

RESEARCH ARTICLE

The concept of the foreign terrorist fighter: An immanent critique

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Abstract

The conflicts in Iraq and Syria have led to concerns in the West over ‘foreign fighters’. Although states are anxious about the role these individuals play in the conflicts they join, their primary concern relates to the perceived ‘terrorist’ threat they pose on their return. This fear has led to an evolution in the international policymaking arena, with foreign fighters now often referred to as ‘foreign terrorist fighters’ (FTFs). A Critical Theory-inspired *immanent critique* is offered to highlight various problems that exist with the FTF term and to argue policymakers should resist its use. The article demonstrates the importance of language by showing how the invocation of the FTF threat has strengthened the ongoing development of globally coordinated counterterrorism action. Specifically, it argues UN Security Council Resolution 2178, agreed in 2014, generates a legal obligation upon UN member states to implement new counterterrorism laws at national level to combat the perceived threat from FTFs. The article highlights the negative effect these laws have on human rights. It is argued institutions like the UN need to ensure new counterterrorism legal instruments are built from a human rights rather than security-first perspective if commitments to human rights in transnational counterterrorism are to be fully realised.

Keywords: Foreign Terrorist Fighter; Counterterrorism; Immanent Critique; Foreign Fighters; Human Rights

Introduction

The conflicts in Iraq and Syria have led to fears in the West regarding the threat posed by foreign fighters, with special concern focused on individuals who fought for the so-called ‘Islamic State’ and other violent ‘jihadi’ organisations.¹ This unease is twofold. It involves not only the immediate threat posed by individuals who left to participate in Iraq and Syria but also the perception there is a longer-term security threat from those who return to their country of origin after taking part in conflict.² Although estimates differ from one source to another, in 2015 the United Nations (UN) claimed 25,000 foreigners, from over one hundred different countries, went to fight in Syria alone.³ Similarly, the European Parliamentary Research Service estimated 4,000 citizens from European Union (EU) member states (mostly from Belgium, France, Germany and the

¹I use the label ‘Islamic State’ to refer to the terrorist group. The acronyms ISIS and ISIL may also be used to refer to Islamic State when directly quoting from policy documents or other source material.

²Thomas Hegghammer, ‘Should I stay or should I go? Explaining variation in Western jihadists’ choice between domestic and foreign fighting’, *American Political Science Review* (2013), pp. 1–15.

³United Nations, ‘Analysis and Recommendations with Regard to the Global Threat from Foreign Terrorist Fighters’, Analytical Support and Sanctions Monitoring Team, S/2015/358 (2015), available at: {http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/358}.

United Kingdom) left to participate in the Syrian civil war, with over 30 per cent having returned to Europe.⁴ The terrorist attacks in Paris in November 2015, which claimed the lives of over 130 people, were thought to have involved ‘returning foreign fighters’ (RFFs), and were seen as emblematic of this emerging threat to Western societies.⁵ Indeed, it is this belief foreign fighters will return en masse to conduct acts of terrorism that now characterises common perceptions of this threat.

In this article, it is argued it is specifically the fear foreign fighters might commit acts of terrorism in foreign lands or return to their country of origin and commit a terrorist act, which has led to an evolution in the language used by policymakers. Where once foreign participants in conflict were referred to as foreign fighters, there is now an inclination to refer to these individuals as ‘foreign terrorist fighters’ (FTFs).⁶ The choice of language is important in that although it is true a large number of foreigners participated in the conflict in Iraq and Syria, it is also clear not all went to carry out terrorist offences.

Significantly, the use of the term ‘terrorism’ in conjunction with ‘foreign fighter’ goes against the grain of established academic scholarship in this area.⁷ I argue below, building on the research of key scholars in this area, like Cerwyn Moore and Nir Arielli, it is more accurate to view foreign fighting as one form of transnational activism or foreign volunteerism.⁸ This also entails recognising foreign volunteers are motivated to participate in conflict for many different reasons and they engage in a variety of combat and non-combat roles, which can range from financing, training, or medical support through to actual fighting. I situate my argument with the broader literature on foreign volunteers/fighters in order to challenge the homogenising and narrowing effect of the new FTF concept, which limits explanations for foreign fighting to a sole concern with terrorism. The article, therefore, seeks to problematise the concept of the FTF, to consider how and why it has emerged and to consider the consequences of this term for international policy-making in the field of security.

In order to draw out the issues with the term, the article adopts an *immanent critique*. This method is useful in the context of analysing security issues because it is both analytical and connected to political praxis.⁹ It provides a framework through which to highlight the internal contradictions of predominant security arrangements, while also offering transformative possibilities

⁴EPRS, ‘The Return of Foreign Fighters to EU Soil: Ex-Post Evaluation’, European Parliament Research Service, Brussels (May 2017).

⁵Europol, ‘TE-SAT: EU Terrorism Situation and Trends Report’ (The Hague: Europol, 2016).

⁶Chair of the Security Council Committee Concerning Al-Qaida and Associated Individuals and Entities, ‘Letter Dated 19 May 2015 to the President of the Security Council, United Nations’, S/2015/358; UN News, ‘Top UN Counter-Terrorism Official Urges Cohesive Response to “Persistent” Threat of Terrorism’ (22 July 2016), available at: {<https://news.un.org/en/story/2016/07/535202-top-un-counter-terrorism-official-urges-cohesive-response-persistent-threat>}.

⁷Cerwyn Moore and Paul Tumelty, ‘Foreign fighters and the case of Chechnya: A critical assessment’, *Studies in Conflict and Terrorism*, 31:5 (2008), pp. 412–33; Cerwyn Moore and Paul Tumelty, ‘Assessing unholy alliances in the North Caucasus: From communism and nationalism to Islamism and Salafism’, *Journal of Communist Studies and Transition Politics*, 25 (2009), pp. 73–94; Thomas Hegghammer, ‘The rise of Muslim foreign fighters: Islam and the globalization of jihad’, *International Security*, 35:3 (2011); David Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford, UK: Oxford University Press, 2013); Donald Holbrook, *The Al-Qaeda Doctrine* (London, UK: Bloomsbury, 2014); Cerwyn Moore, ‘Foreign bodies: Transnational activism, the insurgency in the North Caucasus and beyond’, *Terrorism and Political Violence*, 27:3 (2015), pp. 395–415; Timothy Holman, ‘Belgian and French foreign fighters in Iraq 2003–2005: A comparative case study’, *Studies in Conflict & Terrorism*, 38:8 (2015), pp. 603–21; Marco Nilsson, ‘Foreign fighters and the radicalization of local jihad: Interview evidence from Swedish jihadists’, *Studies in Conflict & Terrorism*, 38:5 (2015), pp. 343–58; Nir Arielli, *From Byron to Bin Laden: A History of War Volunteers* (Cambridge, MA: Harvard University Press, 2018).

⁸See Donatella Della Porta and Sydney Arrow, *Transnational Protest and Global Activism* (Oxford, UK: Rowman & Littlefield, 2005); Donatella Della Porta and M. Diani, *Social Movements: An Introduction* (2nd edn, Oxford, UK: Blackwell, 2006); Moore and Tumelty, ‘Assessing unholy alliances’; Cerwyn Moore, *Contemporary Violence: Postmodern War in Kosovo and Chechnya* (Manchester, UK: Manchester University Press, 2013); Arielli, *From Byron to Bin Laden*.

⁹João Nunes, ‘Reclaiming the political: Emancipation and critique in security studies’, *Security Dialogue*, 43:4 (2012), pp. 345–61.

in the form of ideas that have the potential to contribute to change. The article uses this framework to offer three novel contributions to current debates on the foreign fighter issue.

First, the article addresses the conceptual lacuna surrounding the FTF term by offering the first detailed account, inspired by critical approach to international security, of the way it has been conceptualised in transnational counterterrorism policymaking forums and in international law. I offer a genealogy of the FTF term to show how it arose out of two interrelated policy priorities that emerged at the start of the Global War on Terror (GWOT), including unilateral efforts by the United States (US) to police 'Muslim mobility' in the context of the wars in Afghanistan and Iraq, and multilateral efforts to create globally coordinated counterterrorism action through the UN Security Council.¹⁰ It is argued although the new FTF measures proposed under the 2014 UN Security Council Resolution (UNSCR) 2178 are claimed to have been adopted as a necessary response to the foreign fighter issue, they are in fact primarily concerned with extending previous efforts to develop a transnational counterterrorism legal architecture.¹¹ Importantly, I argue that transnational legal instruments have been built from a security-first rather than human rights based perspective. Second, I use the academic literature on foreign fighters to critique the policy discourse on FTFs and to highlight the inherent problems with the term. Specifically, I draw attention to the ways in which the FTF concept has come to be used interchangeably with the term foreign fighter in transnational security policy and international law. Third, the article argues the FTF concept has important consequences for human rights. I argue the FTF concept generates a legal expectation state actors transpose new laws for the purpose of combatting terrorism into their domestic law. I highlight several real-world examples of the impact of these laws. The article concludes by offering two transformative possibilities for policymaking in response to the foreign fighter problem and the development of transnational counterterrorism.

Theoretical and methodological framework: Immanent critique and critical discourse analysis

The first section starts by situating this research within the foreign fighter literature, before outlining the theoretical and methodological framework. According to Moore, research on foreign fighters has dealt with one of two things, either recruitment and mobilisation processes or disengagement from militant movements more generally, with a smaller body of research analysing the impact of foreign fighters on local conflict dynamics.¹² Importantly, notwithstanding some work on social movement theory addressing motivations for transnationalism, Moore notes only a small amount of attention has been paid to conceptual issues in debates on foreign fighters, with the definitional debate split on several important factors.¹³

According to Moore, 'the contested definitional parameters of [research on] foreign fighters ... can be traced across three phases of academic work.'¹⁴ The first phase, adopting a case study approach, emerged in the early 2000s exploring the role of foreign fighters in the conflicts in Afghanistan in the 1980s and in other conflicts, such as the wars in Chechnya, in the 1990s.¹⁵

¹⁰Darryl Li, 'A universal enemy: Foreign fighters and legal regimes of exclusion and exemption under the global war on terror', *Columbia Human Rights Law Review*, 41 (2009), pp. 355–428; Kim Lane Scheppele, 'The international standardization of national security law', *Journal of National Security Law & Policy*, 4:2 (2010), pp. 437–53; Fiona de Londras, *The Practice and Problems of Transnational Counter-Terrorism* (Cambridge, MA: Cambridge University Press, 2022).

