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Foreign Fighters on Trial:

Why a universal legal definition of terrorism is not needed for States to improve regulation and prosecution of the foreign terrorist fighters Daesh under international law.

Master's Thesis

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INTRODUCTION

As the war in Iraq and Syria draws to a close, refugee camps and military detention centers have began to flood with foreign terrorist fighters and their families in retreat from the fallen Islamic caliphate in Iraq and Syria. As of early 2019, ISIS and its fighters continue to rapidly lose territory in their strongholds due to strong counter military action by the USA, Russia, and Kurdish forces, resulting in an increase in fleeing foreign terrorist fighters, something which is only expected to grow in coming days.[1] The Canadian government estimates that since the start of the war in 2011, over 180 Canadian nationals have defected to join the fight in defence of the Islamic caliphate, generating a significant national security concern for Canadians.[2] In parliament, Canadian politicians have referred to foreign terrorist fighters as, "the biggest plague that the Western world is perceiving right now."[3] However, the problem extends well beyond Canada, as it is estimated that from Western Europe alone the number of defectors has swollen to well over 5000.[4] It is estimated by UN researchers that since the start of the Syrian civil war, numbers of foreign terrorist fighters have peaked at over 41,000 citizens from over 80 countries.[5] By now, over half of the total number of defectors have died in the fighting, but this still leaves significant numbers of foreign terrorist fighters and their families in the battlefield, in military or ad hoc prisons, in refugee camps, or somewhere in between enroute back home.[6] When determining what to do with these surviving fighters, States are faced with a dilemma of diverging moral obligation and legal restrictions, leading to large scale political turmoil. Lack of concrete legal mechanisms to handle this influx of returning foreign terrorist fighters are leaving States scrambling for solutions and they are rapidly running out of time to make this decision proactively. States are aware that in many cases their domestic laws do not provide sufficient remedies for putting foreign terrorist fighters on trial. States face limitations due in part to insufficient evidence, concern for

[1] "IS 'Caliphate' Defeated but Jihadist Group Remains a Threat" *BBC*, 2019.
[2] P. Zimonjic, "Justin Trudeau Tells Hamilton Town Hall Canadians Can Feel Safe Despite Returning ISIS Fighters," *CTV,* 2018.
[3] E.Dyer, "Federal Government not Tracking Interventions with Returning ISIS Fighters," *CBC*, 2017.
[4] CSIS Report (2016), *The Foreign Fighters Phenomenon and Related Security Trends in the Middle East: Highlights From the Workshop*, Pg. 63.
[5] J. Cook and G. Vale (2018), "From Daesh to Diaspora: Tracing the Women and Minors of Islamic State," Pg 3.
[6] E.Bakker and A. Reed and J.D. Roy Van Zuijdewijn (2015, *Pathways to Foreign Fighters: Policy Options and Their (Un) Intended Consequences*, Pg. 3.

human rights, and inadequate legal language which in some cases even fails to condemn terrorism acts as criminal. The need to provide "proof beyond a reasonable doubt" is limiting and inhibits the ability of many Western States in particular to take swift and effective action domestically.[7] Those who claim to have not engaged directly in hostilities or violent action amounting to criminal acts are able to effectively slip through the cracks of many domestic justice systems and evade criminal punishment.

UN resolution 2178 has acknowledged that foreign terrorist fighters pose a significant threat to international peace and security, and has called on States to improve their cooperation in combating the threats that foreign terrorist fighters pose.[8] This is one way international law has been engaged in response to this problem however, engaging the law though UN resolutions alone is not enough. Seeking a resolution for the threats that foreign terrorist fighters pose has become truly a collaborative effort. States need to separate through clear universal definitions and legal acts what constitutes as a crime versus what constitutes a person's right to self-determination and freedom association. However, States continue hitting legal and political roadblocks along the way when trying to do so. While many States are now beginning to understand the need of universal jurisdiction over foreign terrorist fighters, to date no proposal for managing this transnational issue under international law has been adopted or enforced effectively by the UN.[9]

One of the key problems holding States back in collaboration is the lack of a unified definition on what constitutes a 'terrorist', 'terrorism', or a 'terrorist act'. The UN has stated that in all of its forms and manifestations, terrorism is among the greatest threats to international peace and security facing the world today, effectively acknowledging the risk terrorism presents while sidestepping the need to define it directly.[10] With no clear codification of crime or act, it is impossible to determine what international court has jurisdiction over these cases. Though the international community did established a 'world

[7] F.Picinali (2018), *Can the reasonable doubt standard be justified?* Pg. 9; UNHRC (1984), *CCPR General Comment No. 13*: *Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law,* Pg. 2.
[8] S/RES/2178/2014.
[9] Canadian Government (2017), *Public Report on the Terrorist Threat to Canada*. Pg.15.
[10] UNSC (2017), *Prevention, Development Must Be at Centre of All Efforts Tackling Emerging Complex Threats to International Peace, Secretary-General Tells Security Council.* Online.

court' in 1988 as a mechanism intended to put the criminals of the world on international trial, the ICC only has jurisdiction over the four gravest international crimes: crimes against humanity, genocide, war crimes, and crimes of aggression.[11] Without a definition for terrorism or terrorists acts included in the scope of one of these three crimes, the ICC is not able to be engaged as a tool in prosecuting foreign terrorist fighters. Thus, today there is no international court or legal body with the jurisdiction to prosecute foreign terrorist fighters for their alleged crimes, meaning that the task has been left entirely to States to handle domestically. Interstate agreements on counter terrorism would help reduce limitation in counter terrorism, thus enabling foreign terrorist fighters less opportunity to escape prosecution and would serve to limit the scope of this legal problem.

The purpose of this thesis will be to establish recommendations for legal solutions to the legal problem currently facing States regarding how to prosecute foreign terrorist fighters under international law. To address this problem, this thesis will review the current legal regime surrounding the prosecution of suspected foreign terrorist fighters and then proceed to make recommendations for how States could improve collaboration on an international solution. The thesis will address this problem through the following three research questions: Is there a universal definition of 'foreign terrorist fighters' under law? Are States able to effectively collaborate on combating foreign terrorist fighters without a universal definition of 'terrorism'? Can international law be further engaged to bring foreign terrorist fighters to swift and uniform justice? The hypothesis preceding this thesis, seeking to address the problems and answer the research questions, is that under international law States can be more effective in prosecuting foreign terrorist fighters than under domestic law as through developing uniform criminal jurisdiction States would ensure universal justice and avoid conflicting domestic legal interpretations. This hypothesis also seeks to prove that although there is no universal definition of terrorism under international law, this does not limit States in collaborating on a definition of foreign terrorist fighters. The research methodology used in this thesis will vary on the basis of how analysis is conducted and legal acts applied to the topic within particular sections. It will be comprised of empirical methods such as use of objective knowledge, operational definitions (legal and hypothetical), and the analysis of research questions and topics. Further, there will be an analytical review of the relevant

[11] UNGA (1998), *Rome Statute of the International Criminal Court,* Art. 5.

materials and a comparative review of applicable legal acts, and a structural review of applicable international treaties. Changes will be proposed to the current positive law through the core recommendations of this thesis relating to how we define on the international state foreign terrorist fighters and the crimes of terrorism which they commit. Data will be sourced from publicly available databases, articles, and applicable literature and will be analysed through interpretive methods. These recommendations will reflect the projected need which will be shown through this research, that between States there is greater need for the sharing of evidence, prosecuting foreign terrorist fighters, and codifying certain forms of terrorism as crimes in the defences of national security against terrorist threats. The practical application of the work presented in this thesis will be shown through the final conclusion but will clearly reflect that the recommendations presented in this thesis are just some of the possible options for States to engage counter terrorism collectively moving forward. Overall, this thesis will seek to prove the hypothesis by highlighting how international law has nearly no universal treaties addressing the problem of foreign terrorist fighters and no effective solution to the securitization issues which foreign terrorist fighters present. As a conclusion of the findings, there will be two core suggestions made by this thesis directing States on resolving this problem through international law. First, the thesis will recommend the creation of a treaty to unify international understanding of key terms relating to foreign terrorist fighters, addressing the threats they pose, and affirming positive action of States for collaboration on resolving this problem. Second, the thesis will recommend the establishment of an international tribunal with a narrow scope of the jurisdiction to hear just the cases of accused foreign terrorist fighters alleged to have been engaged in terrorist acts as part of Daesh in Iraq and Syria between the years 2011-2019.

The system as it stands is broken, as historically States have focused on combating terrorism reactively, rather then proactively seeking methods of deterrence. Thus, the recommendations of this thesis will be to establish clear proactive cooperation and combating mechanisms to enable States to more effectively prosecute foreign terrorist fighters and bring them to justice before the situation worsens further. It will make clear the existence of a governance gap impacting the regulation of terrorism and will show how new developments in international law and interstate cooperation would be effective helping to close it. It will make recommendations to improve international systems while still recognizing the limitations that

any possible solution may face due to the political sensitivity of this topic. It is important to elaborate that this thesis will be limited in its scope by seeking only to address foreign terrorist fighters in the context, location, listed in the preceding section. What this thesis will not do is address the political constraints of applying law to foreign fighters such as determining how and what to do with women and children, or whether rehabilitation methods being employed by some States are effective, and how to manage returning foreign terrorist fighters who cannot be prosecuted. The focus will be on establishing the legal basis for dealing with the problems foreign terrorist fighters present and in proposing concrete legal solutions.

To address this problem, the following thesis will be structured in five sections. The first section will focus on providing the reader with a comprehensive overview on the subject of foreign terrorist fighters by briefly highlighting the subject's history, the main security threats associated with it, and the key problems facing States in addressing these threats. This initial overview will help clarify the narrow scope of analysis that this thesis is seeking to engage, show what areas will be expanded on later in the thesis, and address definitions relating to terrorism, foreign fighters, and criminal terrorist acts. The second section will review current legal mechanisms and methods in place for prosecuting terrorist more broadly, which can be drawn from to determine how to manage foreign terrorist fighters though international law on the international stage. It will review domestic and international legal mechanisms currently available for fighting terrorism and will elaborate on what customary international law has crystallized as a result.[12] The third section will engage a case study on Canada's experience with foreign terrorist fighters, highlighting examples of the challenges and struggles which Canada has faced in prosecuting foreign terrorist fighters under the State's judicial system. It will review how the subject has deepened political divide in Canada and left many unanswered questions about what can be done to improve securitization. It will highlight the loopholes that returning foreign terrorist fighters are able to slip through and will address the existing criticism held by Canadian academics and politicians alike. It will analyse what limitations on counter terror action could be perceived under Canadian domestic law and will

[12] *Jus Cogens* is defined as, "a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." UN (1969). *Vienna Convention on the Law of the Treaties.* Art. 53.

address the flaws that have allowed so many to return unchallenged. This section will serve to show how Canada is struggling to prosecute foreign terrorist fighters under domestic law and will make it clear that domestic remedies are not effective in bringing accused terrorists to trial when their crimes are committed abroad. The fourth section will present core recommendations showing viable alternatives to the current legal regime. These recommendations will seek to establish a treaty to codify the criminality of foreign terrorist fighters under international law and to create an international criminal tribunal with the capacity to prosecute them for their crimes. This is important as international tribunal would represent a global alternative to prosecution which enhance securitization against this threat. The thesis will close with its fifth section, a critical analysis of the recommendations and a balanced overview of the challenges which may be faced in practical application. Further, this section will review the criticism against the proposed solutions due to the potential increased they pose of restricting human rights and fundamental freedoms. The thesis will then close with a conclusion that will draw together the thoughts presented throughout, answer the research questions, and establish if the hypothesis of the thesis was achieved in hopes to show the best way forward in counter terrorism through international law.

With these points covered, this thesis will be successful in effectively establishing recommendations for the implementation of enhanced legal mechanisms under international law through which proactive measures for prosecution and securitization can be engaged. It will be able to effectively analyse the complex legal question of what can be done to bring foreign terrorist fighters to justice. It will present solutions which can be engaged through law to help improve securitization and to resolve international dispute over how to manage foreign terrorist fighters under law and will show how state collaboration can serve to establish the legal mechanisms needed to adequately address the threats foreign fighters pose. However, it is important to note that the recommendations made in this thesis and the conclusions drawn are just some of the possible remedies for this complex problem. This thesis will seek to overview the legal options present to States in order to provide a legal solution which will be most universally acceptable to all. The findings presented within this thesis should be used as a base for improvement rather than a statement of sole option for change and represent realistic practical application of the findings. Inaction by and between States relating to securitization against foreign terrorist fighters is enabling them to go

unpunished and puts the lives of the citizens of many States at risk. Though legal solutions are complex and time consuming, this thesis will proceed to show that State consensus on this issue is strong enough to enable solutions to be found.

1. OVERVIEW OF FOREIGN TERRORIST FIGHTERS

Wars of the world have long inspired people across great distances and State lines to collectively take up arms in defence of a like cause or morality. This was best exemplified during the Christian Crusades of 1096-1291, arguably the world's greatest series of holy wars, where States and individuals answered the call of Christian Pope Urban II to join forces in defence of Jerusalem and in the name of Christianity.[13] War waged in the name of the Christian God drove people from across the European continent to take up arms in defence of Christian morals and righteousness. Today, there is a new great holy war attracting the attention of the faithful from beyond borders and across nations: Jihad. By definition, Jihad is holy war waged in the name of Islam instigated by the Muslim faithful and is similar in character to other holy wars, as it is engaged as a religious duty for the purpose of defending and propagating religious beliefs and values. Similarly to the Crusades, Jihad is controversial for its violent and often extremist nature in pursuit of religious fundamentalism.[14] Central to this controversy is the terrorist group ISIS, hereafter referred to in this thesis as Daesh.[15] Estimating to have originated in 1999, Daesh began growing in popularity peaked in its control of territory in 2017, when it had successfully occupied large portions of Iraq and Syria.[16] Its presence was able to explode rapidly across the region largely due to the instability resulting from the 2011 Syrian civil war. As a "symptom of broken politics", Daesh thrives in the disruptive social climate synonymous with civil war and is sheltered by the institutional chaos that it brings, thus leading to its protected growth.[17] They have been successful in recruiting foreign fighters from across the globe with estimates of over 2000 foreign fighters from just the top four countries; Russia, France, the UK and Germany.[18] Daesh has been established as the centerpiece for radical Islam through its large social media presence and heavy coverage in international media for acts of terrorism committed across

[13] J. Riley-Smith (2008), *The Crusades, Christianity, and Islam*, Pg. 14.
[14] B. Chang (2005), *Islamic Fundamentalism, Jihad, and Terrorism*, Pg. 58.
[15] Throughout this thesis ISIS will be referred to as Daesh. 'Daesh' represents the Arabic language acronym of Islamic State of Iraq and Syria and is detested by members as it is said to represent a pun. Daesh has been adopted for use by many academics as it seeks to delegitimize the group; L. Dearden,"Isis vs Islamic State vs Isil vs Daesh: What do the different names mean – and why does it matter?" *The Independent*, 2014.
[16] See Figure 1.1 for a map showing territory lost by Daesh since 2015.
[17] F.A. Gerges (2014), *ISIS and the Third Wave of Jihadism*, Pg. 339.
[18] See Figure 1.2 shows the estimated number of foreign terrorist fighters from the top twelve contributing countries.

the globe. They are successful in attracting the attention of followers largely in part to their foundational promises for the creation of a State where an extreme interpretation of Islamic law would rule and where followers could live their lives in conformity with the 'purest' form of Islam. This prospect is attractive to many who feel ostracised by society and limited in their ability to practice their religious beliefs at home, but may otherwise not be interested in the acts of extremism and violence that the group engages in. Thus, the proposed caliphate has been shown to be one of Daesh's key marketing tools and has supported the group's rapid growth and popularity with foreign fighters, attracting them to fight, support, and live in the proposed Islamic 'paradise'. These nationals that defect to Daesh from abroad to engage in terrorist activities have become known as foreign terrorist fighters, and their presence poses a serious security threat to the international community.

