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Lloyd, Marnie Elspeth

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**Persisting Tensions:
The Framing of International Legal Debates
on Foreign Fighting**

Marnie Elspeth Lloyd

ORCID: [0000-0001-6131-5151](https://orcid.org/0000-0001-6131-5151)

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Abstract

The issue of foreign fighting is approached today within a predominant framing of counterterrorism and security. Yet, international legal debate over the twentieth century to today demonstrates a grappling with richer debates and histories surrounding private individuals participating in “other people’s wars”. By carefully considering the alternative framings and international legal responses surrounding a broader range of foreign fighting, this thesis reveals the powers and limits of the present counterterrorism framing of foreign fighter issues. Not only has a counterterrorism approach proven problematic in its operation, but the continued participation in warfare of foreign fighters of different categories and persuasions means that a framing focusing solely on counterterrorism risks over-extension or reaches limits in terms of providing satisfactory responses to broader questions surrounding foreign fighting. This thesis argues that those working with international law are not limited to a counterterrorism framing of foreign fighting; that there is a richer repertoire of possible argument available within international law than may at first be appreciated.

This argument is made by stepping back to consider three selected moments of foreign fighter regulation between 1907–2014, namely, neutrality law and the response to foreign volunteer fighters during the Spanish Civil War, the definition and attempted criminalisation of mercenaries following the conflicts linked to decolonisation, and the Security Council’s 2014 definition of foreign terrorist fighter. This study demonstrates how in each setting, legal debate, assessment of the key issues at stake, and resultant determinations took place within a powerful predominant legal framing of the foreign fighter issue, affecting the scope and focus of legal argumentation: neutrality and abstention at the beginning of the century, self-determination during decolonisation, and counterterrorism in the twenty-first century. At the same time, the thesis makes visible how red threads of debate surrounding foreign fighting reoccur across time and setting, and continue to resonate today. These include questions about the public and private, about foreignness, about ideological motivations and the commercialisation of force, about groups and individuals, abstention and intervention, harm and required levels of diligence.

What emerges from this project is a view of both the change and the stasis in international law surrounding foreign fighting: changes, such as legal determinations made within alternative framings in different moments and the resultant definitions of categories of foreign fighters, and tensions — red threads — that persist throughout the debates. The tensions are always there but are argued and settled differently in different situations in line with the dominant framing of the moment.

This thesis suggests the complementary explanatory power offered by paying attention to the operation of the counterterrorism framing; what it allows and what it obscures, and by thinking more generously and creatively about the shape of debates across different phenomena of foreign fighting, and, thus, the concerns and values *beyond terrorism* upon which determinations about foreign fighting could be based.

Declaration

I declare that:

- this thesis comprises only my original work towards the fulfilment of the requirements of the Doctor of Philosophy;
- due acknowledgement has been made in the text to all other material used; and
- the thesis is fewer than the maximum word limit in length, exclusive of the bibliography and appendix.

Marnie Elspeth Lloyd

August 2020

Preface

Publications

Research undertaken towards this thesis has been included in the following publications, in which some of the language of this PhD may be replicated:

‘Persistent Tensions? International Legal Perspectives on ‘Other’ Foreign Fighters’, (2017) 60 *German Yearbook of International Law* 539

* Awarded Melbourne Law School Graduate Student Published Research Prize 2018

‘Framing Foreign Fighting: Exploring the Scope of Prevention and the Categorisation of Fighters in International Law’, in Christophe Paulussen and Martin Scheinin (eds), *Human Dignity and Human Security in Times of Terrorism* (Springer, 2020) 407

‘Challenges in the Application of the Obligation to Ensure Respect for IHL: Foreign Fighting as an Example’, in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for International Humanitarian Law* (Routledge, 2020) 231

‘Retrieving Neutrality Law to Consider ‘Other’ Foreign Fighters Under International Law’, *European Society of International Law (ESIL) SSRN Conference Paper Series*, ESIL Research Forum (Granada, March 2017)

‘Book Review: *Foreign Fighters under International Law and Beyond* edited by Andrea de Guttry, Francesca Capone, Christophe Paulussen (Springer, 2016)’, (2017) 18(1) *Melbourne Journal of International Law* 95

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The work for this thesis was undertaken chiefly at Melbourne Law School, partly in Geneva, but also at Fitzroy and Bargoonga Nganjin North Fitzroy libraries, in Fitzroy, Carlton and Parkville cafés, in a friend's quiet house in Brunswick East, and at home in Fitzroy in the company of a charming partner and an even more charming toddler during Covid-19 restrictions. These places are part of the traditional lands of the Wurundjeri peoples of the Kulin Nation and I pay respect to their Elders, past and present.