¹¹United Nations, Security Council Resolution 2178, S/RES/2178, Distr.: General, 24 September 2014.

¹²See Moore, 'Foreign bodies'.

¹³On definitional issues in the foreign fighter literature, see *ibid.*; Moore and Tumelty, 'Foreign fighters and the case of Chechnya'; Hegghammer, 'The rise of Muslim foreign fighters'; Malet, *Foreign Fighters*; David Malet, 'Foreign fighter mobilization and persistence in a global context', *Terrorism and Political Violence*, 27:3 (2015), pp. 454–73.

¹⁴Moore, 'Foreign bodies', p. 398.

¹⁵F. Gerges, *The Far Enemy: Why Jihad Went Global* (Cambridge, UK: Cambridge University Press, 2005); Moore and Tumelty, 'Assessing unholy alliances'.

A second phase followed around the time of the US withdrawal from Iraq in 2010, comprising mainly large-N comparative studies of foreign fighters that sought to explore conceptual issues, mobilisation, and the impact of foreign fighters on conflict.¹⁶ Finally, a third phase of research began to develop following the emergence of Islamic State in the summer of 2014, which consisted mainly of policy reports by think tanks and journalists focusing on foreign fighters engaged in the conflict in Iraq and Syria.¹⁷

Since Moore offered his overview of the foreign fighter literature in 2015 there have been further contributions in this area. First, the development of historical accounts of foreign volunteerism investigating past historical examples of foreign participants in civil conflict and war. This research aims to draw out historical trends and their significance for contemporary debates on foreign fighters.¹⁸ Second, a body of research on the terrorist threat (returning) foreign fighters pose, which focuses specifically on counterterrorism strategies that might be employed to deal with this issue.¹⁹ Third, an emerging literature that not only accepts the link between foreign fighting and terrorism as a given but adopts the term FTF and uses it interchangeably with the term foreign fighter.²⁰ Finally, a small but evolving literature that challenges an assumed link between foreign fighting and terrorism through the use of critical modes of social inquiry, including anthropological and discourse analysis approaches. This literature focuses on the relationship between the invocation of threat discourses involving terrorism/foreign fighting and the formulation of counterterrorism policy.²¹

Importantly, although there has been a great deal of research exploring the role of foreign volunteers/fighters in conflicts, it is clear there has been less engagement with governmental responses to this issue. Moreover, very little research on foreign fighters has employed critical modes of social inquiry or analysed specifically the new FTF concept and its role in the development of counterterrorism policy. This is a gap in the literature this article seeks to address.

The approach taken here is inspired by ideas from Critical Security Studies (CSS).²² Specifically, the article uses Critical Theory, and the theoretical tool of *immanent critique*, as a conduit through which to interrogate knowledge about foreign fighters, terrorism, and the practice of counterterrorism. As Pinar Bilgin argues, CSS teaches us security thinking has a

¹⁶F. Cilluffo, J. B. Cozzens, and Magnus Ranstorp, 'Foreign Fighters: Trends, Trajectories & Conflict Zones' (Homeland Security Policy Institute: George Washington University, 2010); Hegghammer, 'The rise of Muslim foreign fighters'; Malet, *Foreign Fighters*.

¹⁷ICCT, Security Council Resolution 2178 (2014), 'Challenges and Opportunities for EU Policy', 7 November 2014; Thomas Renard and Rik Coolsaet, 'Returnees: Who Are They, Why Are They (Not) Coming Back and How Should We Deal with Them', Egmont Papers 101 (2018).

¹⁸Arielli, *From Byron to Bin Laden*; Steven O'Connor and Guillaume Piketty, 'Introduction: Foreign fighters and multinational armies: From civil conflicts to coalition wars, 1848–2015', *Revue Européenne d'histoire [European Review of History]*, 27:1–2 (2020), pp. 1–11; Fraser Raeburn, 'Politics, networks and community: Recruitment for the international brigades reassessed', *Journal of Contemporary History*, 55:4 (2020), pp. 719–44.

¹⁹Hegghammer, 'Should I stay or should I go?'; Thomas Hegghammer and Peter Nesser, 'Assessing the Islamic State's commitment to attacking the West', *Perspectives on Terrorism*, 9:4 (2015), pp. 14–30; Daniel Byman, 'The homecomings: What happens when Arab foreign fighters in Iraq and Syria return?', *Studies in Conflict & Terrorism*, 38:8 (2015), pp. 581–602; Andrea De Guttry, Francesca Capone, and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (The Hague: TMC Asser Press, 2016).

²⁰Literature using the term FTF interchangeably with 'foreign fighter' includes: Renard and Coolsaet, 'Returnees: Who Are They'; Jessie Blackburn, Deniz Kayis, and Nicola McGarrity, *Anti-Terrorism Law and Foreign Terrorist Fighters* (London, UK: Routledge, 2018); David Malet and Rachel Hayes, 'Foreign fighter returnees: An indefinite threat?', *Terrorism and Political Violence*, 32:8 (2020), pp. 1617–35; R. Kim Cragin, 'Preventing the next wave of foreign terrorist fighters: Lessons learned from the experiences of Algeria and Tunisia', *Studies in Conflict & Terrorism*, Online First (2021).

²¹Darryl Li, *The Universal Enemy: Jihad, Empire and The Challenge of Solidarity* (Stanford, CA: Stanford University Press, 2019); Christopher Baker-Beall, 'The threat of the "returning foreign fighter": The securitization of EU migration and border control policy', *Security Dialogue*, 50:5 (2019), pp. 437–53; Raphaël Leduc, 'The ontological threat of foreign fighters', *European Journal of International Relations*, 27:1 (2021), pp. 127–49.

²²Keith Krause and Michael C. Williams, *Critical Security Studies: Concepts and Strategies* (Abingdon, UK: Routledge, 1997); Ken Booth, *Critical Security Studies and World Politics* (London, UK: Lynne Rienner, 2005).

constitutive character: as a result, institutional practices and assumptions about foreign fighting, foreign volunteerism and the perception of a relationship with terrorism have created a reality, in this case, in which the concept of the FTF has emerged, necessitating policy responses designed to combat this issue.²³ As a branch of Critical Theory, immanent critique helps identify, understand, and analyse the processes through which ideas become reified in, and make possible, institutional and cultural practices.²⁴ As Robert J. Antonio explains, ‘immanent critique attacks social reality from its own standpoint, but also criticises the same standpoint from the perspective of its historical context.’²⁵ As such, it allows for analysis of historical process through which, in this instance, international security problems are produced.²⁶

I adopt the method of immanent critique as a way of analysing the FTF concept for two reasons. First, as Schroyer explains, immanent critique holds utility, in this instance for analysing the impact of the FTF concept on responses to foreign fighters *and* counterterrorism policymaking, in part because it first describes ‘what a social totality holds itself to be, and then confront[s] it with what it is in fact becoming’.²⁷ Effectively, the threat discourse associated with the concept of the FTF plays a key role in making certain policies possible; where the discourse on FTFs purports to be about counterterrorism and preventing terrorist acts (what it holds itself to be), it instead plays a key role in fixing the response to this issue in a specific way. As I will demonstrate, an immanent critique reveals the main response to the FTF issue has been to reconstruct the foreign fighter problem as one that requires the adoption of counterterrorism measures and border control, include specific policies that place restrictions on travel and more coercive practices like the removal of citizenship (what it is in fact becoming). Importantly, the intention here is not to argue that terrorism is a form of violence that exists objectively, out there in the real world, but to show how the label of ‘terrorism’, and more specifically the new ‘FTF’ label, has been constructed and then invoked by political actors to justify security practices.²⁸

Second, immanent critique allows for an explicitly normative argument to be made, moving the analysis away from the priorities of the governments that introduced this term and to argue the response to this issue *ought* to place ‘human rights’ at the centre of policy. By adopting immanent critique, this article recognises the negative impacts of FTF policy and pushes for emancipatory knowledge on this topic. I also make the explicitly normative argument policymakers should resist the use of the FTF term, with the concept of foreign volunteerism providing a more appropriate starting point from which to begin when considering the issue of foreign fighters.²⁹ Of course, academic findings are rarely the driver of policy, and while abandonment of the FTF term would bring the language of policy in line with much of the earlier academic research on foreign fighters, it would not necessarily change the institutional and legal framework built in response to this issue. The article therefore offers a second normative argument policymakers should, at the very least, put practices in place ensuring commitments to human rights in internationally coordinated counterterrorism polices are realised.

For the purpose of this analysis, I use Critical Discourse Analysis (CDA) as the method through which to operationalise the immanent critique, given its specific take on how language

²³Pinar Bilgin, ‘Critical theory’, in *Security Studies: An Introduction* (London, UK: Routledge, 2008), pp. 89–102.

²⁴Richard Wyn Jones, *Security, Strategy and Critical Theory* (Boulder, CO: Lynne Rienner, 1999).

²⁵Robert J. Antonio, ‘Core of critical theory: Its origins and developments in Hegel, Marx and contemporary thought’, *The British Journal of Sociology*, 32:3 (1981), pp. 330–45.

²⁶Columba Peoples, ‘Emancipation, power, insecurity: Critical Theory and immanent critique of human security’, in *Handbook of Critical International Relations* (Cheltenham, UK: Edward Elgar Publishing, 2020), pp. 55–71.

²⁷T. Schroyer, *The Critique of Domination: The Origins and Development of Critical Theory* (Boston, MA: Beacon Press, 1971), pp. 30–1.

²⁸I am not arguing the FTF term was created intentionally for this purpose. It was created to solve a problem, specifically how to prevent individuals joining ‘terrorist groups’ in Syria. However, the term has, since its emergence, been frequently invoked to justify the development of policies I will show go beyond its original purpose and entail a series of problematic consequences.

