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# War Tourism: A Growth Industry

Jeremy Gale

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# War Tourism: A Growth Industry

Jeremy Gale \*

## ABSTRACT

*At the founding of the country, out of fear of becoming implicated in the wars of Europe, the United States passed the Neutrality Laws, forbidding U.S. citizens from engaging in conduct that would jeopardize the peaceful standing of the country. Fast-forward approximately 200 years and, although the military posture of the U.S. has changed significantly, serious concerns regarding the safety of the country persist, not in the form of external threats, but from U.S. citizens and residents who travel overseas to align themselves with non-state armed groups and then return home with unknown skills and intentions.*

*This Note identifies deficiencies in the statutes currently used to prosecute individuals for engaging in violent behavior overseas and makes recommendations on how new legislation can be crafted, or old legislation amended, to address the acts of individuals who engage in a practice of “war tourism.” For historical context and understanding, the Note briefly examines the appearance of civilians on the battlefield through history and how international law has struggled to address concerns similar to those currently faced by domestic law enforcement.*

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## Table of Contents

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ABSTRACT .....	118
I. INTRODUCTION .....	119
II. THE IRREGULARITIES OF CIVILIANS IN COMBAT .....	121
III. THE CURRENT LEGAL FRAMEWORK .....	128
A. § 2339A and B: Material Support.....	128
B. § 956 and § 960: Acts in and Against a Foreign Nation .....	130
C. § 959: Enlistment in Foreign Service .....	132
D. Shortcomings of the Current Structure.....	133
IV. ALTERNATIVE ENFORCEMENT OPTIONS .....	137
V. CONCLUSION.....	143

### I. INTRODUCTION

In late 2014, FBI officials admitted that American citizens had been traveling overseas to fight in the Syrian conflict, and asked for the public's help in identifying individuals planning to travel abroad to join terrorist groups, or who had returned from overseas combat.<sup>1</sup> The Bureau noted “the threat of U.S. citizens traveling overseas to fight alongside terrorist groups is not new,” and recalled the cases of four individuals arrested for this reason within the last two years.<sup>2</sup> The FBI was correct in stating that civilian participation in combat, whether with terrorist organizations or not, extends well beyond recent history, and western security services are now dealing with the latest incarnation of this historical phenomenon.<sup>3</sup>

Since the beginning of the War on Terror, the presence of foreign fighters on Afghan and Iraqi battlefields has been reported with mild interest, possibly because it seemed natural that transnational groups would continue to draw in like-minded individuals from sympathetic populations the world over.<sup>4</sup> With the beginning of the civil war in Syria

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<sup>1</sup> *Seeking Information: Help Identify Individuals Traveling Overseas for Combat*, FED. BUREAU OF INVESTIGATION (Oct. 7, 2014), <http://www.fbi.gov/news/stories/2014/october/help-identify-individuals-traveling-overseas-for-combat>.

<sup>2</sup> *Id.*

<sup>3</sup> DAVID MALET, *FOREIGN FIGHTERS: TRANSNATIONAL IDENTITY IN CIVIL CONFLICTS* 33-34 (Oxford University Press, 2013) (explaining that although “transnational non-state military groups” date back 1,000 years, the more familiar foreign fighter has been around since the early 1800’s).

<sup>4</sup> Paul Cruikshank & Tim Lister, *NATO on Alert for Influx of Foreign Fighters in Southern Afghanistan*, CNN (May 25, 2011), <http://www.cnn.com/2011/WORLD/asiapcf/05/24/afghanistan.foreign.fighters/> (noting the mild interest of European

however, the topic of foreign fighters has received much more attention as large numbers of westerners appear on the battlefield for the first time in the history of recent campaigns.<sup>5</sup> Although the total number of individuals heading to conflict zones to fight is unclear, by some estimates, nearly 1,000 Europeans and at least one hundred Americans are currently or have recently been in the Middle East fighting in some capacity.<sup>6</sup> While the major concern of law enforcement focuses on extremist motivated actions, as will be discussed later in this Note, the individual with unknown motivations is just as concerning. Consequently, western law enforcement agencies must now confront the spectre that attackers will not just be foreign terrorists but foreign trained domestic citizens. At first blush, the challenge to law enforcement appears to be logistical; how do you track and prosecute individuals in a warzone? However, there is a more significant legal complication; whether and how to prosecute civilian combatants who have not collaborated with terrorists or did not intend to collaborate with them?<sup>7</sup> Currently, few U.S. statutes address civilians going abroad to fight in foreign wars, and those that do, do not adequately contemplate the current state of world affairs.

To achieve the current U.S. goal of deterring U.S. citizens from leaving to fight, this Note will argue that it is in the United States' best interest to create a strict liability structure for any civilian who goes overseas to fight, irrespective of their intentions or affiliations. To provide historical context, Part II will discuss the role that civilian and irregular forces have traditionally played in combat and examine how international law has struggled to address this phenomenon. Part III will introduce the statutes currently used to address citizens who fight overseas and analyze the shortcomings of the current laws that prevent law enforcement officials from adequately addressing non-terror affiliated fighters. Part IV explores options for reforming existing laws and introducing new legislation that would close some enforcement

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governments in foreign fighters in Afghanistan due to their "marginal" effect on the fighting).

<sup>5</sup> Brian Murphy, *Official: Over 20,000 Foreign Fighters Lured by Militant Factions in Syria*, WASH. POST (Feb. 11, 2015), [http://www.washingtonpost.com/world/national-security/official-over-20000-foreign-fighters-lured-by-militant-factions-in-syria/2015/02/11/8f12eaa0-b212-11e4-827f-93f454140e2b\\_story.html](http://www.washingtonpost.com/world/national-security/official-over-20000-foreign-fighters-lured-by-militant-factions-in-syria/2015/02/11/8f12eaa0-b212-11e4-827f-93f454140e2b_story.html).

<sup>6</sup> Michael S. Schmidt & Eric Schmitt, *U.S. Identifies Citizens Joining Rebels in Syria, Including ISIS*, N.Y. TIMES, (Aug. 28, 2014), [http://www.nytimes.com/2014/08/29/world/middleeast/us-identifies-citizens-joining-rebels-in-syria.html?\\_r=0](http://www.nytimes.com/2014/08/29/world/middleeast/us-identifies-citizens-joining-rebels-in-syria.html?_r=0).

<sup>7</sup> *U.S. Officials Try to Gauge Threat From American Fighters in Syria*, NAT'L PUB. RADIO (Aug. 27, 2014) <http://www.npr.org/blogs/parallels/2014/08/27/343435296/u-s-officials-try-to-gauge-threat-from-american-fighters-in-syria> (discussing the story of Eric Harroun, introduced in part II of this paper).

loopholes. Finally, Part V briefly concludes that because the nature of future conflicts cannot be foreseen it is strongly within the interest of U.S. national security to prohibit all non-sanctioned civilian participation in conflicts.

## II. THE IRREGULARITIES OF CIVILIANS IN COMBAT

The presence of irregular troops on the battlefield goes back at least to the time of the Crusades and has roots in the mercenary soldiers who travelled between conflicts seeking employment.<sup>8</sup> The “mercenary” model persisted until the Napoleonic wars and the rise of the modern nation-state, when a reliance on foreign soldiers gave way to the *levée en masse*.<sup>9</sup> Rather than relying on foreign soldiers to supplement state forces, the *levée en masse* conscripted large numbers of peasants into military service.<sup>10</sup> Following the Napoleonic campaigns, France again innovated the use of supplementary irregular forces in 1830, with the creation of the French Foreign Legion.<sup>11</sup> Initially created to “remove from France those officers and soldiers . . . who were felt to be awkward, excitable or frankly dangerous subjects for the new monarchy,” while the command structure of the Legion was French, a significant portion of the fighting force was composed of soldiers from across Europe.<sup>12</sup> Over the next 80 years, while many nations passed laws forbidding the enlistment of citizens in foreign militaries, by the time of the Spanish Civil War, the Legion had been reformed to be a staple component of the French military, accepting foreign nationals from all walks of life, including Danish princes, Eastern European mercenaries and American civilians.<sup>13</sup>

The Spanish Civil War proved to be another significant milestone for foreign fighters. Not only was recruitment during this time based almost entirely on ideology, but it also saw an unprecedented level of American involvement.<sup>14</sup> In response to a fascist revolt in 1936, the Spanish government established the “International Brigades” to utilize volunteers

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<sup>8</sup> MALET, *supra* note 3.

