighters have focused on terrorist offences, in particular broad offences related to proscribed forms of association with terrorist groups.⁵²⁶ Requiring little evidence of activities abroad, prosecution for such offences is easier than for war crimes or other unlawful conduct.⁵²⁷ However, it pursues a very different policy aim: to safeguard national security rather than repress war crimes. Without discounting the difficulties involved in investigating and prosecuting war crimes committed abroad during an armed conflict, it is problematic to frame the issue of foreign fighters exclusively in terms of the terrorist threat they pose to their home states.

Further, simply transposing counterterrorism law into an armed conflict context may ultimately be equally detrimental to IHL. As one commentator has cautioned:

Unlike global counter-terrorism law, IHL was not developed yesterday, but through a gradual and delicate process of codification and consensus building over more than a century. While it is resilient and flexible enough to accommodate new challenges, it is also fragile – and capable of unravelling if powerful states are no longer willing to support it. Only terrorists, not states or civilians, will ultimately benefit from the fraying or disintegration of IHL.⁵²⁸

It may be argued that it is increasingly difficult to disentangle IHL and counterterrorism law because some situations are genuinely hybrid. Some armed groups are party to an armed conflict, but are simultaneously also a terrorism threat, plotting attacks against other states outside the theatre of armed conflict; some terrorist groups based in a zone of armed conflict recruit foreigners fighting in that conflict to carry out attacks in their home countries; and some groups commit systematic violations of IHL that are justly described as ‘terrorist acts’. The armed conflicts in Syria and Iraq, including the involvement of foreign fighters, are emblematic of such hybrid situations and the legal difficulties they generate. Counterterrorism laws may indeed have a role to play in such situations. For example, they might reinforce IHL prohibitions on attacks against civilians; or might prevent and suppress funding from abroad of such violations. Decisions on the application of counterterrorism laws to hybrid situations should be taken with extreme care. More research and reflection are needed to properly articulate the relationship between currently ‘competing’ legal regimes. ‘Legislate in haste, repent at leisure’ is not less true because it is something of a cliché.

⁵²⁴ ‘UN “may include” Isis on Syrian War Crimes List’, *BBC*, 26 July 2014. At: www.bbc.com/news/world-middle-east-28498661.

⁵²⁵ See, for example, ‘British jihadist could face war crimes after alleged boasts over prisoner executions’, *Daily Telegraph*, 3 August 2014. At: www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11009096/British-jihadist-could-face-war-crimes-after-alleged-boasts-over-prisoner-executions.html.

⁵²⁶ See Chapter F, Prosecution of foreign fighters.

⁵²⁷ ‘Syria Terrorism Cases on Rise, CPS says’, *Guardian*, 4 September 2014. At: www.theguardian.com/politics/2014/sep/04/syria-terrorism-cases-cps-jihadist.

⁵²⁸ Saul, ‘Terrorism and International Humanitarian Law’, in *Research Handbook of International Law and Terrorism*, p. 231.

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Villa Moynier

Rue de Lausanne 120B - CP 67 - 1211 Genève 21 - Switzerland

Phone +41 22 908 44 83 - Fax +41 22 908 44 99

info@geneva-academy.ch - www.geneva-academy.ch

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