²⁹Arielli, *From Byron to Bin Laden*.

can be used to achieve particular goals. The argument below seeks to highlight how the concept of the FTF has been invoked to help justify the development of policy in this area. Furthermore, as Benno Herzog explains, by combining immanent critique with CDA it is possible to not only ‘perform controlled interpretations ... [and] analyse the socio-historic context of these interpretations’, but to highlight the often-unacknowledged normative basis of multiple social practices,³⁰ and to provide a unique perspective through which normative arguments about policy discourses can be made.³¹ The approach taken here involved a four-step process, whereby a series of critical questions were used to conduct the immanent critique of the FTF discourse.

The first step in the research process involved asking: ‘what are the key documents that make up the discourse on FTFs?’. In terms of the level of analysis, this immanent critique focused primarily on how the FTF discourse has been produced at the international level since 2014, first by the Global Counter-Terrorism Forum (GCTF) and then through the UN Security Council. The GCTF website was searched manually for all documents relating to the FTF concept. Specifically, the documents listed under the GCTF Framework Documents on ‘Foreign Terrorist Fighters’, returning four results, and ‘Border Security and Interdicting Terrorist Travel’, returning three results, were selected for analysis.³² In terms of identifying the key UNSCRs, a keyword search for the term ‘foreign terrorist fighter’ was run through the unscr.com search engine, returning seven results. Additional Security Council Resolutions were identified via the list of resolutions upon which UNSCR2610 is based,³³ giving a total of thirty resolutions central to the development of the UN’s counterterrorism regime. To demonstrate the dissemination of the FTF concept into other intergovernmental institutions, the EU’s eur-lex.europa.eu site was searched for the term ‘foreign terrorist fighter’, returning one result. Furthermore, where appropriate other laws, resolutions, policy documents, reports and letters from the GCTF, UN, EU and human rights organisations were used to enhance the immanent critique of the FTF concept.

The second step asked: ‘how has the discourse on FTFs been constructed historically at the international level and what are the key themes upon which the discourse rests?’. In order to answer this question, the analysis below provides a genealogy of the FTF concept, highlighting its emergence through the GCTF, its adoption by the UN and its dissemination into other multi-lateral institutions like the EU. A genealogy of the term is offered not simply to provide a sequence of events leading to the emergence of the FTF term but to draw attention to the highly contingent historical processes that have made its emergence a possibility.³⁴ This step focused on the creation of FTF policies at the international level, which it is argued represent an extension of earlier efforts to create a coordinated global counterterrorism legal infrastructure. As such, the genealogical analysis provided the necessary starting point from which an immanent critique can begin.

The third step in the process asked the question ‘how can the knowledge upon which the FTF concept be critiqued?’. As such, the analysis below goes on to challenge the emerging ‘conventional wisdom’ on FTF, which it is argued is reinforcing the notion foreign fighting and terrorism are interlinked, by using the discourses internal contradictions, mistakes, misconceptions, and omissions to analyse the FTF discourse on its own terms. This involved subjecting the FTF concept to analysis through engagement with the academic literature on foreign volunteers/foreign

³⁰Benno Herzog, ‘Discourse analysis as immanent critique: Possibilities and limits of normative critique in empirical discourse studies’, *Discourse & Society*, 27:3 (2016), pp. 278–92.

³¹Herzog also draws attention to some of the limitations with immanent critique when combined with CDA. I have taken account of these limitations when conducting the analysis of the FTF concept. *Ibid.*, p. 287.

³²GCTF, GCTF Framework Documents, available at: {<https://www.thegctf.org/About-us/GCTF-framework-documents>}.

³³UN Security Council Resolution 2610, S/RES/2610, Distr.: General, 17 December 2021, p.1. Not all resolutions were cited in the construction of the genealogy.

³⁴On combining Immanent Critique with Genealogy, see Robert Guay, ‘Genealogy as immanent critique: Working from the inside stone’, in Alison Stone (ed.), *Edinburgh Critical History of Nineteenth-Century Philosophy* (Edinburgh, UK: Edinburgh University Press, 2011), pp. 168–86.

fighters, for the purpose of destabilising the knowledge on FTFs upon which the international legal and policy response rests. The fourth step of the immanent critique involved going beyond internal reflection to ask, 'what are the wider social and political consequences of the FTF discourse?'. Importantly, this stage considered the ways the discourse works in practice, highlighting how the invocation and application of the FTF concept helps to naturalise a particular social and political order.³⁵ Specifically, in terms of the level of analysis, this step in the critique focused on several examples demonstrating the impact new FTF laws have had at national level.

Analysing the concept of the foreign terrorist fighter: An immanent critique

A genealogy of the foreign terrorist fighter concept

Although the FTF term originated primarily as a response to the issue of individuals leaving their country of origin to participate in the civil war in Syria, it did not emerge in a vacuum. Instead, a genealogy of the term reveals it is the product of two interrelated policy priorities linked to the GWOT. First, unilateral efforts on the part of the US to police 'out of place' Muslim migrants and travellers, the so-called 'Muslim foreign fighters', who went to participate in Afghanistan in 2001, Iraq in 2003, and other conflicts during this period.³⁶ Second, multilateral efforts at the UN during the early 2000s focused on the development of coordinated international counterterrorism policies, which have played a key role in the standardisation of national security laws.³⁷

With regard to the first policy priority, Darryl Li has shown how the conflation of terrorism with foreign fighting is not new.³⁸ According to Li, in policy terms it was the US that proved the key actor in establishing this discursive link and although it can be traced prior to the events of 9/11, it was the start of the GWOT that solidified this perception of 'Muslim foreign fighters' and terrorism as indelibly connected.³⁹ Importantly, Li has shown how this perceived link gave rise to a unilateral, US-driven process of attempts to police transnational Muslim mobility, and specifically those (predominantly Muslim) individuals who cross borders to participate in foreign conflicts, through exclusion and exemption from local and international legal protections. The policies Li identifies are specifically linked to the governance of mobility of populations thought to be suspect, including repatriation of individuals to their place of origin, often to face detention and possibly torture, and the more controversial practice of extraordinary rendition.

At the same time the US was pursuing unilateral policies designed specifically for combating the mobility of 'Muslim foreign fighters', the UN was in the process of developing a coordinated global counterterrorism legal architecture. Significantly, the UN Security Council invoked the threat from al-Qaeda inspired terrorism as justification for passing two important resolutions during this period: UNSCR 1373 on combating terrorism in September 2001; and UNSCR 1390 in January 2002 that turned the earlier UNSCR 1267 on 'terrorist lists', agreed in October 1999, into a permanent regime. Kim Lane Scheppele has argued UNSCR 1373 was of major significance in requiring states to change their domestic laws to carry out Security Council requirements by fighting terrorism in specific ways,⁴⁰ leading to a convergence in anti-terrorism laws across multiple countries otherwise radically different. She explains countries as varied as Canada, Germany, Indonesia, China, and Vanuatu all enacted laws that took similar approaches to combatting terrorism including 'criminalizing new terrorism-related offenses

³⁵ Although it is not the specific focus of this article, there is one final reason for selecting CDA, which will be drawn out in the third stage of the research. CDA allows for the introduction of feminist inspired reflections on the implications and consequences of the adoption of the FTF term. See Michelle M. Lazar, 'Feminist critical discourse analysis: Articulating a feminist discourse praxis', *Critical Discourse Studies*, 4:2 (2007), pp. 141–64.

³⁶ Li, *A Universal Enemy*.

³⁷ Scheppele, 'The international standardization of national security law'.

³⁸ Li, *A Universal Enemy*.

³⁹ *Ibid.*, p. 369.

⁴⁰ Scheppele, 'The international standardization of national security law'.

like conspiracy, planning, recruitment, incitement and indirect assistance, cracking down on terrorism financing, increasing surveillance of the resident population, and tightening border controls'.⁴¹

In the period from 2001 through to the start of the civil war in Syria in 2011, foreign fighting was not a focus of transnational counterterrorism. It was only in 2014 when the link between terrorism and foreign fighting was explicitly stated through the creation of the FTF concept, which was first put forward by the GCTF as a key counterterrorism priority.⁴² Initially, it was Morocco and the Netherlands who took the lead on developing a response to the issue of FTFs. The first meeting of the GCTF FTF working group took place in The Hague in February 2014.⁴³

This was followed by further conferences that brought together 'experts' on the FTF phenomenon in Marrakesh in May 2014 and Countering Violent Extremism in June 2014.⁴⁴ These initiatives led to the development of The Hague-Marrakech Memorandum on the FTF Phenomenon. The document produced by the GCTF was the first by an international policymaking forum to offer a definition of the term FTF as:

Individuals who travel abroad to a State other than their States of residence or nationality to engage in, undertake, plan, prepare, carry out or otherwise support terrorist activity or to provide or receive training to do so.⁴⁵

Establishing 'travel' as a priority concern in relation to the issue of FTFs, the memorandum also acknowledged 'radicalisation' to violence was a primary motivating factor in drawing individuals to fight in conflict areas. Furthermore, the memorandum raised the prospect FTFs may represent a threat on return to their country of origin.

This understanding of FTFs was strengthened when agreement was reached on UNSCR 2178, unanimously adopted by heads of states on Wednesday 24 September 2014.⁴⁶ The resolution, advanced primarily by the US, focused specifically on individuals who had left one country to fight in a conflict in another, setting out the first definition of FTFs, contained in a legal document, as:

Individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.⁴⁷

The resolution was unanimously adopted by the Security Council under Chapter VII of the UN Charter, which made it legally binding for all 193 Member States. Taking the lead from the GCTF, UNSCR 2178 was 'in large part cut and pasted' from the GCTF's Hague-Marrakech Memorandum developed four months earlier.⁴⁸ Importantly, although border security was

⁴¹Ibid., p. 438.

⁴²The GCTF is described on its website as 'an informal, a-political, multilateral counterterrorism (CT) platform' that aims to strengthen 'the international architecture for addressing 21st century terrorism'.

⁴³GCTF, 'The Hague-Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon' (2014), p. 1.

⁴⁴Ibid.

⁴⁵Ibid.

⁴⁶UN Security Council Resolution 2178.

⁴⁷Ibid., p. 2. The UN first used the term Foreign Terrorist Fighter in August 2014. See UN Security Council Resolution 2170, S/RES/2170, Distr.: General, 15 August 2014.

