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The troubled HOMECOMING

Seeking accountability against Canadian foreign fighters returning home from abroad

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Executive Summary

This paper analyses the relevant criminal and civil law remedies available to governments and private parties to hold returning foreign fighters accountable for atrocity crimes and human rights abuses committed abroad. In conducting this analysis, the paper identifies certain gaps in the law and policy that Canadian lawmakers may want to consider addressing to ensure that Canadians committing serious crimes abroad do not enjoy impunity for those crimes when they return to this country.

There are four broad avenues under which returning foreign fighters may be held accountable in Canada: criminally by the state upon their return to Canada, through private criminal prosecutions, through public civil remedies, and via private civil remedies.

When fighters are **prosecuted by the state**, several *Criminal Code* provisions are relevant. Most pertinent are the offences contained in sections 83.18 and 83.181, which criminalize participation in the activities of a terrorist group if they are undertaken for the purpose of enhancing the ability of the group to commit terrorist activities. This provision is specifically extended to individuals who leave Canada, or attempt to leave Canada, to join a terrorist group for this purpose. Prosecutors should continue to use these provisions to prosecute offences committed by foreign fighters where appropriate. Beyond this, lawmakers might further consider criminalizing membership in a terrorist group (while excluding individuals who had no knowledge of the group's purpose), following the precedent of the Nuremberg Tribunal. Finally, foreign fighters may be prosecuted under Canada's *Crimes Against Humanity and War Crimes Act* for involvement in genocide, crimes against humanity, and war crimes.

The availability of **private criminal prosecutions** is limited by the fact that offences committed under Part II.1 of Canada's *Criminal Code* and under the *Crimes Against Humanity and War Crimes Act* all require that any prosecutions receive the consent of the Attorney General before proceeding. And, in fact, the Attorney General's consent for private prosecutions of returning foreign

fighters may be denied arbitrarily and this decision cannot be judicially reviewed. This should be remedied with clear and public guidelines outlining when the Attorney General's consent will be granted (or withheld).

Not just criminal remedies, but certain **public civil remedies** are also available for the government to use in seeking redress from foreign fighters returning home. Canadian citizens may have their passports revoked, although they can no longer have their citizenships revoked. Non-citizens may be deemed inadmissible and removed from Canada. Although these public civil remedies are an important complement to the other remedies available, Canada should develop clear guidelines explaining how it intends to respond to returning foreign fighters, and those guidelines should generally prioritize criminal prosecutions over deportations or revocations, as prosecutions are often more effective at limiting impunity.

Finally, private citizens may launch **civil lawsuits** against returning foreign fighters using tort law and/or the *Justice for Victims of Terrorism Act* (JVTA). Such lawsuits can enable victims to seek redress from perpetrators directly, although there are victim eligibility restrictions under the JVTA and receiving any awarded compensation can be difficult when the perpetrator has no assets in Canada.

The paper makes several recommendations, including that Canadian lawmakers may want to consider amending Part II.1 of the *Criminal Code* to criminalize the act of joining a terrorist group (while excluding individuals who had no knowledge of the group's purpose, following the precedent set by the Nuremberg Tribunal); that Canada consider modernizing its treason laws as Australia has done; and that the federal government increase the budget for the Department of Justice's War Crimes Section to enable it to actively prosecute individuals for atrocity crimes.

Further, while the government can revoke a foreign fighter's passport and sometimes even deem a returning foreign fighter inadmissible to the country, Canada should generally prioritize criminal prosecutions over deportations or passport and citizenship revocations as prosecutions are more likely to ensure the fighters receive no impunity for their actions. Finally, victims can launch civil actions, including by using the *Justice for Victims of Terrorism Act*, to seek compensation for the damages they have suffered, and the Canadian government and/or civil society should empower and assist victims who wish to explore these options.

Several legal avenues are available to those seeking accountability from Canadians who have committed crimes or atrocities abroad and then returned to this country. However, those avenues are not always clear, and there are sometimes gaps in the relevant legislation and in policy. This paper analyses the current tools available across criminal and civil law and identifies those gaps – a first step in ensuring there is no impunity for returning foreign fighters.

Sommaire

Ce document présente une analyse des recours en droit pénal et civil offerts aux gouvernements et aux parties privées pour obliger les combattants coupables d'atrocités criminelles et de violations des droits de l'homme à étranger de rendre compte de leurs actes à leur retour au pays. La conduite de cette analyse permet de mettre au jour certaines lacunes dans la législation et la politique que les législateurs canadiens pourraient vouloir corriger afin d'empêcher les Canadiens coupables de crimes graves à l'étranger de jouir de l'impunité à leur retour au Canada.

On peut emprunter quatre grandes voies au Canada pour tenir responsables de leurs actes les combattants étrangers revenant au pays : la criminalisation par l'État dès l'arrivée, les poursuites pénales privées, les recours civils publics ou les recours civils privés.

Lorsque les combattants sont **poursuivis par l'État**, plusieurs dispositions du *Code criminel* sont applicables. Les plus pertinentes ont trait aux infractions comprises dans l'article 83.18 ainsi qu'au paragraphe 83.18(1), qui criminalisent la participation à une activité d'un groupe terroriste dans le but d'accroître sa capacité à se livrer à une activité terroriste. Cette disposition cible en particulier les personnes quittant le Canada, ou tentant de le faire, dans ce but. Les poursuivants doivent continuer d'avoir recours à ces dispositions pour inculper les combattants étrangers qui commettent ces infractions, lorsque c'est possible. Au-delà de cela, les législateurs pourraient envisager de criminaliser en outre l'appartenance à un groupe terroriste (tout en excluant les personnes n'ayant pas eu connaissance du but du groupe), conformément au précédent établi par le tribunal de Nuremberg. Parfois, enfin, les combattants étrangers qui participent à un génocide, à des crimes contre l'humanité et à des crimes de guerre peuvent être poursuivis en justice en vertu de la *Loi sur les crimes contre l'humanité et les crimes de guerre* du Canada.

L'accès aux **poursuites pénales privées** est limité par le fait que toutes les infractions commises en vertu de la partie II.1 du *Code criminel* du Canada

et de la *Loi sur les crimes contre l'humanité et les crimes de guerre* exigent que la poursuite ne soit engagée que si le procureur général y consent au préalable. Qui plus est, le procureur général peut, par convention, ne pas consentir à toute poursuite privée contre des combattants étrangers de retour au pays, et cela, sans faire l'objet d'un contrôle judiciaire. Il convient de remédier à cette situation en adoptant des lignes directrices claires et publiques indiquant dans quels cas le consentement du procureur général sera accordé (ou refusé).

Le gouvernement peut non seulement engager des poursuites pénales, mais aussi se prévaloir de certains **recours civils publics** pour demander réparation aux combattants étrangers qui rentrent au pays. Les citoyens canadiens peuvent se voir retirer leur passeport, mais non plus leur citoyenneté. Les non-citoyens peuvent être jugés inadmissibles et renvoyés du Canada. Bien que ces recours civils publics constituent un complément important aux autres recours possibles, le Canada doit élaborer des lignes directrices claires expliquant comment il entend traiter les combattants étrangers de retour au pays, lignes directrices qui doivent généralement donner la priorité aux poursuites pénales plutôt qu'aux expulsions ou aux révocations, car les poursuites sont souvent plus efficaces pour restreindre l'impunité.

Enfin, les citoyens peuvent se prévaloir de **recours civils** privés en droit de la responsabilité civile délictuelle et en vertu de la *Loi sur la justice pour les victimes d'actes de terrorisme* (LJVAT). On peut dans ces cas obtenir réparation directement auprès des auteurs, bien que la LJVAT prévoie des restrictions en matière d'admissibilité et qu'une indemnité peut être difficilement perçue lorsque l'auteur du crime ne possède pas de biens au Canada.

Ce document formule plusieurs recommandations, notamment que les législateurs canadiens envisagent des modifications de la partie II.1 du *Code criminel* en vue de criminaliser l'acte de se joindre à un groupe terroriste (tout en excluant les personnes n'ayant pas eu connaissance du but du groupe, conformément au précédent établi par le tribunal de Nuremberg); que le Canada modernise ses lois sur la trahison comme l'a fait l'Australie; et que le budget de la Section des crimes de guerre du ministère fédéral de la Justice soit augmenté afin de lui permettre d'engager des poursuites efficaces contre les coupables d'atrocités criminelles.

En outre, bien que le gouvernement puisse révoquer le passeport d'un combattant étranger et parfois même le juger inadmissible à un retour au pays, le Canada doit généralement donner la priorité aux poursuites pénales plutôt qu'aux expulsions ou aux révocations de passeport et de citoyenneté, car elles sont plus susceptibles de garantir que les combattants ne puissent pas s'en tirer impunément pour leurs actes. Enfin, les victimes peuvent se prévaloir de recours civils, notamment en vertu de la *Loi sur la justice pour les victimes d'actes de terrorisme*, dans le but d'obtenir une indemnisation

pour les dommages qu'elles ont subis, tandis que le gouvernement canadien, la société civile ou les deux doivent habiliter et aider les victimes qui le souhaitent à explorer ces options.

Plusieurs voies juridiques s'offrent à ceux qui cherchent à demander des comptes aux Canadiens qui commettent des crimes ou des atrocités à l'étranger, puis reviennent au pays. Cependant, ces voies ne sont pas toujours claires, des lacunes existant parfois dans la législation pertinente et la politique. Ce document analyse les outils existants en droit pénal et civil en mettant au jour ces lacunes   un premier pas à franchir pour veiller à ce que les combattants étrangers de retour au pays ne puissent pas jouir de l'impunité.