<sup>9</sup> *Id.* at 35-36; accord Isser Woloch, *Napoleonic Conscription: State Power and Civil Society*, 111 *Past and Present* 101, 101-104 and 109-110 (1986).

<sup>10</sup> *Id.*

<sup>11</sup> JOHN PARKER, *INSIDE THE FOREIGN LEGION* 9 (Judy Piatkus Limited, 1998).

<sup>12</sup> *Id.*

<sup>13</sup> MALET, *supra* note 3, at 36; PARKER, *supra* note 11, at 80-81 and 88-89.

<sup>14</sup> MALET, *supra* note 3, at 92 (noting that ideological recruitment did not serve a single side, but rather both sides of the conflict. Moreover, both sides accepted recruits into traditional military forces as well as irregular fighting force depending on the relative strengths of each side).

from a panoply of countries and walks of life.<sup>15</sup> Motivated by communist recruiters and the Great Depression, tradesmen and members of the intelligentsia from America and elsewhere travelled to Spain to fight in numbers sufficient to attract the attention of the U.S. State Department.<sup>16</sup> An analysis of the motivations for the enlistment of civilians during the Spanish Civil War reveals the modern impetus for the phenomenon.<sup>17</sup> Overwhelmingly, successful recruitment was not based on simple bloodlust or the promise of riches, but on cleverly fostering personal identification with a similarly-situated population abroad and a concern for their safety.<sup>18</sup> By drawing on a diaspora's connection to home or by 'revealing' a previously unknown connection to strangers abroad, recruiters were able to sell to the recruit the idea that if the population abroad was not protected, the recruit himself may one day be in jeopardy from the same threat.<sup>19</sup>

The same motivations have allegedly underlied the support that some Americans have provided to foreign organizations engaged against the United States. Shortly after the American invasion of Afghanistan in 2001, a joint force of Afghan Northern Alliance and United States Special Forces captured an individual by the name of John Walker Lindh.<sup>20</sup> In May 2001, John Lindh traveled to Pakistan and on to Afghanistan with the stated intention of joining the Taliban to fight the Northern Alliance.<sup>21</sup> Although there is some disagreement over what Mr. Lindh's true intentions were when he traveled to Afghanistan, in 2002 Mr. Lindh pled guilty in a plea agreement to promoting terrorism by providing services to the Taliban and to carrying an explosive during the commission of a felony.<sup>22</sup> There is also the case of Al-Qaeda spokesman Adam Gadahn. Born in Oregon and raised in California, Gadahn

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<sup>15</sup> JOHN CARVER EDWARDS, *AIRMEN WITHOUT PORTFOLIO 21* (Praeger Publishers, 1997).

<sup>16</sup> *Id.* at 21-22; see also MALET, *supra* note 3, at 98-100 (taking note of the variety of nations which contributed citizens to the Spanish Civil War based on common communist ideology. Also, take note of the number of irregular fighters recruited by the communist International Brigade alone: an estimated 35,000 to 50,000 individuals). Compare MALET, *supra* note 3, at 98-100 with Murphy *supra* note 5 (reflecting similar numbers of recruits by both sides of the Spanish Civil War in the 1930's and ISIS today).

<sup>17</sup> MALET, *supra* note 3, at 102-104.

<sup>18</sup> *Id.* at 22-24.

<sup>19</sup> *Id.*

<sup>20</sup> *United States v. Lindh*, 227 F. Supp. 2d 565, 569 (E.D. Va. 2002).

<sup>21</sup> *Id.* at 567; Frank Lindh, *How John Walker Lindh Became 'Detainee 001,'* THE NATION (Aug. 29, 2014), <http://www.thenation.com/article/181414/how-john-walker-lindh-became-detainee-001#> (recounting that Mr. Lindh was allegedly motivated by religious conviction to defend civilians from the human rights abuses of non-Taliban forces).

<sup>22</sup> *Id.*

converted to Islam in 1995 and after radicalizing in the United States, traveled to Pakistan in the late 1990's to join Al-Qaeda.<sup>23</sup> In September 2006, Gadahn was indicted for treason and providing material support to a terrorist organization and placed on the FBI's most wanted list.<sup>24</sup>

Although the number of American citizens known to have joined terrorist organizations is very few, recent trends show greater numbers of American citizens jumping at the chance to participate in foreign conflicts.<sup>25</sup> Like specific participation rates, individual motives and affiliations remain a point of some uncertainty.<sup>26</sup> Undeniably, some American citizens are traveling to the region in order to fight with ISIS or other extremist organizations.<sup>27</sup> Other cases are not as clear.

During the summer of 2011, Chris Jeon, a University of California student travelled to Libya to "join the rebels."<sup>28</sup> Although multiple reports indicate that Mr. Jeon did not go to the region to engage in any actual fighting, one article does quote him as saying that he was "helping" the Libyan rebels.<sup>29</sup> A much more serious case is presented in the story of Eric Harroun. In 2013, veteran U.S. Army Private Eric Harroun crossed into Syria and began fighting with the Free Syrian Army against the Assad government.<sup>30</sup> At some point during the six

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<sup>23</sup> See *Adam Gadahn: Al-Qaeda's American Voice*, ANTI-DEFAMATION LEAGUE, [http://archive.adl.org/terrorism/profiles/adam\\_gadahn/background.html?m\\_flipmode=4](http://archive.adl.org/terrorism/profiles/adam_gadahn/background.html?m_flipmode=4) (last visited Feb. 18, 2015) (discussing his disillusionment with Christianity and America).

<sup>24</sup> *Investigative Highlights: Major Terrorism Preventions, Disruptions and Investigations*, FED. BUREAU OF INVESTIGATION (July 8, 2011), <http://www.fbi.gov/about-us/ten-years-after-the-fbi-since-9-11/investigative-accomplishments/terrorism-investigations>.

<sup>25</sup> Schmidt & Schmitt, *supra* note 6 (quoting American intelligence officials as saying that "more than 100 have fought alongside groups there since the civil war began three years ago," reflecting a two-fold increase in eight months).

<sup>26</sup> Compare Greg Bothelo & Jim Sciutto, *Slain ISIS Jihadi Among More Than 100 Americans Fighting With Militants in Syria*, CNN (Aug. 27, 2014), <http://www.cnn.com/2014/08/26/world/meast/syria-american-killed> and Daniel L. Byman & Jeremy Shapiro, *Homeward Bound? Don't Hype the Threat of Returning Jihadists*, BROOKINGS INSTITUTE (Sept. 30, 2014), <http://www.brookings.edu/research/articles/2014/09/30-syria-foreign-fighters-byman-shapiro> (noting in both articles the unclear motives for participation by foreign fighters).

<sup>27</sup> FED. BUREAU OF INVESTIGATION, *supra* note 1 (discussing unknown man believed to be from North America).

<sup>28</sup> Joshua E. Keating, *Is It Legal for Americans to Fight in Another Country's Army?*, FOREIGN POLICY MAGAZINE (Sept. 2, 2011) <http://foreignpolicy.com/2011/09/02/is-it-legal-for-americans-to-fight-in-another-countrys-army/>.

<sup>29</sup> See *Id.*; also see Kristen Chick, *American College Kid Joins Libyan Rebels for 'Vacation'*, CHRISTIAN SCIENCE MONITOR (Sept. 1, 2011) <http://www.csmonitor.com/World/Middle-East/2011/0901/American-college-kid-joins-Libya-rebels-for-vacation>.

<sup>30</sup> See *U.S. Citizen Indicted for Conspiring to Provide Material Support to a Foreign Terrorist Organization*, FED. BUREAU OF INVESTIGATION (June 20, 2013), <http://www.fbi.gov/newsroom/press-releases/2013/06/20130620-us-citizen-indicted-for-conspiring-to-provide-material-support-to-a-foreign-terrorist-organization>.

weeks Pvt. Harroun spent fighting in Syria, he was separated from the Free Syrian Army and continued fighting with Jabhat al-Nusra,<sup>31</sup> a group designated by the United States as a Foreign Terrorist Organization.<sup>32</sup> After allegedly unknowingly fighting with a terrorist organization, Pvt. Harroun was arrested upon his return to the United States and charged with conspiracy to provide material support to a foreign terrorist organization and conspiracy to use destructive devices overseas.<sup>33</sup> Eventually able to convince prosecutors that he did not go to Syria with the intention of joining a terrorist group, Pvt. Harroun served six months of a possible life sentence.<sup>34</sup> The story of Eric Harroun is illustrative of the challenge that security services face with civilian “war tourists.”<sup>35</sup> When seemingly well-intentioned civilians travel to war zones to fight, the fog of war may redirect their efforts to the benefit of foreign terrorist organizations. Upon return home, the individual is placed in the position of having to prove his innocence while law enforcement resources are consumed pursuing what may eventually culminate in a fruitless prosecution or wrongful conviction.