⁴⁸Alistair Millar, 'The European Union and the Global Counterterrorism Forum: The Importance of Continued Engagement', CT Morse Counter-Terrorism Monitoring Reporting and Support Mechanism (2017), p. 5.

mentioned briefly in 2001 in the text of UNSCR 1373 on combating terrorism, UNSCR 2178 gave priority to this area with 12 of the 27 measures in the resolution aimed at preventing, disrupting, or monitoring movement across borders.⁴⁹ In effect, what the resolution did was to invoke the FTF concept as a way of legitimising pre-existing state agendas associated with extending and enhancing border security arrangements.

In September 2015, the GCTF working group on FTFs released an addendum to the Hague-Marrakesh memorandum that sought to further clarify the FTF issue.⁵⁰ This was important in a conceptual sense because it extended the focus on FTFs to include also those FTFs who return home from conflict, referred to as ‘returning foreign terrorist fighters’ (RFTFs). Although the addendum did not offer a definition of RFTFs it did provide more detail on the perceived domestic threat posed by these actors. It noted RFTFs might become involved in ‘plotting [domestic] terrorist attacks’, ‘establishing new terrorist cells’, providing ‘operational expertise’, raising ‘funds for terrorist activities’, ‘be actively involved in recruitment ... or ... source of inspiration to others susceptible to terrorist ideologies’.

These developments are revealing. They show how the GCTF and the UN played a key role in explicitly constructing foreign fighting as an activity intimately linked to terrorism. The concept of the FTF has been central to this process, transforming the meaning of foreign fighting and fixing our understanding of what the FTF looks like as a social object. FTFs are viewed as radically dangerous and threatening political subjects, precisely because they have the ability to move across borders or travel between states for the purposes of committing terrorist acts. Of course, from the perspective of state actors, the need to prevent individuals from travelling to foreign conflict zones to join terrorist groups appears logical. The consequences of these developments are however problematic. Essentially, the concept of the FTF has been created, and then invoked, to legitimise the ongoing securitisation of migration and travel through the linking of border control to counterterrorism concerns.⁵¹ We see this in the agreement on UNSCR 2178 and the steps taken by the GCTF to identify appropriate responses to the FTF issue. Furthermore, this imperative to develop laws designed to counter the FTF threat has begun to disseminate to other regional intergovernmental organisations.

For example, in the period since September 2014, the EU has adopted the language associated with FTFs and used it interchangeably with the term ‘foreign fighter’. The 2017 EU ‘Directive on Combating Terrorism’, offers the clearest indication yet of how the EU conceptualises this threat.⁵² It describes FTFs as ‘Individuals ... [who] travel abroad for the purpose of terrorism’ and ‘returning foreign terrorist fighters’ (RFTFs) in quite ambiguous terminology as ‘a heightened security threat to all Member States’.⁵³ What is striking about this is the way in which this process mirrored the earlier dissemination of norms in counterterrorism law from the UN to the EU and to state actors, when Security Council Resolutions 1373 and 1390 were agreed in the early 2000s.⁵⁴ In essence, as Scheppele has demonstrated, initially it was the concept of terrorism that was instrumentalised in order to justify the creation of an international counterterrorism legal regime through the UN and other multilateral forums. What this genealogy helps to reveal

⁴⁹UN Security Council Resolution 1373, S/RES/1373, Distr.: General 28 September 2001.

⁵⁰GCTF, ‘Initiative to Address the Life Cycle of Radicalization to Violence: Addendum to The Hague-Marrakech Memorandum’ (2015).

⁵¹See Baker-Beall, ‘The threat of the “returning foreign fighter”’.

⁵²European Union, 2015/0281 (COD), ‘Directive on Combating Terrorism’, Brussels, 23 February 2015.

⁵³*Ibid.*, p. 5.

⁵⁴UNSCR 1373 in 2001 foreshadowed the development of the first EU Framework Decision on Combating Terrorism in 2002. See Scheppele, ‘The international standardization of national security law’. De Londras has also established the straight lines between the development of legal instruments at the UN and the EU with specific respect to the FTF issue. See Fiona de Londras, ‘Politicisation, law and rights in the transnational counter-terrorism space: Indications from the regulation of foreign terrorist fighters’, *European Review of International Studies*, 5:3 (2018), pp. 115–38.

is the way in which the new FTF concept has been created and invoked as a way of legitimising the ongoing development of this global counterterrorism regime.

Importantly, the EU ‘Directive on Combating Terrorism’ reinforces this transnational legal assemblage on counterterrorism, as well as solidifying the notion the threat from FTFs/RFTFs should be assessed according to their ability to travel across borders for the purpose of engaging in terrorism. The directive contained three new articles to this effect, which member states are obligated to implement as new legislation in domestic law. These include:

Article 9: ‘Travelling for the purpose of terrorism’ (including travel or attempt to travel for the purpose of committing, or contributing to the commission of, a terrorist offence, or for the purpose of the providing or receiving of training for terrorism).

Article 10: ‘Organising or otherwise facilitating travelling for the purpose of terrorism’.

Article 11, ‘Terrorist financing’ (which includes financing of travel for the purposes of terrorism).⁵⁵

The EU Directive, like UNSCR 2178 before it, defines the threat from FTFs in such a way it necessitates moves by states to criminalise travel and enhance border security as a key dimension of their counterterrorism strategies.⁵⁶ Significantly, both the UN resolution and the EU directive do not clearly define what is meant by ‘travel’ for the purpose of contributing to a terrorist offence, leaving open the possibility humanitarian aid workers or human rights activists, including for example medical staff who have travelled to conflict zones and are performing lifesaving work on the battlefield, might be labelled ‘terrorist’ by governments that disapprove of their activities.⁵⁷

Moreover, the focus on restricting travel of terrorism suspects is not the end of the story, with the perceived threat from FTFs leading to the development of UNSCR 2396, adopted in November 2017, which focused specifically on the threat posed by RFTFs.⁵⁸ Like UNSCR 2178 before it, which was based on ideas developed at the GCTF, UNSCR 2396 was based on suggestions outlined in the GCRFs Good Practices in the Area of Border Security policy document, released in 2016.⁵⁹ The primary focus of UNSCR 2396 was border security and information sharing. The resolution required member states to develop 15 policies, strikingly similar to those outlined in the GCTF document, to ‘prevent the movement of terrorists by effective national border controls’, notification to other countries of concerns over suspected FTFs, ‘information and financial intelligence regarding actions or movements, and patterns of movements, of terrorists or terrorist networks, including foreign terrorist fighters’, intelligence agencies to share information with ‘front-line screeners, such as immigration, customs and border security agencies’ on suspected FTFs, and states ‘develop the capability to collect, process and analyse’, both advance passenger information (API) systems and passenger name record (PNR) data.⁶⁰

Importantly, there has been one major discursive shift during this period relating to FTFs, counterterrorism and the issue of human rights. Whereas UNSCR 1373, which kick-started the development of this transnational counterterrorism legal architecture in 2001, did not contain

⁵⁵Ibid.

⁵⁶UNSCRs and EU Directives are international legal instruments that oblige states to make required changes to their domestic law.

⁵⁷Letta Tayler, ‘Foreign terrorist fighter laws: Human rights rollbacks under UN Security Council Resolution 2178’, *International Community Law Review*, 18:5 (2016), pp. 455–82.

⁵⁸United Nations, Security Council Resolution 2396, S/RES/2396, Distr.: General, 21 December 2017.

⁵⁹GCTF, ‘Good Practices in the Area of Border Security and Management’, available at: {<https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Good-Practices%20BSM-ENG.pdf?ver=2016-09-13-124953-540>}.

⁶⁰Ibid., pp. 5–8.

a single reference to the development of counterterrorism in accordance with human rights. By way of contrast, UNSCR 2178 and UNSCR 2396 include a requirement counterterrorism measures, including those dealing specifically with FTFs, should ‘comply with all ... obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law’.⁶¹ As Andrea de Guttry has noted, the move to ‘reaffirm’ the need for states to formulate counterterrorism laws that ‘respect’ human rights, which emerged with agreement on UNSCR 2178 in 2014, is a ‘new and positive trend’ not reflected to the same extent in the UNSCRs agreed after 9/11.⁶²

However, as Fiona de Londras has pointed out, the development of human rights-compliant counterterrorism remains problematic in the sense that although ‘human rights are frequently invoked [by the UN] to justify countering terrorism ... [they] are rarely regarded as limits on its reach or ambition.’⁶³ The UN does have in place the Special Rapporteur on Human Rights and Counter-Terrorism (UNSRCT), a role filled previously by Martin Scheinin and Ben Emmerson and currently by Fionnuala Ní Aoláin, all of whom have been outspoken in their criticism of the human rights implications of certain aspects of the UNSCRs on FTFs. However, institutions are not unitary actors, and while the UNSRCT acts as an internal site of resistance to the overarching UN discourse on FTFs, the overwhelming focus of the UNSCRs is on the necessity of new laws for security purposes. It is important to remember, therefore, that the new laws designed to tackle the FTF issue have been built up in a system that started out without clear attention given to human rights. What this means is that the FTF resolutions were constructed from a security-first, rather than a human rights based starting point, with the commitment to human rights-compliant counterterrorism reflecting a secondary concern rather than the primary focus of policy and law. As such, following much of the legal literature that has analysed UNSCR 2178 and the accompanying FTF laws developed since 2014, I agree that as a result the ‘regime built around the concept of foreign terrorist fighters ... risks becoming of itself a threat to the values ... it is supposed to protect. And since respect for human rights is an integral part of any successful counter-terrorist strategy, it also risks jeopardising its own purposes.’⁶⁴

Indeed, the human rights criticisms of UNSCR 2178 led directly to the publication of two guidance documents by the UN in 2018 and 2019 that offered advice to states on how to make new FTF laws human rights compliant.⁶⁵ However, the documents only provide guidance and were only developed after criticisms of the human rights impact of UNSCR 2178 were made. Importantly, while they advise states to ensure new counterterrorism laws take account of the rights obligations in other UN instruments of international law, the guidance documents do not have the same legal status as UNSCRs. Moreover, although the UNSRCT has a degree of independence and autonomy to make recommendations on the protection and promotion of human rights, they have neither the power nor the resources to compel states to follow such guidance, or more broadly develop human rights-compliant counterterrorism laws.⁶⁶ Indeed, in the UNSRCT 2020 report to the UN Security Council, Ní Aoláin noted there continues to be a troubling conflation of ‘international humanitarian law and the norms and standards relevant to countering terrorism’, which is leading to ‘counter-terrorism practice that fails to protect the most vulnerable, including persons deprived of their liberty, persons with disabilities, older persons,

⁶¹UNSCR 2178 and UNSCR 2396, p. 1. Both resolutions contain the same quote.