Due to previous study and work, my time in Melbourne (2016–2020) has become the longest period that I have lived in one city since 2002. For many PhD candidates, the opportunity to visit other institutions helps to broaden the world on offer to them. For me, it has been the staying put during this project—that settled connection to place—which has, fortunately, brought the world to me. That is thanks to having landed somewhat naively but very fortuitously within Professor Anne Orford's ARC Laureate Program in International Law's project *Civil War, Intervention, and the Transformation of International Law (2015–2020)*. I have benefitted not only from exposure to a wide range of critical legal scholarship which has been profoundly formative, but from the good company and intellectual support of my Laureate Program colleagues especially Fabia Veçoso and Luis Bogliolo, but also Anna Saunders, Ntina Tzouvala, Sebastian Machado, Kathryn Greenman, Vesna Stefanovski, Wendy Chen and Jack Stanovsek. The magic of Melbourne also involved the world that Anne Orford was able to bring to Melbourne Law School in the form of visiting fellows and professors. I was delighted to reconnect with Nele Verlinden and to have been able to meet and engage with Matilda Arvidsson, Maria Varaki, Rebecca Sutton, Renate Nagamine, Daria Davitti, Christina Nowak, Katherine Fallah, Mónica García-Salmones, Ville Kari, Viktorija Jakjimovska, Paulina Starski and Lianne Boer.

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For every PhD Candidate, normal life continues alongside our work. As well as celebrating our academic successes, my cohort parented, moved in with girlfriends, lost family members, said goodbye to relationships, applied for residencies, and grieved a baby. In the hope of starting a family, my 'extra-curricular' life involved several surgeries, countless appointments, tests and procedures, and two miscarriages. All worth it. I am forever grateful to Dr Karen Paice for helping to bring our daughter Ellia into our lives. I thank the teams at Melbourne IVF, the East Melbourne Day Hospital and the Royal Women's Hospital (Parkville) for their expertise and care. I thank also Peter Slipper and Gina Fox at Fertile Ground Health Group for their expert care, guidance, and compassion over the years. Ellia has been looked after with fun, loving kindness and expert care at the University of Melbourne's Queensberry Childcare Centre. I am grateful to the entire team, especially Sue Devinentis, Maria Sommerville, Robert Connelly, Amanda Lutze, Priyanka Shahi, Samantha Swynnerton and Vi Nguyen. I found that when the medical journey got tough, the PhD project gave me something external to focus on. When the PhD journey got tough, the medical challenges, and then the baby(!), put things into perspective. Ellia is my world.

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I would like to dedicate this work to Louisa as well as to my very wonderful friend and former colleague Valérie Houetz. Val worked around the world, with grace and with very good humour, to protect people affected by armed conflict, and passed away far too early in July 2020. May I always be inspired by her example.

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Chapter One

Introduction

1. Framing the Question of Foreign Fighting and International Law

In early 2016 as I was starting this doctoral research, Briton Kimberley Taylor travelled to Syria to volunteer with the Syrian Kurdish armed group, the Women's Protection Units (YPJ).¹ Taylor was 27 years old, a former student from Lancashire. She joined the YPJ's media team, contributing to the group's public communications. As her unit came under attack, she also began fighting. International media featured Taylor as the first British woman to join the fight *against* the Islamic State group. Journalists described her humanitarian motivations, particularly the protection of women and girls, and her willingness to kill and die for the cause.² Seeing the plight of Yazidi women at the hands of the Islamic State group, 'I had to do something' she said.³ In the United Kingdom, police searched the home of her parents and confiscated phones and laptops. She reported being nervous about returning home in case of prosecution.⁴

Eighty years earlier, in 1936 during the Spanish Civil War, another 27-year-old, the French philosopher Simone Weil, found herself similarly motivated to fight in support of a warring party. She travelled into Spain to support the Republican forces. Writing to a friend about her motivations, she explained:

I don't love war; but what has always seemed to me most horrible in war is the position of those in the rear. When I realised that, try as I would, I could not prevent myself from participating morally in that war — in other words, from hoping all day and every day for the victory of one side and the defeat of the other — I decided that, for me, Paris was the rear.⁵

* All translations by the author except where otherwise indicated.

¹ Kurdish: *Yekîneyên Parastina Jin* (YPJ), together with the *Yekîneyên Parastina Gel* (YPG), the armed wing of the Syrian Kurdish Democratic Union Party (Kurdish: *Partiya Yekîtiya Demokrat*, PYD).

² See, eg, Lizzie Dearden, 'Former Student from Blackburn Becomes First British Woman to Fight Isis in Syria', *Independent* (online, 10 February 2017) <<http://www.independent.co.uk/news/uk/home-news/syria-anti-isis-fighters-british-volunteers-women-kurds-ypg-ypj-kimberley-kimmie-taylor-blackburn-a7574171.html>>.

³ Mark Townsend, "'Hundreds of Us will Die in Raqqa': The Women Fighting ISIS", *Guardian* (online, 30 April 2017) <<https://www.theguardian.com/world/2017/apr/30/hundreds-of-us-will-die-in-raqqa-the-women-fighting-isis>>.

⁴ Lizzie Dearden, 'British Volunteers Preparing for "Bloodbath" Fighting Isis in Raqqa as Offensive on Syrian Stronghold Looms', *Independent* (online, 28 March 2017) <<http://www.independent.co.uk/news/world/middle-east/isis-raqqa-offensive-british-fighters-volunteers-kurdish-ypg-ypj-sdf-syria-kimmie-taylor-bob-crow-a7654781.html>>.

⁵ Simone Weil, *Seventy Letters: Personal and Intellectual Windows on a Thinker*, tr Richard Rees (Wipf and Stock, 1965) 106.