Introduction

In June 2014, the Islamic State of Iraq and Syria (ISIS) launched an offensive on Mosul and Tikrit. Its leader, Abu Bakr al Baghdadi, announced the establishment of an Islamic caliphate ruling over eight million people, spanning Aleppo, Syria, to Diyali, Iraq – an area of approximately 41,000 square miles. The organization quickly changed its name to the Islamic State and made clear that it planned on conquering further territory.

As the Islamic State grew, so did its crimes and its human rights abuses. Members of the Islamic State committed mass atrocities. They kidnapped and murdered innocent civilians, they used hundreds of thousands of civilians as human shields, and they enslaved, traded in, and raped thousands of Yazidi women and girls. Islamic State's atrocious crimes were well-publicized and well-documented, and the world responded. It was the threat of genocide against the Yazidi population that pushed then US President Barack Obama to intervene in August 2014.

A US-led coalition commenced airstrikes against the Islamic State in August 2014. By December 2017, the Islamic State had lost 95 percent of its territory. A year later, in December 2018, the Islamic State's territory was reduced to a handful of villages in eastern Syria. In February 2019, Baghouz fell, which was the Islamic State's last remaining territory. On October 26, 2019, Baghdadi was killed in northern Syria in a US raid.

With the collapse of the Islamic State's territory, Canada became one of many countries grappling with the same question: what should it do with foreign fighters who want to return to Canada?[1] The Islamic State drew a great number of people to its territory – at least 40,000. It is estimated that over 5000 came from Europe. An estimated 180 foreign fighters came from Canada, approximately 60 of whom have already returned.

As these foreign fighters return, it is important for Canada to ensure that its legal system is prepared to deal with them. A key issue that Canadian politicians and lawmakers must address is the risk of impunity – that these

fighters might simply go unpunished for their crimes. Canadians who travelled to Syria, joined the Islamic State, and engaged in or contributed to atrocity crimes against the Yazidis and others should be held accountable for their crimes. Ensuring that Canadian law and policy can do so requires an analysis of current law and policy tools, spanning criminal and civil law remedies. Following that analysis, any gaps that may contribute to impunity should be resolved.

This is the task that this paper undertakes: it analyses the current tools available across criminal law (i.e., for crimes listed in Canada's Criminal Code) and civil law (a private dispute that the courts are asked to settle) and identifies gaps in the available remedies as a first step to combatting impunity for returning foreign fighters.

Part I. Public Criminal Remedies

As foreign fighters return to Canada, lawmakers should ensure that public prosecutors are able to criminally prosecute them where this is appropriate. Public criminal remedies will, of course, not be appropriate in all situations, but for returning fighters who were involved in serious crimes, Canada should ensure that it has the means and capability to hold them accountable.

The question that follows is, does it? To answer that question, this part begins by considering relevant sections of both the Canadian *Criminal Code* and the *Canadian Crimes Against Humanity and War Crimes Act*.

A. TERRORISM OFFENCES IN CANADA'S CRIMINAL CODE

Part II.1 of the *Criminal Code* of Canada addresses the terrorism offences. It begins by defining "terrorist activity" and "terrorist group," and then outlines several criminal offences, which are generally split along the lines of terrorist activity or terrorist group. The offences cover, among other things, financing terrorism, dealing in any property owned or controlled by a terrorist group, facilitating terrorist activity, and harbouring a person who committed or is likely to commit terrorist activity.

i. Definitions: Terrorist Activity and Terrorist Group

Because the criminal offences generally refer to either "terrorist activity" or "terrorist group", Part II.1 begins by defining both terms.

Terrorist activity is defined as one of two things. First, an act or omission is considered a terrorist activity if it constitutes one of the several offences referred to in section 7 that are described in an international treaty (for example, the International Conventions Against the Taking of Hostages (UN 1979)). Alternatively, an act or omission is considered a terrorist activity if it fulfils the following two requirements, as noted in the *Criminal Code*:

- The act or omission was committed "(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act."
- The act or omission intentionally "(A) causes death or serious bodily harm to a person by the use of violence, (B) endangers a person's life, (C) causes a serious risk to the health or safety of the public or any segment of the public, (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)." (Criminal Code (R.S.C., 1985, c. C-46), sec. 83.01 (1))

Terrorist group is defined as either a listed entity, or an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity. This definition also explicitly includes associations of such entities.

ii Relevant Criminal Offences

The *criminal offences* outlined in Part II.1 of the *Criminal Code* are financing terrorism; dealing in terrorist property; participating in the activities of a terrorist group; facilitating terrorist activity; committing an indictable offence for the benefit of a terrorist group; committing an indictable offence that is also a terrorist activity; instructing a person to carry out activity in association with a terrorist group; counselling the commission of a terrorist offence; and harbouring or concealing. Many of these have multiple subsets of offences. These are described in detail in Appendix I. For purposes of the following discussion, the most relevant to prosecuting returning foreign fighters are the participation offences contained in sections 83.18 and 83.181.

Section 83.18 (1) of the *Criminal Code* criminalizes when one "knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity." The maximum sentence upon conviction of this offence is 10 years' imprisonment.

Subsection 83.18 (3), which provides a list of examples of what "participating in or contributing" means, specifically includes "(d) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group."

Building on this offence, section 83.181 further provides that,

> Every person who leaves or attempts to leave Canada, or goes or attempts to go on board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an offence under subsection 83.18(1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

Notably, it is not a criminal offence to join a terrorist group. Joining a terrorist group is somewhat captured by sections 83.18 and 83.181, but conviction under those provisions contain the added requirement that the person participated in the activity of a terrorist group *for the purpose of enhancing the terrorist group's ability to commit a terrorist activity*. The fact that it is not a crime to simply join a terrorist group is likely due to constitutional reasons. It is also likely due to international legal obligations, which generally provide that membership in a criminal organization is not sufficient for guilt.[2]

iii. Applicability to Foreign Fighters

All the criminal offences contained in Part II.1 of the *Criminal Code*, outlined in Appendix I, might be relevant in the prosecution of a returning foreign fighter, depending on the facts of the particular case. For instance, a foreign fighter might have provided property to the Islamic State, might have facilitated terrorist activity, or might have committed an indictable offence (for example, murder or rape) at the Islamic State's direction or association. Most generally relevant, though, as already noted, are the participation offences in sections 83.18 and 83.181.

Sections 83.18 and 83.181 make it a criminal act to participate in the activity of a terrorist group when it is for the purpose of enhancing a group's ability to engage in terrorist activity. Subsection 3(d) specifically lists "entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group" – as an example of participating. Section 83.181 further criminalizes leaving or attempting to leave Canada "for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an offence under subsection 83.18(1)."

Therefore, joining a terrorist group such as the Islamic State, or even attempting to leave Canada to join the group, is prosecutable under these offences *so long as the person joined for the purpose of enhancing the terrorist group's ability to engage in terrorist activity*. So, these provisions may be used to prosecute returning foreign fighters who joined the Islamic State for this purpose.[3]

These provisions of the *Criminal Code* have already been used to prosecute foreign fighters. In *R. v. Habib*, [2017] Q.J. No. 8174, the Court of Quebec

(Criminal and Penal Division) found Ismaël Habib guilty under section 83.181 for trying to leave Canada to join the Islamic State. He was sentenced to just over six and a half years' imprisonment.[4]

As noted, the offences contained in sections 83.18 and 83.181 require additional proof that the accused participated in the activities of a terrorist group for the purpose of enhancing the terrorist group's ability to engage in terrorist activity. Although this purpose may often be inferable from the accused person's statements or computer files or other evidence, prosecution would undoubtedly be simpler if this was not required, or if it were a criminal offence to simply join a terrorist group. This may be especially true in instances where evidence of an alleged crime remains in Syria.

The difficulty, as noted, is likely constitutional. Canadian case law has indicated that mere passive association on its own might lead to a criminal offence being struck down for overbreadth in violation of section 7 of the *Canadian Charter of Rights and Freedoms*.[5] Further, international legal obligations generally provide that membership in a criminal organization is not sufficient for guilt, and Canadian jurisprudence has accepted that position.[6]

Despite this, it is possible that neither the Canadian Constitution nor international law requires the high-level specific intent that is presently incorporated into section 83.18 of the *Criminal Code*. It may be acceptable – and more straightforward – to simply criminalize joining a terrorist group, but with certain constitutional safeguards in place.

The Nuremberg Tribunal dealt with this issue in the 1940s. The Nuremberg Tribunal declared certain organizations to be "criminal organizations." Once an organization was declared criminal, it was treated as a criminal conspiracy, and this "fix[ed] the criminality of its members" (Lillian Goldman Law Library 2009). Precisely because of this effect, it was decided that the definition would specifically exclude individuals "who had no knowledge of the criminal purposes or acts of the organisation … unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation" (Lillian Goldman Law Library 2009). In other words, membership was criminalized, but individuals "who had no knowledge" of the organization's "criminal purposes or acts" were not penalized, unless those members "were personally implicated in the commission of [crimes]" (Lillian Goldman Law Library 2009).

Of course, the provisions of the Canadian *Criminal Code* already permit the listing of certain entities as "terrorist," which then hinders their operations in Canada. However, Canada may use the approach adopted by the Nuremberg Tribunal as a precedent to enact a new criminal offence that would criminalize membership in a listed terrorist entity, but excluding individuals who had no knowledge of the terrorist purposes or acts of the organization unless

personally implicated in the commission of terrorist acts. This would not criminalize mere membership – which, as described, would likely be a breach of international law as well as the Canadian Constitution – but would still likely capture more than is currently captured by sections 83.18 and 83.181, and make prosecutions easier, limiting impunity for crimes committed by returning foreign fighters.