⁶²Andrea de Guttry, ‘The role played by the UN in countering the phenomenon of foreign terrorist fighters’, in de Guttry, Capone, and Paulussen (eds), *Foreign Fighters under International Law and Beyond*, pp. 259–82 (p. 269).

⁶³De Londras, ‘Transnational counter-terrorism’, p. 3.

⁶⁴Veronika Bilková, ‘Foreign terrorist fighters and international law’, *Groningen Journal of International Law*, 6:1 (2018), pp. 1–23 (p. 23).

⁶⁵United Nations, ‘Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters’, Counter-Terrorism Implementation Task Force (New York, 2018); United Nations, ‘Children Affected by the Foreign-Fighter Phenomenon: Ensuring a Child Rights-Based Approach’, UN Counter-Terrorism Centre (2019).

⁶⁶See De Londras, ‘Transnational counter-terrorism’, pp. 177–83.

persons in need of medical care, women and children'.⁶⁷ Significantly, with regard to these claims human rights are a primary concern for the UN, the UNSRCT has been particularly critical noting that the development of the transnational counterterrorism architecture, at the UN and beyond, has had 'a distinctly negative effect on the overall advancement of meaningful protection for human rights'. The human rights impact of these new FTF laws will be considered in greater detail in the third section of the article.

In summary then, a genealogy of the FTF term reveals its emergence was the result of a historically contingent process, which extended out of a unilateral US concern with 'foreign fighters' and the creation of a global multilateral counterterrorism legal architecture at the start of the GWOT in the early 2000s. The genealogy has shown how the discourse on foreign fighters evolved from one centred on official US discourse after the invasion of Iraq in 2003, which was designed to distinguish local Muslim populations from foreign ones, with the latter deemed a threat due to a combination of their fanaticism and mobility, to a multilateral discourse on FTFs that emerged in 2014 with the conflict in Syria. The post-Syria FTF discourse introduces a second phase driven by a wider range of states through multilateral institutions such as the GCTF, the UN and the EU. Significantly, the genealogy helps to demonstrate how the threat from (R) FTFs post-Syria has been invoked to legitimise the extension of these same processes, and specifically the meshing of counterterrorism with border control, mirroring the invoking of terrorism as threat discourse which paved the way for the first steps taken to create a coordinated counterterrorism legal infrastructure that begun with UNSCR 1373 in 2001.

Critiquing the FTF concept and UN Security Council Resolution 2178

The emerging 'conventional wisdom' underpinning the international response to foreign fighters appears logical. For state actors, there is a perception that most individuals who participated in the conflict in Syria did so to join violent 'jihadi' groups. These groups have committed acts of violence that clearly meet any practical definition of terrorism, therefore the individuals who join these groups are not just foreign fighters they are also terrorists: hence the term FTF is an appropriate description. For states whose citizens have left to participate in hostilities, it also seems a rational assumption if someone has committed acts of violence in another country, on their return they may pose a terrorist threat. It then follows governments need to expand their definition of terrorism and develop policies to counter the RFF phenomenon. Significantly, because these individuals cross borders either on transit to, or return from, a conflict zone, a central dimension of the policy response to this issue should involve border control. It has also been suggested the FTF concept might work as a definitional distinction category which, rather than conflate ideas of foreign fighting, serves to sort foreign fighters that join terrorist organisations from foreign fighters involved with activities not necessarily criminal in nature. Indeed, as de Guttry has explained, for the UN at least, the concept of foreign fighting has been considered primarily 'under the more general headline of terrorism, almost as a specific category of terrorist groups'.⁶⁸

The analysis offered here aims to challenge this emerging conventional wisdom on FTFs, critiquing the concept on its own terms, and demonstrating how rather than help to sort different categories of foreign fighters from terrorists, the concept actually serves to blur this important distinction by reframing foreign fighting as terrorism. The point of this critique is not to offer some absolute or real truth, but rather to 'to destabilise dominant interpretations and demonstrate the inherently contested and hence political nature' of the FTF discourse.⁶⁹ By analysing the FTF with respect to the literature on foreign volunteers/foreign fighters, it becomes clear

⁶⁷UNSRCT, A/75/150, 'Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Distr.: General, 3 September 2020.

⁶⁸De Guttry, 'Foreign terrorist fighters', p. 260.

⁶⁹Jackson, 'Knowledge, power and politics', p. 68.

the FTF term and the associated response, outlined in UNSCRs 2178 and 2396, are based on flawed thinking about the foreign fighter problem. I argue instead the FTF concept should be viewed as the product of a simplistic, policy-oriented approach to counterterrorism. As such, there are three major issues with the FTF concept an immanent critique of the discourse helps to reveal.

The first concerns the way the FTF concept has contributed to a further broadening of how terrorism is conceptualised in international law. UNSCR 2178 repeats errors made in UNSCR 1373, which failed to define terrorism and instead left it open to the discretion of states to unilaterally decide what constitutes terrorism in national law, permitting wide and divergent definitions.⁷⁰ However, UNSCR 2178 goes further by focusing not just on international terrorism or specific types but ‘terrorism in *all* forms and manifestations’.⁷¹ This reflects an extremely broad understanding of terrorism, one that is not clearly defined and which leaves open the possibility for governments to extend their focus to groups or individuals they label as terrorist, thereby opening up the possibility for the state to target those it deems to be problematic under the guise of counterterrorism. According to former UNSRCT Martin Scheinin, this aspect of the resolution can allow states to apply ‘notoriously wide, vague or abusive definitions of terrorism, often with a clear political or oppressive motivation’.⁷²

Furthermore, although UNSCR 2178 broadens the focus to terrorism in ‘all [its] forms and manifestations’, it has the opposite effect with regard to foreign fighters. Here it reinforces a very narrow understanding of foreign fighting as linked primarily to terrorism. This perception runs counter to the academic literature on this topic. Although (returning) foreign fighter involvement in terrorism has occurred, the literature that explores this relationship has been quick to highlight the importance of viewing foreign fighters as a category of actor distinct from insurgents and terrorists.⁷³ Thomas Hegghammer has argued the primary terrorist threat posed by foreign fighters is on their return, claiming ‘militants usually do not leave intending to return for a domestic attack, but a small minority acquire that motivation along the way and become more effective operatives on their return ... [with] no more than one in nine foreign fighters returned to perpetrate attacks in the West’.⁷⁴ It should be noted however, according to Raphaël Leduc, who reviewed Hegghammer’s figures on foreign fighter involvement in terrorism, in practice ‘returning foreign fighters do not present a domestic terrorist threat ... any higher than any other member of the population’.⁷⁵

This leads to a second related issue. In essence the FTF concept, created independently of the academic literature, further confuses debates on foreign fighters by taking two essentially contested terms, ‘foreign fighter’ and ‘terrorism’, and merging them to create the new concept of the FTF. As a result, it artificially constructs all foreign fighters as terrorists; in effect, blurring the analytical distinction between different categories of foreign volunteer outlined in the literature.⁷⁶ Instead, as it was suggested earlier, I argue we should view foreign fighting as a specific subset of foreign volunteerism. As Arielli explains, when considering the foreign fighter issue, the term ‘foreign volunteer’ provides a more appropriate starting point for several reasons. It

⁷⁰Scheppele, ‘The international standardization of national security law’; Ben Saul, ‘Definition of “terrorism” in the UN Security Council: 1985–2004’, *Chinese Journal of International Law*, 4:1 (2005), pp. 141–66.

⁷¹UN Security Council Resolution 2178, p. 1.

⁷²Martin Scheinin, ‘Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters’, *Just Security* (23 September 2014), available at: {<https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>}.

⁷³Hegghammer, ‘The rise of Muslim foreign fighters’, p. 55.

⁷⁴Hegghammer, ‘Should I stay or should I go’, p. 1.

⁷⁵Raphaël Leduc, ‘Are returning foreign fighters dangerous? Re-investigating Hegghammer’s assessment of the impact of veteran foreign fighters on the operational effectiveness of domestic terrorism in the West’, *Journal of Military and Strategic Studies*, 17:1 (2016), pp. 83–103 (p. 99).

⁷⁶See John Ip, ‘Reconceptualising the legal response to foreign fighters’, *International & Comparative Law Quarterly*, 69:1 (2020), pp. 103–34.

has been used widely throughout history since foreign volunteerism first emerged, it emphasises the point that volunteers choose to take part in conflict rather than being forced to through conscription, and it draws attention to the fact not all volunteers to foreign conflict are ‘fighters’, with volunteers occupying a wide variety of roles that mean ‘the boundary between armed and non-military volunteers ... [is often] a porous one.’⁷⁷

Similarly, it is also important when focusing on foreign fighting as a subcategory of foreign volunteerism, researchers and policymakers are specific about what they mean by those who engage in conflict and those who play a supportive role. For example, if we start with one of the earliest definitions in the literature, Moore and Tumelty described foreign fighters as:

non-territorialized combatants who, motivated by religion, kinship, and/or ideology rather than pecuniary reward, enter a conflict zone to participate in hostilities.⁷⁸

What is most striking about this definition is terrorism is not presented as a motivation for foreign fighting. Moreover, foreign volunteers can be further split into a wide range of non-combat and combat roles. This may include – but should not be limited to – those engaged in non-combat roles, such as ‘ideologues’, ‘financiers’, ‘trainers’, and ‘medical experts’, and those actively engaged in forms of combat, such as a ‘foreign fighter’, a ‘transnational insurgent’, a ‘foreign-trained fighter’, a ‘foreign-trained terrorist’, a ‘foreign terrorist’ and a ‘returning foreign fighter’.⁷⁹ The term FTF by way of contrast is incapable of accurately capturing the nuances and complexities associated with the foreign fighter issue because it oversimplifies and reduces this activity to a sole concern with terrorism.