Like Taylor, Weil started in the warzone with journalist credentials, but went on to participate in the civil war — briefly and rather unsuccessfully — with an international group within an anarchist militia, the National Confederation of Workers.⁶

As a former delegate with the International Committee of the Red Cross (ICRC), I had also felt a pull towards populations suffering armed conflict, the desire to be directly involved in helping restore aspects of dignity denied by violence; the adventure of travel, and physical and emotional trial. Still, the ICRC's work was undertaken within the bounds of state consent, and taking up arms was anathema: ICRC delegates, mandated with strict neutrality as to the legality and causes underlying armed conflict, had once been described as 'warriors without weapons'.⁷ I felt drawn into the contrasting story of these foreign volunteer fighters; their individual determination that it was necessary and acceptable to join a foreign war — sometimes described as *someone else's fight* — outside the structures of state armed forces.

Legal scholarship and practice approach the present issue of foreign fighting within a dominant framing of counterterrorism and security. That makes today's priority policy concern and most pertinent category of study the Salafi-jihadist, or at least Muslim, *foreign terrorist fighter*. Indeed, this is what is often meant by the shorthand term *foreign fighter*. As this thesis explores, in earlier moments, other types of foreign participants in armed conflict, such as volunteer fighters during the Spanish Civil War or mercenaries in decolonisation-era conflicts, were responded to in their own ways, within the dominant legal framing of each moment. It is not that terrorism or security were not already concerns in those earlier moments. Rather, the legal issues associated with foreign fighting were not chiefly framed as being about counterterrorism but about neutrality, non-intervention, the protection of self-determination and the commercialisation of private violence. More recently, too, individuals of different motivations and persuasions continue to leave their homes to fight with armed groups around the world without necessarily having links to listed terrorist organisations or terrorist activity — Burma/Myanmar, South Sudan, Libya, Central African Republic, Iraq, Syria, Ukraine, Venezuela.

This thesis began, then, with a curiosity about a seemingly straightforward question: was it legal or illegal to become a foreign fighter of this *other* category, such as with

⁶ Spanish: *Confederación Nacional del Trabajo* (CNT). Simone Pétrement, *Simone Weil: A Life*, tr Raymond Rosenthal (Pantheon, 1976) 269, 271–2.

⁷ Hans Magnus Enzensberger (ed), *Krieger Ohne Waffen: Das Internationale Komitee Vom Roten Kreuz* [Warriors without Weapons: The International Committee of the Red Cross] (Eichborn, 2001).

the opposition forces in Libya in 2011 or the Kurdish forces in Syria since 2012?⁸ As applied to the individual fighter, this is a question of domestic criminal law and prosecutorial practice — that of the territorial or destination state and of the parent state.⁹ Yet, the phenomenon of individuals choosing to leave their country of origin or residence to participate with an armed group in a foreign armed conflict also raises multiple considerations under international law.¹⁰ That is where the interest of this thesis lies.

Opening this work with the stories of foreign fighters Kimberly Taylor and Simone Weil might suggest sympathy with certain kinds of foreign fighting; a distinguishing of certain causes from others. My intention is, in fact, to illustrate the dilemmas inherent to this topic. My interest in examining the limits of the counterterrorism framing and considering *other* types of foreign fighting reflects an underlying intuition that even “good” foreign fighting raises significant legal and policy issues.¹¹ If, as this thesis will explore, reaching definitional clarity on different types of foreign fighting will always remain elusive, then, rather than seeking to appropriately discern legitimate from illegitimate forms and causes of foreign fighting, I would favour abstention. I am aware that my background with the ICRC has contributed to a practice of thinking chiefly about *how* war is fought — and, often, the fact that it is fought at all — over and above *why* or *by whom*. Taking into account the *why* and the *by whom* of foreign fighting raises complex and morally intimate questions that Taylor and Weil’s stories evoke; my thoughts remain somewhat torn. Overall, I remain wary of a lowering of the bar to entry into hostilities.

Regardless of my personal view, though, as an international lawyer, it became clear that while the existence of a diligence duty on states to prevent terrorism was ‘so

⁸ Regarding American and European fighters in Libya, see, eg, *Point & Shoot* (Marshall Curry Productions, 2014); Asim Qureshi, ‘Blowback: Foreign Fighters and the Threat They Pose’ (Report, CAGE, 2014) 32, 5, 17–18 <<https://www.cage.ngo/wp-content/uploads/2014/07/CAGE-Blowback-Foreign-Fighters-report.pdf>>. Kurdish forces in Syria are discussed in Chapter Five.

⁹ *Territorial or destination state* referring to the country in which the armed conflict is taking place. *Parent state* referring to the country of citizenship and/or habitual residence of the fighter. References to *nationals* in this thesis should generally be read as including habitual residents.

¹⁰ See, eg, Hersch Lauterpacht, ‘Revolutionary Activities by Private Persons against Foreign States’ (1928) 22 *American Journal of International Law* 105; Manuel R Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (Martinus Nijhoff, 1962) (‘*International Responsibility*’); Sandra Krähenmann, *Foreign Fighters under International Law* (No 7, Geneva Academy of International Humanitarian Law and Human Rights, October 2014) (‘*Geneva Academy Briefing*’); Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016).