B. CRIMINAL CODE – TERRORISM PEACE BONDS

Part II.1 of the *Criminal Code* contains remedies that address far more than the myriad of criminal offences already discussed. Part II.1 also provides for the use of recognizances, popularly called "peace bonds," in cases of suspected future terrorist activities. Terrorism peace bonds also expressly permit the use of electronic monitoring.

i. Review of the Peace Bond Provisions in the Criminal Code

A recognizance is a commonly used court order that is essentially an agreement between the justice system and a particular individual that the individual will not breach the conditions of the order. Its conditions always include a provision to "keep the peace and be of good behaviour," and may also include other conditions, such as an agreement not to possess weapons, and/or a condition not to leave the country. It is a criminal offence to breach a peace bond, so if a signee breaches a peace bond, they can be charged criminally on that basis. The criminal justice system commonly uses peace bonds; they do not exist solely to address terrorism.

Peace bonds related to terrorism are governed by section 83.3 of Part II.1 of the *Criminal Code*. Section 83.3 allows a peace officer, subject to the Attorney General's consent, to lay an information before a provincial court judge if the peace officer "(a) believes on reasonable grounds that a terrorist activity may be carried out, and (b) suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity."

Then, pursuant to a hearing, a judge may require the individual to sign a recognizance with conditions. As noted, the conditions may include: surrender of passport, not to leave a certain geographic area, and not to possess any weapons. In fact, in the terrorism context, the judge must provide reasons if they decide to *not* include any of the above three conditions. The individual can be ordered detained pending this hearing if the judge finds it necessary, and the individual can also be jailed if they refuse to sign the recognizance.

ii. Applicability to Foreign Fighters

Terrorism peace bonds provide another type of tool to deal with returning foreign fighters – particularly returning foreign fighters where there is a reasonably ground belief that terrorist activity may be carried out, as well as a reasonably ground suspicion that the imposition of the recognizance is necessary to prevent it from being carried out.

Since terrorism peace bonds already apply to returning foreign fighters who present a threat to the safety of Canadians, there should be no need for lawmakers to make further amendments to these sections. There is no gap in the law. However, there might be gaps in policy. It is unclear how frequently terrorism peace bonds are imposed on returning foreign fighters. According to the Department of Justice's 2020 annual report, no terrorism peace bonds were entered into in the period from June 21, 2019, to June 20, 2020 (Canada 2020).

To maximize efficiency, lawmakers might consider instituting a policy whereby these peace bonds are used regularly with returning foreign fighters where the requirements of the section are met (in other words, where there is a reasonably ground belief that terrorist activity may be carried out, and a reasonably ground suspicion that the imposition of the recognizance is necessary to prevent it from being carried out).

C. CRIMINAL CODE – OTHER SECTIONS

Other sections of the *Criminal Code*, outside of Part II.1, are relevant to the state's ability to prosecute returning foreign fighters. These include the *Criminal Code*'s conspiracy provisions and treason provisions.

i. Conspiracy Provisions

The definition of terrorist activity in section 83.01 includes conspiracies, attempts, or threats to commit terrorist activity. Terrorist activity also includes being an accessory after the fact or counselling in relation to terrorist activity. Therefore, an individual may be charged with conspiracy to commit one of those offences and be liable to the same punishment as if they had actually committed that offence.

However, the ability to prosecute terrorism-related conspiracies is limited when the conspiracy occurs outside of Canada.

Pursuant to subsections 465 (3) and (4) of the *Criminal Code*, Canadian courts have the jurisdiction to prosecute conspiracies that occur abroad when at least one stage of the conspiracy occurs in Canada. Subsection (3) enables Canadian courts to take jurisdiction when a person in Canada conspires on an offence to be committed outside of Canada, and subsection

(4) enables Canadian courts to take jurisdiction when a person outside of Canada conspires on an offence to be committed within Canada. Specifically, these subsections read as follows:

> (3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.
>
> (4) Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.

However, these sections do not permit Canadian courts to take jurisdiction where the conspirer is outside Canada *and* the offence also takes place outside of Canada. This is significant in the context of terrorism, and specifically in the context of foreign fighters, where many offences occur entirely abroad.

Section 7 bridges this gap, but only for certain types of terrorism-related conspiracies. Recognizing the transnational nature of terrorism offences in general, section 7 permits Canadian courts to prosecute certain terrorism offences that occur entirely outside of Canada as long as there is some connection to Canada (this is required to ground jurisdiction in international law). Specifically, subsection 7(3.73) permits Canadian courts to take jurisdiction over *terrorism financing* committed outside of Canada; subsection 7(3.74) permits Canadian courts to take jurisdiction over *terrorism offences* committed outside of Canada; and subsection 7(3.75) permits Canadian courts to take jurisdiction over *terrorist activity* committed outside of Canada.[7]

According to the language of subsections 7(3.73) to (3.75), jurisdiction over terrorism financing outside of Canada includes conspiracy, while jurisdiction over terrorism offences and activities do not include conspiracy. In other words, subsection 7(3.73) fixes the gap left by the conspiracy provisions in section 465, but subsections 7(3.74) and 7(3.75) do not. As a result, conspiracies to commit terrorism financing abroad can be prosecuted by Canadian courts, but conspiracies to commit terrorism offences or terrorist activity abroad, cannot be prosecuted by Canadian courts.

Lawmakers might consider bridging this gap by amending subsections 7(3.74) and 7(3.75) to match the language used in subsection 7(3.73), to permit Canadian courts to take jurisdiction over conspiracies for terrorism offences and terrorist activities committed outside Canada. Of course, when dealing with individual prosecutions on charges of conspiracies, a case-by-case analysis will be required rather than a one-size fits all approach.

ii. Treason Provisions

Across the Commonwealth, laws related to treason tend to be some of the oldest in existence. There have been some initiatives recently to modernize the laws of treason, particularly in Australia (where the laws of treason were modernized in 2018) and the United Kingdom (where modernization was recently proposed) (Ekins et al. 2018). It is possible, especially if Canadian laws of treason were modernized along similar lines, that these laws could apply to returning foreign fighters.

The current *Criminal Code* provisions on high treason and treason read as follows (emphasis added):

> **46 (1)** Every one commits high treason who, in Canada,
>
> **(a)** kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;
>
> ***(b)*** *levies war against Canada or does any act preparatory thereto; or*
>
> ***(c)*** *assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country whose forces they are.*
>
> **(2)** Every one commits treason who, in Canada,
>
> ***(a)*** *uses force or violence for the purpose of overthrowing the government of Canada or a province;*
>
> **(b)** without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;
>
> ***(c)*** *conspires with any person to commit high treason or to do anything mentioned in paragraph (a);*
>
> ***(d)*** *forms an intention to do anything that is high treason or that is mentioned in paragraph (a) and manifests that intention by an overt act;* or
>
> **(e)** conspires with any person to do anything mentioned in paragraph (b) or forms an intention to do anything mentioned in paragraph (b) and manifests that intention by an overt act.

Essentially, what is criminalized by the current Canadian treason laws can be broken down as follows:

1. Preparing for war against Canada or conspiring to do so.
2. Assisting an enemy at war with Canada (whether or not a state of war exists) or conspiring to do so.
3. Using force or violence for the purpose of overthrowing the government of Canada or a province or conspiring to do so.

The *Policy Exchange* proposal in the UK argued that in a changing world, with asymmetric warfare (i.e., using covert or guerrilla tactics), proxy warfare, and the prominence of non-state actors on the rise, it is appropriate for the country to examine its treason laws and ensure they continue to reflect the changing realities of armed conflict. The same argument can be made for Canada.

Canada's treason laws have not been updated; and yet, the modern realities of armed conflict have changed. There are an increasing number and variety of non-state actors engaged in hostilities with the Canadian Armed Forces, and an increasing use of non-traditional methods of warfare.

It is unclear whether Canada's current treason laws apply to non-state actors such as terrorist organizations. In contrast, Australia's updated treason laws explicitly apply to non-state actors. Canadian lawmakers could consider amending section 46(1)(c) of the *Criminal Code* to mirror Australia's laws so that the section would read: "an enemy at war with Canada, *including state or non-state actors,* or any armed forces *or armed groups* against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists."

Given the growing discussion of this issue among the Commonwealth countries, Canadian lawmakers should probably consider the merits of modernizing the current treason laws – aside and independent from the foreign fighter phenomenon. However, it is noteworthy that if Canada's treason laws clearly applied to non-state actors, as Australia's treason laws do; these provisions would likely apply to the prosecution of certain returning foreign fighters and provide another avenue for Canadian prosecutors to hold them accountable for their crimes.[8]

D. CRIMES AGAINST HUMANITY AND WAR CRIMES ACT

Beyond their culpability under the *Criminal Code*, returning foreign fighters might also be criminally liable under the *Crimes Against Humanity and War Crimes Act*.

The *Crimes Against Humanity and War Crimes Act* permits Canadian courts to prosecute individuals for crimes against humanity, genocide, and war crimes that have occurred outside of Canada, pursuant to the principle of universal jurisdiction for atrocity crimes. The definitions used in the Act track those used in the Rome Statute of the International Criminal Court.

It is well-established that the Islamic State committed crimes against humanity, genocide, and/or war crimes, particularly against Yazidi women and girls, and members of other minority groups.

Therefore, if a returning foreign fighter committed genocide, a crime against humanity, or a war crime, or conspired or attempted to commit, was an accessory after the fact in relation to, or counselled in relation to, one of those offences; they may be prosecuted under section 6 of the *Crimes Against Humanity and War Crimes Act*. If convicted, they may be sentenced to imprisonment for life.