Domestic civilian jurisprudence is not the only field which has struggled to adequately address civilians on the battlefield, however. The changing composition of warfare in the last several decades has seen greater civilian direct participation in combat and has placed a heavy burden on international law to remain attentive.<sup>36</sup> The most pressing concern for militaries engaged in conflict is how to distinguish between civilians and combatants when each population seems to blend and

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fbi.gov/washingtondc/press-releases/2013/u.s.-citizen-indicted-for-conspiring-to-provide-material-support-to-a-foreign-terrorist-organization; NAT'L PUB. RADIO, *supra* note 7.

<sup>31</sup> NAT'L PUB. RADIO, *supra* note 7.

<sup>32</sup> *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Oct. 9, 2014).

<sup>33</sup> *United States v. Harroun*, 2013 WL 3131794 (E.D.Va.).

<sup>34</sup> NAT'L PUB. RADIO, *supra* note 7.

<sup>35</sup> For an interesting discussion of similar behavior from Europeans, *See* Ishaan Tharoor, *Dutch Biker Gang Members Join the Fight Against the Islamic State*, N.Y. TIMES (Oct. 16, 2014) <http://www.washingtonpost.com/blogs/worldviews/wp/2014/10/16/dutch-motorbike-gang-joins-the-fight-against-the-islamic-state/>; *also see* John Hall & Chris Pleasance, *Now German Biker Gangs Join Their Dutch Counterparts in Fighting Against ISIS in Kobane*, DAILY MAIL (Oct. 18, 2014) <http://www.dailymail.co.uk/news/article-2798507/now-german-biker-gangs-join-dutch-counterparts-fighting-against-isis-kobane.html> (discussing that under Dutch law, citizens are not banned from fighting abroad, but the ultimate legality of fighting with the Kurds may be suspect since the Kurdish PKK is classified as a foreign terrorist organization).

<sup>36</sup> DR. NILS MELZER, INT'L COMM. OF THE RED CROSS, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law 7* (2008).

separate from the other like a kaleidoscope.<sup>37</sup> Derived from the black-and-white principles of the Geneva Convention and its Additional Protocols, the Law of Armed Conflict traditionally provided clear answers to who may be targeted and when. During international armed conflict, only non-civilian military objectives were subject to attack.<sup>38</sup> Civilians are defined as persons who are not members of the armed forces of a party to the conflict, part of any organized militia or organized resistance movement, members of armed forces not recognized by a detaining power, or persons accompanying armed forces or spontaneous resistance forces who act in accordance with the laws of war.<sup>39</sup> During non-international armed conflicts, persons not involved in hostilities including members of the armed forces who have laid down their arms or are immobilized, are not subject to attack.<sup>40</sup> However, there is an exception to this rule for civilians who directly participate in hostilities.<sup>41</sup>

Just as domestic law fails to adequately address the prosecution of individuals not aligned with terrorist organizations, international law currently struggles to effectively control the targeting of civilians who do not conform to the strict guidelines of the Geneva Conventions.<sup>42</sup> As noted in the Judge Advocate General's Operational Law Handbook, although the first Additional Protocol to the Geneva Conventions takes measures to define when civilians are exempt from protection, in practice the application is not pragmatic.<sup>43</sup> In an effort to clarify engagement principles, in 2003, the International Committee of the Red Cross began work on the "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law."<sup>44</sup> In 2009, the

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<sup>37</sup> Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SEC. J. 45, 53-54 (2010).

<sup>38</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, *adopted* Aug. 6, 1977.

<sup>39</sup> *Id.* at Art. 50 (citing to Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4 A(1), (2), (3) and (6), *adopted* Aug. 12, 1949).

<sup>40</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3(1)(a)-(d), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>41</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13(3), *adopted* Aug. 6, 1977.

<sup>42</sup> Blank & Guiora, *supra* note 37, at 45-47.

<sup>43</sup> U.S. ARMY JUDGE ADVOCATE GEN.'S LEGAL CTR. and SCH., OPERATIONAL LAW HANDBOOK Ch. 2, §VIII E(3)(c) 21 (2014) (noting that although the definition may be fairly straightforward, the lack of expert consensus and complexity of the test proposed by the International Committee of the Red Cross make a standard approach almost impossible leading the U.S. military to adopt a case-by-case approach).

<sup>44</sup> MELZER, *supra* note 36, at 5-7.

final report of the workgroup was published, detailing revised definitions of civilians, armed forces, and organized armed groups, by defining their relationship to one another.<sup>45</sup> The Guidance also included criteria for assessing when individuals fall under each category, exposing or exempting them to targeting.<sup>46</sup>

Under the Interpretive Guidance, a civilian in a non-international armed conflict is someone who is not a member of state armed forces, like traditional military, or an organized armed group.<sup>47</sup> As long as the civilian is not directly participating in the conflict, the civilian retains protection from attack by other parties to the conflict.<sup>48</sup> However, the Interpretive Guidance acknowledges the fact that “in practice, the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State party to the conflict and its armed forces.”<sup>49</sup> Distinguishing civilians from fighters is further complicated by instances of civilians engaging in hostilities on a “spontaneous, sporadic or unorganized basis.”<sup>50</sup> To clarify when targeting is appropriate, the Interpretive Guidance detailed three criteria which would inform whether a person is directly involved in hostilities. First, “the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm).”<sup>51</sup> Second, “there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation).”<sup>52</sup> Finally, “the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).”<sup>53</sup> A civilian whose actions meet every element of the direct participation test loses his protection from attack “for such time” as he is involved in direct

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<sup>45</sup> *Id.* at 16-17.

<sup>46</sup> *Id.* at 27-36 (explaining the when civilians and armed groups may be targeted in non-international armed conflicts. For definitions based on international armed conflict, see pages 20-26).

<sup>47</sup> *Id.* at 27 (defining an organized armed group as “a non-State party to the conflict consisting only of individuals whose continuous function is to take direct part in hostilities”).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 33.

<sup>50</sup> MELZER, *supra* note 36, at 34.

<sup>51</sup> *Id.* at 46.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

hostilities.<sup>54</sup> The Interpretive Guidance also suggests that decisions on whether someone is a civilian or a member of an armed group may be determined by conclusive behavior, such as the repeated direct participation in hostilities.<sup>55</sup> However, later in the Guidance, the authors warn “even the fact that a civilian has repeatedly taken part in direct hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct.”<sup>56</sup>

Although the Interpretive Guidance admirably sought to create clear and functional criteria for deciding when individuals are susceptible to attack, several parties regarded the Interpretive Guidance as lacking the ability to “remain sensitive to the interests of states in conducting warfare efficiently.”<sup>57</sup> The primary criticism was the inability to adequately address the problem of militaries that need to strike at irregular forces that intermingle with civilian populations.<sup>58</sup> As modern fighters melt in and out of civilian populations, the Interpretive Guidance urges restraint from attack due to the inability to know the current intentions of a person who has previously participated in combat.<sup>59</sup> However, as noted by an expert who worked on the drafting of the Interpretive Guidance, military planners who have identified an individual as someone continuously present in the conflict will not want to wait to see what the individual does next when the window to successfully execute an operation is narrow.<sup>60</sup>

The confusion surrounding the targeting of civilians on the battlefield provides a clear example of the difficulties inherent in trying to identify and take action against an individual in the chaos of a warzone. While the United States does possess the legislation necessary to prosecute individuals who collaborate with terrorist organizations, prosecutorial efforts fall flat when dealing with the same issues as military planners: distinguishing casual civilian fighters from dedicated “professional” fighters and identifying the relevant associations, a person’s role within an organization, and the time period encompassed by their activities.

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<sup>54</sup> *Id.* at 70.

<sup>55</sup> *Id.* at 35.

<sup>56</sup> MELZER, *supra* note 36, at 71.

<sup>57</sup> Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5, 6 (2010); also see U.S. ARMY JUDGE ADVOCATE GEN.’S LEGAL CTR. and SCH., *supra* note 43 (explaining the U.S. Army’s position that the ICRC criteria are too complex to be useful).

<sup>58</sup> Schmitt, *supra* note 57, at 5-7.

<sup>59</sup> MELZER, *supra* note 36, at 76.

<sup>60</sup> Schmitt, *supra* note 57, at 23-25.