¹¹ See similarly Craig Forcese and Ani Mamikon, ‘Neutrality Law, Anti-Terrorism, and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies’ (2015) 48 *University of British Columbia Law Review* 305, 318.

widely recognized that it should not fuel a debate’,¹² one striking aspect of the debates around broader examples of foreign fighting was the lack of consensus about the exact contours of duties surrounding foreign fighters’ transnational movement and resort to force. International law did not clearly rule out all foreign fighting.

Despite a rich web of potentially applicable law, international legal scholars throughout the twentieth century have been unable to identify a settled position regarding the scope of duties on states regarding the departure of volunteer fighters, or at least, not regarding *all* volunteer fighters. In 1928, Hersch Lauterpacht concluded that ‘there is no common measure of agreement on the question as to the scope of state responsibility for preventing and repressing revolutionary acts of private persons against foreign states’.¹³ Arnold McNair, writing at the time of the Spanish Civil War, found the rules on volunteers applicable in civil war ‘ill-defined and still in course of development’.¹⁴ Ian Brownlie in 1956 argued that customary neutrality law concerning volunteers needed ‘rationalisation’. He diffidently suggested extending the duty of prevention to cover all volunteers rather than only hostile expeditions as ‘the simplest solution’.¹⁵ In the early 1960s, Manuel Garcia-Mora could likewise not identify a clear rule obliging states to prevent volunteers. He nevertheless took a more convinced position than Brownlie, advocating for a ‘frank recognition of the obligation of the state to prevent the departure of volunteers’ *de lege ferenda*.¹⁶ Henry Burmester in 1978 acknowledged that clear duties regarding the more difficult categories of individual volunteers or fighters could not necessarily be easily identified in customary international law but suggested that states should have a responsibility to control their nationals beyond current customary law, at least when international peace and security were threatened.¹⁷ The precise scope of asylum state preventive duties regarding the ‘violent subversive acts of foreign exiles’ against their country of origin was considered ‘unsettled in significant aspects’ by Steven Corliss in 1990.¹⁸ Moving to the present manifestations of foreign fighters, Craig Forcese and

¹² Vincent-Joel Proulx, ‘Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks’ (2005) 23(3) *Berkeley Journal of International Law* 615, 660.

¹³ Lauterpacht (n 10) 126–7.

¹⁴ Arnold D McNair, ‘The Law Relating to Civil War in Spain’ (1937) 53 *Law Quarterly Review* 471, 496–9.

¹⁵ Ian Brownlie, ‘Volunteers and the Law of War and Neutrality’ (1956) 5(4) *International & Comparative Law Quarterly* 570, 579–80.

¹⁶ Garcia-Mora, *International Responsibility* (n 10) 79. See also Manuel R Garcia-Mora, ‘International Law and the Law of Hostile Military Expeditions’ (1958) 27(3) *Fordham Law Review* 309, 325–8.

¹⁷ HC Burmester, ‘The Recruitment and Use of Mercenaries in Armed Conflicts’ (1978) 72(1) *American Journal of International Law* 37, 44, 48, 50, 56.

¹⁸ Steven Corliss, ‘Asylum State Responsibility for the Hostile Acts of Foreign Exiles’ (1990) 2(2) *International Journal of Refugee Law* 181, abstract, 208.

Ani Mamikon commented that “[i]nternational law is remarkably unhelpful on the foreign fighter issue”.¹⁹ Tom Ruys expressed that:

[t]he Syrian civil war indicates that there is perhaps, to a certain extent, a legal vacuum in this context. It is open to discussion, for instance, whether third States ... are legally obliged to take steps to prevent persons under their jurisdiction from joining one of the warring parties in the conflict.²⁰

Experts of the United Nations (UN) Working Group on the Use of Mercenaries²¹ concluded in 2018 that ‘the adoption of specific international measures regulating foreign fighters was problematic due to the remote possibility of achieving a consensus among States on whether or not the presence of foreign fighters was legitimate or illegal in all circumstances.’²²

In some instances, foreigners fight in solidarity with what are anyway contested claims in international law, such as self-determination, revolution or resistance against international crimes. Foreign fighting represents, then, a transnational and solidary sub-category of those contested concepts. This adds a foreign and transborder twist to the trope that ‘one man’s terrorist is another man’s freedom fighter’. We must ask not only whether there may be a right to resort to force for national liberation, self-determination, resistance, revolution or protection and what that right might look like, but also *who* externally might be allowed to act in solidarity with that right? These uncertainties — the persisting tensions — sparked the research for this study.

This thesis explores how instances of foreign fighting have been responded to in international law throughout the twentieth century to today. It recognises that while present attention is understandably focused first and foremost on so-called foreign terrorist fighters, foreign fighting has been responded to within different dominant legal framings in different moments and settings. Those framings have impacted on how international law on foreign fighting has been articulated at different times. As this thesis will argue, because foreign fighters are not only foreign terrorist fighters, thinking solely within the present counterterrorism framing of the issue either risks over-extension or reaches limits regarding any broader understanding of international law related to foreign fighting.