The major limitation with using the *Crimes Against Humanity and War Crimes Act* relates to funding. The Department of Justice's War Crimes Section, which is part of the broader Crimes Against Humanity and War Crimes Program, is responsible for facilitating and funding these prosecutions. However, the War Crimes Section has not received a funding increase since its establishment in 1998 – not even to keep pace with inflation. As a result, the section has focused almost exclusively on deporting international criminals rather than holding them criminally responsible in Canadian courts. In fact, the section has only ever prosecuted two people (Teich and Reisdorf 2021).

Part II. Private Criminal Remedies

In general, the initiation of criminal prosecutions is not limited to the state. Unless explicitly not permitted, private parties can also “press charges” (to use the colloquial language). They can lay an information and thereby begin a criminal prosecution.

Private prosecutions are rarely used. For one thing, launching one is quite onerous. The private party must first lay the information before a Justice of the Peace; the information must be made under oath, in writing, and must set out the identity of the accused person, the particulars of the offence(s) alleged, and the relevant sections/legislation (Damstra 2016). The private party must serve the information on the Attorney General. The court will then hold a pre-enquete hearing (i.e., in which a justice will consider the information) to decide whether a criminal prosecution should be commenced. The private party must provide reasonable notice to the Attorney General of the pre-enquete hearing and at the hearing the private party must demonstrate a *prima facie* case on all essential elements of the offence(s) alleged (Damstra 2016). If all those steps are satisfied, a criminal prosecution may be initiated. At that time, the Attorney General has the option of taking over the prosecution or withdrawing the charges. If the Attorney General does nothing, the matter will proceed as a private prosecution (Damstra 2016).

The default in the *Criminal Code* is that private prosecutions are permitted. However, this varies by offence. If a particular offence specifically includes the “consent of the Attorney General” as a requirement (this does not have to be verbatim), no private prosecution on that offence is permitted without the consent of the Attorney General.

In the case of returning foreign fighters, there is unlikely to be much room for private prosecutions. This is because the terrorism offences contained in Part II.1 of the *Criminal Code* require the consent of the Attorney General (s. 83.24). Similarly, prosecutions under the *Crimes Against Humanity and War Crimes Act* require the consent of the Attorney General.

If the Canadian government wants to enhance the ability of victims to seek redress from returning foreign fighters, it should develop clear public policy outlining when consent will or will not be provided. This transparency is important because if the Attorney General does not provide consent, there can be no judicial review of that decision.[9]

The request that the government establish public criteria is not novel. B'nai Brith Canada has requested the same in the context of private prosecutions for hate speech. As David Matas, Honorary Senior Legal Counsel to B'nai Brith Canada, submitted to the House of Commons Standing Committee on Justice and Human Rights in May 2019:

> What we need is that the consent or denial of consent of the Attorney General be exercised according to principle. In British Columbia, the *Crown Counsel Policy Manual* provides that in almost all hate offences, the public interest applies in favour of prosecution.
>
> Approvals for alternative measures should be given only if:
>
> 1. Identifiable individual victims are consulted and their wishes considered.
>
> 2. The offender has no history of related offences or violence.
>
> 3. The offender accepts responsibility for the act, and
>
> 4. The offence must not have been of such a serious nature as to threaten the safety of the community
>
> Those are criteria which could be adopted for denial of consent. There needs to be at least something, rather than, as now, a vacuum where consent can be denied arbitrarily, without explanation.
>
> …
>
> The grant or denial of consent by the Attorney General for hate speech crimes should be subject to clear public criteria. Reasons should be given for the grant or denial of consent and those reasons should explain why the criteria were or were not met. (B'nai Brith Canada 2019)

Presently, as with hate speech, the Attorney General's consent for private prosecutions of returning foreign fighters may be denied arbitrarily and cannot be judicially reviewed. This hampers access to justice for victims of terrorism. This should be remedied with clear and public guidelines outlining when the Attorney General's consent will be granted (or withheld).

As with British Columbia's approach for almost all hate offences, the guidelines established should favour enabling prosecutions unless enumerated criteria are satisfied to ground a denial of consent.

One issue that arises federally, but not provincially, is whether to pursue prosecution on the one hand, or passport revocation or revocation of citizenship or deportation on the other. Clear public guidelines should make clear that prosecutions (criminal law remedies) should generally be favoured over deportation or passport revocation (public civil law remedies). When dealing with alleged perpetrators of terrorism or atrocity crimes, the Canadian government has tended to lean toward deportation over criminal prosecutions (Teich and Reisdorf 2021).

Although deportation can be an important tool to ensure that Canada is not a safe haven for international criminals, criminal prosecutions are often a more direct manner of holding perpetrators accountable and limiting impunity. This is the case when, for example, deportation would have the effect of sending the perpetrator back to a state that does not have the means to prosecute them, when the receiving state is implicated in the crimes (e.g., in the case of authoritarian states that support terrorism), or when the terrorist group is still in power in the region (e.g., when deportation would be sending Islamic State members back to Islamic State-controlled territory). Even if deportation would not have the effect of sending the individual to one of these states – for example, if deportation sends the individual back to another well-resourced, democratic state – deportation may do nothing more than simply punt the burden of prosecution to another state's criminal law system. So, while the appropriate remedies will vary by case, prosecution will generally be the better option to limit impunity for returning foreign fighters.

Part III. Public Civil Remedies

The public civil remedies that are typically used to counter terrorism are passport revocation, citizenship revocation, and immigration remedies. It is important at the outset to clarify the differences between these types of public civil remedies.

Passport and citizenship revocation are remedies available for those who are Canadian citizens. With respect to the differences between passport and citizenship revocation, if a Canadian citizen has their *citizenship* revoked, they will consequently lose their Canadian passport. But a Canadian may have their *passport* revoked while retaining their Canadian citizenship. Citizenship revocation for terrorism offences was repealed by the Canadian government in 2017, but passport revocation is still in use for this purpose. Passports can be cancelled and then revoked for national security reasons.

When dealing with non-citizens, who do not hold Canadian citizenship or passports, the provisions of the *Immigration and Refugee Protection Act* may permit the government of Canada to order their removal from Canada on various grounds (including for involvement in war crimes, engagement in terrorism, et cetera). Each of these public civil remedies is discussed in turn.

A. PASSPORT REVOCATION

Under the Canadian Passport Order, the Canadian Minister of Public Safety and Emergency Preparedness, or their delegate, has the authority to make passport decisions when it is necessary to prevent the commission of a terrorism offence, as defined in section 2 of the *Criminal Code*, or to protect the national security of Canada or that of a foreign country or state (Canada 2016a).

Before a passport is *revoked,* it may first be *cancelled*. A Canadian passport may be cancelled by the Minister of Public Safety and Emergency Preparedness if there are reasonable grounds to suspect that the decision is necessary to prevent the commission of a terrorism offence as defined in section 2 of the Criminal Code, or to protect the national security of Canada or that of a

foreign country or state. When a passport is cancelled, law enforcement and border control partners are notified of the cancellation and the passport can no longer be used for travel. A passport may be cancelled prior to revocation, as cancellation renders a passport invalid for travel while officials conclude a more comprehensive review to establish whether there are grounds to ultimately revoke the passport (Canada 2016b).

The minister may *revoke* a Canadian passport when there are reasonable grounds to believe that the decision is necessary to prevent the commission of a terrorism offence, as defined in Section 2 of the *Criminal Code*, or to protect Canada's national security or that of a foreign country or state. If the Minister of Public Safety and Emergency Preparedness decides that a passport is to be revoked, they may decide that passport services are not to be delivered for a period of up to 10 years. During this period the person affected may need to travel urgently, in which case a limited validity passport may be issued on urgent, compelling, and compassionate grounds (Canada 2016a).

i. Applicability to Foreign Fighters

These sections provide a tool to address risks posed by returning foreign fighters. As described, a Canadian passport may be cancelled or revoked when this is necessary to prevent the commission of a terrorism offence, or to protect the national security of Canada or a foreign country or state. This can clearly apply to the passports of certain foreign fighters where these requirements are met.

There are no discernable gaps in the law and policy related to passport revocation.

B. CITIZENSHIP REVOCATION

One's citizenship can be revoked for several reasons; the permissible reasons for doing so vary by country. In several countries, including the UK and the Netherlands, citizenship can be revoked if the person joins a terrorist group or is convicted of a terrorism offence. In many jurisdictions these grounds for revocation only apply to naturalized citizens, not to those born in the country. Canada had similar laws under the Harper government that were subsequently repealed.

i. The History of Citizenship Revocation for Terrorism in Canada

As noted, in a brief period between 2014 and 2017, Canada allowed for citizenship revocation for convicted terrorists. The *Strengthening Canadian Citizenship Act* (SCCA) (2014) gave the Minister of Citizenship and Immigration the power to revoke the Canadian citizenship of dual citizens in two circumstances:

1. If such a person, while a Canadian citizen, was convicted of terrorism, high treason, treason, or espionage, depending on the sentence received; or
2. If such a person, while a Canadian citizen, served as a member of an armed force of a country or organized armed group engaged in armed conflict with Canada.

However, Bill C-6 (*An Act to Amend the Citizenship Act and Make Consequential Amendments to Another Act)*, which received Royal Assent on June 19, 2017, repealed the above provision of the *Citizenship Act* on the grounds that it treated dual citizens differently from other Canadians (Canada 2018). Since then, Canada has not used citizenship revocation to deal with terrorism.

ii. The Difficulties with Using Citizenship Revocation

The use of citizenship revocation for terrorism crimes is complex and potentially controversial. If such revocation provisions are applicable to everyone, they risk increasing statelessness, which the United Nations has aimed to reduce in recognition of the right of every person to a nationality. Were it to apply such a policy to everyone, Canada would risk breaching its international legal obligations.