Importantly, although UNSCR 2178 employs a broad definition of terrorism, it clearly identifies the type of foreign fighter it considers to be the main threat: individuals ‘joining entities such as the Islamic State in Iraq and the Levant (ISIL), the Al-Nusrah Front (ANF) and other cells, affiliates, splinter groups or derivatives of Al-Qaida’.⁸⁰ This leads to a third major issue with the term FTF. It is now often used to describe everyone who travelled to participate in the conflict in Syria. The term FTF, in this context, has a homogenising effect. Not only does it conflate and construct different forms of foreign volunteerism – or even a seemingly benign act like travel – as potential terrorist activity; it also prevents a more nuanced understanding of the foreign fighter phenomenon from emerging. As Scheinin points out, the FTF resolution extends the legal definition of terrorism and terrorist training to broad situations of armed conflict, without any consideration of the legal consequences.⁸¹ Indeed, depending upon the circumstances, it is possible for acts of violence committed during an armed conflict to be classified as a lawful act of war, a war crime, a crime against humanity, an ordinary crime, or indeed an act of terrorism.⁸²

Since 2014, every UNSCR and major policy document produced by the UN on foreign fighters has referred to these individuals as FTFs. When policymakers, such as the UN’s Jean-Paul Laborde, claim there are ‘30,000 foreign terrorist fighters worldwide’, they fail to recognise the diversity of motivations and reasons for participation that exists within foreign fighter populations.⁸³ Indeed, John Ip has noted how the UN uses the FTF term as a subset of terrorism in many of the various UNSCRs that deal with this issue and, more importantly, often use the terms ‘FTF’ and ‘foreign fighter’ interchangeably. The record at the time of the adoption of UNSCR 2178 is particularly revealing in this sense, with the term foreign fighter mentioned

⁷⁷Arielli, *From Byron to Bin Laden*, p. 6.

⁷⁸Moore and Tumelty, ‘Foreign fighters and the case of Chechnya’, p. 412.

⁷⁹See Moore and Tumelty, ‘Assessing unholy alliances’; Malet, ‘Foreign fighter mobilization’, pp. 458–9.

⁸⁰*Ibid.*, pp. 2–4.

⁸¹Martin Scheinin, ‘The Council of Europe’s draft protocol on foreign terrorist fighters is fundamentally flawed’, *Just Security* (18 March 2015).

⁸²*Ibid.*

⁸³UN News, ‘Top UN Counter-Terrorism Official Urges Cohesive Response’.

102 times and the FTF term used a further 70 times.⁸⁴ For example, US President Obama used the term ‘foreign fighter’, rather than FTF, to describe the 15,000 individuals that had travelled to Syria and ‘joined terrorist organizations such as Al-Qaida’s affiliate, the Nusra Front, and the Islamic State’.

Problematically, the term FTF is not only consistently used interchangeably with the term foreign fighter but is also used to refer to contexts not directly connected to terrorism. In support of this argument, a letter from Gerard van Bohemen, Chair of the Committee concerning al-Qaeda, is illustrative. The letter takes the concept of FTFs and retrospectively applies it to past historical contexts in which foreign fighters were involved. For example, talking about conflicts in the 1980s, 1990s, and early 2000s, the letter states:

The first generation of terrorists associated with Al-Qaida came from various countries and included foreign terrorist fighters. They were not just the wave of individuals drawn to Afghanistan during the 1980s, but veterans who travelled to Algeria, Somalia, Tajikistan and the former Yugoslavia during the 1990s and those who later went to Iraq, Pakistan and Yemen during the 2000s.⁸⁵

The letter goes on to note although the Afghan conflict of the 1980s was ‘often thought of as the original zone of foreign terrorist fighters’, what has changed is the scale of the issue, with more than 25,000 FTFs located around the world today. Importantly, by applying the term FTF to these past historical contexts, the language conflates groups, factions, and movements that had different aims, goals, and ideologies, obscuring the complexities behind the motivations for foreign fighting in these highly diverse conflicts.

The notion that all individuals who travel to join groups participating in conflicts – that have been labelled terrorist by others – should automatically be categorised as FTFs is also problematic. As Veronika Bílková explains, there are important differences, with the term foreign fighter used to denote ‘all persons who participate in an armed conflict taking place outside their country of origin’, whereas, according to UNSCR 2178, FTFs only need to demonstrate a terrorist intent, with ‘participation in and ... the existence of an armed conflict ... not required’.⁸⁶ Importantly, the criticism here is with regard to the conflation of the two terms. Put simply, not everyone who travelled to Syria went to fight for Islamic State, al-Nusra, al-Qaeda or to commit acts of terrorism. There have been different waves of foreign fighters, not just historically but in terms of those that went to fight in Syria specifically.⁸⁷ Those participants who left to fight a more limited war in Syria in 2011 at the start of the conflict – and subsequently returned home before the emergence of Islamic State – were certainly there for different reasons to those who later went to Syria to join ‘jihadi’ groups.

Furthermore, as Audrey Kurth Cronin explains, labelling those who join groups like Islamic State as ‘terrorist’ is also contentious. Cronin takes issue with the idea that Islamic State should be viewed as a terrorist organisation, stating ‘ISIS hardly fits that description, and indeed, although it uses terrorism as a tactic, it is not really a terrorist organization at all ... If ISIS is purely and simply anything, it is a pseudo-state led by a conventional army’.⁸⁸ Again, this reinforces the main argument put forward in this article. Namely that using the term terrorist/FTF to

⁸⁴UNSC 7272 Meeting, S/PV.7272, 24 September 2014.

⁸⁵Chair of the Security Council Committee, ‘Letter Dated 19 May 2015’.

⁸⁶Bílková, ‘Foreign terrorist fighters and international law’, pp. 2–5.

⁸⁷R. Bergema and M. van San, ‘Waves of the Black Banner: An exploratory study on the Dutch jihadist foreign fighter contingent in Syria and Iraq’, *Studies in Conflict & Terrorism*, 42:7 (2017), pp. 1–26; Güneş Murat Tezcür and Clayton Besaw, ‘Jihadist waves: Syria, the Islamic State, and the changing nature of foreign fighters’, *Conflict Management and Peace Science*, 37:2 (2020), pp. 215–31.

⁸⁸Audrey Kurth Cronin, ‘ISIS is not a terrorist group: Why counterterrorism won’t stop the latest jihadist threat’, *Foreign Affairs*, 94 (2015), pp. 87–98 (p. 88).

describe all individuals that went to fight in Iraq and Syria (and even all those that specifically joined ‘jihadi’ organisations) is problematic and runs counter to the knowledge that can be drawn from the academic literature on foreign fighters. It blurs distinctions between foreign fighting and terrorism, which as I demonstrate further below has real-world consequences for the response to this issue in terms of: (a) how states deal with foreign fighters; and (b) human rights. From a Critical Theory perspective, it is clear then that more careful use of language in policymaking on foreign fighters is necessary moving forward.

The implications and consequences of adopting the FTF concept: A challenge to human rights?

Having highlighted the main problems with the FTF concept and the associated response outlined in UNSCR 2178 and 2396, a wider critique of the consequences of the FTF discourse is now offered. The reason for this is to highlight the wide-ranging impact of the FTF laws passed at national level since 2014. Furthermore, as part of the reconstructive dimension of any imminent critique, I offer suggestions for how policy *ought* to be adapted moving forward. Significantly, I argue the UN response to FTFs should begin with human rights, rather than a security-first approach, if the commitments made to human rights in the UN Security Council resolutions are to be fully realised.

The first major consequence of the FTF discourse relates to its role in expanding the reach of counterterrorism law and policy. UNSCR 2178 has led to the imposition of FTF laws in over forty countries, which have given governments sweeping powers including expansion of police authority, restrictions on speech, extensive travel bans for individual suspects, revocation of citizenship and criminal convictions without observation of legal safeguards.⁸⁹ For Letta Tayler, the response to FTFs has meant an:

expansion of government powers at the expense of internationally protected human rights including freedom of expression, association, peaceful assembly and movement, as well as freedom from religious or ethnic discrimination, and from torture and other inhuman or degrading treatment.⁹⁰

Importantly, Tayler notes UNSCR 2178 does not set limits on what terrorism means. This then is one of the main consequences of the broadening of terrorism, to issues like foreign fighting, as outlined in UNSCR2178. The expansion of terrorism to include multiple new offences, offers an additional benefit for some states in providing cover to *stigmatise as terrorism* individuals or groups who they do not like, including political opposition, indigenous or minority groups, religious groups, and trade unions.⁹¹ An example of this are the actions taken by the Egyptian government to ‘unlawfully prevent scores of citizens from traveling outside the country’, including ‘leaders and members of political parties, youth activists [and] people associated with nongovernmental groups’, with one prominent example the 2015 detention and interrogation of a group of young women travelling to Germany on the invitation of a European organisation for training on combating violence against women.⁹²

A second important consequence of the FTF concept is the way in which it has provided the basis for states to restrict travel and further enhance the merging of border security with counterterrorism. Although the scope of FTF laws extends into many areas that can impact upon human rights, the primary response enacted by states has been to push for the restriction of travel and the surveillance of movement across borders. This is itself a reflection of the importance

⁸⁹Human Rights Watch, ‘US Summit: Revamp Foreign Terrorist Fighter Laws: Measures in 30 Countries Threaten Rights’ (28 September 2015), available at: {<https://www.hrw.org/news/2015/09/28/us-summit-revamp-foreign-terrorist-fighter-laws>}.

⁹⁰Tayler, ‘Foreign terrorist fighter laws’.

⁹¹Ibid.