¹⁹ Forcese and Mamikon (n 11) 344.

²⁰ Tom Ruys, ‘Of Arms, Funding and “Non-Lethal Assistance”: Issues Surrounding Third-State Intervention in the Syrian Civil War’ (2014) 13(1) *Chinese Journal of International Law* 13, 49.

²¹ Full title: Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination. See Chapter Four, section 3.3.

²² Human Rights Council, ‘Mercenarism and Private Military and Security Companies’, UN Doc HRC/NONE/2018/40 (April 2018) 16 <<https://www.ohchr.org/Documents/Issues/Mercenaries/WG/MercenarismandPrivateMilitarySecurityCompanies.pdf>>.

By paying careful attention to the transforming legal framings of the issue in different times and settings, the purpose is not to seek a resolution for the observed tension or ‘vacuum’ in international legal rules surrounding foreign fighting. I do not seek to identify the precise parameters of international legal duties on states, nor to suggest whether foreign fighting should be prohibited to a greater or lesser extent. Rather, the purpose became to understand better the persisting tensions and to pay attention to how the legal framings have operated to pin down those tensions in different moments of international legal regulation. This provides some insight into the operation and stakes of today’s dominant counterterrorism framing of foreign fighting; its claims and powers but also its limits.

My project therefore developed into a consideration of a more complex question: *what might a study of the alternative framings and international legal responses surrounding foreign fighting appearing throughout the twentieth century to today reveal about the present counterterrorism framing of foreign fighter issues?*

In terms of political stance, then, this study hopes to present a counterpoint to the narrower and rushed “thrill” of counterterrorism approaches. It does so by making visible otherwise hidden questions and conceptual matters at the heart of international legal debate and practice that have arisen in different moments concerning the private taking up of arms across borders. This offers a broader view of concerns and values *beyond counterterrorism* affecting determinations about foreign fighting in different times and settings.

2. Approach Taken in the Study

In the current dominant counterterrorism framing, terrorism is imagined as a universal problem, and foreign (terrorist) fighting one manifestation of that global issue.²³ In order to pay attention to this framing of the issue, this project seeks critical distance by stepping back and “flipping” the object of study. It therefore takes the concept of *foreign fighting* as its main object of interest. Terrorist activity then becomes one manifestation of foreign fighting among others. Suddenly, the scope of the collectivity of interest looks different; its definition encompassing greater instances of foreign fighting than only foreign terrorist fighting. Relatedly, the category’s length of life and, therefore, the historical landscape look different. This change in view helps make visible the definitional and conceptual treatment of broader instances of foreign fighting in international legal argument across time, setting and legal framing.

²³ Andrea de Guttry, ‘The Role Played by the UN in Countering the Phenomenon of Foreign Terrorist Fighters’ in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 259, 260; John Ip, ‘Reconceptualising the Legal Response to Foreign Fighters’ [2019] *International & Comparative Law Quarterly* 1, 17–18.

One problem, though, with this broader object of study is that there is no definition of *foreign fighting* or *foreign fighter* in international law. There are only definitions of the *mercenary* and the *foreign terrorist fighter*.²⁴ Based on the standard meaning of the two individual words, any person fighting in an armed conflict abroad, or with a force from another country, could be described as a *foreign fighter*: United States' forces in Afghanistan, Lebanese Hezbollah forces fighting in Syria, members of the French Foreign Legion, expatriate staff of private military and security companies (PMSCs) or UN peacekeepers who directly participate in hostilities and so forth. This is not, however, the special meaning that the term has come to encompass since the late 1980s, and entering common usage in the last decade during the war in Syria.²⁵ This special meaning focuses on foreigners who join an organised armed group already based in the destination state, and not organised armed groups or forces based in one state that intervene in another state.²⁶ Similarly, it focuses on individual determinations to fight abroad, and not the sending of "volunteer" proxy forces by states.

While these aspects represent some common understanding of what constitutes foreign fighting, its exact features and contours remain contested.²⁷ In turn, that becomes important for the application of the law. Demonstrating and exploring the tensions and contingencies inherent in determinations surrounding foreign fighting is precisely the aim of this thesis.

²⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 47(2) ('AP I'); *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, opened for signature 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001) art 1 ('UN Mercenary Convention'); SC Res 2178, UN Doc S/RES/2178 (24 September 2014) preamble ('Resolution 2178').

²⁵ *Foreign fighter* in its current sense was reportedly first used in 1988 media regarding foreign members of the Afghan mujahidin, then sparingly until 2001 after which it became more common: David Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford University Press, 2013) 216–7.

²⁶ They do not become a party to the conflict but join an existing party: Daniel Byman, *Road Warriors: Foreign Fighters in the Armies of Jihad* (Oxford University Press, 2019) 10; Roy Emerson Curtis, 'The Law of Hostile Military Expeditions as Applied by the United States' [1914] *American Journal of International Law* 1, 8–9.