On the other hand, if citizenship revocation provisions are only applicable to dual nationals or those with the ability to become a national of another country or territory, those laws could be seen as discriminatory and could be found to breach Section 15 of the *Canadian Charter of Rights and Freedoms*, which guarantees Canadians freedom from discrimination.

The European Parliament has similarly identified this Catch-22 circularity paradox of using citizenship revocation to address terrorism:

> One of the major legal objections against citizenship deprivation is the duty of states to prevent statelessness. This legal constraint explains why most deprivation provisions only concern dual citizens. However, making the citizenship of dual citizens less secure than that of single-nationality citizens raises questions about citizenship equality. (European Parliament 2017, 11)

There are also issues with making such revocation retroactive as this, too, raises legitimate Charter issues.

Despite these articulated concerns, some countries, such as the UK and the Netherlands, still allow a person's citizenship to be revoked if they have joined a terrorist group or been convicted of a terrorism offence. This remains a live issue and a growing topic of discussion in Canadian politics.

iii. Possible Solutions

Instead of returning to Harper-era citizenship revocation, there may be less contentious ways for Canada to bring citizenship revocation back into the terrorism toolkit.

Like many countries, Canada allows for someone's citizenship to be revoked if they have made false representations or fraud, or have knowingly concealed material circumstances during their citizenship process. This type of revocation provision is common across Western democracies: the US, the UK, and almost every EU country (except for Croatia, Poland, and Sweden) have similar provisions (European Parliament 2017). If Canadian citizenship is revoked on this ground, the person becomes a permanent resident. If the individual became a permanent resident by false representation or fraud or knowing concealment, they then become a foreign national. The individual is then precluded from reapplying for citizenship for 10 years.

One element of the American version of this policy is that naturalized US citizens are subject to citizenship revocation if they are affiliated with certain organizations, including terrorist organizations, within 5 years of naturalization. Due to the naturalization requirements in the US (attachment to the Constitution, etc.) – early involvement in terrorist organizations after attaining citizenship is considered *prima facie* evidence that there was concealment or wilful misrepresentation of material evidence in the naturalization process (US Citizenship and Immigration Services 2022). Note that this policy pre-dates the Trump presidency; it was used during the Obama administration and potentially even earlier.[10]

Canada might consider implementing a similar policy. By considering affiliation with a terrorist group, within a proscribed number of years, to be *prima facie* evidence of concealment, the Canadian government could use the citizenship revocation tool for certain terrorism cases in a way that does not run afoul of Section 15 of the *Canadian Charter of Rights and Freedoms*.

C. IMMIGRATION REMEDIES

The federal government can revoke the citizenships and passports of Canadian citizens. But how can it handle Canadian permanent residents or temporary residents? This falls under the purview of immigration law, codified in Canada's *Immigration and Refugee Protection Act* (IRPA).

Under IRPA, Canadian permanent residents and temporary residents have the right to enter and remain in Canada (Immigration and Refugee Protection Act (S.C. 2001, c. 27), sections 19 and 29). However, there are certain criteria that, if satisfied, can result in a permanent resident or foreign national being removed from Canada following an admissibility hearing.

Several inadmissibility criteria might apply specifically to the grounds for removal of a returning foreign fighter. Pursuant to sections 34-37, a permanent resident or foreign national is inadmissible if there are reasonable grounds to believe that one of the following has occurred, is occurring, or may occur:[11]

1. Engaging in or instigating the subversion by force of any government;
2. Engaging in an act of subversion against a democratic government, institution, or process as they are understood in Canada;
3. Engaging in terrorism;
4. Being a danger to the security of Canada;
5. Engaging in acts of violence that would or might endanger the lives or safety of persons in Canada;
6. Being a member of an organization that there are reasonable grounds to believe engages, has engaged, or will engage in acts referred to in 1, 2, or 3 above;
7. Committing an act outside Canada that constitutes an offence referred to in the *Crimes Against Humanity and War Crimes Act*;
8. Committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an act of Parliament punishable by a maximum term of imprisonment of at least 10 years;
9. For foreign nationals only, committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an act of Parliament;
10. Being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern;
11. Engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons, or laundering of money or other proceeds of crime.

Similarly, refugees in Canada may lose refugee protection if they have "committed a crime against peace, a war crime, or a crime against humanity."[12]

In interpreting these provisions, courts follow a balancing act. Interpreting provisions too narrowly risks creating a safe haven for international criminals – the very scenario that these exclusions were designed to prevent (*Ezokola v. Canada (Citizenship and Immigration)* 2013 SCC 40 at para 35).[13] However, on the other hand, interpreting the provisions too loosely risks undermining humanitarian aims (*Ezokola v. Canada (Citizenship and Immigration)* 2013 SCC 40 at para 35).

After weighing these competing aims, the Supreme Court held that it is not sufficient for ineligibility that the individual held membership in a terrorist or criminal organization. Some complicity is required; the Supreme Court specifically required, in *Ezokola v. Canada,* that the claimant must have "voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose" (*Ezokola v. Canada (Citizenship and Immigration)* 2013 SCC 40 at para 84).

Ultimately, whether a Canadian permanent resident or foreign national who joined the Islamic State will be deemed inadmissible to Canada on that basis will be a case-by-case exercise. If the foreign fighter voluntarily made a significant and knowing contribution to the group's criminal purpose, it is likely they would be deemed inadmissible, which could ultimately result in their removal from Canada.

Part IV. Private Civil Remedies

Private civil remedies are an important potential avenue to holding returning foreign fighters accountable, because, as noted, all relevant provisions of the *Criminal Code* and the *Crimes Against Humanity and War Crimes Act* require the consent of the Attorney General to proceed. In other words, private parties, including victims, cannot hold perpetrators accountable on their own initiative through the criminal remedies without the consent of the Attorney General.

In contrast, any party can initiate a private civil lawsuit and seek damages for harm caused by a perpetrator in a court of competent jurisdiction. So, if a returning foreign fighter, through their involvement with the Islamic State, caused damages to a victim, that victim might be able to launch a civil lawsuit in their quest for justice. A victim might be able to sue in tort, or under the *Justice for Victims of Terrorism Act* (JVTA).

A. TORT LAW

A victim may have a viable intentional tort action if a foreign fighter intentionally inflicted physical or emotional damage. A foreign fighter might be liable for the intentional tort of assault, battery, and/or false imprisonment, depending on the facts of the particular case. A victim may also sue for acts that intentionally caused emotional distress. If successful, a victim can be compensated for damages caused. If the fighter does not have the ability to pay the judgment, many provinces and territories compensate the victim through victim compensation fund schemes.

Alternatively, if the requisite intentionality cannot be shown, a victim may have a case for negligence by asserting that a foreign fighter failed to take reasonable care and thereby caused damage to the victim. Generally, liability on a negligence theory follows if the *prima facie* case for negligence is met. This would generally require showing (a) that the fighter owed a duty of care to the victim, (b) that the fighter breached that duty, (c) that the fighter's breach caused the victim's injury, and (d) that the victim suffered damages.

In either case, intentional tort or negligence, the major hurdle in proceeding with a tort case would likely be jurisdictional. The doctrine of *forum non conveniens* means that a Canadian court may stay proceedings if it finds that there is an alternative forum that is a more appropriate place for the case to be tried. The burden would be on the party seeking to stay the case on that basis. That party would have to show that the alternative forum is *clearly more appropriate,* or put another way, "is in a better position to dispose fairly and efficiently of the litigation."[14]

Where a victim sues a foreign fighter in Canadian court for events that transpired wholly in Syria, the foreign fighter would likely argue that Syria is clearly the more appropriate forum. To counter this, the victim/plaintiff may demonstrate that there is a real risk of an unfair trial in Syria, which would actually make Syria *not* a more appropriate forum.[15]

B. JUSTICE FOR VICTIMS OF TERRORISM ACT

More straightforward might be a lawsuit under the JVTA, which in 2012 established a cause of action that specifically allows victims of terrorism to sue perpetrators of terrorism and their supporters for injury caused by terrorism.

Section 4 (1) of the JVTA provides,

> Any person that has suffered loss or damage in or outside Canada on or after January 1, 1985 as a result of an act or omission that is, or had it been committed in Canada would be, punishable under Part II.1 of the *Criminal Code*, may, in any court of competent jurisdiction, bring an action to recover an amount equal to the loss or damage proved to have been suffered by the person and obtain any additional amount that the court may allow, from any of the following:
>
> (a) any listed entity, or foreign state whose immunity is lifted under section 6.1 of the *State Immunity Act*, or other person that committed the act or omission that resulted in the loss or damage; or
>
> (b) a foreign state whose immunity is lifted under section 6.1 of the *State Immunity Act*, or listed entity or other person that – for the benefit of or otherwise in relation to the listed entity referred to in paragraph (a) – committed an act or omission that is, or had it been committed in Canada would be, punishable under any of sections 83.02 to 83.04 and 83.18 to 83.23 of the *Criminal Code*.

Essentially, if a victim of the Islamic State can demonstrate on a balance of probabilities (the civil standard of proof) that a returning foreign fighter

committed an act or omission that would be punishable under one of the terrorism offences – and that the victim suffered injury thereby – the victim might be able to recover in damages from the fighter in Canadian court. Note, however, that per section 4 (2) of the JVTA, a Canadian court may hear this type of action "only if the action has a real and substantial connection to Canada or the plaintiff [the victim] is a Canadian citizen or a permanent resident."