Prior to addressing the legal problem of determining what the content of the definition for foreign terrorist fighters should be and what effect it would have on the legal mechanisms for prosecution, it is important to first overview how foreign terrorist fighters are viewed and defined by the UN and various States and regional bodies, understand what criminal acts are associated with them, and establish the points of similarity and difference of our understanding on foreign terrorist fighters today globally. Thus, this section will start by reviewing definitions, then by elaborating on differences and similarities found between State practices, and closing by highlighting where and why there may yet to be universal understanding clearly established at all. To be clear, what this thesis will not try to do in this section or beyond is attempt to propose a new universal definition on terrorism outside of the scope of the problem of foreign terrorist fighters. This is because establishing a definition of terrorism that could be used universally has long been disputed by States through international forum and that in this case doing so would potentially lead to creating an to unwanted connection between freedom terrorist fighters and individuals or groups seeking self-determination, an issue which will be examined further on in this thesis. Thus, as a proposal of a new universal definition for terrorism would surely be unable to adequately resolve the concerns and objections of all States, it is instead more practical to elaborate on already established terms to determine how to develop this legal regime under international law. This thesis will address how to build uniform understanding on a definition of foreign terrorist fighters specifically through defining them in the narrow scope of Daesh in Iraq and

Syria, thus making it much more plausible that a uniform understanding can be achieved even without a definition being applied. This will serve to provide a clear overview of the topic prior to reviewing the legal mechanisms surrounding prosecution later in this thesis, allowing this section to first focus on elaborating on a number of the universal knowns and unknowns relating to foreign terrorist fighters more broadly. With the crimes of foreign terrorist fighters largely undefined and international legal mechanisms overwhelmingly lacking jurisdiction over their acts; how, where and on what grounds to prosecute foreign terrorist fighters remains convoluted and contested. Without international legal solutions, law enforcement and security forces are at a loss in how to collect and process information about suspected foreign terrorist fighters to effectively deter and prevent them from developing into greater threats. Through engaging the problem with domestic understanding, States are not adequately engaging the full range of tools and strategies that would be available to them through international legal engagement. Thus, through reviewing the known legal understanding presented in the following section, it will become evident where gaps in legal understanding still exist.

1.1 Terrorism Under International Law

Prior to beginning with the review of applicable interpretations of foreign terrorist fighters in the law, it is first important to review how terrorism in a broader sense is understood. Definitions under international law are central to the establishment of universal understanding on any issue. However, when it comes to concluding a uniform definition on any aspect of terrorism, States have long struggled to collaborate and produce any functional universal terminology. States are hesitant to present universal definitions as they can then be construed and applied in ways that they were not originally created for or intended. Yet such definitions are desperately needed in order to make progress towards developing global understanding of terrorism and terrorist acts so that States can more effectively collaborate on resolving securitization challenges presented by terrorists. Universal definitions are needed as States use varying terminology under their domestic law, thus leading to misunderstanding and miscommunication between them when reviewing the application of law to terrorists. Though there has been some progress in recent years through UN resolutions on terrorism and limited regional codification along the same line, however the greatest challenge facing

States in counter terrorism today remains is the lack of consensus on the broad definition of terrorism. Formulating a universal definition for foreign terrorist fighter involves reviewing the known elements of the crime, which could be used to codify terrorism under international law. To do so, States must collect known definitions, review the elements that are diverging and those that are uniform, and collectively agree on which aspects reflect universality. As one of the most highly debated features of international law, terrorism remains one of the few terms lacking a definition with international unity though establishment of a treaty. It could be argued that this is the case for a number of different reasons. Though the UN has been unable to universally codify the definition of terrorism, its predecessor, the League of Nations, defined it by stating terrorism to be, "all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons, or the general public."[19] However, this definition proved problematic as effectively it could be used to claim that any acts against a State could be terrorism regardless of the context or intent behind the action and thus it did not received strong support.

Arguably, a more accurate understanding of what constitutes as an act of terror would be an indiscriminate act meant to insight fear and instability for the purpose of promoting an ideology or specific view. This understanding can be concluded from drawing on various domestic definitions of acts of terror. States have been left to establish their own definitions of terrorism and determine its criminality within their own domestic systems and thus, while various interpretation of terrorism exist under domestic law, the problem of interstate communication on the subject is compounded. In Canada, an act of terror is defined through section 83.01 of the Criminal Code and establishes terrorism as;

> "An act committed in whole or in part for a political, religious or ideological purpose, objective or cause with the intention of intimidating the public with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act."[20]

In the UK, the definition of terrorism is broken down by defining acts that amount to terrorism. The definition is very broad, including acts that involve serious violence, damage to property, endangers life, generates risk to health, or could potentially disrupt an electronic

[19] League of Nations (1937), *Convention for the Prevention and Punishment of Terrorism.*
[20] *Canadian Criminal Code* (1985), Section 83.01.

system.[21] It also consists of some problematic features such as stating terrorists acts can be those designed to influence the government or to intimidate the public.[22] It is these such definitions that can be easily manipulated to stifle political dissidents and self-determination, which is risky when adopted globally. In the USA, terrorism is defined through its criminal code and is divided into two definitions: one for international terrorism and one for domestic. The domestic definition is stated to, "involve acts dangerous to human life that are a violation of the criminal laws of the US or of any State."[23] The definition of international terrorism diverges slightly to be acts that:

> "Involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State."[24]

Effectively, this second definition just serves to widen the scope of the USA's jurisdiction in being able to prosecute acts that are criminal if they are intended to cause intimidation, influence government, or interrupt the function of the government. More interesting is when analysing terrorism definitions given by regional bodies, as these definitions require the approval of more States and thus the definitions become broader. They are also localized to reflect regional problems and issues, thus making a definition in one region not necessarily applicable in another. As a body of States collectively, the EU has defined terrorism by stating it as:

> "Seriously intimidating a population, or; unduly compelling a government or international organisation to perform or abstain from performing any act, or; seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation."[25]

The EU has commissioned a working group called CODEXTER, whose mission is to further terrorism research and to continue building upon the EU's understanding of terrorism and terrorist acts. CODEXTER has assisted in developing the Council of Europe Convention on the Prevention of Terrorism, which directs States in the EU to collaborate by offering their, "greatest measure of assistance in connection with criminal investigations," as possible.[26]

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[21] *United Kingdom Terrorism Act* (2000), Sec. 1.
[22] *United Kingdom Terrorism Act* (2000), Sec.1.
[23] 18 U.S. Code § 2331, Sec.5 A.
[24] 18 U.S. Code § 2331, Section 1 A.
[25] Council Framework Decision 2008/919/JHA amending Council Framework Proposal 2002/475/JHA.
[26] Council of Europe (2005), *Council of Europe Convention on the Prevention of Terrorism*, Art.17(1).

Though the commissioning of a working group to aid with the development of law is a good first step, it does not help with resolving the issue of practical application of putting these recommendations into action.

The UNSC, through its continued use of resolutions and declarations, has condemned terrorism and extremist violence, vowing to continue to encourage States to take affirmative and collaborative action in the prevention and deterrence of any act by any individual that would seek to inflict terror.[27] However, condemning something with no universal definition proves to be fairly ineffective in practice. When States come together to collaborate on counter terrorism, the first issue that must be addressed is ensuring that the understanding of all States on the subject is the same. Even though it is clear that the incorporation of the term 'terrorist' when referring to foreign fighters has become universally understood, the use of the term terrorist as such is still problematic in a number of ways. Though the UN refers to 'terrorism' within the definition for foreign terrorist fighters that it provides through resolution 2178, which will be reviewed further in the following section, independently the term 'terrorism' remains undefined or elaborated by them. Thus, picking apart exactly which crimes and actions constitute terrorism in the context of foreign terrorist fighters is near impossible and almost guaranteed to face debate. Stating foreign terrorist fighter without a universal definition of terrorist is no more effective at clarifying as to who are foreign terrorist fighters versus just foreign fighters. With terrorism as the core feature of the phrases, the application becomes weak and impractical without contextual understanding of what the additional term does to narrow the scope of the foreign fighter definition. One such example of narrowing the definition can even be said to be derived from stereotypes related to the mention of terrorism. "The conventional view is that women are less likely than men to engage in terrorism," has been elaborated by the UN as one concern in our understanding of the role of women as foreign terrorist fighters.[28] As what is or is not terrorism can be easily disputed, it also means that who and what qualifies as a foreign terrorist fighter can be easily challenged. The inclusion of terrorist in the phrase serves to overly generalize when applying foreign terrorist fighter in the context of defectors to Daesh in Iraq and Syria. This is because

[27] Such examples of such UNSC resolutions include SCR/1267/1999, SCR/1269/1999, SCR/1371/2001, SCR/1373/2001, and SCR/1456/2003.
[28] CTC, *Foreign Terrorist Fighters*. Online.

in doing so, the understanding rests on grouping all who defect to join Daesh as seeking to plan, prepare, or participate in violent acts. Thus in conclusion, with no universal definition of terrorism it is crucial to tread carefully when applying the term terrorist to an universal understanding for fear that doing so will lead to diverging understanding on the subject and thus will reduce the likelihood of success in using the term in application.

1.2 Legally Defining Foreign Terrorist Fighters

In order to delve deep into seeking solutions for the problems that foreign terrorist fighters present, it is first important to clarify how they are defined in law and common understanding to establish whether the definition provides either universal understanding or one that is limited in scope. This is important, as a universal definition is needed to be able to propose solutions with global scope, yet many States tend to focus on developing domestic understanding as a first priority, causing an international standard to get pushed to the side. Thus, in reaction to terrorist attacks around the world, States have proceeded to prosecute perpetrators under definitions given through national law and under the justification of their own State authorities capable of prosecuting actions amounting to serious offences.[29] To understand the impact of definitions on prosecution, it is first necessary to examine definitions and understand their origin. This section will review the foreign terrorist fighter definition used globally and will analyse its legal strength and ability to be applied to crimes.

A universal definition for foreign terrorist fighters that is applicable to those who have defected to join Daesh can be derived from both analytical understanding and UN declarations and decisions. To start this analysis, it helps to break down the phrase into first more commonly used terms: foreign and fighter. The definition of foreign fighter is self-explanatory from the literal definition of the words and generally goes uncontested. It is used most broadly to describe all who defected to join a war outside their own borders and does not necessarily carry the connotation of criminal action when considering the words in their literal dictionary understanding.[30] More precisely, a foreign fighter is any person:

[29] A. Cassese (2001), *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law,* Pg. 994; *United States v. Dynar* (1997), 2 SCR 462, Phar. 89; *Zaoui v. Attorney-General* (2004) CIV 13/2004, Phar.48(2); *Canada (Attorney General) v. Ward* (1993), 2 S.C.R. 689, Phar. 2.
[30] B. Mendelsohn (2011), *Foreign Fighters-Recent Trends*, Pg. 192.

> "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."[31]

Alternatively, the definition can be simplified to reflect just, "non-citizens of conflict(ing) States who join insurgencies during civil conflict," which can be contextualized and applied to the specific case of foreign terrorist fighters in Syria.[32] It can be applied regardless of the demographics of the individuals who are engaged in foreign conflict, and does not require an analysis of intent or reason. However, without the clarifying term of 'terrorism', this phrase is overly broad and applies to too many different scenarios. When adding the term 'terrorism' into the phrase, the scope is significantly narrowed and can be more clearly shown to refer to those engaged in violent activities and those assisting in the functions of terrorist organizations such as Daesh. A recent proposal tabled for a definition on terrorist acts was put forth by the panel constructed by the Office of the United Nations High Commissioner for Human Rights, where they recommended that the definition should include,

> "Any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act".[33]

This definition is broader and does not implicate that actions must be against the State. However, this definition is also problematic as it fails to address the motivation that we have come to accept terrorism as being coherently part of. However, analysing motivation involves the political side of this problem and thus will not be analysed in this thesis.

When referring to a foreign terrorist fighter, it can clearly be understood that the subject is associated with a negative understanding, and by implying the connotation there is an aspect of illegality and fear involved. The UN has defined a foreign terrorist fighter through

[31] S. Kraehenmann (2014), *Foreign Fighters Under International Law*, Pg.6.
[32] D. Malet (2013), *Foreign Terrorist Fighters: Transnational Identities in Foreign Conflicts*, Pg.9.
[33] UNHCR (2008), *Fact Sheet No. 32, Human Rights, Terrorism and Counter-terrorism*, Pg. 6.

resolution 2178, leaving little interpretation open to the understanding of this phrase in the context of Daesh. The UNSC stated that foreign terrorist fighters are:

> "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."[34]

Due to the understanding provided by the UN's definition, States have a clear starting point from which to begin establishing their own interpretations into domestic legal acts. However, it remains important to note that while the UN has made reference to terrorists through the definition provided in resolution 2178, this understanding of terrorist is limited to the scope as described within this term. Beyond this use, the term's lack of specific definition causes its application to be convoluted and problematic, as terrorism and corresponding acts of terror that terrorists commit are still largely undefined and lacking associated crimes. As the purpose of this thesis is to provide options for enhanced securitization and prosecution tactics for combating foreign terrorist fighters under international law and to establish means to tackle the threats posed by those who have defected from abroad to Iraq and Syria, the inclusion of the term terrorism is necessary in the scope of understanding. Though largely undefined, when used in the context of foreign terrorist fighters, terrorist should help distinguish between those seeking self-determination or supporting just causes versus those engaging in clearly established illegitimate hostilities such as with Daesh, due to clarification provided by the UN foreign terrorist fighter definition. This makes it clear that the UN's efforts have managed to isolate conflicting States concerns on defining terrorism through bypassing this and instead, proceeding to define a much more narrow aspect of one terrorist cell.