²⁷ Proposed definitions of *foreign fighter* in scholarship centre on questions of citizenship, residence and kinship, ideological including religious motivations, military aims, the lack of overt state sponsorship, and the method and location of fighting. See, eg, Krähenmann, 'Geneva Academy Briefing' (n 10) 6; Andrea de Guttry, Francesca Capone and Christophe Paulussen, 'Introduction' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 1, 2; Malet, *Foreign Fighters* (n 25) 9; Cerwyn Moore and Paul Tumelty, 'Foreign Fighters and the Case of Chechnya: A Critical Assessment' (2008) 31(5) *Studies in Conflict & Terrorism* 412, 412. See also the discussion of definitions in Veronika Bílková, 'Foreign Terrorist Fighters and International Law' (2018) 6(1) *Groningen Journal of International Law* 1, 2–5.

Before going on to describe my method, I want to set out two key ideas underlining how I approach these dilemmas and how this thesis should be read. These theoretical considerations have come to influence and support my thinking about international law, on this topic and more generally. They have helped me to understand the persisting tensions that I could observe regarding foreign fighting, and have contributed to my consideration of the limitations surrounding my choices of definition, periodicity and doctrinal focus for this project outlined in the following sub-sections.

2.1 Theoretical Considerations

2.1.1 History, Definition and the Concept of Foreign Fighting

The first observation was that international legal works reiterated — typically in an opening sentence — that foreign fighting was ‘not a new phenomenon’;²⁸ that ‘terrorists ... guerrilleros and mercenaries ... [e]ach of these groups has existed since time immemorial’.²⁹ Such statements nod to a longer past of a broader conceptual whole, and to certain continuities between different manifestations of foreign fighting. Historical examples are also regularly retrieved to justify or vilify instances of foreign fighting today — especially the International Brigades during the Spanish Civil War.³⁰

In practice, though, as certain new manifestations of what we might today call foreign fighting appeared and became policy concerns for states — the volunteer, but particularly the mercenary and the foreign terrorist fighter — they have been responded to based on their features, including the perceived threat and the level of state toleration or facilitation, *and*, as argued in this thesis, the priority concerns arising within the dominant framing of the moment in question.³¹ That is, rather than foreign fighting being understood as a single, whole phenomenon, various manifestations have been distinguished, responded to in international law as new policy issues, and described with different labels — filibusters, volunteers, international brigaders, mercenaries, freedom fighters, mujahidin, foreign terrorist

²⁸ Krähenmann, ‘Geneva Academy Briefing’ (n 10) 3; Elke Krahmann, *States, Citizens and the Privatisation of Security* (Cambridge University Press, 2010) 2; de Guttery, Capone and Paulussen (n 27) 1; Bílková (n 27) 1; Ben Emmerson, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc A/71/384 (13 September 2016) 18 [42].

²⁹ Georg Schwarzenberger, ‘Terrorists, Hijackers, Guerrilleros and Mercenaries’ (1971) 24 *Current Legal Problems* 257, 257.

³⁰ See Chapter Three, text accompanying nn 8–12.

³¹ See also Malet, *Foreign Fighters* (n 25) 8–9.

fighters.³² The resulting categories of foreign fighter defined in international law have been perceived as requiring specific technical expertise and, from the twentieth century at least, a specialised institutional home, based on their features and framing. This has buoyed the understanding of their separate characters.

The fact that legal scholarship tends to work with distinguished categories of foreign fighting is partly a matter of disciplinary practice since distinguishing and working with legally-defined categories is part of standard legal practice; partly a matter of salience — an interest in, and pragmatic need to deal with the here and now; partly a matter of resources and workable parameters of study. Partly, it is also because grappling with the history of a concept proves difficult if that concept's exact contours are unsettled. Not only does a complicated relationship evolve between generally-applicable norms and new definitions pinned down in a specific time and setting, but the histories of a phenomenon take on different shapes depending on one's definitional focus. New categorisations and labels can also time-travel in as much as, once adopted, new terms such as *foreign terrorist fighter* are then applied to earlier examples of foreign fighting.³³

It seems to prove challenging to hold both the distinguished policy issue and the broader concept and history in one's hands at once. Focusing on the present policy priority works to obscure other examples, including historical examples. Yet, trying to hold the whole becomes unwieldy because of the multiple variants involved.³⁴ Indeed, in international legal scholarship, histories of this 'not new phenomenon' have rarely been grappled with in depth, at least regarding the broader category of the foreign fighter as opposed to distinguished categories such as mercenarism or terrorism. For example, an historical view might feature only in an opening chapter of a volume.³⁵

³² Nir Arieli, 'Foreign Fighters and War Volunteers: Between Myth and Reality' (2020) 27(1–2) *European Review of History* 54, 55 ('Myth and Reality').

³³ See, eg, 'Foreign Terrorist Fighters Manual for Judicial Training Institutes South-Eastern Europe' (United Nations Office on Drugs and Crime, 2017) 3 <https://www.unodc.org/pdf/terrorism/Foreign_Terrorist_Fighters_Handbook/EN_Foreign_Terrorist_Fighters_Ebook.pdf>: '[Foreign Terrorist Fighters] participated in the Spanish civil war, the war in Afghanistan following the 1989 Soviet invasion, the war in Bosnia and Herzegovina in the 1990s' (citation omitted). According to NAM Rodger, the label 'privateer' is likewise used anachronistically in many histories: 'The Law and Language of Private Naval Warfare', (2014) 100(1) *The Mariner's Mirror* 5, 12.