There might be a further possibility for a victim to recover damages from a returning foreign fighter even if the victim's injuries were not specifically caused by the criminal actions of the fighter if the fighter committed some (unrelated) terrorism offence for the benefit of or in relation to the terrorist group. There is no jurisprudence on this particular point, but a plain reading of section 4 (2.1) of the JVTA seems to suggest this possibility. This subsection provides:

> In an action under subsection (1), the defendant is presumed to have committed the act or omission that resulted in the loss or damage to the plaintiff if the court finds that
>
> (a) a listed entity caused or contributed to the loss or damage by committing an act or omission that is, or had it been committed in Canada would be, punishable under Part II.1 of the *Criminal Code*; and
>
> (b) the defendant – for the benefit of or otherwise in relation to the listed entity referred to in paragraph (a) – committed an act or omission that is, or had it been committed in Canada would be, punishable under any of sections 83.02 to 83.04 and 83.18 to 83.23 of the *Criminal Code*.

Based on the plain wording of this subsection, it appears that a victim may recover from a defendant (for example, a returning foreign fighter) if a listed entity (e.g., the Islamic State) caused damage to the victim by committing a terrorism offence *and* the defendant also committed a terrorism offence (though not necessarily the same one). Of course, without jurisprudence on this point, it is not clear whether this type of argument would be successful or whether it would be considered constitutional. However, it is an interesting possibility to keep in mind as foreign fighters return and civil lawsuits are considered in Canada by victims of the Islamic State.

A further possibility that should be considered is civil lawsuits under the JVTA against Syria. In addition to enabling lawsuits against persons who commit terrorism, the JVTA provides a cause of action against those states whose immunity has been specifically lifted for their support of terrorism. Syria is one of two states whose immunity has been lifted by Canada for this

purpose. Therefore, Syria can be sued for its support of terrorism, by victims of terrorism, in Canadian courts. If such lawsuits are successful, Syrian assets can be seized, sold, and the proceeds distributed to victims.

Finally, victims should keep in mind that a listed entity itself, such as the Islamic State, can also be specifically sued under the JVTA for damages caused by terrorism. Again, if such a lawsuit is successful, Islamic State assets in Canada (if they exist) can be seized, sold, and the proceeds distributed to victims.

If a successful JVTA judgment is obtained but the perpetrator has no assets in Canada, the Canadian judgment in favour of the victims could possibly be recognized abroad, in countries that permit such recognition. That would enable the victims to seize the perpetrator's assets in that foreign state, in satisfaction of the Canadian judgment. This possibility could be useful where a perpetrator has no assets in Canada but does have assets in a foreign jurisdiction that permits the recognition of foreign judgments. This might apply regardless of the identity of the perpetrator and might be available for judgments against individual foreign fighters, Syria, and the Islamic State alike.

Although this avenue already exists via the JVTA, both the Canadian government and civil society may still play an important role in empowering and assisting these victims in their civil lawsuits. For instance, the Canadian government and/or Canadian legal associations may establish a coalition of pro bono legal assistance for victims who wish to explore a potential civil lawsuit, as the Association of Trial Lawyers of American (now the American Association for Justice) did for US victims of the 9/11 attacks.[16]

Further, as noted, there are victim eligibility restrictions under the JVTA. A court is only permitted to hear an action when "the action has a real and substantial connection to Canada or the plaintiff is a Canadian citizen or a permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act." This should be expanded to include refugees as well as Canadian citizens and permanent residents, so that refugees do not have to wait until they obtain permanent residency, to launch a civil lawsuit under the JVTA.

Conclusions and Recommendations

Canadians who travelled to Syria to join the Islamic State are now returning to Canada. As the returns continue, Canadian lawmakers must ensure that our legal system is prepared, and that there is no impunity for fighters who were involved in atrocities and other serious crimes. The first step in this effort must be to thoroughly evaluate the current state of the law. This paper has aimed to contribute to that end.

A. PUBLIC CRIMINAL REMEDIES

Looking to the criminal law, and particularly the terrorism offences in Part II.1 of the *Criminal Code*, it is clear that returning foreign fighters may be held criminally liable for their actions. Leaving or attempting to leave Canada to join a listed terrorist group (such as the Islamic State) is a criminal offence if the departure (or attempted departure) was undertaken for the purpose of enhancing the group's ability to commit terrorist activity. Further, other offences might be applicable on a case-by-case basis, including facilitating terrorist activity, committing an indictable offence for the benefit of a terrorist group, and others. **As foreign fighters return to Canada, prosecutors should make sure they are laying criminal charges where appropriate, using one or more of these relevant offences.**

In addition, Canadian lawmakers may want to consider amending Part II.1 of the *Criminal Code* to criminalize the act of joining a terrorist group, though excluding individuals who had no knowledge of the terrorist purposes or acts of the organization unless they were personally implicated in the commission of terrorist acts, following the precedent of the Nuremberg Tribunal.

Terrorism peace bonds are another feature of Part II.1 and can mitigate the risk posed by foreign fighters where there is a reasonable basis to believe that they may carry out terrorist activity upon their return. However, although this tool is available, the Canadian government imposed no terrorism peace bonds in the last reporting period (2019-2020). **Prosecutors should ensure**

there is clear policy and direction on this, such that terrorism peace bonds are used where appropriate.

The conspiracy provisions in the *Criminal Code* might also be useful for prosecuting returning foreign fighters for terrorism. However, there is a gap in the law whereby conspiracies to commit terrorism financing abroad can be prosecuted by Canadian courts, but conspiracies to commit terrorism offences or terrorist activity abroad cannot be prosecuted by Canadian courts. **Lawmakers might consider amending subsections 7(3.74) and 7(3.75) to bridge this gap, to permit Canadian courts to take jurisdiction over conspiracies for terrorism offences and terrorist activities committed outside Canada.**

The treason provisions in the *Criminal Code* might also be applicable to prosecute returning foreign fighters if the provisions are modernized. Recently, there has been a push for Commonwealth countries to modernize their treason laws. Australia's treason laws were modernized in 2018, and there has been a similar proposal to do so in the UK. **If Canadian treason laws are modernized along similar lines, the treason offences might apply, which could provide another avenue of prosecution for certain returning foreign fighters.**

Finally, the *Crimes Against Humanity and War Crimes Act* permits the public prosecution of returning foreign fighters for involvement in genocide, war crimes, and crimes against humanity. However, this option may be constrained due to the underfunding of the Department of Justice's War Crimes Section. **Canadian lawmakers should increase the budget for the War Crimes Section to enable it to prosecute individuals for atrocity crimes.**

B. PRIVATE CRIMINAL REMEDIES

Since the terrorism offences contained in Part II.1 of the *Criminal Code* and the offences under the *Crimes Against Humanity and War Crimes Act* all require the consent of the Attorney General to proceed, private prosecutions of these offences are limited as a remedy for victims. **To enhance the ability of victims to seek redress from returning foreign fighters, governments should establish clear public guidelines outlining when the Attorney General will grant or withhold consent for private prosecutions. Moreover, clear and public federal guidelines should clarify that criminal prosecutions should generally be prioritized over deportation and other public civil remedies.** Government has tended to prioritize deportation of international criminals, but prosecutions will generally be more effective at limiting impunity.

C. PUBLIC CIVIL REMEDIES

The public civil remedies that have typically been used to counter terrorism include passport revocation, citizenship revocation, and immigration remedies.

When dealing with Canadian citizens who return from the Islamic State, passport revocation is still available as a tool in Canada's counter-terrorism toolkit. In contrast, citizenship revocation for terrorism, which was permitted under the Harper government, is no longer available. **Rather than reverting to the Harper-era legislation on citizenship revocation, Canada might consider mirroring the US approach, which considers affiliation with a terrorist group within five years of naturalization to be *prima facie* evidence of misrepresentation in the naturalization process**.

When dealing with non-citizens, immigration law governs. Per the *Immigration and Refugee Protection Act*, permanent residents and temporary residents may become inadmissible to Canada for several reasons, including by committing an atrocity crime, subverting democratic institutions, engaging in certain transnational crimes, engaging in terrorism, or joining an organization that engages in terrorism. Similarly, refugees may lose refugee protection if they commit a crime against peace, a war crime, or a crime against humanity. **Based on these provisions, the Immigration Division may find certain returning foreign fighters, if they are not Canadian citizens, inadmissible to Canada.**

As discussed previously, while it is important to have a variety of tools available for use, including public civil options, Canada should develop clear guidelines and generally prioritize criminal prosecutions over deportation/revocations.