### III. THE CURRENT LEGAL FRAMEWORK

U.S. prosecutions of terror suspects are predominantly conducted using sections 2339A and B of Title 18.<sup>61</sup> Prosecutions invoking these sections address the provision of support of terrorist acts and terrorist organizations.<sup>62</sup> After participation in a “general criminal conspiracy,” charges under these sections have, by a large margin, been the primary means of prosecuting terror suspects since 2001.<sup>63</sup> Title 18 also provides several non-terrorism-based means to prosecute individuals for violent acts under sections 956, 959, and 960.<sup>64</sup> While the aforementioned statutes have proven effective in prosecuting individuals for terrorist actions, they inadequately address the role of the modern “casual” fighter.<sup>65</sup>

#### A. § 2339A and B: Material Support

Section 2339A of the U.S. Code makes it a crime for any individual to “provide material support or resources” to the acts of a terrorist and defines this phrase as the provision of any property or services except religious or medical items.<sup>66</sup> The law also requires that a person aiding terrorist activity “know[ing] or intend[ing]” that the property or services be used in the preparation or execution of a terrorist act.<sup>67</sup> Section 2339B provides for similar prohibitions, but focuses on the assistance to terrorist groups rather than terrorist acts.<sup>68</sup> As currently drafted, § 2339B makes it unlawful to “knowingly provide[s] material support or resources to a foreign terrorist organization, or attempt[s], or conspire[s] to do so.”<sup>69</sup> Under § 2339B, the definition of “material support” is preserved from § 2339A and a list of “foreign terrorist organizations” as defined under section 212(a)(3)(b) of the Immigration and Nationality Act is currently

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<sup>61</sup> CTR. ON LAW AND SEC., *Terrorist Trial Report Card* 13 (New York University Law School, 2011).

<sup>62</sup> 18 U.S.C. § 2339A (2012); 18 U.S.C. § 2339B (2012).

<sup>63</sup> *Terrorist Trial Report Card*, *supra* note 61.

<sup>64</sup> 18 U.S.C. § 956 (2012); 18 U.S.C. § 959 (2012); 18 U.S.C. § 960 (2012).

<sup>65</sup> I use the term “casual fighter” to refer to a civilian engaging in foreign conflicts, but not engaged in traditional terrorist behavior. The terms “war tourist” or “war tourism” have also been used, but more commonly refer to people who will tour a battlefield without actually engaging in the conflict.

<sup>66</sup> 18 U.S.C. § 2339A(a) & (b)(1); CHARLES DOYLE, CONG. RESEARCH SERV., R41333, *TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B* 19 (2010) (explaining the relation of the outlawed behavior to the commission of a terrorist act).

<sup>67</sup> 18 U.S.C. § 2339A(a).

<sup>68</sup> 18 U.S.C. § 2339B(a)(1) (2012).

<sup>69</sup> *Id.*

maintained by the U.S. State Department.<sup>70</sup> Notably, § 2339A includes in the definition of “material support or resources” the provision of personnel, including one’s own self.<sup>71</sup>

Interestingly, although both statutes read very similarly, § 2339B has been subjected to several challenges over the constitutionality of the prohibition on providing personnel and services to foreign terrorist organizations. As originally drafted, the statute prohibited all support to terrorist organizations, including nonviolent support, unless it was medical or religious in nature.<sup>72</sup> However, as challenged in *Humanitarian Law Project v. Reno*, this general prohibition on providing “personnel” and “training” was so broad and vague that it could easily encompass seemingly legal activities.<sup>73</sup> In *Reno*, political activists distributing literature on the use of international law to resolve conflicts sought an injunction against the enforcement of the Antiterrorism and Effective Death Penalty Act, claiming that the use of the term “personnel” in the material support clause infringed on the freedoms of speech and association.<sup>74</sup> On appeal, the Ninth Circuit affirmed the injunction granted by the District Court, leading to a redrafting of the “personnel” language in the statute.<sup>75</sup> With the passage of the USA PATRIOT Act, the “personnel” language was revised to refer to personnel “providing expert advice or assistance.”<sup>76</sup> Again, this language was found to be impermissibly vague under the First Amendment.<sup>77</sup> Final redrafting of the language in the Intelligence Reform and Terrorism Prevention Act refined the provision of personnel to refer to persons who “knowingly provided, attempted to provide or conspired to provide a foreign terrorist organization, with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control to organize, manage, supervise, or otherwise direct the operation of the organization.”<sup>78</sup> Most importantly, the statute exempts individuals who act entirely independently of a foreign terrorist organization from

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<sup>70</sup> *Id.* at (g)(4) and (g)(6); see *Foreign Terrorist Organizations supra* note 32 for a complete list of currently recognized terrorist groups.

<sup>71</sup> 18 U.S.C. § 2339A(b)(1).

<sup>72</sup> Antiterrorism and Effective Death Penalty Act of 1996, PL 104–132, §§ 303 and 323, 110 Stat 1214 (1996).

<sup>73</sup> *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1204 (C.D. Cal. 1998), *aff’d*, 205 F.3d 1130 (9th Cir. 2000).

<sup>74</sup> *Id.* at 1181-1186.

<sup>75</sup> *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1138 (9th Cir. 2000).

<sup>76</sup> USA PATRIOT Act of 2001, Pub. L. No. 107–56, §805, 115 Stat 272 (2001).

<sup>77</sup> *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1185, 1200-1201 (C.D.Cal. 2004).

<sup>78</sup> 18 U.S.C. § 2339B(h) (2012).

inclusion under the term.<sup>79</sup> With this final drafting, the text of the law as it relates to “material support” was finally deemed to be specific enough to provide “persons of ordinary intelligence fair notice of what is prohibited.”<sup>80</sup> While sections A and B use the same definition for material support, the application of the scienter requirement to a specific offense in the original drafting of § 2339A, protected the section from the constitutional challenges faced by § 2339B.<sup>81</sup>

*B. § 956 and § 960: Acts in and Against a Foreign Nation*

In addition to the terrorism statutes, Title 18 also provides for alternate means with which to prosecute terrorism suspects for acts that affect U.S. foreign relations. Section 956 of Title 18 seeks to protect individuals outside of the United States by targeting individuals for prosecution who conspire within U.S. jurisdiction to murder, kidnap or maim in any place outside of U.S. jurisdiction.<sup>82</sup> Additionally, the statute also forbids conspiring within the U.S. to damage the property of a foreign nation with which the United States is at peace.<sup>83</sup> The prohibitions of section 956 find their roots in the Neutrality Act of 1794, which sought to keep the United States insulated from involvement in foreign wars.<sup>84</sup> Accordingly, the act has been interpreted as criminalizing the actions of individuals within United States jurisdiction, which may lead to a breach of neutrality.<sup>85</sup> To trigger a violation of Section 956, an individual must: (1) agree with at least one other individual to commit an act prohibited by the statute; (2) willfully join in the agreement with the intent of furthering the conspiracy’s purpose; (3) commit an overt act in furtherance of the conspiracy; and (4) form the conspiracy with at least one conspirator within the jurisdiction of the United States.<sup>86</sup> When the act targets a foreign nation and not an individual, the act must also be perpetrated against a nation with which the United States is “at peace.”<sup>87</sup> However, the meaning of the term “at peace” can be highly variable depending on “the sense of th[e] law” being interpreted.<sup>88</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> Holder v. Humanitarian Law Project, 561 U.S. 1, 3 (2010).

<sup>81</sup> United States v. Amawi, 545 F. Supp. 2d 681, 684-685 (N.D. Ohio 2008).

<sup>82</sup> 18 U.S.C. § 956(a)(1).

<sup>83</sup> *Id.* at (b).

<sup>84</sup> The Three Friends, 166 U.S. 1, 52 (1897).

<sup>85</sup> *Id.*

<sup>86</sup> United States v. Wharton, 320 F.3d 526, 537-38 (5th Cir. 2003).

<sup>87</sup> 18 U.S.C. § 956(b).

<sup>88</sup> United States v. Yasith Chhun, 513 F. Supp. 2d 1179, 1182 (C.D. Cal. 2007), *aff’d sub nom.*, 744 F.3d 1110 (9th Cir. 2014) (quoting Lee v. Madigan, 358 U.S. 228, 230-31 (1959)).