⁹²Human Rights Watch, ‘Egypt: Scores Barred from Traveling’ (1 November 2015), available at: {<https://www.hrw.org/news/2015/11/01/egypt-scores-barred-traveling>}.

given to this aspect of the FTF issue as laid out in UNSCR 2178 and UNSCR 2396. For example, in 2015 the government of the UK passed the Counter-Terrorism and Security Act, which included two new powers related to travel for the purpose of terrorism.⁹³ As Zubeda Limbada and Lynn Davies explain, these powers '(a) enable the seizure and retention of the passport of a person suspected of leaving the UK for the purpose of a terrorism-related activity outside the UK, and (b) enable the 'temporary' exclusion (for up to two years) of individuals from the UK if they are believed to be involved in terrorism related activity outside the UK.'⁹⁴

Comparable laws have been passed in Canada, where the 2015 Anti-Terrorism Act has established new powers designed to prevent travel for the purpose of committing terrorist acts, including the confiscation of a passport and the restriction of movement of suspects; and Australia, where the 2015 Citizenship Amendment (Allegiance to Australia) Act has created a new offence to travel to certain areas without reason, as well as allow authorities to suspend a passport at short notice.⁹⁵ In Australia, the new FTF laws that passed through parliament allowed the Foreign Minister Julie Bishop to cancel the passports of 75 'suspected extremists' and refused to issue a further ten, on the grounds of preventing individuals leaving Australia to participate in the conflict in Syria.⁹⁶ Further examples of restriction on travel include Malaysia, which in 2015 passed counterterrorism legislation that limited the movement of suspects, as well as extended indefinite detention for those accused of terrorism offences.⁹⁷

A third key consequence and one of the most controversial aspects of the proliferation of FTF laws, relates to the steps taken by some states to revoke the citizenship of individuals that joined Islamic State. According to Tayler, countries have developed these provisions as part of their application of the FTF resolution include Austria, Australia, Bahrain, Belgium, Canada, the Netherlands, and the UK. This is best characterised by the UK government who in 2019 took the decision to revoke the citizenship of Jack Letts and Shamima Begum, who had travelled to Syria.⁹⁸ Begum is one of the most widely publicised cases involving the stripping of an individual's citizenship.⁹⁹ She was just 15 years of age when she travelled to Syria with two friends, Amira Abase and Kadiza Sultana, to marry the Dutch fighter Yago Riedijk, going on to have three children all of whom have since died.¹⁰⁰ Begum's citizenship was revoked in February 2021, while detained in a Kurdish refugee camp in Syria. The primary reason given for this decision was the British Intelligence Agency MI5 deemed her a potential security threat to the UK, arguing she had aligned with Islamic State and sought to recruit others to the conflict in Syria.¹⁰¹

⁹³UK Government, 'Counter-Terrorism and Security Act' (2015), available at: {<http://www.legislation.gov.uk/ukpga/2015/6/contents/enacted>}.

⁹⁴Zubeda Limbada and Lynn Davies, 'Addressing the foreign terrorist fighter phenomenon from a human rights perspective', *International Community Law Review*, 18:5 (2016), pp. 483–93 (p. 486).

⁹⁵Government of Australia, 'Citizenship Amendment' (2015), available at: {<https://www.legislation.gov.au/Details/C2015A00166>}; Government of Canada, Anti-Terrorism Act (2015), available at: {http://laws-lois.justice.gc.ca/PDF/2015_20.pdf}.

⁹⁶Nick Pedley, 'Al-Raqqa: Foreign Minister Julie Bishop declares it an offence for Australians to visit Syrian province', *ABC News* (4 December 2014), available at: {<https://www.abc.net.au/news/2014-12-04/bishop-declares-it-an-offence-for-australians-to-visit-al-raqqa/5943094>}.

⁹⁷Human Rights Watch, 'Malaysia: Scrap Repressive Counterterrorism Bill – Proposed Law Restores Indefinite Detention Without Trial' (5 April 2015), available at: {<https://www.hrw.org/news/2015/04/05/malaysia-scrap-repressive-counterterrorism-bill>}.

⁹⁸Jihadi Jack: IS recruit Jack Letts loses UK citizenship', *BBC News Online* (18 August 2019), available at: {<https://www.bbc.co.uk/news/uk-49385376>}.

⁹⁹Denaturalisation usually occurs in cases where it was found that bribery or fraud were involved in citizenship applications.

¹⁰⁰Conrad Nyamutata, 'Young terrorists or child soldiers? ISIS children, international law and victimhood', *Journal of Conflict & Security Law*, 25:2 (2020), pp. 237–61.

¹⁰¹The decision to remove Shamima Begum's citizenship was taken by the Home Office and the then Home Secretary Sajid Javid on 19 February 2019. See UK Government, 'Shamima Begum – Home Office Statement', available at: {<https://home-officemedia.blog.gov.uk/2019/02/19/shamima-begum-home-office-statement/>}.

Although it is understandable states may see individuals like Begum as a threat, there is little in the way of evidence to suggest deprivation of citizenship is an effective counterterrorism response. Indeed, Leduc has argued convincingly policies that ‘seek to criminalise foreign fighting, ban re-entry or remove citizenship [are potentially] counter-productive’ and may instead ‘encourage the establishment of a permanent group of transnational terrorists by keeping foreign fighters from demobilizing after the conflict’.¹⁰² There is a further argument not only are governments of those labelled FTFs capable of bringing their citizens home to face justice but it is their responsibility to do so. Indeed, just like policies that criminalise travel, the move to revoke citizenship ‘erodes due-process rights recognized under international law, including the presumption of innocence, the right to a fair trial, and the right to appeal’.¹⁰³

The Begum case is also of importance because it draws attention to the gendered dimensions of the FTF issue, including the role of women and children who travel to participate in foreign conflicts. It is estimated over four thousand women travelled to Iraq and Syria to join Islamic State, with these women most commonly framed as ‘jihad brides’.¹⁰⁴ Of course, while Begum is only the most publicised of these cases, there are thousands of others. Research has shown some of these women (and children) had different motivations for foreign volunteerism than seeking to participate in acts of terrorism, and most had different roles.¹⁰⁵ Again, the focus on ‘citizenship’ of volunteers and the adoption of the language of FTFs in legalese and institutional practices has far-reaching implications and consequences for female volunteerism in terms of their construction as a potential terrorist threat.¹⁰⁶ Significantly, although UNSCR 2396 calls on states to develop strategies for prosecuting and rehabilitating or reintegrating women and children associated with RFTFs in accordance with their status as a potential victim, it again takes a security-first perspective, stressing prominence should be given to their potential role as ‘supporters, facilitators, or perpetrators of terrorist acts’.¹⁰⁷

As Helen Duffy explains, it is only right where women commit or contribute to violent crimes, they should be prosecuted through the criminal justice system in a fair and non-discriminatory manner.¹⁰⁸ However, she also argues, without denying their agency, this should not detract from the fact ‘many have been subject to egregious human rights abuses, including sexual violence, trafficking and forced marriage’.¹⁰⁹ Similarly, Duffy also highlights the plight of children who either travelled with their families or were born abroad to foreign fighters during the conflicts in Iraq and Syria. Indeed, in January 2021 the UN estimated there were 27,000 children stranded in the Al-Hol refugee camp in North-Eastern Syria and called on UN member states to repatriate these children as quickly as possible.¹¹⁰ Duffy points out that while some states have begun to repatriate children associated with Islamic State, representing best practice around which future developments in policy can be made, the more general shift in counterterrorism to see children as potential threats runs counter to the principles outlined in the UN Convention on the Rights of the Child.¹¹¹

¹⁰²Leduc, ‘Are returning foreign fighters dangerous?’, p. 84.

¹⁰³Taylor, ‘Foreign terrorist fighter laws’, p. 470.

¹⁰⁴United Nations, ‘Gender Dimensions of the Response to Returning Foreign Fighters’, Counter-Terrorism Committee Executive Directorate (CTED Report, 2019).

¹⁰⁵See, for example, Aleksandre Kvakhadze, ‘Gender and jihad: Women from the Caucasus in the Syrian conflict’, *Perspectives on Terrorism*, 14:2 (2020), pp. 69–79.

¹⁰⁶Moore has argued the focus on citizenship as a basis for delineating foreign fighters in conceptual debates is problematic. See Moore, ‘Foreign bodies’.

¹⁰⁷UNSCR 2396, p. 10.

¹⁰⁸Helen Duffy, “‘Foreign terrorist fighters’: A human rights approach?”, *Security and Human Rights*, 29 (2018), pp. 120–72

¹⁰⁹*Ibid.*, p. 164.

¹¹⁰Associated Press, ‘UN: 27,000 children need to be repatriated from ISIS camp in Syria’, *Euronews*, available at: {<https://www.euronews.com/2021/01/30/un-27-000-children-need-to-be-repatriated-from-isis-camp-in-syria>}.

¹¹¹Duffy, “‘Foreign terrorist fighters’”.

The case of Begum perfectly reflects all of these concerns over the gendered dimensions of responses to FTFs. Not only was she 15 years of age when she left for Syria, raising the potential of her being ‘groomed’, but she was also pregnant with a third child when discovered in the Kurdish refugee camp in 2019. The child would later die within two weeks of Begum giving birth, with the British state having chosen not to help her return to the UK. Conrad Nyamutata has argued convincingly a more appropriate framework through which to treat any child under the age of 18 associated with a foreign conflict is to regard them as child soldiers who should be given ‘protections accorded to all children recruited for purposes of warfare’.¹¹² Importantly Nyamutata, echoing Duffy, has argued the UN Convention on the Rights of the Child should be adopted in such cases and moreover, the European Charter of Fundamental Rights guarantees every person the right to due process and a fair trial. The removal of citizenship, especially in the case of those who travelled to Syria when they were children, is both arbitrary and runs counter to the principles of international human rights law.

Regarding the normative dimension of this immanent critique, there are two final points I wish to make. First, having considered the consequences of the new FTF laws and the impact they are having on human rights, it is imperative governments do more to distinguish between terrorism and foreign fighting. This then was the finding of the UN’s own Counter-Terrorism Task Force, which suggested states should do more to differentiate between terrorism and foreign fighting in domestic law.¹¹³ Noting that while UNSCR 2178 called for states to ensure human rights compliance when developing laws to combat foreign fighting, it did not specify how these proposals should be implemented into national law. Instead, the UN guidance document explicitly stated governments should ensure ‘terms such as “terrorist” and “fighters” are applied on the basis of clear and established legal procedures, rather than in an arbitrary, discriminatory or indiscriminate manner.’¹¹⁴ If the guidance issued by the UN is clearly asking for states to ensure domestic laws be crafted through the careful separation of the terms ‘terrorist’ and ‘fighters’, it again calls into question the utility of the term FTF as the basis for policymaking in this area.