³⁴ Ulrich Petersohn, 'Reframing the Anti-Mercenary Norm: Private Military and Security Companies and Mercenarism' (2014) 69(4) *International Journal* 475, 480: 'All [mercenary definitions] suffer from serious shortfalls; most notably, they cannot account for the different historical shapes of mercenarism' (citation omitted); Marcello Flores, 'Foreign Fighters Involvement in National and International Wars: A Historical Survey' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 27, abstract: 'The term "foreign fighters" is difficult to define in a straightforward and exhaustive way, since it is a new phenomenon that has evolved in recent years'.

³⁵ See, eg, de Guttry, Capone and Paulussen (n 10). See further section 4 below.

I read this, on the one hand, as signifying that international lawyers understand the concern that some people hold about the possible ills that foreign fighters pose as a broader category. On the other hand, it represents the difficulty in pinning down an all-encompassing rule or concept, given the different transformed manifestations and related treatment of foreign fighting in practice, and the alternative arguments concerning their regulation that this thesis explores. It leaves a reference to history and conceptual completeness, to the notion of a universal rule that could be uncovered or worked out, married with a pragmatic and political need — perhaps even a coping strategy — of distinguishing manifestations of foreign fighting and the threats they may pose in discrete times and settings; to respond to present policy priorities; to attempt to clarify smaller chunks of the doctrine where possible.

This reflects debate in the wider literature as to whether instances of foreign fighting, particularly mercenarism, should be considered old or new; their transformations a continuation or a rupture. For some, foreign and irregular participation represents a historical constant in warfare,³⁶ over which greater democratic control was exerted over time as the state-based international order developed, the state claimed the monopoly on the legitimate use of collective force,³⁷ and national citizen armies became the norm during the nineteenth century.³⁸ A different understanding perceives those changes and exertions of control as having made possible the category in question. There, the concept of the foreign fighter is inherently tied to the modern state-based international legal order, and to how it regulates foreignness and non-stateness/irregularity. As such, earlier practices, even if they share some common elements, posed different policy issues in their own time and were subject to different norms — often not considered unlawful.³⁹ In wider scholarship on armed conflict, we

³⁶ Discussing scholarship such as that offered by Sarah Percy on a norm against mercenaries, Malte Riemann, “‘As Old as War Itself’? Historicizing the Universal Mercenary” [2020] *Journal of Global Security Studies* 1, 1.

³⁷ As notably articulated by Weber in his 1919 speech published as ‘Politics as a Vocation’: Max Weber, *From Max Weber: Essays in Sociology*, trs & eds Hans Gerth and Charles Wright Mills (Oxford University Press, 1946), 77.

³⁸ There are competing explanations for these shifts. See, eg, Samuel E. Finer, ‘State- and Nation-Building in Europe: The Role of the Military’ in Charles Tilly (ed), *The Formation of National States in Western Europe* (Princeton University Press, 1975) 84, 94–102, 117, 155ff; Krahmann (n 28) 2, 18–19, 21ff; Sarah V. Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007) 94ff; Janice E. Thomson, ‘State Practices, International Norms, and the Decline of Mercenarism’ (1990) 34(1) *International Studies Quarterly* 23 (‘State Practices’); Deborah Avant, ‘From Mercenary to Citizen Armies: Explaining Change in the Practice of War’ (2000) 54(1) *International Organization* 41; Sibylle Scheipers, *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford University Press, 2015) 5–19, 33ff.

³⁹ Riemann (n 36); Aaron Ettinger, ‘The Mercenary Moniker: Condemnations, Contradictions and the Politics of Definition’ (2014) 45(2) *Security Dialogue* 174. More generally regarding private force, Benjamin de Carvalho, ‘Private Force and the Making of States, c. 1100–1500’ in Rita Abrahamsen and Anna Leander (eds), *Routledge Handbook of Private Security Studies* (Routledge, 2015) 11, 11. On

see parallel debates regarding the features of so-called old and new wars,⁴⁰ whether today's terrorism is a new reality or an old threat,⁴¹ and whether PMSCs are a continued form of mercenarism or something new and different.⁴²

Like international law more generally, the normative approach to understanding how states claimed the monopoly of force has been critiqued as Eurocentric, overly juridical and not reflecting actual practice.⁴³ The reality seems to be that although, in legal thought, the waging of war eventually became a public rather than a private concern — the 'prerogative of states'⁴⁴ — and a distinction developed between privileged combatants and non-privileged but protected civilians,⁴⁵ states have shifted between different models of democratic control over military force in the face of changing situations, threats and norms. This reflects a 'historical cycle of critique and transformation of the state monopoly on collective violence'.⁴⁶ Following Patricia Owens, the two notions of public and private are not 'solidly fixed' but are 'made' by states. 'The identity of these spheres shifts and changes as a way of organizing power.'⁴⁷ In legal argumentation, too, whether an issue is old or new, and already covered by existing law or not, can be manipulated to suit the desired discourse.⁴⁸

lawfulness of earlier practices, James Fitzjames Stephen, *A History of the Criminal Law of England*, vol III (Macmillan, 1883) 257.