In the 1989 case of *U.S. v. Terrell*, the District Court for the Southern District of Florida investigated what it meant for the United States to be “at peace” for the purposes of the neutrality statutes.<sup>89</sup> During its analysis, the court noted that modern warfare often involved “covert activities and undeclared warfare,” rendering declarations of war “passé.”<sup>90</sup> On this basis, despite the government’s contention that a state of peace persists until Congress has “affirmed or ratified actions contrary to a state of peace,”<sup>91</sup> the court held that a state of war would exist where either the executive or legislative branches of government have taken action to intervene militarily in the affairs of a foreign nation.<sup>92</sup> In the later case of *U.S. v. Yasith Chhun*, the District Court for the Central District of California affirmed this formula, holding that “the term ‘at peace’ refers to the relationship between the United States and a foreign country when there is no war, whether declared or undeclared.”<sup>93</sup> However, on a post-decision motion, the District Court revisited the notion of “at peace” and departed from *Terrell* by ruling that any state of war would have to be “open and notorious,” precluding many covert actions.<sup>94</sup> The *Chhun* court additionally departed from the holding of *Terrell* on whether the state of war was a question of law or fact.<sup>95</sup> As an element of the crime of conspiracy under § 956, the question of belligerence was one that was properly left to a jury to decide after the court had articulated the proper legal standard.<sup>96</sup>

Like § 956, § 960 finds roots in the Neutrality Act but it provides a more generalized prohibition against engaging in acts against foreign nations.<sup>97</sup> Rather than addressing the conspiracy to act, §960 criminalizes the actual commission of acts against foreign nations with which the U.S. is at peace.<sup>98</sup> The statute requires that a “military or naval expedition or enterprise” originate within the U.S. and target a foreign friendly nation.<sup>99</sup> The applicability of the statute to nations with which we are “at peace,” has used the same interpretation as the language in § 956.<sup>100</sup>

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<sup>89</sup> *United States v. Terrell*, 731 F. Supp. 473, 476 (S.D. Fla. 1989).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 477 (note also from the recitation of the facts that financial support for military activities will also qualify to repeal a state of peace).

<sup>93</sup> *Chhun*, 513 F. Supp. 2d 1179 at 1184.

<sup>94</sup> Order Granting Mot. In Limine, Case No. 2008 WL 793386, at 2 (C.D. Cal., Mar. 20, 2008).

<sup>95</sup> *Chhun*, 513 F. Supp. 2d 1179 at 1182.

<sup>96</sup> *Id.*

<sup>97</sup> 18 U.S.C. § 960 (2012).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *United States v. Yasith Chhun*, 513 F. Supp. 2d 1179 at 1181-1182.

Interestingly for the purposes of this Note, judicial interpretation has held that the prohibition against undertaking “military enterprises” abroad does extend to individuals and some non-state groups.<sup>101</sup> Justification for this reading was found in the case of *Wiborg v. U.S.*, where the Supreme Court held that the most important factor in determining the existence of a military expedition or enterprise, was the character of the undertaking rather than the number of individuals participating.<sup>102</sup> Finally, modern applicability of this statute to insurgent groups is not difficult to imagine. In the 1897 case of *United States v. Hart*, the District Court for the Eastern District of Pennsylvania specifically held that insurgent actions against foreign nations are prohibited under § 960.<sup>103</sup>

### C. § 959: *Enlistment in Foreign Service*

Also a result of the Neutrality Act, § 959 prohibits individuals within the United States from enlisting in the service of “any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer.”<sup>104</sup> The law also forbids individuals from actively recruiting within the United States to get American citizens to go overseas to fight.<sup>105</sup> Interestingly however, the law does not forbid individuals from willingly going overseas with the intention of enlisting in foreign service while abroad.<sup>106</sup> The distinction lies in the fact that an individual who goes overseas to enlist in a foreign military surrenders his citizenship, allowing him to engage in hostilities without compromising the neutrality of the United States.<sup>107</sup> To date, no cases have been prosecuted in the United States which deal with the applicability of this law to transnational groups of a character similar to foreign terrorist organizations or other armed groups, largely due to the existence of other more specific legislation.<sup>108</sup> The most recent case to come the closest to implicating joining a foreign terrorist organization is the 2004 case of *U.S. v. Khan*, which mentions a

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<sup>101</sup> *United States v. Sander*, 241 F. 417, 417 (S.D.N.Y. 1917) (discussing prosecution of a spy ring working on behalf of German government in World War I).

<sup>102</sup> *Wiborg v. United States*, 163 U.S. 632, 650-652 (1896).

<sup>103</sup> *United States v. Hart*, 78 F. 868, 875 (E.D. Pa. 1897) (dealing with an insurgent force organized in the United States and dispatched against the government of Cuba).

<sup>104</sup> 18 U.S.C. § 959.

<sup>105</sup> *Id.*

<sup>106</sup> *United States v. Hertz*, 26 F. Cas. 293, 295 (C.C.E.D. Pa. 1855) (No. 15,357).

<sup>107</sup> *Chacon v. Eighty-Nine Bales of Cochineal*, 5 F. Cas. 390, 393 (C.C.D. Va. 1821) (No. 2,568) *aff'd sub nom.* *The Santissima Trinidad*, 5 L. Ed. 454 (1822).

<sup>108</sup> *See United States v. Khan*, 309 F.Supp.2d 789 (4th Cir. 2006) (discussing violation of Neutrality Act based on taking specific actions against the U.S.).

conspiracy to violate §959, but ultimately relies on other statutes which specifically address joining groups hostile to the United States.<sup>109</sup>

#### D. *Shortcomings of the Current Structure*

While the current anti-terrorism and neutrality statutes have done an excellent job of prosecuting individuals whose conduct fits into traditional categories, they still fail to address the problem of the casual fighter. As seen in the examples of Eric Harroun and Chris Jeon, there exists a class of person who is willing to travel overseas alone, to engage in combat, without interests clearly adverse to the U.S.

As currently written, § 2339A requires that prosecutors be able to prove that an individual specifically knew or intended their actions to further a terrorist act.<sup>110</sup> This places a high bar of responsibility on the government to affirmatively prove the mindset of an individual who can avail himself of a powerful ignorance defense based on the chaos of a battlefield setting. In order to manifest the intent necessary to expose himself to prosecution, the fighter would have to engage in a comprehensive analysis based on information that is imperfect to say the least. While in a foreign combat zone, the individual will have to transcend a possibly significant language and culture barrier to ascertain the identity and the motives of groups alongside which he wishes to fight.<sup>111</sup> After obtaining this information, the individual will then have to undertake an analysis of the law of armed conflict to decide whether the actions he is about to undertake conform to the accepted practices of states at war.<sup>112</sup> While it is arguably very simple for any rational person to differentiate between a valid act of war and a violation of *jus cogens* norms by considering basic human morality, it is not an easy thing for a casual combatant to correctly decide whether the destruction of a military establishment constitutes a legal act of war or an act of terrorism.<sup>113</sup> As

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<sup>109</sup> *Id.* at 823.

<sup>110</sup> 18 U.S.C. § 2339A(a).

<sup>111</sup> While the individual can consult the U.S. State Department website for a list of known terrorist groups, the individual may run into trouble differentiating between such groups as: Al-Aqsa Martyr's Brigade, Asbat al-Ansar, Ansar al-Islam, Ansar al-Dine, Ansaru, Army of Islam and groups of similar names which may not yet be on the list or may not be considered terrorist groups. See *Foreign Terrorist Organizations*, *supra* note 32 for complete list.

<sup>112</sup> See MELZER, *supra* note 36 at 77-78 (detailing just some of the principles to be taken into account when assessing the proper use of force during combat).

<sup>113</sup> Compare discussion at notes 47-56 (detailing the proper targeting of civilians) with Rome Statute of the International Criminal Court arts. 5-8, July 17, 1998, 2186 U.N.T.S. 3. (describing acts which are contrary to the laws of war either due to the inherent nature of the act or as in the case of murder, the circumstances and target of the act) and 18 U.S.C. § 2441 (detailing what the United States considers to be war crimes).

previously discussed in Part II of this Note, even experts tasked with operationalizing the law of armed conflict could not agree on clear tests which combatants could follow to determine which actions place a person within the protection of the law.<sup>114</sup> At any step in this process an individual could credibly claim that they never meant to engage in a terrorist act, shielding them from prosecution due to their lack of knowledge. While it is not unreasonable to demand that the government adhere to a high standard when contemplating labeling someone a terrorist, a necessary amount of flexibility must also be given to the government to properly address criminal acts.