Indeed, what this immanent critique has helped to demonstrate is the term FTF confuses the question of foreign fighting with terrorism. Moving forward, a first transformative possibility arising from this analysis is that intergovernmental actors and states alike should refrain from using the term FTF and instead develop a more complex array of terms that can provide the basis for policy designed to respond to the foreign fighter issue. As previously noted, a starting point would be the development of a more nuanced lexicon that distinguishes between different categories of foreign volunteer and which clearly differentiates between those who occupy combat and non-combat roles.¹¹⁵ Linked to this is the need for policy to be ‘evidence-based’.¹¹⁶ The FTF term emerged not out of the academic literature but rather immediate policy concerns linked to the perceived terrorist threat associated with returnees from foreign ‘conflict zones’. It is clear the policy response to this issue has had negative consequences for human rights. Moving forward, it is obvious there needs to be a more thorough evaluation of this term both in terms of its impact on policy and the consequences of approaching the foreign fighter issue from a limited, security-first perspective. One suggestion for the continued development of policy in this area then concerns the potential use of the findings from the academic literature on foreign fighters, foreign volunteers, and social movements, including what can be learnt from this research to construct a more effective response to the foreign fighter problem.¹¹⁷

¹¹²Nyamutata, ‘Young terrorists or child soldiers’, p. 241.

¹¹³United Nations, ‘Guidance to States’.

¹¹⁴Ibid., p. 36.

¹¹⁵See fn. 79.

¹¹⁶See EPRS, ‘The Return of Foreign Fighters’, on shortcomings relating to evidence-based policy in this area.

¹¹⁷See fns 7 and 8.

Second, it is essential states should seek to reorient responses to foreign fighters around the notion of human rights. In terms of the FTF issue, this means *starting with* human rights and the rule of law, rather than the security concerns of the state, at the centre of policy.¹¹⁸ Although states have an obligation to combat terrorism, including any terrorist acts committed by foreign fighters in conflict zones or on their return, moving forward measures to tackle this issue should be developed from a human rights perspective in order to ensure they are compliant with international human rights law. At present, as the examples I have discussed demonstrate, the commitments to human rights in UNSCR 2178 are a secondary concern to the development of new counterterrorism laws. As noted above, the UN has begun to produce guidance documents on the development of foreign fighter laws that integrate human rights perspectives. However, these documents were only produced after initial criticisms of the human rights implications of UNSCR 2178, and as de Londras explains, ‘the guidance, best practices, model laws, and recommendations on how states should implement [human rights] obligations generally offer no effective answer ... usually containing little more than similarly general injunctions to implement counterterrorism obligations in a manner that is consistent with international human rights law.’¹¹⁹ In essence, what I am arguing is that although the UNSCR resolutions agreed in response to the foreign fighter issue express a commitment to human rights, this is difficult to achieve in practice because the structure of transnational counterterrorism takes a security-first approach.

A second transformative possibility that emerges from this immanent critique then is the need for transnational counterterrorism to be held accountable in relation to the commitments made to human rights. De Londras has argued while the UN has processes of accountability in place, the architecture is internally focused on reporting between and to UN agencies, with a key concern being the extent to which states have implemented the types of security measures outlined in UNSCRs, rather than a ‘need to be accountable to the people the UN’s decisions actually affect’. Specifically, de Londras notes with regard to transnational counterterrorism this type of accountability ‘lack[s] evaluative engagement with the work to assess, for example, human rights compliance and promotion standards’.¹²⁰ For example, she points to the fact that while no one doubts the importance of human rights to the work of the UN Security Council ‘meaningful engagement with rights as limitations on the Council’s own power (as opposed to generic directions to implementing states to comply with human rights) or as design principles in transnational counterterrorism is manifestly lacking’.¹²¹

One solution then to this problem may lay with the office of the UNSRCT as a form of accountability through review. Again, however there are problems. Although the UNSRCT has been very active in seeking to promote human rights-compliant counterterrorism, the postholder is constrained in various ways. The UNSRCT is an unpaid, part-time role with limited secretarial support, with the postholder expected to act professionally and to not go beyond their mandate. Moreover, there is always the possibility that if the UNSRCT was to overstep or act in to critical a manner, the UN has the capacity to change and limit the role. As de Londras points out, the major issue here is that the postholder has an ‘enormous thematic mandate and responsibility to represent human rights across much of the UN’s counter-terrorism architecture’, while constrained by ‘a resource asymmetry between the UNSRCT and the breadth of the mandate’.¹²² Indeed, writing in 2019 Fionnuala Ní Aolá’ín herself stated:

¹¹⁸By this I mean human rights should be built in at the design stage, rather than added later after criticisms are raised of the human-rights implications of international legal instruments.

¹¹⁹See De Londras, ‘Transnational counter-terrorism’, p. 84.

¹²⁰Ibid., p. 162.

¹²¹Ibid., p. 164.

¹²²Ibid., p. 181.

While the SRCT mandate can contribute to advancing human rights within the UN CT architecture and via bi-lateral state engagement ... the capacity to do so effectively or adequately is nearly impossible for a stand-alone entity operating with limited OHCHR staff, on a part-time basis, with few resources and with severely limited operational authority.¹²³

In essence then, the UNSRCT is an evaluative review body without any real power to compel the UN to ensure human rights are built into international counterterrorism legal instruments or, more broadly, to obligate the UN to start from a human rights rather than security first-perspective in the development of the transnational counterterrorism legal architecture.¹²⁴ If the UN is genuinely serious about putting human rights front and centre of its approach to issues like the foreign fighter problem – as it claims to be – then it is essential the office of the UNSRCT is given more authority and funding to actually hold transnational counterterrorism to account.

Conclusion

By way of conclusion, I want to reiterate three points in regard to the FTF concept and the associated policy response. First, this immanent critique has demonstrated how the FTF concept first emerged in international policymaking forums like the GCTF and the UN, highlighting the wider political and social consequences of the development of this term. In doing this, the article has sought to contribute to policymaker and academic debates on foreign fighters and highlight the important role terrorism threat discourses play in the development of policy at the international level. Specifically, I have demonstrated how the threat from FTFs has been invoked by institutions like the UN to justify the development of new laws that extend previous efforts to build a transnational legal assemblage for the purpose of globally coordinated counterterrorism action. I have argued the label of terrorism becomes important in this instance, where it has been invoked and combined with foreign fighting as a way of legitimising the development of new FTF laws required by the various UNSCRs that deal with the foreign fighter issue. This includes measures such as enhanced border control, restrictions on travel, and controversial practices such as the revocation of citizenship.

Second, I have shown how the FTF concept is problematic for several reasons. Specifically, the term has a narrowing effect in that it reframes understanding of foreign fighting as simply another form of terrorism. Driven by concerns over individuals joining violent ‘jihadi’ group, this move reflects a simplistic, policy-oriented approach to terrorism, which is based on knowledge about foreign fighters that is ahistorical and fails to account for social context. Moving forward, I have argued that policymakers should resist using the term FTF and, more broadly speaking, there is a need to decouple the concept of foreign fighting from the concept of terrorism, with more precise use of terminology necessary when discussing the foreign fighter issue. Research to date has taught us both that the motivations to participate in foreign conflicts are varied and more nuanced than the narrow and ahistorical concept of FTFs is able to account for and, when and where it does occur, foreign fighter involvement in terrorism is a very small dimension of the foreign fighter issue.¹²⁵

Finally, it has been suggested by some working in this area the term FTF has been adopted by governments as a way of categorising and sorting different types of foreign fighter, stigmatising specifically those who join designated terrorist groups and UNSRCs have had significant utility in binding member states together in responding to this issue. Yet, as it has been demonstrated,

¹²³UNHRSP, ‘Input of the Special Rapporteur’ (16 December 2019), available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/InputSRCTUNOCTGCTSIImplementation2020.pdf>.

¹²⁴It is important to note the mandate of the UNSRCT concerns the actions of states not UN institutions.

¹²⁵See fn. 7.

developing policies that bind states together for the purpose of stigmatising individuals that are suspected of being FTFs may, from the perspective of state actors, appear like a sensible solution to this problem, the effects of this move are highly problematic in practice. It opens up the possibility for states to apply the terrorism label as a way of targeting anyone the state deems a security threat. Furthermore, by binding states together on the basis of the logics contained in the UNSCR 2178 and 2396, the UN is making similar mistakes, which impact on human rights, to those that were made over a decade earlier with UNSCR 1373.

Writing in 2010, Scheppele warned attempts by the UN Security Council to create globally coordinated counterterrorism action ‘had not yet led to the development of a world-wide web of legal interdiction’.¹²⁶ Instead, she noted that although international legal obligations may require states to change domestic laws in specific ways, the varied application of these laws at the local level risked doing ‘collateral damage ... to domestic constitutional law and international human rights law in the process’.¹²⁷ This problem has not been addressed, with the new FTF resolutions contributing to an extension of these same processes and continuing a pattern whereby the security concerns of governments continue to be prioritised over the commitments to human rights made in those same resolutions. As Fiona de Londras has argued, the invocation of the FTF threat in transnational counterterrorism has led to the emergence of norms and standards that not only generate ‘expectations around prosecution, rehabilitation, and reintegration’ but also compel ‘excessive criminalisation, surveillance, and the securitisation of borders’.¹²⁸ As a result, an atmosphere has been created ‘that tolerates the failure of states to discharge their positive obligations towards persons broadly associated with terrorism’.¹²⁹ Moving forward, it has been argued institutions like the UN need to ensure new counterterrorism legal instruments are built from a human rights rather than security-first perspective if the commitments to human rights in transnational counterterrorism are to be fully realised.

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¹²⁶Scheppele, ‘The international standardization of national security law’, p. 453.

¹²⁷Ibid.

¹²⁸De Londras, ‘Transnational counter-terrorism’, p. 149.

¹²⁹Ibid.