1.3 Criminal Acts of Foreign Terrorist Fighters

One of the greatest challenges in prosecuting suspected terror returnees is in determining whether their involvement constituted illegal activities or not. Participation in a terror group can be broken down into many different elements of involvement or 'acts', and thus does not necessarily constitute criminality in itself unless a State's national law has defined it to be. With understanding of terrorism addressed and the definition of foreign terrorist fighters

[34] SCR/2178/2014.

given above, it is now time to analyze what crimes are associated with it or with terrorism more broadly. Clear definitions are an important aspect for establishing acts associated with crime and thus previously, States have been hesitant to criminalize terrorism universally for the same reasons they are hesitant to define it. To provide understanding of the criminal acts that States can directly attribute to terrorism, it will also be necessary to synthesize the understanding provided on the definition of foreign terrorist fighters under domestic and international law, including establishing a high level understanding of their motivation and how motivation can play into criminality. Pinpointing motivation is challenging, as the membership of those who have defected as foreign terrorist fighters is highly demographically diverse. In a report published by the ICSR in 2001, it is stated that motivation for religious extremism can be summarized as resulting from four main sources of interest: financial benefits, protection, military capacity, and ideology.[35] However, while many can be directly linked with seeking to engage in extremist activities, others rather perceive themselves as seeking community and a religiously regulated society. Memorably stated by former UN Secretary-General Kofi Annan,

> "Human rights law makes ample provision for counter terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective — by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter terrorism strategy. It is an essential element."[36]

Arguably the only universal aspect of motivation for foreign terrorist fighters is a sense of desperation or lack of belonging within one's society.[37] A uniform element of State's understanding of terrorism is that the motive of terrorist acts should be clearly connected to a

[35] H. Haid (2018), *Reintegration ISIS Supporters in Syria: Efforts, Priorities and Challenges*, Pg. 3.
[36] K. Annan (2005), *A Global Strategy for Fighting Terrorism*, Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security.
[37] However, contrary to my view, Antoni Cassese (Professor of international law at the University of Florence) challenges this notion claiming that in fact there are three uniform understandings of terrorism: (1) acts normally criminalized under any national penal system, (ii) intended to provoke terror (iii) are politically or ideologically motivated. I would challenge his points (i) and (ii) on the bases that these elements are not unique to terrorism and thus are too general to attribute to it directly as attributing universal consensus directly attributable to the understanding of terrorism. A. Cassese (2006), *The Multifaceted Criminal Notion of Terrorism in International Law*, Pg. 3.

group or ideology, thus differentiate terrorist acts as being collective criminallity rather than individual.[38]

In 2001, as a result of events of the 9/11 terror attacks, the UNSC released resolution 1373, which outlined certain requirements for defining terrorist acts that States are obligated to implement into their own domestic legal systems.[39] State are required to establish legislation, prosecute, and punish offenses including travelling to a foreign State intending to "commit, plan, prepare, or participate" in acts of terrorism, collecting of funds for the purpose of financing terror travelers, and organizing plans for terror travellers.[40] The EU has taken a number of steps to implement this resolution, including the adoption of the Council Framework Decision on combating terrorism, which clearly articulated acts constituting terrorism within the EU, reiterating what has been said by the UN and helping to implement the policies dictated by resolution 1373.[41] However, as with the application of most UN resolutions, it is hard to evaluate the application of these provisions and the effect they are having in practice on a domestic level, as implementation and enforcement is ultimately left to States. There is also an issue with States taking measures beyond the intention of resolution 1373 and this helps to highlight the problematic interpretation that terrorism can have on the domestic level. One example lies in Israel, where it is stated as being illegal if one, "knowingly and unlawfully leaves Israel...or any other part of the Land of Israel that is outside of Israel," and doing so can result in a penalty of four years or a fine.[42] This local interpretation of a law meant to counteract terrorism under its domestic understanding shows how State interpretation can play a large role in the execution of justice. This shows that having the UN dictate the development of laws relating to terrorism is only effective if member States implement those laws into their on legal systems in the same manner which the UN intended they do, something which is challenging to execute in a way that ensures uniform replication of law and crimes across all States.

[38] A. Cassese (2006), *The Multifaceted Criminal Notion of Terrorism in International Law*, Pg. 5.
[39] SCR/1373/2001.
[40] Staff of the Global Legal Research Center (2014), *Treatment of Foreign Fighters in Selected Jurisdictions* Pg. 2
[41] Council Of The European Union (2002), *EU Framework Decision on Combating Terrorism*
[42] LSI (1954), *Prevention of Infiltration (Offences and Jurisdiction) Law*, 5714-1954, § 2A, 8.

It is possible to further identify how terrorist action in the context of Daesh can be qualified as illegal by reviewing what it means to commit the crime of terrorism. As discussed in the preceding section, the definition of terrorism remains largely decentralized, lacking universality or direction from the UN through specific definition. Thus, 'terrorist act' remains challenging to criminalize universally. However, there has been some development recently through regional cooperation such as through action of the EU, Arab League and Conference of Islamic States.[43] Transnationalism in international criminal law is also part of the international nature of terrorism and extends to include the mechanisms that States have developed in order to prosecute those accused of criminal offences away from their home State. It can be applied to law in such circumstances, regardless of its political origins, as it seeks to adequately consider the social factors of today's world. It also relates to the principle of collective security, where an attack on one equals an attack on all, resulting in coalition wars that changes the power of State sovereignty in determining the wars in which to engage. As the world continues to become more interconnected due to globalization and advances in transportation and communication technology, efforts to engage with international criminal law through transnationalism as 'judicial globalization' will continue to rise in popularity between States.[44] International cooperation in prosecuting transnational crime is layered in procedural requirements as outlined through treaties, and must be handled with the awareness that a State's sovereignty remains paramount.[45]

As such, when speaking about foreign terrorist fighters in the context of Daesh, since universal understanding of acts of terror cannot be said to clearly exist, the criminalization of certain terrorist acts can be said to have been established by most States in response to the obligations made by the UN. Though acts that constitute a crime under other definitions can be said to be engaged by foreign terrorist fighters, it is clear that there has yet to be an act passed that provides comprehensive understanding applicable to this specific problem. Foreign terrorist fighters are the threat central to this thesis and the importance of clear

[43] D. M. Jones and M. L. R. Smith (2007), *Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order* Pg. 148;K. Graham (2005), *The Security Council and Counterterrorism: Global and Regional Approaches to an Elusive Public Good,* Pg. 2.
[44] N. Rajkovic (2010), *'Global law' and governmentality: Reconceptualizing the 'Rule of Law' as Rule 'Through' Law,* Pg. 37.
[45] In *France v. Turkey* (1927), (the case of the S.S. Lotus) it is made clear that States are sovereign entities free to exercise jurisdiction as they deem fit; *Cross-Border Evidence Gathering in Transnational Criminal Investigation: Is the Microsoft Ireland Case the "Next Frontier"?* Pg. 3.

understanding of the criminality of their actions will be further addressed when reviewing the need for a treaty to combat them and, further still, through the recommendation for the establishment of international tribunal for the prosecution of their crimes.

There have been without a doubt certain acts of terror that have triggered reaction from the international community collectively and highlights the truly international nature of the security threat that terrorism poses. The attacks of 9/11 is usually the first example raised when discussing acts of terror and is undoubtedly an example where we can show what happens when trying to prosecute terrorists for terrorist acts across State lines without global consensus. When the USA was attacked by a group of terrorists on home soil, the world watched as the USA quickly retaliated, enacting collective self defence and jumping into the 'war on terrorism' in the Middle East.[46] In the aftermath of 9/11, the USA struggled to prosecute suspected terrorists. Instead, it often turned to unregulated detention of suspected terrorists in military prisons such as Guantánamo, an issue that will be reviewed later in this thesis. Detention was seen often as the only option for holding suspected terrorists who do not fall under the criminal jurisdiction of the State seeking to prosecute them. However, it is widely criticised as being "unnecessary, unwise, and unconstitutional."[47] In a more recent example of an act of terror committed by a returning foreign terrorist fighter, in 2015, Paris was attacked in multiple locations by gunman allege to have been French citizens who had returned from fighting for Daesh in Syria.[48] Both these examples have seen States joining together to collectively combat and prosecute terrorism, which in itself was not something new.[49] Transnational cooperation originates from interstate agreements aimed at regulating partnerships that will provide benefits to all States. Such agreements exist for purposes such as cooperation, spurring the global movement of people and ideas, supporting economic relations, and countering terrorism. Through interstate collaboration, more effective and universal solutions can be implemented, which is particularly useful when combating terrorism. Terrorism on the international stage refers to the truly international nature in which terrorist organizations and terrorist actions can apply. It reflects how widespread the impact can be. In the case of foreign terrorist fighters, everything from recruitment to training takes

[46] NATO (1949), Art.5.
[47] ACLU (2019), *Indefinite Detention Without Charge or Trial*, Pg.1.
[48] J.C Brisard (2015), *The Paris Attack and the Evolving Islamic State Threat to France,* Pg.5.
[49] M.Howard (2011), *Transnationalism and Society: An Introduction*, Pg.3.

place across borders and through international systems that need to be regulated by States. Transnational cooperation in counter terrorism has been exemplified through select international incidents where States have cooperated in reacting to international incidents of terrorism. The bombing of Pan Am flight 103, known better as the Lockerbie case, was a landmark example of transnational cooperation. Though initially, the Libyan government strongly held that they were under no obligation to extradite the suspects to the USA, instead wishing to prosecute them under their own domestic law, the UNSC intervened and enacted resolution 748, which obligated the extradition.[50] Libya made reference to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, better known as the Montreal Convention, to try and show that they had a right to refuse extradition if they proceeded with prosecution domestically. However, it was the USA's fear that the alleged perpetrators would not be held to the same standards for the crime of terrorism in Libya as they would be in the USA.[51] Though negotiations continued for some time, it was finally determined that they would be extradited and tried in the Hague under Scottish law as a compromise, thus establishing a strong example of international cooperation in seeking criminal convictions for terrorists. Further, it is from case law that we can draw understanding on the state of the terrorist definition. In *Tel Oren v. Libyan Arab Republic,* the Court of Appeals of the District of Columbia held that there remained no universal definition of terrorism, either as written international law or otherwise.[52] This judgment under USA law implied that it is still not possible to liken terrorism to an international crime falling under universal jurisdiction. However, such lack of definition has not stopped States or regional bodies from creating and applying their own definitions or creating interpretations of their own. Further, simply lacking a broad and universal definition for terrorism does not mean that one cannot be created and applied more narrowly in the context of a specific group like Daesh. These examples show how international mechanisms that enables coordination to react to acts of terrorism are important. However, these mechanisms continue to fail to be

[50] G.P. McGinley (1992), The ICJ's Decision in the Lockerbie Case, Pg. 579; S/RES/748/1992.
[51] Article 7 of the convention is clear in stating that, "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."; ICAO (1971), *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, Art. 7; "U.N. to suspend sanctions as Libya delivers Lockerbie suspects", *CNN* 1999.
[52] *Tel-Oren v. Libyan Arab Republic*, 726 f.2d 774 (D.C.Cir.1984).

elaborated proactively. It has already been established through customary international law that acts of terror across State lines and by foreign non-state actors amounts to a transnational crime that is prohibited.[53]

Beyond just exemplifying examples of international cooperation, history also can guide our understanding of the development of customary international law surrounding prosecution of terrorism and the criminalization of terrorist acts. The events of 9/11 have fundamentally shifted our understanding of terrorism and has resulted in the codification of certain legal norms and understanding of terrorism into customary international law. However, even though some elements of law surrounding terrorism and criminal prosecution have become customary, other aspects have failed to establish such pull and are limited by both lack of State participation in counter terror treaties and continued lack of a universally convened definition of terrorism. A norm that has certainly developed due to the history of events surrounding terrorism is the legitimization that terrorism can give to State action in self defence, an inherent right of all States that is defended by international law and guaranteed as a legitimate justification for enacting force against a threat. However, many feel that the current regime surrounding counter terrorism limits a State's capacity to act in self defence and thus is limiting State sovereignty. While self defence requires a specific sequence of events to occur prior to action without security council sanctions, it has been argued that acts of terror in the last 20 years have forced the development of customary international law on self defence to make permissible certain reactions by States to acts of terror. This can be in part due to the passing of UN resolution 1368 in reaction to the events of 9/11, where it defined acts of terror as constituting a threat to the peace, thus equaling an armed attack and further allowing self defence as established under Article 51 of the UN Charter.[54] Such was exemplified with USA action in Afghanistan as it is noted that,

> "The United States has based its armed intervention in Afghanistan on its inherent right of self-defence as confirmed by Article 51 of the Charter, a legal position which seems to be generally accepted."[55]

[53] A.Cassese (2001), *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, Pg.994.
[54] S/RES/1368 (2001); S/RES/1373 (2001); A. Cassese (2001), *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, Pg.996.
[55] H.P.Gasser (2002), *Acts of Terror, "Terrorism" and International Humanitarian Law*. Pg.550.

Throughout history, the USA has shown that it is not a State willing to wait for others to adapt their understanding of terrorism and how to prosecute it. The example of customary development towards enabling States to act in self defence against a terror attack should serve as encouragement to States for finding a resolution that would reduce the likelihood of other means being engaged to resolve the problem of foreign terrorist fighters. The USA presents a strong case for a need of uniform laws and understanding, as without this they continue to implement solutions of their own, which are often not consistent with the international norm.

Given the findings presented in this section, it is clear that a universal definition of terrorism does not currently exist, leaving States to regulate the problem independently. As shown, this can lead to confusion, unequal treatment of the same crime, and potentially even terrorist slipping through the legal cracks. Though this section does not conclude that a universal definition of terrorism is needed, it does conclude that understanding in the context of foreign terrorist fighters must be uniform and the crimes that accompany this understanding must be expressed the same way between States.