The same flaws are manifested in the provisions of § 2339B. Although § 2339B assists an individual in ascertaining potential danger by referencing a list of foreign terrorist organizations, by requiring that an individual have intent to assist a terrorist organization, § 2339B opens itself up to the same defenses as § 2339A.<sup>115</sup> Again, the difficulty for prosecutors and would-be fighters alike arises from ascertaining whom an individual is actually fighting for. In addition to the previously mentioned culture and language problems, individuals are confronted with a problem that plagues experts in the field. As noted by U.S. government officials throughout the Syrian Civil War, the number of groups and objectives present in the conflict zone numbers into the hundreds if not thousands.<sup>116</sup> By contrast, only 59 groups are designated by the U.S. State Department as Foreign Terrorist Organizations, placing the burden on the individual to divine the intentions of unlabeled groups.<sup>117</sup> Government officials themselves have repeatedly recited, as a reason for not supporting “moderate Syrian opposition,” the fact that it is often unclear even to them which groups are friendly or benign to U.S. interests and which are organizations that engage in terrorist behavior.<sup>118</sup> If lawmakers privy to U.S. intelligence cannot ascertain the qualities of groups they seek to support, it is highly unlikely that “persons of ordinary intelligence” would be able to before it was too late.<sup>119</sup> Indeed,

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<sup>114</sup> See Schmitt, *supra* note 57; also see Blank & Guiora, *supra* note 37.

<sup>115</sup> See discussion at note 111.

<sup>116</sup> BRIAN MICHAEL JENKINS, RAND CORPORATION, *The Dynamics of Syria's Civil War* 8 (2014).

<sup>117</sup> *Foreign Terrorist Organizations*, *supra* note 32.

<sup>118</sup> Jeff Stein, *Inside the CIA's Syrian Rebels Vetting Machine*, NEWSWEEK (Nov. 10, 2014) <http://www.newsweek.com/2014/11/21/moderate-rebels-please-raise-your-hands-283449.html>.

<sup>119</sup> *Id.*; Holder v. Humanitarian Law Project, *supra* note 80 (discussing the standard for judging when the statutory language of 18 U.S.C. § 2339B provided proper notice to citizens of when their behavior may violate the statute. When persons of “ordinary intelligence” could ascertain that their actions would go to provide material support to terrorist organizations, the statutory language was not held to be impermissibly vague,

this was essentially the story of Eric Harroun and could easily have been the story of Chris Jeon had his excursion gone differently. Even if individuals were knowledgeable and deliberate in their decisions of who to support and how, prosecutors would still have to overcome pleas of ignorance from individuals who point to the difficulty that government officials had in establishing the same information. It is entirely conceivable that a person could draw on the stories of the men who inspired this article and obtain military training while disclaiming knowledge of the true ramifications of their actions. At this point in the discussion, it is logical to wonder: why we would want individuals who are not engaging in terrorist acts, but seemingly are working to support the same groups and interests as the American government prosecuted for their acts?

The simple answer to this question is deterrence. A consistent trend through American foreign policy has been an emphasis on adherence to neutrality when the U.S. was not involved in the conflict.<sup>120</sup> While the original intent of the neutrality acts may not resonate in government today, the statutes are still worth observing, at the very least to avoid having American citizens fall into the custody of foreign governments or terrorists organizations.<sup>121</sup> Although the foreign relations statutes come the closest to the approach later recommended by this Note, their current formulation fails to plug the hole in the levee. § 956 of Title 18 prohibits violent activities overseas in language easily understood by the average individual.<sup>122</sup> Any conspiracy to commit acts of murder, kidnapping, maiming or which damage the property of a nation with which the United States is at peace will expose an individual to prosecution.<sup>123</sup> However, the reach of the statute falls short of modern applicability by

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however the responsibility was still on the individual to find out exactly who their actions were supporting).

<sup>120</sup> CHARLES G. FENWICK, *THE NEUTRALITY LAWS OF THE UNITED STATES* 2-3 and 10 (Carnegie Endowment for International Peace, 1913) (explaining the original purpose of neutrality laws as the codification of the principle of abstention from conflict that a nation is not directly involved in. The principle of abstention places both active and passive duties on a state to refrain from assisting any party to the conflict. Among these active duties is the responsibility to “prevent private persons, whether aliens or its own citizens from cooperating with a belligerent in the use of neutral territory for hostile purposes.” In enforcing this principle a state may “take whatever steps it pleases to prevent such individuals from compromising its neutrality”).

<sup>121</sup> See generally Matt Schiavenza, *Should the United States Pay Ransoms to Terrorists?*, *THE ATLANTIC* (Nov. 16, 2014) <http://www.theatlantic.com/international/archive/2014/11/should-the-united-states-pay-ransoms-to-terrorists/382803/> (discussing five American and English hostages captured and executed by the Islamic State in Iraq and Syria).

<sup>122</sup> 18 U.S.C. § 956.

<sup>123</sup> *Id.*

confining its terms to the existence of a conspiracy.<sup>124</sup> Moreover, the statute is further limited by the requirement that the conspiracy be formed within the jurisdiction of the United States.<sup>125</sup>

To circumvent applicability of the statute, an individual need only travel to a foreign destination prior to the formation of the conspiracy or, as in the case of Eric Harroun and Chris Jeon, travel abroad alone. While this loophole may be convenient by placing the onus on foreign law enforcement to detect and prevent a conspiracy, the ultimate goals of the act are still frustrated by the presence of belligerent U.S. citizens abroad.<sup>126</sup> The requirement that hostile acts be confined to nations with which the U.S. is at war further stymies attempts to prevent violent acts abroad.<sup>127</sup> Under current law, if an individual undertakes actions prior to the commencement of U.S. military action, either overt or covert, the individual has committed a crime.<sup>128</sup> However, if the individual waits until the U.S. commences airstrikes or special operations, the state of peace has dissolved and the individual has escaped the reach of § 956. Using Syria as an example, any individual who travelled to fight overseas before Congress made a decision to supply arms would have been committing a crime, even though the state of peace was rapidly dissolving between our two countries.<sup>129</sup> By adhering to temporal criteria for judging when someone has committed a crime, the strict reading of the Neutrality Acts lends itself poorly to casual fighter problems. If the country is seeking to prevent individuals from going abroad to fight, then precluding their acts from prosecution until the U.S. has agreed to undertake military activity completely misses the point.<sup>130</sup> Finally, the prohibition on committing acts only against nations with which we are at peace runs contrary to public policy by essentially allowing U.S. citizens

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Brooklyn Man Fights in Syria. Is He a Threat to the U.S.?*, NAT'L PUB. RADIO (Aug. 28, 2014), <http://www.npr.org/blogs/parallels/2014/08/28/343805340/brooklyn-man-fights-in-syria-officials-unsure-of-the-threat> (quoting the U.S. Attorney in Virginia who prosecuted Eric Harroun: "As a matter of policy and a matter of criminal law enforcement, the U.S. government is just not going to stand for people going into Syria to take up arms and fight with these groups that are in almost every instance avowedly anti-American").

<sup>127</sup> 18 U.S.C. §956 (requiring that acts which damage property be perpetrated against nations with which the U.S. is at peace).

<sup>128</sup> *United States v. Terrell*, 731 F. Supp. 473, 476 (S.D. Fla. 1989).

<sup>129</sup> *See Terrell*, 731 F. Supp. 473; *also see United States v. Yasith Chhun*, 513 F. Supp. 2d 1179, (C.D. Cal. 2007) (both discussing the provision of arms to an armed group is a military action which indicates a state of war between the U.S. and that country).

<sup>130</sup> NAT'L PUB. RADIO, *supra* note 126.

to go abroad and gain military skills and then return to the United States.<sup>131</sup>

The shortcomings of § 956 are best viewed in contrast to § 960, which would prevent all U.S. citizens from undertaking “military expeditions or enterprises” abroad, but for the limitation to nations that the U.S. is not at peace with.<sup>132</sup> As previously discussed in Part II of this Note, § 960 of Title 18 has been interpreted to apply to individuals as well as parties who undertake “military expeditions or enterprises.”<sup>133</sup> In contrast to § 956, § 960 does not seek to address the conspiracy of individuals to commit violent acts abroad, but instead addresses the actual commission of those acts.<sup>134</sup> Consequently, if the act was not limited in its scope by confining the application of the law only to acts against nations the United States is at peace with, it would serve as an effective prohibition against all persons within U.S. jurisdiction who travel overseas to fight, irrespective of their motives or who they fight with. Unfortunately, like § 956, the statute does include the “at peace” language and consequently falls victim to the same temporal flaws.<sup>135</sup>

#### IV. ALTERNATIVE ENFORCEMENT OPTIONS

Law enforcement officials must now contend with a new twist on the old concern of terrorist attacks. Previously, the most pressing concern was that foreign nationals living in the United States or travelling to the United States would commit attacks domestically.<sup>136</sup> Recent developments in American citizen self-radicalization have shown however that xenophobia is not an effective remedy against threats.<sup>137</sup> Law enforcement must now also concern itself with the prospect of the “average American” travelling abroad to learn to fight and then returning home to ply his new skills against his homeland. Because it is impossible to predict which individuals may have an interest in perpetrating attacks in the U.S., security policy would be best served by preventing all

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<sup>131</sup> *Id.*

<sup>132</sup> 18 U.S.C. § 960.