D. PRIVATE CIVIL REMEDIES

Since private criminal remedies are limited in this area, there is an increased significance in the availability of private civil remedies. The advantage of private civil lawsuits is that victims can take the initiative, without requiring the consent of the Attorney General, and seek damages from perpetrators for their injuries. There may be multiple options for victims to seek redress from foreign fighters using civil law. **Victims might be able to launch civil lawsuits under tort law or using the *Justice for Victims of Terrorism Act*. Government and civil society should empower and assist victims to use these remedies where appropriate. Further, the ability to launch civil lawsuits under the JVTA should be expanded to include refugees as well as Canadian citizens and permanent residents.**

APPENDIX I

SUMMARY OF THE TERRORISM OFFENCES IN THE CRIMINAL CODE

1. Financing terrorism

a. *Offence 1:* “provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out [certain types of terrorist activity]” (Maximum sentence: 10 years (s. 83.02))

b. *Offence 2:* “collects property, provides or invites a person to provide, or makes available property or financial or other related services (a) … for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or (b) knowing that, in whole or part, they will be used by or will benefit a terrorist group” (Maximum sentence: 10 years (s. 83.03))

c. *Offence 3:* “(a) uses property… for the purpose of facilitating or carrying out a terrorist activity, or (b) possesses property intending that it be used or knowing that it will be used… for the purpose of facilitating or carrying out a terrorist activity” (Maximum sentence: 10 years (s. 83.04))

2. Property offences – dealing in terrorist property, etc.

a. *Offence 1:* “knowingly (a) deal directly or indirectly in any property that is owned or controlled by or on behalf of a terrorist group; (b) enter into or facilitating, directly or indirectly, any transaction in respect of property referred to in paragraph (a); or (c) provide any financial or other related services in respect of property referred to in paragraph (a) to, for the benefit of or at the direction of a terrorist group” (Maximum sentence: 10 years (s. 83.12 / s. 83.08))

b. *Offence 2:* Not disclosing (without delay) to RCMP Commissioner or to CSIS Director “(a) the existence of property in their possession

or control that they know is owned or controlled by or on behalf of a terrorist group; and (b) information about a transaction or proposed transaction in respect of property referred to in paragraph (a)" (Maximum sentence: 10 years (s. 83.12 / s. 83.1))

c. *Offence 3:* For listed entity/company under s. 83.11 (1), not determining "on a continuing basis whether they are in possession or control of property owned or controlled by or on behalf of a listed entity [(i.e., auditing)]" (Maximum sentence: 10 years (s. 83.12 / s. 83.11(1)))

d. *Offence 4:* For listed entity/company under s. 83.11 (1), not reporting regularly to its regulating body "(a) that it is not in possession or control of any property referred to in subsection (1), or (b) that it is in possession or control of such property, in which case it must also report the number of persons, contracts or accounts involved and the total value of the property [(i.e., monthly report)]" (Maximum sentence: 10 years [s. 83.12 / s. 83.11(2)])

3. Participation

a. *Main offence:* "knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity" (Maximum sentence: 10 years (s. 83.18))

   i. "Participating in or contributing to an activity of a terrorist group includes … entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group" (s. 83.18(3)(d))

b. *Leaving or attempting to leave, to participate:* Leaving or attempting to leave Canada "for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an offence under subsection 83.18(1)" (Maximum sentence: 10 years (s. 83.181))

4. Facilitating

a. *Main offence:* "Knowingly facilitates a terrorist activity" (Maximum sentence: 14 years (s. 83.19))

b. *Leaving or attempting to leave, to facilitate:* Leaving or attempting to leave Canada "for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an offence under subsection 83.19(1)" (Maximum sentence: 14 years (s. 83.191))

5. Indictable offence for the benefit of a terrorist group

a. *Main offence:* Committing "an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of

or in association with a terrorist group" (Maximum sentence: life imprisonment (s. 83.2))

b. *Leaving or attempting to leave, to commit indictable offence for the benefit of a terrorist group:* Leaving or attempting to leave Canada "for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group" (Maximum sentence: 14 years (s. 83.201))

6. Indictable offence that is also a terrorist activity

a. Leaving or attempting to leave Canada "for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an indictable offence under this or any other Act of Parliament if the act or omission constituting the offence also constitutes a terrorist activity" (Maximum sentence: 14 years (s. 83.202))

7. Instructing

a. *Offence regarding terrorist group:* "knowingly instructs, directly or indirectly, any person to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity" (Maximum sentence: life imprisonment (s. 83.21))

b. *Offence regarding terrorist activity:* "knowingly instructs, directly or indirectly, any person to carry out a terrorist activity" (Maximum sentence: life imprisonment (s. 83.22))

8. Counselling commission of terrorist offence

a. "Counsels another person to commit a terrorism offence without identifying a specific terrorism offence" (Maximum sentence: fiveyears). This offence may be committed "whether or not a terrorism offence is committed by the person who is counselled" (s. 83.221)

9. Harbouring or concealing

a. *Offence when a person carried out a terrorist activity:* "knowingly harbours or conceals another person whom they know to be a person who has carried out a terrorist activity, for the purpose of enabling that other person to facilitate or carry out any terrorist activity" (Maximum sentence: 10 or 14 years, depending on the activity (s. 83.23(1)))

b. *Offence when person is likely to carry out terrorist activity:* "knowingly harbours or conceals another person whom they know to be a person who is likely to carry out a terrorist activity, for the purpose of enabling that other person to facilitate or carry out any terrorist activity" (Maximum sentence: 10 years (s. 83.23(2)))

In general, there are several gaps in what is criminalized by Part II.1 of the Code*;* this is evident when the offences are broken down into whether they are in relation to "terrorist activity" or "terrorist group," which the authors have done in Table 1 (see pages 41-42).

Table 1 demonstrates the multiple gaps in terms of what is criminalized and what is not criminalized. For example, it is not a criminal offence to facilitate the activities of a *terrorist group*. It is only a criminal act to facilitate *terrorist activity*, and to participate in the activities of a terrorist group "for the purpose of enhancing the ability of any terrorist group to facilitate or carry out terrorist activity." Under the participation offence, it may be a crime to facilitate the activities of a terrorist group if that facilitation is for the purpose of enhancing a terrorist group's ability to carry out terrorist activity – but in either case, it is tied to *terrorist activity*.

It is also not a criminal offence to harbour or conceal a person who has acted for a terrorist group. Currently, it is only a crime to harbour or conceal another person who committed or is likely to commit terrorist activity.[17]

Further, although Part II.1 opens by defining *terrorist activity* and *terrorist group,* it is not explicitly stated that it is a criminal offence to either commit a terrorist activity or join a terrorist group. Instead, committing a terrorist activity is captured by the facilitation offence, which is broader: it is not a criminal offence to participate in *terrorist activity,* but it is a crime to knowingly facilitate terrorist activity. Further, because of the operation of party liability laws (meaning, a party to a crime may be liable for the crime along with the person who principally committed it), it is a crime to participate in the commission of an indictable offence that is also terrorist activity – because it is criminalized to commit an indictable offence that is also terrorist activity (see #6 above), and because party liability applies to terrorism offences. In the same vein, it is also a crime to participate in the facilitation of terrorist activity (see #4 above).

In contrast, joining a terrorist group is somewhat captured by the participation offence, although conviction under this provision further requires that the person had *the specific purpose* of enhancing the terrorist group's ability to commit a terrorist activity. In other words, it is not a crime to simply join a terrorist group. This is likely due to constitutional reasons. It is also likely due to international legal obligations, which generally provide that membership in a criminal organization is not sufficient for guilt.[18]

TABLE 1: WHAT IS A CRIMINAL ACT AND WHAT IS NOT?

<table>
<tr><th>REGARDING “TERRORIST ACTIVITY”</th><th>REGARDING “TERRORIST GROUP”</th><th>OTHER</th></tr>
<tr><td>Financing Terrorism:
• Providing or collecting property to carry out (a) one of paras (a)(i) to (ix) of the definition of “terrorist activity,” OR (b) any other act or omission intended to cause death or serious bodily harm to a civilian, if the purpose is to intimidate the public or to compel a government or international organization to do or refrain from doing any act
• Collecting property, providing, or inviting a person to provide, or making available property or financial or other related services “(a) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity”
• Using or possessing property “directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity”</td><td>Financing Terrorism:
• Collecting property, providing, or inviting a person to provide, or making available property or financial or other related services “… (b) knowing that, in whole or part, they will be used by or will benefit a terrorist group”
Dealing in Terrorist Property:
• Dealing in any property “owned or controlled by or on behalf of a terrorist group”</td><td></td></tr>
<tr><td></td><td>Participating in or contributing to, “directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity.” This includes: “entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group.”
Leaving for Participating: Leaving or attempting to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would constitute the above offence</td><td></td></tr>
</table>

REGARDING "TERRORIST ACTIVITY"	REGARDING "TERRORIST GROUP"	OTHER
Facilitating terrorist activity **Leaving for Facilitating:** Leaving or attempting to leave Canada, for purpose of facilitating terrorist activity		
Leaving for Indictable Offence + Terrorist Activity: Leaving or attempting to leave Canada "for the purpose of committing … an indictable offence … if the act or omission constituting the offence also constitutes a terrorist activity"	**Indictable Offence + Terrorist Group:** Committing "an indictable offence … for the benefit of, at the direction of or in association with a terrorist group" **Leaving for Indictable Offence + Terrorist Group:** Leaving or attempting to leave Canada, "for the purpose of committing … an indictable offence … for the benefit of, at the direction of or in association with a terrorist group"	
Instructing "any person to carry out a terrorist activity"	**Instructing** "any person to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity"	**Counselling** "another person to commit a terrorist offence"
Harbouring or concealing "another person … who has carried out a terrorist activity" or "who is likely to carry out a terrorist activity, for the purpose of enabling that other person to facilitate or carry out any terrorist activity"		

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References

American Immigration Lawyers Association (AILA). 2021. *Tracking USCIS Policy Manual Changes*. AILA. Available at https://www.aila.org/infonet/tracking-uscis-policy-manual-changes.

B'nai Brith Canada. 2019. *Combatting Online Hate*. B'nai Brith Canada. Available at https://d3n8a8pro7vhmx.cloudfront.net/bnaibrithcanada/pages/2771/attachments/original/1556816941/Matas-Submission_02May2019.pdf?1556816941.

Canada. 2016a. "Cancellation and revocation of passports and refusal of passport services on grounds of national security." *Refusal, Revocation, Cancellation and Suspension of Canadian Passports*. Government of Canada. Available at https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/security/refusal-revocation/national-security.html.