2. CURRENT LEGAL MECHANISMS AND METHODS OF PROSECUTION

One central problem that this thesis seeks to address is one that remains at the forefront of counter terrorism politics today: What action through law can be executed to prosecute suspected foreign terrorist fighters effectively? Although from the proceeding section, it is clear that no universal definition of terrorism exists, it is not necessary to define terrorism to prosecute those perpetrating the acts associated with it when narrowing our view on the foreign terrorist fighters for Daesh. However, how, where, and on what specific grounds to prosecute is a question that remains largely unanswered and deeply complex. The greatest challenges facing States are determining what acts committed by foreign terrorist fighters are criminal and under what jurisdiction they should be put on trial. There are deep complexities present for States when considering how to prosecute their nationals who have been suspected of defecting as foreign terrorist fighters that current international and domestic legal systems do not well regulate. Working within the system as it currently stands, many States have come to different conclusions on this matter and the methods being engaged are incredibly diverse. Current international law focuses largely on combating non-state actors as a whole - understanding them as embodying any entity that is not a State under international law. The range of possible entities includes: rebel groups, terrorist organizations, religious groups, civil society organizations, corporations, all kinds of businesses, and international organizations."[56] Though foreign terrorist fighters do fit into this understanding, it is the motivation under their acts of violence that force them to be understood through their own light. As traditionally understood, non-state actors should not possess any government or official authority or power and must not have financial relationships or otherwise with States, whereas terrorists often do.[57] The problem of defining criminality is complex, as the acts and motives committed by foreign terrorist fighters are not uniform across all cases. For instance, not all foreign fighters left at a time where Daesh had emerged to embody the internationally condemned terrorist organization that it has become known to be today. Thus, is it just to say that those who left before international condemnation were joining a terrorist organization and not just an ideological group? This has lead to a number of defectors requesting that

[56] A. Clapham (2009), *Non-State Actors*, Pg. 4.
[57] E.J. Nijman (2009), *Non-State Actors and the International Rule of Law: Revisiting the "Realist Theory" of International Legal Personality, Non-State Actors in International Law, Politics and Governance Series*. Pg. 5.

courts consider their motive to defect as being to join a religious caliphate, as they argue that they had not believed this meant leaving to join a terrorist group. Others argue similarly on the lines that though they left conscious that the activities of some in the caliphate would be violent and potentially involve crimes, they themselves never directly engaged in hostilities, something that is hard to prove or disprove due to an overwhelming lack of verifiable evidence. Some of those who defected did so with only the intent of fighting to help aid Muslims in a religiously motivated uprising and others believed at the time that they were fighting a holy war but now return full of remorse and desire to change. This thesis will focus primarily on determining prosecution for suspected foreign terrorist fighters and will not seek to analyse reintegration or deradicalization of those determined innocent. It is still important to note that these individuals and their families present additional complications to prosecution that cannot be fully analyzed by just one thesis. However, there are overarching elements of the problem that this thesis will review and propose solutions to; hopefully inspiring further analysis to determine how to identify the difference between legitimate right to self-determination versus electing to engage in a terrorist organization, and also in determining what level of engagement is accountable as criminal. This section of the thesis will not focus on the determination factors of criminality, but will instead proceed to turn focus towards current methods and State strategies of dealing with foreign terrorist fighters. It will first examine the domestic legal remedies and understanding on the criminality of terrorism and acts of terrorism that States have drawn. It will then move into the analysis of the current methods of international engagement that are enabled by treaties under international law. These two sections will help to highlight the divergence between domestic and international legal solutions in counter terrorism, but will also show the overlap that exists and could be further engaged.

2.1 Domestic Legal Methods

Currently, the role of States in the prosecution of suspected foreign terrorist fighters is highly independent. This section will focus on highlighting some of the domestic methods used and crimes that have been established and applied, which may be extended to prosecute foreign terrorist fighters as well. Though there is some cooperation between States on counter terrorism, the capacity of cooperation is fragile and limited. The non-existence or overall

ineffective mechanisms under international law leave States to prosecute suspected foreign terrorist fighters independently. This lacking mechanism is a court or tribunal with criminal jurisdiction over terrorists and their acts. This is understandable, as there is no comprehensive treaty unifying State views on the threat and prosecution of foreign terrorist fighters, and no universal definition of terrorism, which are both prerequisites for establishing such legal mechanisms.[58] As a result, States have largely been left to regulate the justice process themselves and overwhelmingly have made efforts to manage foreign terrorist fighters independently through domestic means. As previously stated, States implement counter terrorism policy at their own accord or at the direction of UN or regional bodies, but this implementation of law and policy is not regulated or controlled due to States' sovereignty over the maintenance of domestic justice. States independently have their own definitions of terrorism, terrorist acts, and criminal punishment to enforce against convicted foreign terrorist fighters. Though many of the definitions have similar qualities, they do differ in content and function. For example, while some countries have elected to enforce the criminalization of the act of travel with intent to join a terrorist group, others do not criminalize these people until they are proven to have participate in terrorist acts. What one State considers terrorism, another may consider freedom of expression or right to self determination. Though human rights are universal and thus should not be pushed to the wayside for States who chose to regulate terrorism differently, human rights are also subjectively digested under national legal systems. This challenge to establish equality under law is one way in which international law tries to help, but is not always successful. Perhaps what is most distinctly regulated differently from State to State is the management of reintegration, surveillance, and monitoring of returned foreign terrorist fighters, who either have not been able to be prosecuted as terrorists or who have been but have been found innocent. The controversial process of reintegration is most prevalent in Sweden, where returned Swedish fighters who have not been found criminally convicted are provided with basics of life re-establishment such as housing, transportation, and education.[59] The Swedish method is extremely controversial and in many ways it is too soon to really tell if this method will have positive impact or only project further insecurity into the community. Thus, this

[58] H. P. Gasser (2002), *Acts of Terror, "Terrorism" and International Humanitarian Law*, Pg. 550.
[59] L. Dearden, "Swedish City to Offer Returning Isis Fighters Housing and Benefits in Reintegration Programme." *The Independent,* 2016.

section has briefly shown some of the diverging methods used under domestic law in counter terrorism practice.

2.2 International Legal Methods

International legal methods are key for ensuring justice is served equally for the same crime. As the previous section has shown, under domestic law terrorism is dealt with in various ways or in some cases not at all. International jurisdiction and international criminal mechanisms would allow for more uniform justice to be served. Currently there are some international legal methods which States can leverage in counter terrorism the hope of prosecuting alleged offenders. However, more often we find that international methods can limit prosecution and do not provide a judicial system with clear jurisdiction over the matter of terrorism. However, major developments in international law through the solidifying of customary norms to enhanced interstate cooperation have significantly influenced the operation of international law in relation to terrorism. These developments include the shift in world power from bipolarity to unipolarity, the end to colonization, the rapid advancement of technology, and the increased global concern for human rights in addition to the codification of certain understanding of terrorism under international law.[60] These changes have materialised in counter terror action such as the USA's 'war on terror' and initiatives to further codify terrorism in international law. Though there are only treaties that criminalized certain acts as being acts of terror or terrorism in very narrow scopes, including aviation, financing, and weapons responsibility, these treaties are confirmed as being able to enable some elements of collaborative law enforcement efforts. However, they remain ineffective at obligating States to prosecute or to present proper mechanisms for bringing suspected foreign terrorist fighters to justice through international courts and tribunals as they simply provide an overview of the issues but not of the solutions. These resolutions have come under heavy criticism as failing to do enough to detect, prevent, and prosecute foreign terrorist fighters both when the individuals are abroad or have returned home. Action by States has taken form in reactive responses seeking to manage the threat only once it has resurfaced through the form of returnees.

[60] H. P. Grasser (2002), *Acts of Terror, "Terrorism" and International Humanitarian Law.* Pg. 549.

Though far from operating in a perfect cooperative system, there are currently a number of international treaties and bodies that help to facilitate interstate cooperation in combating terrorism and oblige States to cooperate in prosecuting terrorists. Arguably the best recent example of interstate collaboration in counterterrorism, the UN International Convention for the Suppression of the Financing of Terrorism obligates States to, "take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence," under the treaty.[61] This treaty entered into force and has acted as the primary tool used to combat foreign terrorist fighters and the perpetration of their growth in support, as it obligates States to limit their financing capabilities. Another historical counter terrorism treaty is the Convention on Offences and Certain Other Acts Committed on Board Aircraft.[62] As terrorism presents a deep history with using a civilian aircraft as objects to engage in acts of terror likely to impact and enrage numerous States, it has been crucial for States to collaborate on aviation safety through international law. In working to combat terrorism, the UNSC focuses on four key elements, "Condemnation of terrorist acts, imposition of obligations on all States, capacity building and imposition of sanctions on individuals.[63] The EU has been a leading example of a collective of States that has made progress toward codifying universal understanding of terrorism through international law. In light of recent events involving terrorism, the EU has taken significant steps towards enacting a legal framework that unifies understanding on terrorism and terrorist acts. Fundamentally, a terrorist group is defined through the legally binding Framework Decision on Combating Terrorism where they are stated as,

> "A structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. 'Structured group' shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.[64]

[61] UNGA (1999), *International Convention for the Suppression of the Financing of Terrorism*, Art. 5.
[62] ICAO (1963), *Convention on Offences and Certain Acts Committed on Board Aircraft*.
[63] A. Hudson (2007), *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime:Violating Human Rights* Pg. 205
[64] Council Of The European Union (2002), *EU Framework Decision on Combating Terrorism.* Art. 2.

The need for interstate cooperation on counterterrorism is further highlighted by the Framework Decision on the European Arrest Warrant that the Council of the EU worked to establish.[65] This legally binding decision determined that terrorism is a crime, allowing for the issuing of an arrest warrant by a member State that can be executed in another.[66] Beyond just this, the EU has drafted legislation that intended to give a broader understanding to the issue of foreign terrorist fighters specifically.[67] The UN, as the global voice for law between States, has also enacted a number of counter terror treaties that can be applied to the case of foreign terrorist fighters, which are legally enforceable upon all UN member States.[68] Thus, it goes unchallenged to state that, "counter-terrorist actions transcend individual national jurisdictions and thus go beyond domestic law enforcement."[69] Though these methods help to establish a basic framework for counter terrorism, they are hands off methods which leave much of the implementation and enforcement to individual States. Though the mandate of resolution 2178 it was made clearer that States need to address this problem one way or another through implementing domestic legal acts which reflect its terms. However, critics have been vocal in highlighting how ineffective the resolution has been as it only serve to perpetuate the same problem, a vague definition with no international legal mechanism to bring justice.[70]

Without global solutions, States turn to more drastic measures to manage the threat of terrorism. This 'take it into your own hands' mentality generates risks and issues that need to be understood to highlight why advancement in this field of law is so desperately needed.

[65] A.Casses (2006), *The Multifaceted Criminal Notion of Terrorism in International Law*, Pg. 2.
[66] Council of the European Union (2002), *Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States.* Art. 2.2.
[67] EPRS (2018), *The return of foreign terrorist fighters to EU soil.* Pg. 6.
[68] Further notable treaties for combating terrorism include: ICAO (1963) *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, UN (1970) *Convention for the Suppression of Unlawful Seizure of Aircraft*, ICAO (1971) *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,* UNGA (1973) *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, (1979) *Convention against the Taking of Hostages*, (1988)*Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (1988), *International Convention for the Suppression of Terrorist Bombings.* (1997), and *International Convention for the Suppression of the Financing of Terrorism* (1999). Collectively, all of these treaties provide us with deeper understanding of the global vision for counter terrorism and provide States with direction on how to implement counter-terrorist laws domestically.
[69] H. P. Gasser (2002), *Acts of terror, "terrorism" and international humanitarian law*, Pg. 550.
[70] Kopitzke is an outspoken critic of the implementation of resolution 2178 stating that though he feels that it proposes a "positive and comprehensive strategy" to combat foreign terrorist fighters, that States have not been effective in implementing the resolution to their domestic law. C. Kopitzke (2014) *Security Council Resolution 2178: An Ineffective Response to the Foreign Terrorist Fighter Phenomenon.* Pg. 311, 330.

One such risk is shown through the engagement of intervention and use of force by some States in the name of counter terrorism. Some States argue that through acts of terror, terrorists start wars in which, "they are responsible for all the death and destruction that ensues," and though this view, it can be justified that terrorism is within the scope of *jus ad bellum* and thus justify a States right to use force.[71] However, the line is often blurred, as justifying intervention on humanitarian grounds when the true motivation is for non-humanitarian reasons is argued as being one of the core problems with condoning intervention. Thus, it cannot be concluded that intervention should be engaged by States for the purpose of counter terrorism unless counter terrorism is merely a result of action taken with legitimate justification. As said by Heinze, "Humanitarian intervention is not a tool for *post facto* punishment.[72]

Alternatively, sanctions can be engaged under article 41 of the UN charter as a method in which States engage to in order to deter terrorism through limiting movement, financing, weapons trade, and more economic and social factors which enhance their growth and proliferation.[73] UNSC Resolution 1373 was established in 2001 and enforces counter terrorism financing regulations, prohibiting financial assistance and services from being provided to persons who, "Commit or attempt to commit, facilitate or participate in the commission of terrorist acts."[74] This resolution requires States to take an affirmative stance against counter terrorism by sanctioning suspected terrorists directly. However, sanctions can be applied against States to counteract terrorism as well. While sanctions can be effective in stifling terrorist action and State sponsorship of terrorism, as a tool it has little effect over mitigating the threats posed by foreign terrorist fighters. However, while sanctions can be effective reactively, they are ineffective as a protective tool and could lead to risk of violating the "legal rights of individuals."[75] Sanctions need to be carefully applied and narrow enough to still be effective but not to have impact beyond their intended target. International tribunals have, and will continue to, move the development of international criminal law forward.[76]

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[71] A. Roberts (2004), *Counter-terrorism, Armed Force and the Laws of War*, Pg. 10.
[72] E. A. Heinze (2006), *Humanitarian Intervention and the War in Iraq: Norms, Discourses and State Practice*, Pg. 23.
[73] V. Gowlland-Debbas (2004), *Sanctions Regimes under Article 41 of the UN Charter,* Pg. 3.
[74] S/RES/1373/2001.
[75] A. Hudson (2007), *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, Pg. 204.
[76] T. Meron (1998), *Is International Law Moving Towards Criminalisation?*, Pg. 30.

In conclusion, international methods for combating terrorism are underdeveloped and lack uniform understanding. It is clearly necessary for States to improve their collaboration on not only establishing understanding around terrorism but all in determining how to prosecute and combate alleged terrorists in ways that are effective and fair. Though domestic law is necessary to handle foreign terrorist fighters upon their return if they manage to make it back, it is international treaties and legal mechanisms which can have the greatest impact in the pursuit of justice.