<sup>133</sup> See discussion at notes 101-103.

<sup>134</sup> Compare 18 U.S.C. §956 with 18 U.S.C. §960 (lacking specific reference to conspiracy as an element).

<sup>135</sup> *Id.* (both containing the requirement that the U.S. be at peace).

<sup>136</sup> The White House, National Security Strategy 1 and 19-20 (2010) available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

<sup>137</sup> *Hearing on Countering Violent Islamic Extremism: The Urgent Threat of Foreign Fighters and Homegrown Terror*, 114<sup>th</sup> Cong. (2015) (statement of Michael Steinbach, Deputy Assistant Dir. FBI Counterterrorism Div.) available at <http://docs.house.gov/meetings/HM/HM00/20150211/102901/HHRG-114-HM00-Wstate-SteinbachM-20150211.pdf>.

citizens and residents from undertaking military excursions without government approval.<sup>138</sup> To do so would be in keeping with law and policy that has existed in this country approximately since the ratification of the Constitution.<sup>139</sup> Preservation of neutrality and the security of the American homeland and citizenry can be accomplished through either crafting new legislation to prohibit American citizens from fighting abroad or by making revisions to Title 18 §§ 956 and 960.

If future enforcement were to occur on the basis of entirely new legislation, it would still find an analog in current law. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA), codified in 18 U.S.C. § 3261, broadens the jurisdiction of the United States to allow for domestic prosecution of criminal acts committed by Americans overseas.<sup>140</sup> MEJA confines its applicability to criminal acts that would be classified as felony offenses if committed within the maritime or territorial jurisdiction of the United States.<sup>141</sup> Notably, MEJA also provides that no prosecution could be commenced under this statute if the individual was already prosecuted or is being prosecuted by the courts of a foreign government whose jurisdiction is recognized by the United States.<sup>142</sup> This provision is especially useful in deriving a solution to the problem presented by this Note since it implicitly acknowledges the obvious fact that where foreign fighters are flooding into an area to fight, there is no government with the jurisdiction and capability to prosecute the individuals committing the offensive acts. This fact necessitates action by countries like the United States, which possess the willingness and capability to stem the flow of foreign fighters. In 2010, the extraterritoriality of MEJA was unsuccessfully challenged in the case of *U.S. v. Williams*.<sup>143</sup> Charged with the sexual abuse of a child while living in Japan, Williams challenged Congress' power to promulgate a criminal statute with extraterritorial jurisdiction.<sup>144</sup> Citing *U.S. v. Curtiss-Wright Export Corp.*, the District Court for the Middle District of Georgia rejected this challenge and reiterated the Supreme Court's finding that Congress acquired the ability to enforce laws beyond the territorial jurisdiction of the United States through the powers inherent in the sovereignty of the United States.<sup>145</sup> Embracing the doctrine of *U.S. v.*

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<sup>138</sup> NAT'L PUB. RADIO, *supra* note 126.

<sup>139</sup> Three Friends, 166 U.S. 1, 52 (1897) (discussing the origin of the Neutrality Act of 1794).

<sup>140</sup> 18 U.S.C. § 3261 (2012).

<sup>141</sup> *Id.* at (a).

<sup>142</sup> *Id.* at (b).

<sup>143</sup> United States v. Williams, 722 F.Supp.2d 1313 (M.D. Ga 2010).

<sup>144</sup> *Id.* at 1315-1317.

<sup>145</sup> *Id.* at 1317.

*King*, the *Williams* court dismissed the challenge by stating that “[t]here is no constitutional bar to the extraterritorial application of penal laws.”<sup>146</sup> However, the broad reach of Congress is tempered by two criteria. First, Congress must clearly intend for the act to have extraterritorial applicability.<sup>147</sup> Second, the extraterritorial nature of the act must not contravene established principles of international law.<sup>148</sup> So long as the act conforms to one of the recognized justifications for asserting criminal jurisdiction, the law will conform to international standards and vest Congress with the power to extend the reach of legislation beyond the shores of the U.S.<sup>149</sup>

In 2010, David Price of North Carolina proposed a legislative supplement to MEJA in the House of Representatives, with an identical version of the bill introduced by Patrick Leahy of Vermont in the Senate.<sup>150</sup> The Civilian Extraterritorial Jurisdiction Act of 2010 (CEJA), proposed to extend the prohibitions of MEJA beyond individuals employed by or accompanying the military to also include civilian contractors employed by or accompanying any other branch of the federal government overseas.<sup>151</sup> At the request of the Office of Management and Budget, to reduce the scope of the legislation, the Act articulated specific qualifying offenses, many of a violent nature.<sup>152</sup> Although the bill has failed in Congress twice, it was again reintroduced in 2014.<sup>153</sup>

With inspiration taken from CEJA, new legislation can be crafted to specifically address the actions of American citizens who travel overseas to fight. To prevent similar loopholes in the future, any new legislation should create a blanket prohibition on American citizens who travel overseas to engage in violent acts, acts of destabilization, insurgency or combat unless specifically authorized by the President or the Congress and in conformity with relevant international law. Further, the law should apply to individuals or groups of individuals, irrespective of size, who engage in these acts by themselves or in conjunction with irregular forces. A prohibition on joining conventional forces would be unnecessary, since it is already covered in the foreign relations chapter of

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1318.

<sup>148</sup> *Id.*

<sup>149</sup> *United States v. Williams* at 1318-1319 (citing the five principles for extraterritorial criminal jurisdiction in international law).

<sup>150</sup> The Civilian Extraterritorial Jurisdiction Act of 2010, S.2979, 111<sup>th</sup> Cong. (2010).

<sup>151</sup> CHARLES DOYLE, CONG. RESEARCH SERV., R42358, CIVILIAN EXTRATERRITORIAL JURISDICTION ACT: FEDERAL CONTRACTOR CRIMINAL LIABILITY OVERSEAS, 7 (2012).

<sup>152</sup> *Id.* at 7 and 12-13.

<sup>153</sup> The Civilian Extraterritorial Jurisdiction Act of 2014, S.2598, 114<sup>th</sup> Cong. (2014).

Title 18.<sup>154</sup> The justification of such a law would be the desire of the United States to hold accountable U.S. citizens who commit acts abroad which would be illegal if committed at home. Enacting such a law may also circumvent contentious situations like the targeted killing of American citizens overseas who cannot easily be arrested and tried and have been deemed enemy combatants.<sup>155</sup>

The easier remedy to the casual warrior problem may be to amend or supplement current laws. As previously discussed, § 956 prohibits persons under American jurisdiction from conspiring to commit numerous acts overseas.<sup>156</sup> To address modern security concerns, § 956 should be amended to move beyond a narrow focus on conspiracies and include the attempt or completion of the enumerated acts. By broadening the scope of the statute to go beyond conspiracy, the law would succeed in reaching situations where individuals go overseas without the intention of undertaking violent actions, but then become involved in such actions. For example, it is not difficult to imagine an individual who feels compelled to go overseas to manifest support for a government opposition group. After some time in the country however, he feels motivated to engage in more kinetic means of opposition and takes up arms. Under the current language of §956, even if the individual commits murder, kidnapping, or destruction of government property, he cannot be prosecuted because he did not formulate the intention to commit these acts within U.S. jurisdiction.<sup>157</sup> By criminalizing attempt or actual commission of the acts, § 956 could fulfill its purpose by attaching to the designated offenses at any point in the act, whether it is at the formation of the conspiracy or the completion of a unilateral act. The latter point is especially important to address modern trends since by definition; a single person cannot be engaged in a conspiracy.<sup>158</sup> Consequently, under current §956, if for instance a person plots to destroy the property of a foreign government by himself he is not violating the statute. By including attempt and completion in an amended statute, any individual who plots or carries out an act could be prosecuted. Circumventing the application of § 956 could also be avoided by attaching jurisdiction for the crimes to the nationality of the individuals rather than the place in

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<sup>154</sup> See *Chacon v. Eighty-Nine Bales of Cochineal*, 5 F. Cas. 390, 393 (C.C.D. Va. 1821) (No. 2,568) (interpreting 18 U.S.C. § 959 (2012)).