Canada. 2016b. *Refusal, Revocation, Cancellation and Suspension of Canadian Passports*. Government of Canada. Available at https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/security/refusal-revocation/national-security.html.

Canada. 2018. *Changes to the Citizenship Act as a Result of Bill C-6: Backgrounder.* Government of Canada. Available at https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/10/changes_to_the_citizenshipactasaresultofbillc-6.html.

Canada. 2020. *Terrorism Peace Bonds Annual Report*. Government of Canada, Department of Justice. Available at https://www.justice.gc.ca/eng/rp-pr/cj-jp/antiter/terrorism-terrorisme/index.html.

Damstra, Jacob R.W. 2016. "Private Prosecutions in the Public Interest?: Process,

Possibilities, and Problems." *Lerners* (October). Available at https://www.lerners.ca/lernx/private-prosecutions-public-interest-process-possibilities-problems/.

Ekins, Richard, Patrick Hennessey, Khalid Mahmood, and Tom Tugendhat. 2018. *Aiding the Enemy: How and Why to Restore the Law of Treason*. Policy Exchange. Available at https://policyexchange.org.uk/wp-content/uploads/2018/07/Aiding-the-Enemy.pdf.

European Parliament. 2017. *Acquisition and Loss of Citizenship in EU Member States: Key Trends and Issues*. European Parliament. Available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf.

Historic 9/11 Pro Bono Effort. Casey Gerry. Available at https://caseygerry.com/case-results/historic-911-pro-bono-effort/

Lillian Goldman Law Library. 2009. *The Avalon Project*. Yale Law School. Available at https://avalon.law.yale.edu/imt/judorg.asp.

Teich, Sarah, and Maria Reisdorf. 2021. "Canada Underfunds Its Ability to Hold War Criminals To Account." *Troy Media* (April 29). Available at https://tmmarketplace.ca/free-membership-editorial-content/canada-underfunds-its-war-crimes-section/.

United Nations. 1979. International Convention Against the Taking of Hostages. Multilateral No. 21931. United Nations. Available at https://treaties.un.org/doc/db/terrorism/english-18-5.pdf.

US Citizenship and Immigration Services. 2022. "Chapter 2 – Grounds for Revocation of Naturalization." *Policy Manual.* Government of the United States. Available at https://www.uscis.gov/policy-manual/volume-12-part-l-chapter-2.

Legal cases in Canada

Araya v. Nevsun Resources Ltd., [2017] B.C.J. No. 2318.

Club Resorts Ltd. v. Van Breda 2012 SCC 17.

Ezokola v. Canada (Citizenship and Immigration) 2013 SCC 40.

R. v. Habib, [2017] Q.J. No. 13803 at para 57. Available at https://www.internationalcrimesdatabase.org/Case/3289/R-c-Habib,-2017-QCCQ-6948/.

R. v. Khawaja 2012 SCC 69.

Canadian and International Legislation

Canada. 1982. "Part I: Canadian Charter of Rights and Freedoms." In *The Constitution Act, 1982*. Government of Canada, Ministry of Justice. Available at https://laws-lois.justice.gc.ca/eng/const/page-12.html.

Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24). Available at https://laws-lois.justice.gc.ca/eng/acts/C-45.9/.

Criminal Code (R.S.C., 1985, c. C-46). Available at https://laws-lois.justice.gc.ca/eng/acts/C-46/section-83.18.html.

Immigration and Refugee Protection Act (S.C. 2001, c. 27). Available at https://laws.justice.gc.ca/eng/acts/i-2.5/.

International Criminal Court. 1998/2002. *Rome Statute of the International Criminal Court*. International Criminal Court. Available at https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.

Justice for Victims of Terrorism Act (S.C. 2012, c. 1, s. 2). Available at https://laws-lois.justice.gc.ca/eng/acts/j-2.5/FullText.html.

Office of the Law Revision Counsel. 2022. "USC 1451: Revocation of Naturalization." Title 8 – Aliens and Nationality. Chapter 12 – Immigration and Nationality. Subchapter III – Nationality and Naturalization. Part II – Nationality through Naturalization. *United States Code*. United States House of Representatives. Available at https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1451&num=0&edition=prelim.

Endnotes

1 The term "foreign fighters" has become the common, popular language employed to describe people who travelled abroad to join terrorist groups, now returning to their home countries. We have adopted this term here for simplicity and consistency with the existing literature.

2 In *Ezokola v. Canada (Citizenship and Immigration)* 2013 SCC 40, the Supreme Court of Canada drew on international law and held that individuals cannot be declared ineligible to Canada simply because they are associated with a criminal group or passively acquiesced to the group's criminal purposes – something further is required. Similarly, in *R. v. Khawaja* 2012 SCC 69, the Supreme Court found that section 83.18 (the participation offence) was not constitutionally overbroad because the offence required this high-threshold specific intent (that participation must have been for the purpose of enhancing the terrorist group's ability to commit terrorist activity). The implication of the Court's reasoning was that if the offence had criminalized mere membership in a terrorist group, the offence would have been unconstitutional as a violation of section 7 of the *Charter of the Rights and Freedoms*.

3 Of course, it is important to keep in mind that moving to an Islamist society is not necessarily participating in terrorist activity. It is also not necessarily participating in terrorist activity if a woman travels to Islamic State territory to get married to someone associated with the terrorist group, unless she also participates in terrorist activity.

4 *R. v. Habib*, [2017] Q.J. No. 13803 at para 57.

5 In *R. v. Khawaja* 2012 SCC 69, the Supreme Court of Canada examined whether section 83.18 (the participation offence) breached section 7 of the *Canadian Charter of Rights and Freedoms*. The Court in that case held that section 83.18 was not constitutionally overbroad because the offence required this high-threshold specific intent that participation

must have been for the purpose of enhancing the terrorist group's ability to commit terrorist activity. The implication of the Court's reasoning was that if the offence had criminalized mere membership in a terrorist group, the offence would have been unconstitutional as a violation of section 7 of the Charter.

6 In *Ezokola v. Canada (Citizenship and Immigration)* 2013 SCC 40, the Supreme Court of Canada drew on international law and held that individuals cannot be declared ineligible to Canada simply because they are associated with a criminal group or passively acquiesced to the group's criminal purposes – something further is required.

7 Recall that there must be some connection to Canada to ground jurisdiction in international law. In keeping with those requirements, each of these subsections limits jurisdiction to specific circumstances. For example, jurisdiction over terrorism offences outside Canada [s. 7(3.74)] only applies to Canadian citizens, residents, and permanent residents. Jurisdiction over terrorist activity committed outside Canada [s. 7(3.75)] only applies to acts against Canadian citizens, acts against a Canadian government or public facility located outside Canada, and acts intended to compel the government of Canada or of a province to do or refrain from doing any act.

8 It is worth noting for completeness that if an individual or entity is charged with both terrorism and treason offences, and convicted of both, only the more serious conviction will stick, according to the Kienapple principle in Canadian law which guards against duplicity of convictions.

9 Generally, there is no judicial review of a Crown's decision not to prosecute, because this violates the principle of equality of arms.

10 The underlying law, which permits "membership in certain organizations" to constitute *prima facie* evidence of concealment, has been in existence since 1952 (Office of the Law Revision Counsel 2022, "USC 1451: Revocation of Naturalization"). The relevant chapter of the USCIS policy manual, that specifically categorizes terrorist organizations as one such type of organization, has been in existence since at least 2013 (AILA 2021). No manuals from prior to 2013 are available online, so it cannot be discerned if this policy further pre-dated the Obama administration.

11 Note that sections 34-37 contain more criteria than are reproduced here; the following list only includes those criteria most relevant to returning foreign fighters.

12 Article 1F(a) of the *Refugee Convention*, directly incorporated into IRPA at section 98.

13 It is worth noting that there is a distinction between ineligibility and inadmissibility. Ezokola presently applies only to ineligibility, but it should also apply to inadmissibility.

14 *Araya v. Nevsun Resources Ltd*., [2017] B.C.J. No. 2318, para 32, quoting from paras 108-109 of *Club Resorts Ltd. v. Van Breda* 2012 SCC 17.

15 This was the reasoning in *Araya v. Nevsun Resources Ltd*., [2017] B.C.J. No. 2318, for why Eritrea was not a more appropriate forum than British Columbia, Canada.

16 Historic 9/11 Pro Bono Effort. Casey Gerry. Available at: https://caseygerry.com/case-results/historic-911-pro-bono-effort/

17 The specifics of how that gap might be filled (for example, could it be a crime to harbour someone who commits an offence for a terrorist group, or someone who is simply a member?) is beyond the scope of this paper. These are merely examples of the incongruencies concerning what is criminalized in relation to "terrorist activity" compared to "terrorist group," as outlined in Table 1.

18 In *Ezokola v. Canada (Citizenship and Immigration)* 2013 SCC 40, the Supreme Court of Canada drew on international law and held that individuals cannot be declared ineligible to Canada simply because they are associated with a criminal group or passively acquiesced to the group's criminal purposes – something further is required. Similarly, in *R. v. Khawaja* 2012 SCC 69, the Supreme Court found that section 83.18 (the participation offence) was not constitutionally overbroad because the offence required this high-threshold specific intent (that participation must have been for the purpose of enhancing the terrorist group's ability to commit terrorist activity). The implication of the Court's reasoning was that if the offence had criminalized mere membership in a terrorist group, the offence would have been unconstitutional as a violation of section 7 of the *Canadian Charter of the Rights and Freedoms.*

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