3. CANADA'S LEGAL STRUGGLE WITH FOREIGN TERRORIST FIGHTERS

As every State is tasked with implementing counter terrorism regulations passed down from the UN within their on domestic legal systems, it is important to review how this has worked in practice. As a case study, Canada presents an interesting example of a State grappling to gain control on how to most effectively prosecute foreign terrorist fighters. In recent years, Canada has seen a dramatic spike in domestic terrorist attacks, from recent armed attack in Edmonton to shooting at parliament hill in Ottawa that sent shockwaves through the canadian public and warped the view of many on the threats that do exist in what many considers to be a low terror risk country.[77] Thus far, it has yet to be proven that any executed attack on Canadian soil was committed by a returned foreign terrorist fighter, yet that is not to say this concern does not exist. It is known that many Canadian foreign fighters are in the process of currently trying to return to Canada, however there is fear that Canada is not yet ready to process their return. Domestically, there is little that Canada's justice system can do to prosecute foreign terrorist fighters due to the abstract nature of their crimes and lack of verifiable evidence to support any claims. Thus, many who return to Canada and are suspected of having engaged in hostilities are left to roam free and largely unmonitored. The threats posed by returning foreign terrorist fighters have become a hot topic of political debate in the Canadian House of Commons, with political parties deeply divided over what to do. Scott Bardsley, Canadian Minister for Public Safety, publicly referred to Canada's struggle with returning fighters stating:

> "We can only confirm that there are now about 60, which is the same figure as there was when we took office in late 2015. The forthcoming threat report will also use that number, barring any developments between now and its release."[78]

Bardsley went on to state in the same speech that there are still another 180 known foreign terrorist fighters suspected to be abroad, but the reality is that the number could be much larger. According to the Canadian government, individuals who have defected with the

[77] K. Leavitt. "It just takes one person': Security agents at North America's largest mall talk terrorism in 21st century." *The Star Edmonton*. 2018; D. Ljunggren and R.Palmer, "Canada's parliament attacked, soldier fatally shot nearby."*Returners.* 2014.
[78] A. Connolly, "Number of returned foreign terrorist fighters 'essentially the same' as 2 years ago." *Global News Canada.* 2017. Online.

purpose of joining Daesh are classified as "terror travelers", regardless of their level of involvement in extremist activities. It remains the view of the justice system that the act of travel in itself is not enough to prosecute foreign fighters as terrorists.[79] Though what change is needed to improve securitization remains largely up for debate, it is clear that all parties are unified in believing that more needs to be done. In this way, Canada presents an interesting example of a State where domestic law is failing to effectively prosecute foreign terrorist fighters and establishes a good case study for why international mechanisms would be more effective. On December 11, 2018, Public Safety Minister Ralph Goodale said there was no "good solution" to the problem, implying that it is not as easy as just allowing Canadians who left to fight for Daesh to simply return home with the expectation that they can then be prosecuted.[80] In light of recent developments, where Canada has announced that it will not make efforts to bring home or gain the release of its foreign terrorist fighters jailed in Syria and Iraq, it is clear that the Canadian government is aware of the limitations it faces in the prosecution of returning foreign terrorist fighters even if it should be successful in repatriating them. Alternatively, the US's strategy for counterterrorism is significantly more aggressive, as its own domestic counter terrorism laws are more robust and deeply integrated into the core legal system. However, the US method has been more heavily criticized than the Canadian on as it is said to be willfully blind to human rights violations and individual cases, instead painting all suspected terrorists with the same brush. Canada rather attempts to analyse the merits of each case more deeply.

Canada, along with others, such as Australia, the UK, and France, have found their hands tied through domestic policy and international law in which they are, in most cases, preventing from prosecuting returning fighters due to lack of evidence and concern over human rights. In the groundbreaking podcast "Caliphate" by New York Times reporter Rukmini Callamani, the legal shortcomings present when States attempt to prosecute returning foreign terrorist fighters under their own domestic law was highlighted in her examination of a Canadian case study.[81] Through the ten part series, Rukmini proceeds to interview a Canadian returnee who

[79] E. Dyer, "Canada does not engage in death squads, while allies actively hunt down their own foreign terrorist fighters." *CBC News*. 2017. Online.
[80] S. Bell, "Canadian caught in Syria was commander of ISIS unit, according to U.S.-backed forces," *Global News Canada.* 2019. Online.
[81] R. Callamani (2018), *"Caliphate Podcast."* Ep 1-10.

openly discloses his affiliation to Daesh and the terrorist activities he engaged in while living in the Caliphate, yet he expresses no fear of prosecution and remains able to walk free in Canada to this day. Canadian politicians argue that more can and should be done to prosecute the presumed perpetrators of international crimes like the subject of the podcast, however, they fail to put forward effective solutions for the problems presented under international and domestic law. Some politicians have voiced hesitation in being too liberal with defining terrorism in Canadian domestic law, as there is fear that doing so could affect the fundamental freedoms of people by limiting their freedom of association that is both recognized and protected under international law.[82] It is this concern that a new international legal act that enacts limitations on an individual's basic rights and freedoms that could lead to misuse by States. Yet, this hesitation is seen by others as a poor excuse and is met by the counter argument that certain rights are derogable and can be limited by governments in states of emergency, and thus limitations on these rights could be justified in the name of securitization.[83]

Since 2014, Canada's NTTL has been listed as medium, implying that a terrorist act is plausible and that one has occured at some point in the proceeding six months.[84] In order to focus on non-partisan solutions to the complex legal problems that prosecuting suspected foreign fighter returnees as terrorists presents, it will be necessary to study this problem from all sides of the debate. It is fundamental to understand how Canadian domestic law interacts with international law, and to establish where and how the most effective changes can be implemented to the system to enable action against alleged terror travel returnees. Amid the controversy raised since the publication of Callamani's podcast, there has been calls by politicians for Canada to lead the way in developing new international norms by bringing suspected terror returnees forward to the ICC for prosecution despite the limitations of the current legal regime. However, many of these demands have failed to address the

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[82] Council of Europe (1950), *European Convention for the Protection of Human Rights and Fundamental Freedoms.* Art. 11 (1). "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."; UNGA (1948), *Universal Declaration of Human Rights.* Art. 20 "Everyone has the right to freedom of peaceful assembly and association."; UNGA (1966), *International Covenant on Economic, Social and Cultural Rights.* Art. 8; UNGA (1966), *International Covenant on Civil and Political Rights.* Art. 22.

[83] Non-derogable rights include the right to life, freedom from torture, freedom from slavery, and freedom from retroactive application of penal laws. UNGA (1966) *International Covenant on Civil and Political Rights* Art. 4.

[84] Government of Canada (2018), *Canada's National Terrorism Threat Levels.* Online.

international legal restraints in place, restraining States in doing so. Politicians have acknowledged this legal blockade and instead argue that Canada should lead the way in proposing a new international counter terrorism treaty that would address the issue of terror returnees and give States legal remedies to the problems of evidence verification and prosecution.[85] It could be implied that Canada should open an appeal to the ICC to expand the definition of crimes against humanity under the charter to include terrorism and give them legal justification in referring these individuals to the court, though doing so would likely be to no avail. The active nationality principle affirms that a State remains able to, "Exercise jurisdiction over its nationals, even when they are found outside the territory." However, until now, none have been successful in moving this problem forward beyond inter-Party debate in the Canadian House of Commons and plans have been tabled for implementation.

In respect of the findings proceeding in this thesis, a conclusion can be drawn that there is a current gap in international legal regime through the lack of a unified treaty on combating the threat posed by foreign terrorist fighters as they move back towards home as returnees. Thus, this section of the thesis will review how Canada deals with securitizing against the threats presented by foreign terrorist fighters. This case study will help highlight the diverging Canadian political viewpoints that make addressing this problem challenging. It will overview Canada's history with combating terrorism, provide an overview of some of diverging views presented by political parties, and will highlight the direction which counter terrorism in Canada is moving towards today. It will then conclude by summarizing these views in the context of the recommendations this thesis is making to show once again the applicability of these legal solutions to the legal problem being addressed.

3.1 Canadian Methods for Prosecution

It is no secret that Canada, like many western States with their nationals fighting as foreign fighters, is challenged in prosecuting them under the law due to complication of understanding through the legal regime associated with such crimes. There are a number of limitations to domestic remedies that need to be evaluated in the process of recommending improvements. In order to make recommendations for how Canada can engage with other

[85] Government of Canada (2013), *Building Resilience Against Terrorism: Canada's Counter Terrorism Strategy.* Pg. 34-35.

States to find solutions under international law against the threat of terror defectors, it is essential to first understand how Canadian domestic law attempts to address this problem. Canada has jurisdiction over crimes committed abroad by foreign terrorist fighters due in part to the active nationality principle, which enforces that a State remains able to, "exercise jurisdiction over its nationals, even when they are found outside the territory."[86] This principle effectively means that any criminal act committed when abroad falls under the jurisdiction of the State over the national. However, it is often a State's own national legislation that seeks to limit this reach to simply 'serious crimes'.[87] Most would assume that terrorism would count as a crime worthy of being deemed serious. However, this is complicated. Beyond this, there are a number of other more effective tools that Canada can engage to fight terrorism that are also applied attempts to securitize against returning foreign terrorist fighters. One tool engaged by Canadian law enforcement is the peace bond system in which a person can be obligated to attend a hearing where they have yet to be charged with an offence. This is perceived as a method of preventative detention, given the action of suspected returning foreign terrorist fighters through surveillance, and has much of the effect of a restraining order. It has been reported that when all else fails;

> "Police (turn) to another increasingly prominent tool being used to monitor people they suspect may commit acts of terrorism, but who can't be charged due to a lack of evidence — the peace bond"[88]

The judge can decide to impose any of the following temporary conditions on the subject of a bond: participating in a treatment program, wearing an electronic monitoring device, surrendering weapons, surrendering their passport, and/or remaining in a specified geographic location.[89] Another domestic tool engaged by Canada is the CSIS Act. This mandate directs that CSIS to, "collect and analyse intelligence on threats to the security of Canada".[90] However, many view the act as not going far enough as Canadian intelligence has failed to defend against threats in the past or to prevent suspected terrorists from engaging in terror activities.

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[86] C. Ryngaert (2008)*, Jurisdiction in International Law.* Pg. 99.
[87] C. Ryngaert (2008), *Jurisdiction in International Law*. Pg. 100.
[88] T. Khandaker, "When Canadian Police Can't Charge People for Terrorism, They Use Peace Bonds." *Vice News.* 2016.
[89] International Civil Liberties Monitoring Group (2016), *Peace Bonds and Preventative Detention*; See Figure 1.3 which shows countries who are considering or have already implemented laws stripping foreign fighters of citizenship if convicted in some circumstances.
[90] Government of Canada (1985) *CSIS Act* (R.S.C., 1985, c. C-23). Art.12.

Of course, the largest issue with domestic remedies for securitization is the limitation of their scope. Domestic law is restricted to the State that enacts it, which means that foreign terrorist fighters are being compared in different ways in different States. This also means that there is the potential for conflicting understandings to form, such as those relating to the definition of foreign terrorist fighters and the crimes that they engage in. In 2002, on Supreme Court appeal, the government tried to deport Mr. Ahani, an Iranian refugee to Canada, on grounds of suspected terrorist affiliation.[91] Though Mr. Ahani claimed that deportation would inevitably lead to his torture in Iran, the court upheld that due process was taken and proceeded with his deportation on the basis that he presented a culpable threat to Canada. This is one example of the Canadian judicial system taking a stand on terrorism and shows that in certain circumstance and with enough evidence it is possible to succeed in prosecuting and convicting suspected terrorists. However, this is without doubt easier for those whom are not Canadian nationals as the Canadian governments obligations towards it nationals are more extensive and regulated. It is not possible to simply deport a Canadian citizen and it is much harder to convict someone of a crime rather than simply denying their claim for asylum.

In conclusion, it is clear that the issue of foreign terrorist fighters and counter terrorism is an problem which is prevalent in the party platforms Canadian political organizations and is of grave concern to the general public. Though acts of terror in Canada have been significantly less than in other countries, due to the large number of suspected Canadian foreign terrorist fighters still at large, the potential threat of them returning home without facing prosecution is grave. However, what to do about foreign terrorist fighters and the threats that they present remain largely argued through domestic law, with no attempts at innovation being tabled by Canadian politicians. This could be speculated to relate to the mindset that foreign terrorist fighters as a domestic issue needs to be addressed by domestic law. Few have even mentioned international law as an option for prosecution and hesitate to even touch on enhanced international cooperation as an option. This may relate to a general skepticism of how effective international law can be in practice and the fear that increased action through international law would automatically equate to a loss in anatomy. Yet, it is clear that not all

[91] *Ahani v. Canada (Minister of Citizenship and Immigration)*. 1 S.C.R. 72, 2002 SCC 2.

of Canada's politicians believe that the problem of foreign terrorist fighters can be resolved domestically. Thus, it is the recommendation of this thesis that Canada take the lead on establishing a treaty codifying foreign terrorist fighters and their crimes to be used in conjunction with international tribunal with the jurisdiction to hear and prosecute them.

3.2 Citizens Divided

As with many countries grappling with the issue of prosecuting foreign terrorist fighters, Canada remains a country deeply divided along political lines. Though this thesis will to dive deeply into the politics of constructing and implementing counter terror mechanisms, it is relevant to State that politics is a contributing factor to the struggle with securitising against the threats presented. However, through synthesizing the views, of diverging political parties, it becomes clear that the issue, while political in nature, remains well reflected among all the parties. As the current party in power, the Liberals have been in the hot seat in answering the many whys regarding the failures of Canadian laws to adequately prosecute foreign terrorist fighters. The bulk of the criticism has resulted from the findings of Callimachi's podcast, where it was explicitly highlighted that although Canada was aware of the presence of returned foreign fighter, Abu Huzaifa, there was nothing that could be done to prosecute his alleged crimes. The Liberals have largely maintained that reintegration and monitoring of foreign terrorist fighters through the use of peace bonds is the most effective way to combat the foreign fighter threat, however it is argued that, "peace bonds don't do enough in preventing a potential attack," rather acting only as an interim measure for a problem with no current solution.[92] Still today, Abu Huzaifa roams free even given the exposure of his alleged crimes that Callimachi's research has presented. This in particular has drawn harsh criticism from many in Canada's parliament and has been used as a key example of how Canadian domestic laws are not able to do enough in prosecuting suspected foreign fighter returnees. Some opposing parties have been vocal in declaring their concerns if the government considers further restrictions on foreign terrorist fighters, as they believe that this could lead to limiting fundamental rights and freedoms while others feel it is not enough. Ultimately, a

[92] T. Khandaker, "When Canadian Police Can't Charge People for Terrorism, They Use Peace Bonds." *Vice News.* 2016.

legal solution is clearly needed but has not yet been brought forward by any of the respective Canadian political parties.[93]

Even with the need for enhanced capacity to prosecute, there still remains hesitation to put all foreign fighters in a 'terrorist' box, as it includes women and children who may not necessarily have engaged directly in acts of violence. Though this thesis will not analyze the problems associated with repatriating the children of Daesh, it is relevant to State that under certain domestic laws they can be grouped into criminal acts, no differently than the adults. There is also concern in Canada that jail in may not be the best answer for those who are convicted of crimes as foreign terrorist fighters. This is due to the high risk of spreading radicalisation through the prison system.[94] Others argue instead for rehabilitation and reintegration, though this also carries risks, as it is near impossible to establish its level of success due to large variations in motivating factors for extremism between one person to another, and thus are challenging to eradicate in a uniform matter.[95] Another proposed alternative has been to strip foreign terrorist fighters of their citizenship if they are dual passport holders.[96] This is limited to dual citizenship holders as under international law, no State permitted to strip the citizenship from one of its nationals if it will leave that individual stateless.[97] Thus, it is not possible for States to combat the problem by simply dismissing all of those as citizens who wish to return as an attempt to leave them to the international community as a 'global' problem needing resolution. As such, it is often concluded that under domestic law, Canada struggles to effectively securitize against the threats foreign terrorist fighters present, regardless of whether they are convicted or reintegrated. Even with the fall of the Caliphate, Daesh continues expanding and improving its recruitment tactics abroad, thus presenting a continuing threat for Canada and other States as the social pressures against Islam continue to worsen and enable recruitment tactics to be more and more effective.