<sup>155</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9-10 (D.D.C. 2010) *aff'd* *Al-Aulaqi v. Panetta*, 35 F.Supp.3d 56 (D.D.C. Apr. 4, 2014).

<sup>156</sup> 18 U.S.C. § 956.

<sup>157</sup> *Id.* at (a)(1) and (b).

<sup>158</sup> CONSPIRACY, BLACK'S LAW DICTIONARY (10<sup>th</sup> ed. 2014).

which the plot is hatched.<sup>159</sup> By criminalizing the creation of a conspiracy by American citizens, rather than requiring the conspiracy be formed within U.S. jurisdiction, the government could effectively hold individuals accountable for the conspiracies they form at any place outside of the U.S.<sup>160</sup> This approach is consistent with international legal principles for asserting extraterritorial jurisdiction and would provide a more nimble means for the U.S. government to prosecute individuals acting heinously abroad.

A more narrow prohibition, which specifically addresses the foreign fighter problem, could be achieved through amendments to §960. Rather than identifying specific acts that would trigger prosecution, §960 broadly targets actions which are militaristic in nature.<sup>161</sup> By simply removing the requirement that military expeditions or endeavors not be undertaken against *friendly* nations, § 960 would gain the broad application necessary to stop all combat oriented travel overseas.<sup>162</sup> By prohibiting all military expeditions and endeavors, regardless of destination and diplomatic disposition, revised § 960 would end the wait-and-see approach currently in use and put any person wishing to engage in militaristic acts overseas on notice that their actions are prohibited. While it is highly unlikely that a single individual from the U.S. would be able to undertake actions which would lead to a full-blown state of war between the U.S. and another country, from the perspective of neutrality, creating a general prohibition against aggressive actions would only serve to keep American civilians out of positions that may help destabilize situations. In any ceasefire situation for example, the actions of an overzealous individual or group of individuals could endanger a fragile peace or negotiations. This scenario repeatedly plays out in the Israeli-Palestinian conflict where the actions of a few spark weeks of heavy fighting.<sup>163</sup> Even if cooler heads were to prevail and

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<sup>159</sup> United States v. Plummer, 221 F.3d 1298, 1307 (11th Cir. 2000) (discussing the nationality principle of extraterritorial criminal jurisdiction in International Law).

<sup>160</sup> *Id.* (quoting United States v. Columba-Colella, 604 F.2d 356, 358 (5th Cir.1979) that “a country may supervise and regulate the acts of its citizens both within and without its territory”).

<sup>161</sup> 18 U.S.C. § 960 (prohibiting “ any military or naval expedition or enterprise”).

<sup>162</sup> See United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984) (discussing the protective principle of international law which predicates extraterritorial criminal jurisdiction on injury to the national interest).

<sup>163</sup> Compare Isabel Kershner, *A Focused Hunt for a Victim to Avenge Israelis’ Deaths*, N.Y. TIMES, (Jul. 14, 2014), <http://www.nytimes.com/2014/07/15/world/middleeast/israeli-youths-murder-called-blueprint-for-revenge.html> and Jodi Rudoren, *Palestinian Gets 3 Life Sentences in Killing of Israeli Teenagers*, N.Y. TIMES, (Jan. 6, 2015), <http://www.nytimes.com/2015/01/07/world/middleeast/palestinian-sentenced-in-killing-of-kidnapped-israel-teenagers.html> (recounting the killings and revenge killings of

individual actions ran no risk of instigating any type of fighting it is still in the interest of the government to keep American citizens from falling into compromising positions generally. Unfortunately, in the past year multiple cases have arisen which strongly counsel against allowing American citizens into dangerous areas.<sup>164</sup> While humanitarian missions and the accurate reporting of conflicts requires some individuals to risk capture in furtherance of their duties, no public interest is served by having Americans be captured by foreign groups or governments while fighting on the battlefield.<sup>165</sup> Like § 956, § 960 vests criminal jurisdiction in the beginning of the act taking place within the United States.<sup>166</sup> Again, this provision would also have to be revised to vest jurisdiction in the nationality of the individual. The language of MEJA embodies the broad jurisdiction sought to be achieved by the recommendations of this paper and is worth noting. MEJA simply states that “whoever engages in conduct outside of the United States,” that is forbidden, will become vulnerable to prosecution.<sup>167</sup>

The final statute worth amending is §959 of Title 18, which seeks to prohibit the recruitment or enlistment of citizens within the United States into the service of foreign nations. While precedent has come very close to including non-state actors within the meaning of the act, as previously discussed, the last case to deal with enlistment in a foreign terrorist organization stopped short of expanding the reach of the act.<sup>168</sup> By expanding the definition to go beyond traditional state forces and also include non-state actors like armed groups, the act would be able to address modern combat, which sees fewer state-versus-state actions occurring. In an attempt to achieve a similar goal to § 959, Senator Ted Cruz introduced into the 113<sup>th</sup> Congress the Expatriate Terrorists Act of 2014.<sup>169</sup> The purpose of the bill was to combat the risk of terrorist affiliated American citizens returning to the country by interpreting any support of a designated terrorist as grounds for revocation of U.S.

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Israelis and Palestinians by small groups individuals which eventually led to a 50 day war).

<sup>164</sup> See Mark Landler & Eric Schmitt, *ISIS Says It Killed Steven Sotloff After U.S. Strikes In Northern Iraq*, N.Y. TIMES, (Sept. 2, 2014), <http://www.nytimes.com/2014/09/03/world/middleeast/steven-sotloff-isis-execution.html>; see also Rukmini Callimachi & Rick Gladstone, *ISIS Declares Airstrike Killed a U.S. Hostage*, N.Y. TIMES (Feb. 6, 2015), <http://www.nytimes.com/2015/02/07/world/middleeast/isis-claims-american-hostage-killed-by-jordanian-retaliation-bombings.html>

<sup>165</sup> *Id.*

<sup>166</sup> 18 U.S.C. § 960.

<sup>167</sup> 18 U.S.C. § 3261(a).

<sup>168</sup> *United States v. Khan*, 309 F.Supp.2d 789 (4th Cir. 2006).

<sup>169</sup> The Expatriate Terrorists Act of 2014, S. 2779, 113th Cong. (2014).

nationality.<sup>170</sup> However, revocation of citizenship involves significant constitutional hurdles that make passage of the act unlikely.

## V. CONCLUSION

War has never been a straightforward enterprise and modern developments continue to thicken the fog around the issues created by conflicts. As armed groups play an increasing role in conflict, states will have to craft effective tools for depriving these groups of new members, especially those who come from within their own borders. The necessity of these measures is partially derived from the responsibilities of states to keep their own citizens from jeopardizing the diplomatic position of the home state. More importantly, preventing citizens from going abroad to engage in combat is essential to avoid violent blowback against the home state upon the return of the citizen. Consequently, countries like the United States with significant international interests and vulnerabilities will have to be more aggressive in policing citizens who engage in acts that would be prohibited, but for insufficiently modern legislation. Extending the criminal jurisdiction of the United States to reach the conduct of U.S. citizens no matter where they are in the world is not only a matter of good international security policy, but also good domestic security policy.

Throughout the history of the U.S., the government has repeatedly attempted to enforce compliance with the Neutrality Acts by progressively criminalizing behaviors that were likely to embroil the United States in a foreign conflict. While this historic threat has receded, the modern threat of domestic harm stemming from an individual's participation in a foreign conflict has risen to take its place. By broadening criminal jurisdiction, the U.S. can conclusively address the penchant of some individuals to go abroad and gain combat experience without having to fit each person into the narrow definition of a terrorist. More importantly, the U.S. would not have to turn a blind eye to the troublesome activities of citizens and simply live with the hope that the person's attitudes and new skills will not one day turn against their home.

The ultimate goal of the proposed modifications is not to find new and creative ways to expose Americans to criminal liability, but rather to remove the uncertainty that arises when individuals take vigilante actions. The proposed changes only seek to buttress longstanding prohibitions by plugging loopholes that allow citizens to take action outside the established rules and policies of the United States. By

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<sup>170</sup> *Id.*

identifying and remedying these oversights, the government will regain its “monopoly on the legitimate use of violence” and remove American citizens from the threat of prosecution as a terrorist, and the possibility of death or capture on a foreign battlefield.<sup>171</sup>



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<sup>171</sup> JONATHAN WOLFF, AN INTRODUCTION TO POLITICAL PHILOSOPHY 36 (Oxford University Press 2006).