In conclusion, the Canadian case study gives a brief overview of how one States has applied counter terrorism measures but fails to impactfully prosecute and convict suspected foreign

[93] Green Party of Canada Webpage (2019), *Anti-terrorism and border security.*
[94] I. M. Cuthbertson (2004), *Prisons and the Education of Terrorists,* Pg. 15.
[95] S. Teich (2013), *Trends and Developments in Lone Wolf Terrorism in the Western World: An Analysis of Terrorist Attacks and Attempted Attacks by Islamic*. Pg. 21-22.
[96] P. Khalil and M. Noonan (2015), *North American Foreign Fighters*, Pg. 77.
[97] UNGA (1954), *Convention Relating to the Status of Stateless Persons.*

terrorist fighters. This is highlighted as being due to limitations under domestic law which limit prosecution of terrorists due to conflicting rights, lack of evidence, and inadequate elaboration of crimes domestically. Though Canada has clearly made efforts to implement the requirements on counter terrorism passed down by the UN, in practice the function of counter terrorism measures under domestic law is heavily restricted.

4. IMPROVED MECHANISMS UNDER INTERNATIONAL LAW

The need for improved mechanisms under international law for prosecuting foreign fighters is clear. "Intelligence is not evidence" is a phrase frequently used to describe the problem of prosecution foreign terrorist fighters and rings true to the challenges faced by States.[98] Though States have thus far managed limited cooperation in intelligence sharing, it remains challenging to support intelligence with evidence permissible under local jurisdiction. Effectively, lack of evidence and unverifiable evidence is the main obstacle facing States when trying to prosecute returning foreign terrorist fighters under domestic law. However, the same obstacle does not necessarily exist when prosecuting under international criminal mechanisms. International law understood and synthesised through sources of international law including treaties, international customs, general principles of law, scholarly writing.[99] In a world lacking coordinated action against terrorism, there is much room for theories of improvement. Thus far, this thesis has aimed at focusing on the central issue of understanding what threats foreign terrorist fighters pose to States and whether what is being done to combat these threats is effective. Through the analysis it is clear that the current regime fails adequately deter foreign terrorist fighters from returning and furthermore is ineffective at prosecuting them for their crimes. In this section it will take these finding and give them practical application. In order to prosecute suspected foreign terrorist fighters effectively there are two key elements of interstate cooperation which would enhance the existing legal regime. First, it will recommend that States come together to formulate a treaty against foreign terrorist fighters which would clarify definitions and elaborate on aspects of their action which could be constituted as terrorism and criminal. This is needed to collectively condemn the actions of foreign terrorist fighters, drawing the needed parallels between terrorism and crime to show international support for the counteracting this threat. Second, the establishment of an international tribunal focused on the prosecution on foreign terrorist fighters following the end of the Syrian war. This tribunal, in combination with understanding provided by the treaty, would have the jurisdiction to hear the cases of those refed to it and would thus be effective in prosecuting and convicting foreign terrorist fighters

[98] N. Malik, "What Can We Do About Foreign Fighters Returning From Islamic State?" *Forbes.* 2018.
[99] E.Wise (1989), *International Crimes and Domestic Criminal Law*. Pg. 925; UN (1946), *Statute of the International Court of Justice*. Art. 38 (1).

both efficiently and fairly. Both of these recommendations are practical options which States could effectively implement to enable greater collaboration in countering this security threat, but they are not the only solution and cannot be said to effectively rectify the problem all together. The purpose of these recommendations will be to provide a basis for collaborative solutions through which States can engage collectively to enable uniform understanding on foreign terrorist fighters and to encourage prosecution in a uniform matter. The focus of these recommendations will not be on establishing a universal definition of terrorism and will only be seeking to address this problem in the narrow scope of Daesh. The proposals made here are by no means meant to be presented as the only method or resolution to this problem, but rather instead as one possible step in the right direction to engage international law as a conclusion of this research.

4.1 Treaty Addressing Foreign Terrorist Fighters

It was stated by Barack Obama in 2014 that, "no country can counter the phenomenon of foreign terrorist fighters alone."[100] It is the duty of States to do all possible to prevent transboundary harm, which can be directly associated to a States obligation to controlling their nationals who have defected as foreign terrorist fighters.[101] The need for international collaboration against foreign terrorist fighters goes seemingly undisputed, however, the means of this collaboration has been the subject of heavy debate. While less than half of all defected foreign terrorist fighters return, those that do pose a significant security and moral challenge for States remain to deal with. Relying on due process to kick in is not effective in proactively combating the very real threat these individuals pose. However, there are limitations facing States in prosecution, stemming from the formalities of definition acceptance and extending to the establishment of jurisdiction over certain crimes of terrorism for the courts and tribunals of the international criminal justice system. It is currently impossible to try someone for the crime of terrorism as terrorism is not codified or established as crime under international criminal law through treaties. Furthermore, in order to meet the criteria of enacting international mechanisms, often a prerequisite is that the State for the national be unwilling or unable to try the accused. In the case of foreign terrorist

[100] CTITF (2015), *Implementing Landmark Resolution 2178.* Pg.2.
[101] The obligation of a State to prevent transboundary harm was established by the *United States v. Canada* (Trail Smelter Arbitration) (1941).

fighters, it is not the case that States are unwilling or unable but alternatively that they are constructed in what action they can to prosecute a returning foreign fighter once on home soil and subject to domestic legislation. Though under domestic legislation States can clearly specify the crime and even elaborate on the definition of terrorism, once handled in domestic court the cases are restricted conflicts of rights, lack of evidence, and lack of political consensus in effective punishment for such a highly contested crime. Research shows that it is clear the majority of States are in consensus for taking further measures to limit the threat of foreign terrorist fighters and thus a treaty proposed as an element of the solution may be well received.[102] Thus, it is rather a matter of collecting the understanding for universal jurisdiction over foreign terrorist fighters that is needed to set this resolution in motion.

One role a treaty could assist with playing is through helping to manage the flow of fighters through increased interstate collaboration. Returnees will make their journeys home in a number of methods of transportation: by land, sea, and sky. These journeys are hard to track, as many States do not collaborate on securitization through information exchange or other collaborative methods. In addition, many returnees are dual citizens and hold two passports, thus allowing them to easily navigate across borders without traceable records or raising any red flags. However, the tracking of routes taken by foreign terrorist fighters is only a small portion of the problem that States face in combating the threat they pose. The security challenges presented by foreign terrorist fighters upon their return and the outcry of concern from the general public has pushed this problem into the forefront of political debate in most States. Furthermore, States will also be forced to decide what to do with foreign terrorist fighters who have been incarcerated in Iraq and Syria during the war; an aspect of the problem that only contributes to deepening the divide between States striving to achieving an international resolution.

Defining terrorism as an international crime is key in determining the process in which States can engage with prosecuting those who commit acts of terror. It is standard practice that the perpetrators of acts of terror are tried under domestic courts as their actions qualify as ‘serious offences’, thus regardless of the nationality of the offender making them subject to

[102] See Figure 1.4 for a chart indicating States which are considering or have implemented measures on foreign fighters.

the States jurisdiction.[103] This also ties into the notion of universal jurisdiction, which international law has over States who have agreed to the treaties from which it is drawn from, and is preferable for ensuring justice and equality under the law.[104] However, whether or not acts of terrorism qualifies a crime against humanity has yet to be definitely decided by the international community. By definition found in the Rome Statute of the ICC, a crime against humanity can be defined as an act, which amounts to;

> "Any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population…(including) murder, extermination, enslavement; deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group...enforced disappearance of persons, the crime of apartheid other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[105]

States, in the past, have made proposals that would include terrorism as a feature of a crime against humanity; however, these proposals have been met with firm opposition. States such as Turkey, Sri Lanka, and India are all States who have been subject to terror attacks in the past and been challenged with prosecuting the perpetrators, thus now taking an active role in advocating for its inclusion in the definition.[106] However, there remain States who are undecided and there remain States still out right against it. Undecided is the UK, who initially was in support as they viewed a universal definition as being able to assist them with criminalizing the terrorist acts of the Irish Republican Army (IRA), however they diverged from this view for fear that supporting a universal definition would create problems with their allies in the Arab region whom are notoriously against a universal definition.[107] The US

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[103] A. Cassese (2001), *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law.* Pg. 994.
[104] B. Broomhall (2000), *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law.* Pg. 400.
[105] UNGA (1998), *Rome Statute of the International Criminal Court*. Art.7(1).
[106] J. Friedrichs (2006), *Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism.* Pg. 81-84.
[107] J.Friedrichs (2006), *Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism.* Pg. 80.

remains a prominent figure of opposition preliminarily on the grounds that they are concerned terrorism is not yet well enough defined, the terrorism is too political, proportionality in determining which acts of terror to prosecute may not be followed, and that doing so would limit States ability to prosecute terrorists in national courts, which in their view is the most effective method.[108] For the US, there remains motivation to maintain freedom in "determining the international public enemy at its own discretion."[109] One of the most prominent counter arguments for the inclusion of terrorism in the definition of a crime against humanity is the impact which this would have on people's seeking self-determination and freedom from oppressive regimes. Though less prominent today in a post colonial world, it is certainly the case that this would be problematic for people living in occupation. The counter argument is often reaffirmed by domestic court systems, as a decision passed down by the French Court of Cassation, on proceedings against now former Libyan leader Gaddafi, determining that terrorism does not relieve heads of State of immunity as it does not constitute an international crime.[110]

However, the proposed treaty would not seek to define terrorism wholistically. It would instead only be established for the purpose of providing narrow understanding in the scope of foreign terrorist fighters. Of course treaties are only as powerful as the States who ratify them, but as it is obligation under international law for States to no knowingly allow their territory be used for a purpose which may harm others, it would be beneficial of the majority of State impacted by foreign fighters defecting to or from to ratify.[111] A treaty building upon the understanding which exists on foreign fighters would help to unify States, provide uniform understanding of criminal acts, and further solidify their commitment to combat foreign terrorist fighters collectively.

[108] A. Cassese (2001), *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, Pg. 994.
[109] J.Friedrichs (2006), *Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism.* Pg. 90.
[110] *Bulletin des arrêts de la Cour de Cassation* (2001). Report 64. Online.
[111] The obligation to a State of ensuring it's territory is not used to inflict harm on another is drawn from the *United Kingdom v. Albania* (Corfu Channel Case). (1949).

4.2 Establishment of International Criminal Tribunal

In coordination with the previous recommendation, there is one method of cooperative prosecution on which if States could agree to implement, would drastically change the way foreign terrorist fighters are prosecuted. This method is specialized international criminal tribunal. Tribunals can be established by treaties between select States or through UN resolution. In seeking global jurisdiction over foreign terrorist fighter, the UN method is the clear favorite as UN resolutions are binding on all member States whereas tribunal derived from treaties will only have jurisdiction over the States who have ratified. In either case, International tribunals operate with a combination of international and domestic law incorporating the legal regimes of their location with those which apply to the international community as a whole. Amid the controversy surrounding what to do about the threat of foreign terrorist fighters, some States have expressed the desire to see foreign terrorist fighters referred to the ICC for prosecutions. However, these requests fail to address the international legal restraints facing States in regard to due process and assurance of compliance to international legal obligations. The Rome Statute, which served to establish the court, establishes within its charter that it has the capacity to hear crimes of the following nature; Crime of genocide, crimes against humanity, war crimes, and crimes of aggression.[112] Though terrorism is not explicitly stated within the statute of the court, many would argue that the court could still have jurisdiction over these crimes as they can be perceived as crimes against humanity. However, this is a somewhat slippery slope as without a definition of terrorism which is uniformly accepted this would leave the possibility open for States to refer others under the same justification, even if their actions do not embody terrorism in the same sense. Thus, without codification of terrorism which would distinctly define it and equate it to a crime against humanity, the ICC effectively cannot hear the cases of foreign terrorist fighters. In prosecuting terrorist in the ICC for their crimes, it would help to further highlight the ability and desire of States to deter violence, and this increase in visibility could help to deter those considering such action in the future.[113] However, it is not realistic to assume that an amendment to the statue of the court would be possible as amending the ICC

[112] UNGA (1998), *Rome Statute of the International Criminal Court*. Art. 5.
[113] A. Cassese (2001), *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*. Pg. 1000.

charter requires extensive State consent. Thus, in order to use engaging the ICC as an option through which to seek prosecution of foreign terrorist fighters, it would be necessary to establish new clarifications to the definition of terrorism which would allow the criminal action of such to fit into the existing terms of the court. Yet even this would be a stretch and States would be able to easily challenge the legal legitimacy of such interpretation. Thus this thesis will later recommend alternative international judicial answer which would more directly address the issue of prosecuting returning foreign terrorist fighters of Daesh from Iraq and Syria.

As it is rare that States can agree on cooperation which reduces their sovereignty and control over their nationals, is it easy to understand how no international conclusion has been drawn on terrorism. Previously, international tribunals have been established to prosecute war criminals from major wars involving the worst of crimes. Today, there are five international tribunals in existence: the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon (STL). These five examples are a strong base from which to propose the establishment of a tribunal for foreign terrorists fighters as they have been proven to have the jurisdiction and impact strong enough to bring wrongdoers to justice. The mandate of these tribunals were limited to specific conflicts but operated with a similar purpose: To bring justice in cases where States were unwilling or unable to prosecute perpetrators of international crimes on their own. [114] An international tribunal for foreign terrorist fighters would be effective in limiting the security threat which these individuals present and would help to expedite the process of bringing perpetrators to justice. International tribunals are more empowered than individual States to pass judgment on criminal matters which fall distinctly under the court's jurisdiction. With international tribunal, crimes and acts of terrorism could be easily communicated and agreed upon by States. In coordination with the previously recommended

[114] Competence of the court is elaborated for most tribunals (with the exception of ECCC) under the first article of their establishing mechanism and reflects the uniform purpose for tribunal establishment: UNSC (1993), *Statute of the International Criminal Tribunal for the Former Yugoslavia*. Art. 1; UNSC (1994), *Statute of the International Criminal Tribunal for Rwanda*. Art. 1; UN Security Council, *Statute of the Special Court for Sierra Leone*. Art. 1; United Nations (2003), *Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic kampuchea*. Art.9; UNSC (2007), *Security Council resolution 1757*. Art. 1.

treaties, the tribunal would be effective in bringing to justice those who may have otherwise slipped through the cracks of their domestic legal systems as it would limit a State's ability to influence the judicial process and would reduce conflict with existing domestic law which currently inhibits States in prosecution.

5. PROBLEMS WITH COUNTER TERROR MECHANISMS

Though most would agree that increased counter terror measures are needed in light of the threats faced in today's world, critics warn of the risks associated with applying further restrictions to individuals rights. Perversion of the State into personal life is a fear of many and any change which could be interpreted as a limitation to freedoms is often met with swift resistance. Furthermore, as reviewed previously terrorism itself is a controversial topic on often is defined through a State domestic understanding thus leading to concern for contradicting of other rights and universal understandings if the definition was to be expanded to be global. This is largely why any move to further codify terrorism under international law is meat with strong push back and hostility. As the general principles of international law tell us, the role of creating law between States is rooted in the need to defend human rights, pursue peace, resolve disputes, and protect justice though ensuring all States universally adhere to the basic principles of accountability.[115] Thus, when considering whether there is need for the creation of new international law and mechanisms to manage the threats presented by foreign terrorist fighters, it first must be determined whether the need corresponds with the basic principles and purpose which international law stands for. Given the evidence presented and case examples of the mismanagement in prosecution and threat deterrence, it is undeniable that current legal mechanisms are not doing enough to defend against the threats which foreign terrorist fighters present to international peace and security. Thus, it is easy to justify adaptations to international law on these grounds, however justification can be made further on the basis of needing to protect the fundamental human rights of those who remain unlawfully convicted and detained through providing them guarantees for free and fair trial. The UNSC, in its binding resolution 2322, clarifies the importance of fair trial even in cases of alleged terrorism terrorism. They do this with the statement, “Stressing that the development and maintenance of fair and effective criminal justice systems should be a fundamental basis of any strategy to counter terrorism and transnational organized crime,” and further through calling on States to universally comply

[115] A. Cassese (2001), *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law.* Pg. 998.

through increased information sharing through, "The use of electronic communication and universal templates, in full respect for fair trial guarantees of the accused."[116]

This section will start with a review of the concerns which States have relating to human rights and will elaborate on the delicate balance needed to ensure that counter terrorism tactics do not infringe on fundamental human rights. It will then review concerns raised relating to the extension of State authority in seeking to enhance securitization and the way this could enable the abuse of State power. It will close by reviewing some of the struggles which are faced in enacting any new counter terrorism mechanism such as limitations of State funds. By reviewing these concerns, a balanced perspective can be shown to help further analyse the recommendations of this thesis.

5.1 Human Rights Contradictions

Arguably, the largest concern over any expansion of international or domestic law is what implications such extension of the law could have on the rights of the individuals whom this law could impact. When discussing enacting further legal mechanisms to prosecute and manage threats associated to terrorism, there is valid reason for concern to be raised. Grave concerns have been raised by Human Rights Watch and other NGO's stating that increased methods of securitization often lead to violation of individuals core human rights, especially those of children of fighters.[117] To elaborate on these concerns the OHCHR has produced guidance for States meant to caution them on the concerns relating to responding to the threat of foreign fighters. The guide highlights how with the number of foreign terrorist fighters since 2014 has grown from 12,000 to 40,000 including nationals from over 110 countries, that the concern of human rights violations when seeking to prosecute them is now truly a global issue.[118] It recommends States The counter argument to this has been elaborated that in

[116] S/RES/2322/2016 Pg.2, 6.
[117] Human Rights Watch (2019), *Tunisia: Scant Help to Bring Home ISIS Members' Children: 200 Held in Squalid Camps and Prisons in Libya, Syria, Iraq*. Online; Human Rights Watch (2019), *Families of Iraqi ISIS Suspects Transferred from Syria: Restrictive Camps Raised Concerns for Humanitarian Agencies*. Online; OSCE (2018), *Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework.* Online; Save the Children (2019), *Open letter: Save the Children demands public commitment from future prime minister: Children of Australian foreign fighters must be brought home immediately to ease their suffering in war ravaged Syria.* Online.
[118] OHCHR (2018), *Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters.* Online, Pg.1; R.Barrett (2014), *Foreign fighters in Syria.* Pg. 9; R. Barrett (2017), *Beyond the caliphate: foreign fighters and the threat of returnees*. Pg. 7.

increasing securitization and counter terrorism strategy, States are doing more to improve the human rights situation then to inhibit it. This was argued in the case of US intervention in Iraq were Saddam Hussein's violent oppression of Kurdish people was without doubt just one of the many human rights atrocities committed by his regime and was extensively furthered during the time leading up to the US intervention in 2003.[119] There is evidence and concern that already the US and other States already abuse international law through claiming necessity for counter terrorism and thus infringing on human rights. This can be seen directly with contradictions to the principle of non-refoulement in international refugee law where it is *jus cogens* that an asylum seeker is not returned to their country of origin as a means to, "safeguarding the underlying refugee protection regime."[120] There is a profound fear that extensions of counter terrorism could infringe on fundamental rights such as the right to a fair trial and the right to freedom of movement, however fear of what may happen if the world does not do more to counter terrorism may driver State action ahead.[121]

Ultimately, securitization against the threat of foreign terrorists fighters is a balance. The UNSC has even gone as far as to state that, "measure taken to combat terrorism comply with all their obligations under international law...in particular international human rights, refugee, and humanitarian law."[122] States need to be able to establish laws and regulation which will enable the prosecution and conviction of those who truly pose a threat while not infringing on the fundamental rights of those who are not. International solutions to international problems may sound like the best high level solution. A State has *obligationes erga omnes* to defend the rights of their nationals while abroad and thus cannot ignore when their nationals are detained or otherwise prosecuted in ways not inline with human rights standards.[123] However, concerns over human rights remain one of the main reason which States are incapable of resolving to address terrorism on an international level.

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[119] E. A. Heinze (2006), *Humanitarian Intervention and the War in Iraq: Norms, discourses and State practice*. Pg. 24.
[120] A. Farmer (2009), *Non-refoulement And Jus Cogens: Limiting Anti-terror Measures That Threaten Refugee Protection.* Pg 2.
[121] UNGA(1966), *International Covenant on Civil and Political Rights* Art. 12; UNGA (1948) *Universal Declaration of Human Rights.* Art. 13.
[122] S/RES/1456 (2003).
[123] S. Sucharitkul (1996), *State Responsibility and International Liability under International Law*. Pg. 837-838; Codified in *Belgium v. Spain* (Barcelona Traction case) of the ICJ, *obligationes erga omnes* literally means the obligation towards all and can be found to refer to a states obligations to their nationals.

5.2 Unintended Consequences

The most common fear with increased regulation and State power is unintended consequences through accidental overlap or abuse of State power. It is inevitable that one conclusion which can be drawn from increasing interstate capabilities in counterterrorism is that in doing so States are also increasing the likelihood of power abuse as well. Fear of impact on economic, political, and legal relationships beyond just those which legal acts combating terrorism are intended to impact is genuine concern. However, in creating agreements with this in mind, it can be argued that States acting *bona fides* of any treaty. Under the UN convention, any use of force must be justified, regardless if the provisions of any international agreement, with the previously described criteria for the lawful use of force, and further may only be used, "in the most extreme and exceptional cases".[124] It is thus fundamental that States adequately take into consideration proportionality when determining and action, which may affect the sovereignty of another State. In intervention, a proportionality must be considered in light of avoidance of, "causing more destruction than is required to achieve the military objective and that such means are commensurate with the original provocation."[125] It is evident today that States can easily justify their "wars on terrorism" as a valid precondition for the use of force.[126] However, this fear is the reason why this thesis is proposing complimenting legal solutions, a treaty and a tribunal, to narrow the scope of legal measures being taken in counter terrorism to this specific problem with detailed restrictions.

Of course, there is always a fear that any extension of State power could be used as a means to abuse international law to further self-interest and that State responses to terrorism can often be out of self-interest rather than for the greater good so national security. It has been argued that many of the US lead wars of the last 50 years have all been cover-ups for self-interest, which required simply an excuse to enter and destabilize a State first while

[124] *UN Charter* (1945). Art. 51; E. A. Heinze (2006), *Humanitarian Intervention and the War in Iraq: Norms, discourses and state practice*. Pg. 24.
[125] E. A. Heinze (2006), *Humanitarian Intervention and the War in Iraq: Norms, discourses and state practice*. Pg. 28.
[126] H.P. Grasser (2002), *Acts of Terror, "Terrorism" and International Humanitarian Law*. Pg 549

playing the role of hero for the rest of the world.[127] As counter terrorism is generally engaged as a buzzword phrase, which allows for States to take quick and not always balanced action, often self-interest can slip by undetected.

International problems require international solutions and leaving such a widespread and large scale problem to be resolved by individual States without collaboration leads to inconsistent policy and action which mays engaging a solution problematic and confusing. There is an element of State liability which needs to be addressed in dealing with foreign terrorist fighters since case law has shown that States have an obligation to intervene when action by the State or States nationals could cause harm to another.[128] By not addressing issues of prosecution for foreign terrorist fighters collectively States are risking the creation of another long term unregulated detention center for alleged and unverified crimes, similar to the likes of what the US has developed in Guantánamo. The Guantánamo Bay detention center was created by the US 1989 and is the best example of an unregulated solution to a threat by a single State. Guantánamo Bay was established to enable the avoidance of *habeas corpus* and to allow the US to collect and detain .[129] This was enabled by a decades old US decision where it was established that, "aliens detained abroad cannot bring a petition for *habeas corpus* in the federal courts".[130] This effectively makes it so that detainees at Guantánamo have no way of challenging their detention through the US legal system. This has left many in detention indefinitely in detention without judicial process and Currently, there are estimated to be over 2000 foreign terrorist fighters being held at informal government detention in Iraq and Syria, and numbers in the several thousands being held in refugee camps and displacement facilities in segregated sections due to fear of their agreetion and flight risk.[131] Some of the detained claim they have changed and call out to their governments to intervene and help them to return home. Others are less remorseful and

[127] G. Lakeoff (2003), *Metaphor and War, Again.* Pg. 4; G. Johnson (2005), *The certainty of boom and bust*. Pg.1; A. J. Bellamy and N. J. Wheeler (2008), *Humanitarian Intervention in World Politics.* Pg. 16; L. May (2009), *Aggression, Humanitarian Intervention, and Terrorism.* Pg. 330.
[128] Some examples of cases which exemplify State liability are *United States v. Canada* (1941)(Trail Smelter Case), *France v. Spain (1957) (*Lake Lanoux Arbitration), and *United Kingdom v. Albania* (1949)(Corfu Channel Case).
[129] T. Endicott (2010). *Detention in Guantanamo Bay.* Pg. 3.
[130] *Johnson v. Eisentrager* (1950). 339 U.S. 763.
[131] R. Browne and J.Hansler, "US officials say more than 2,000 suspected foreign ISIS fighters being held in Syria." *CNN* 2019.

continue to speak vollally in supported of the failed Islamic State. Thus, it is paramount for States to collaborate in order to avoid furthering the US dominated trend of unregulated detention and to ensure human rights are respected which security is maintained a priority.

CONCLUSION

In conjunction with concluding this thesis, it is important to address that the recommendations which have been made here are just some possible avenues through which States could consider to engage the prosecute foreign terrorist fighters under international law. The use of a treaty and establishment of a tribunal are only a small fraction of the possible ways in which to manage the developing crisis facing States in dismantling the threats posed by foreign terrorist fighters as the war in Syria ends. However, it is the hypothesis of of this thesis that these methods would be the most effective and universal if States could agree to coordinate on their implementation. The answers which this thesis provides are broad, seeking to engage the conversation surrounding what international law can do to aid in counter terrorism in a more general sense and to present a well balanced overview of the security threats which foreign terrorist fighters pose and legal challenges which States are facing in prosecution. However, even with the recommendations presented here, this thesis does acknowledged that formulating a solution which States will be able to agree on will be difficult due to the political polarisation which this problem causes both domestically and on the international stage. The issue which these political hold ups may cause is that in order to implement the changes recommended here it will require State cooperation and collaboration. Thus, it is important to acknowledge that the main conclusion of this thesis is that there will be no one size fits all solution to counteract threats posed by foreign terrorist fighters. It will be up to States and their governments to establish a layered approach to counterterrorism which will be reflective of the concerns of all.

The impact of terrorist groups like Daesh on the world is limitless, not bound by State borders, nationality, or religion. As a result of globalization we are all interconnected through media and movement in a way which previous generations have never experienced before. The crisis facing States with nationals who have defected as foreign terrorist fighters is a reflection of this globalization, in which the free flow of people, ideas, and information without limitation has allowed for radical ideas to be spread with relative ease. It is now easier than ever to be influenced by the forces of good and evil, and as we have seen with foreign terrorist fighters States can no longer rely on distance to support them in

securitization. States have struggled to make concrete steps towards addressing terrorism in a 21st century world and have remained rooted in the direction of dusty treaties and generations old fear that codifying terrorism, in any way, would lead to the abuse of human rights. Individual States have codified definitions under domestic law, which can be applied to domestic criminalization of certain acts and intention. However, internationally there remains no universally accepted definition, which can be applied to see justice through international mechanisms. In addition, the play between international law and State sovereignty continues to be extensively debated at the core of the debate of how to handle foreign terrorist fighters. There is a fear that referring foreign terrorist fighters to an international criminal tribunal could remove the ability of States to control the prosecution of their nationals. Yet on the contrary, by not collaborating in prosecution of foreign terrorist fighters on an international level many are going unpunished and remain a free threat to the societies in which they reside. While States have expressed concern over outdated and ineffective mechanisms of interstate counter terrorism and have made calls for increased cooperation and unity in combating the issue, there has been little progress towards any concrete solution.

At the start of this thesis, three research questions were asked which can now be concluded and addressed through the findings. First, it is clear through the research and analysis conducted that there is a universal definition of 'foreign terrorist fighters' under law as one has been supplied by the UN, however the definition supplied by the UN only addresses who constitutes as a foreign fighter but not whether they are criminal. Second, it is possible for States to effectively collaborate on combating foreign terrorist fighters without a universal definition of terrorism, however this case be challenging due to diverging legal opinions on what constitutes terrorism. Finally, can international law be further engages to bring foreign terrorist fighters to swift and uniform justice. In answering these questions, the thesis has concluded in support of the initial hypothesis showing under international law States can be more effective in prosecuting foreign terrorist fighters than under domestic with uniform definitions and criminal jurisdiction. Further it was proven though there is no universal definition of terrorism under international law this does not limit States in collaborating on a definition of foreign terrorist fighters.

In the Canadian context, members from all political parties have voiced their concerns regarding Canada's lack of action and inability to prosecute suspects reflective of their hands being tied by international law, yet as well there has been no progress in moving towards a bipartisan solution. It is clear through the research presented in this thesis that combating the threat of returning foreign terrorist fighters is a two-pronged issue, which requires both domestic remedies and remedies through international law. As this thesis was able to show, the domestic remedies limit States due to domestic rules relating to evidence, domestic definitions of the crime of terrorism, and domestic concerns relating to human rights and fundamental freedom. The Canadian problem which was highlighted is not unique, as similar troubling scenarios also face States such as the US and the UK. Thus, with the restrictions which are present it is clear that to resolve the threats which foreign terrorist fighters present, both while abroad and at home, collaborative international measures will need to be taken.

As such has been the case, the findings of this thesis have led to three main conclusions. First, that the current legal regime for counter terrorism fails to adequately defend against foreign terrorist fighters both under Canadian domestic law and under international law. Second, that part of the reasons States have been unable to create effective partnerships and mechanisms to address this threat relates to the lack of clarity on the definition of terrorism, to understand its acts and intents, and to evaluate what international crimes it must consist of to meet the requirements of prosecution for those shown to have engaged in it. Third, that there are not international agreements which address the specific topic of foreign terrorist fighters and no universal international agreement on evidence and information sharing in relation to helping States prosecute these crimes thus limiting the ability of States to prosecute suspected terrorist returnees and foreign terrorist fighters of their own. It is clear there needs to be a balance established between maintaining human rights and State sovereignty while also encouraging cooperation and justice.

In light of these findings, the thesis proposed a two part solution. First, it proposed the creation of a treaty for addressing the security threats which foreign terrorist fighters pose through codifying a universal definition for them, criminalizing their acts, and solidifying the commitment of States to work collaboratively to eliminate them as a threat. Such a treaty would see success if it applied the known definition of foreign terrorist fighters already

presented by the UN and if it continued to build upon the partnerships that States have already fostered to fight terrorism such as the collaboration which we see between NATO States. Second, it proposed the establishment of an international tribunal with the mandate of trying foreign terrorist fighters for their crimes. The tribunal being proposed would be established by the UN to bring to justice the foreign terrorist fighters of Daesh who defected to the Caliphate in Iraq and Syria and committed or aided acts of terrorism as elaborated in the treaty. The Convention Establishing the Transnational Threats of Foreign Terrorist Fighters would serve as the basis for the mandate which the court operates under. States would then be able to seek justice through referring their nationals who are suspected foreign terrorist fighter there so answer for their crimes when prosecution under domestic law is not possible.

These solutions collectively would provide States with enhanced ability to prosecute foreign terrorist fighters, seek justice for victims, and improve securitization against the threats which they pose and have served to prove my original hypothesis that under international law more effective criminal jurisdiction could be implemented. As States remain divided on what to do with their nationals who have joined Daesh as the war in Syria comes to an ends and Daesh starts to lose their regional control, it is becoming more evident that the international community will need to collectively address the issue as a threat to all. Through the proposed treaty and tribunal States would all be able to have a say in the development of the legal regime which would regulate this threat but would also need to compromise with others in order to achieve success. This may be where the recommendations of the thesis run into some challenges as it is hard to project which States would be able to coordinate on such a treaty, how much use the tribunal would receive, and if the verdicts of the tribunals would be respected. If States can come together implement these recommendations to insure that those accused face judgment while also ensuring that trials are fair and free, the the threat of foreign terrorist fighters can be effectively mitigated.

This thesis proposed solutions that would aid States in regulating the prosecution of foreign terrorist fighters as the war in Syria draws to an end and would ensure justice for victims of the atrocities committed by Daesh through holding foreign terrorist fighters to an international standard. Canada could play a significant role in bringing this problem to the

table on the international stage and could spearhead such a proposal with its own stories of fail persecution and continuing threats toward national security. Through spearheading an agreement between States on terror prosecution and defector prevention, Canada can lead the way in fighting the threat of returning terrorist to their country of origin while ensuring human rights and international law are respected. It is clear that in Canada party politics is more concerned with the maintenance of image than on engaging in debate which may lead towards solutions.

In final conclusion, this thesis has shown that there is a fundamental need for changes to the existing system for prosecuting foreign terrorist fighters. It was able to show that international collaboration, unlike domestic remedies, presents States with more effective solutions to combat and prosecute foreign terrorist fighters. Perhaps best summarized by Professor Marianne van Leeuwen who stated that, "Jihadist terrorism is a vicious transnational phenomenon and fighting terrorism can be interpreted as a matter for collective defense, provided the task is defined as mainly facilitating non-military lead organizations, with skill and prudence as guidelines."[132] Her call for collective security tactics across States is echoed in the need this thesis has shown for enhanced interstate collaboration to fight threats presented by foreign terrorist fighters. Thus, reduced emphasis should be placed on domestic remedies and more should be placed on international legal remedies, starting with the formulation of a treaty and tribunal addressing this problem directly.

It has been recognized by academics that the issue of terror defectors is not a fading problem. In fact, more recently increased development of Islamic terrorist activities in South America which could suggest that defectors may chose to return areas which may not be consistent with their nationality of the third State which they originally defected to.[133] This further enforces the international nature which foreign terrorist fighters present and enforces that fact that they are truly a global threat thus making it paramount that any solution or tactic considers this reality. It is time that Canada and the rest of the world wake up to the threat of foreign terrorist fighters and stop using domestic politics as justification for failure to move forward with a more aggressive and effective plan to mitigate the problem. As stated by Amal

[132] M. Leeuwen (2017), *Special Section: Commentary NATO and the War on Terror*. Pg. 4.
[133] L. C. P. K. Accott (2004), *Terrorist Threat in the Tri-Border Area: Myth or Reality*. Pg. 52.

Clooney to the members of the UN Security Council, "This is your chance to stand on the right side of history," and enforced the notion that enacting legal change to ensure justice is necessary to ensure this.[134] Without doing so the world risks failing the victims in their search justice and closure. States need to recognize and take action in heeding the UN's call for increased international cooperation by putting domestic politics aside to address this international issue on the international stage. Foreign terrorist fighters are a problem which States are only currently just beginning to address and without innovations in international law and legal mechanisms, it is a problem that is projected to soon get much worse.

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TABLE OF ABBREVIATIONS

CODEXTER: Council of Europe's Committee of Experts on Terrorism

CSIS: Canada Security and Intelligence Services

GA: General Assembly (United Nations)

HRC: Human Rights Committee

ICC: International Criminal Court

ICCPR: International Covenant of Civil and Political Rights

ICJ: International Court of Justice

NGO: Non-Governmental Organization

NTTL: National Terrorism Threat Level (Canada)

OHCHR: Office of the United Nations High Commissioner for Human Rights

UDHR: Universal Declaration of Human Rights

UK: United Kingdom

UN: United Nations

UNGA: United Nations General Assembly

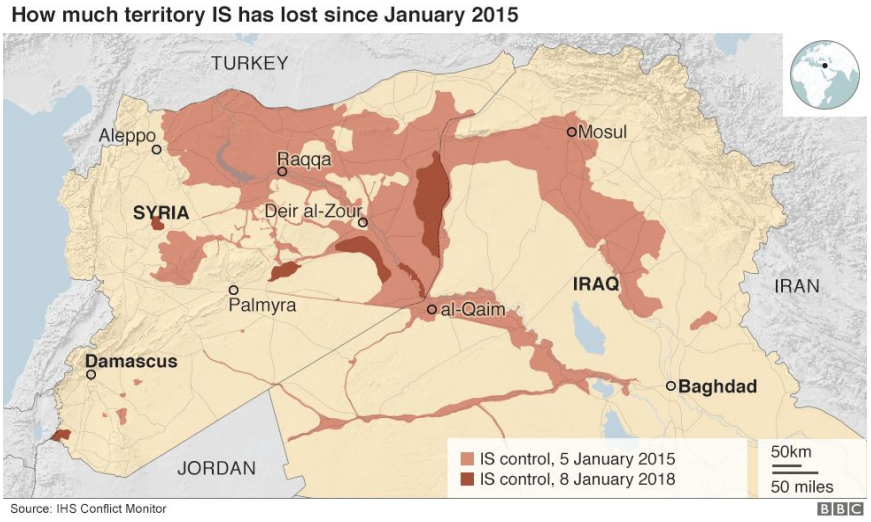
UNHCR: United Nations High Commissioner for Refugees

UNSC: United Nations Security Council

USA: United States of America

APPENDIX

Figure 1.1[135]



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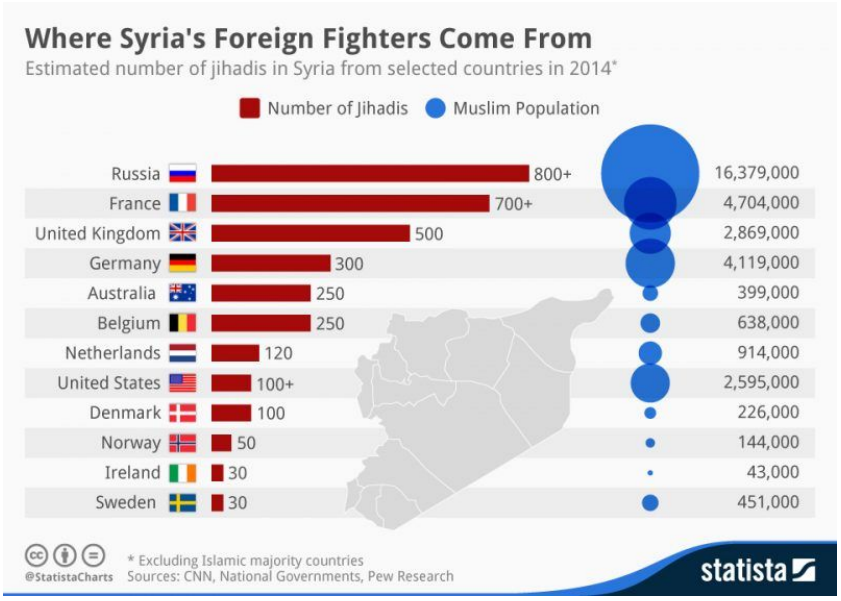

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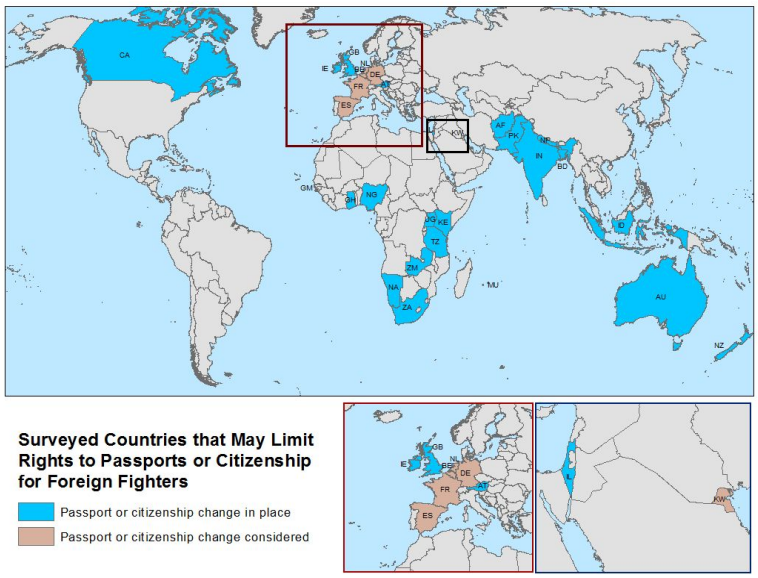
Figure 1.3[137]



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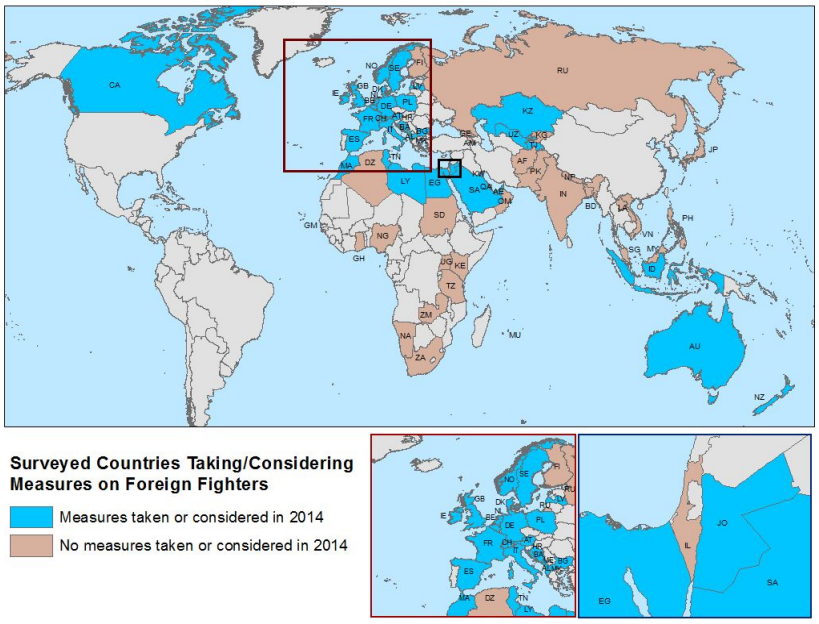

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