⁴⁰ Stathis N Kalyvas, "New" and "Old" Civil Wars: A Valid Distinction? (2002) 54(1) *World Politics* 99 discussing works such as Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Stanford University Press, 1999).

⁴¹ See, eg, Dagmar Rychnovská, 'Securitization and the Power of Threat Framing' (2014) 22(2) *Perspectives* 9, 22ff.

⁴² See, eg, PW Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press, updated ed, 2008) 49: 'The privatised military industry is not just a flashback to historic private military agents. ... it is distinctly representative of the changed global security and business environments'. Cf Samuel Tanner and Massimiliano Mulone, 'Private Security and Armed Conflict: A Case Study of the Scorpions during the Mass Killings in Former Yugoslavia' (2013) 53(1) *British Journal of Criminology* 41, 53–5, disrupting a narrative of PMSCs being 'new mercenaries', and of rupture, by showing continuation even through variation and hybridity in practice. See also Juan Carlos Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1998) 34 *Stanford Journal of International Law* 75.

⁴³ Tarak Barkawi, 'State and Armed Force in International Context' in Alejandro Colás and Bryan Mabee (eds), *Mercenaries, Pirates, Bandits and Empires: Private Violence in Historical Context* (Hurst, 2010) 33; Percy (n 38) 111–19.

⁴⁴ Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Cornell University Press, 2013) 1.

⁴⁵ David Kennedy, *Of War and Law* (Princeton University Press, 2006) 64. See also Thomson, 'State Practices' (n 38) 43–4.

⁴⁶ Krahmann (n 28) 51.

⁴⁷ Patricia Owens, 'Distinctions, Distinctions: "Public" and "Private" Force?' in Alejandro Colás and Bryan Mabee (eds), *Mercenaries, Pirates, Bandits and Empires: Private Violence in Historical Context* (Hurst, 2010) 15, 18. See also Scheipers (n 38) 28, 69, 79–80, 99–102, 143–4, 185–6, 227, describing states' longstanding difficulties to make more precise the legal definition of irregular combatants.

⁴⁸ Describing how, in the negotiation of AP I, existing law on guerrilla warfare was erased and that on civilian protection assumed: Amanda Alexander, 'International Humanitarian Law, Postcolonialism

This means that democratic control over military force and restraining the hostile transnational activities of citizens can be seen not only as being regularly disrespected by states and individual fighters in practice, but as incomplete, ‘intertwined’ and highly contingent in the first place.⁴⁹ Research on the increasing regulation of private participation in warfare in early modern Europe offered by political scientist Janice E Thomson explains how there was never an attempt to abolish non-state violence *per se*. Instead, ‘[e]ach form was delegitimated and eliminated in a different way ... through a sequence of largely unrelated actions directed at the individual actors’:⁵⁰

each practice was politicised in a very specific set of geopolitical circumstances when a particular state saw its interests threatened by another state’s citizens’ or subjects’ engaging in that practice. The removal of violence from the international market was the unintended consequence of a number of unrelated instances of strategic interaction.⁵¹

The twentieth century moments of development of international law regarding individual foreign fighters examined in Chapters Three, Four and Five of this thesis demonstrate how this piecemeal and responsive approach has continued; how the threats posed and legal interests affected by foreign fighting in different times and political settings — at least those considered significant enough for international legal action — have tended to be uniquely framed, the responses reactionary, despite a constant tug of a historical conceptual whole.⁵² In one way, then, foreign fighter mobilisations set the agenda for these responses.⁵³ At the same time, and including through international legal argumentation depicting a transformed phenomenon as old or new, states imbue with power their claim on the monopoly of force by not always insisting upon it.⁵⁴

and the 1977 Geneva Protocol I’ (2016) 17(1) *Melbourne Journal of International Law* 15, 22–4, 28–9, 36.

⁴⁹ de Carvalho (n 39) 18.

⁵⁰ Janice E Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press, 1994) 143 (‘*Mercenaries*’).

⁵¹ Ibid 20. See also Thomson, ‘State Practices’ (n 38) 40. The prohibition of privateering as a specific kind of previously authorised private involvement in hostilities provides one example: *Declaration Respecting Maritime Law*, 115 CTS 1 (signed and entered into force 16 April 1856) (‘*Paris Declaration*’). Privateering vessels manned by private individuals obtained authorisation from state powers (including foreign powers) to attack and plunder usually commercial ships belonging to subjects of an enemy state, and share the proceeds with the commissioning state. See generally Thomson, *Mercenaries* (n 50) 21ff, 140; JT Abdy (ed), *Kent’s Commentary on International Law* (Deighton Bell, 2nd ed, 1878) 225–30, 243–5.

⁵² Similarly, on international counterterrorism treaties being built up sectorially, Kimberley N Trapp, ‘The Potentialities and Limitations of Reactive Law Making: A Case Study in International Terrorism Suppression’ [2016] (3) *University of New South Wales Law Journal* 1191.

⁵³ Ibid 1191.

⁵⁴ Elizabeth Roberts-Pedersen, ‘Foreign Fighters Test the State’s Monopoly on Violence’, *The Conversation* (online, 24 November 2014) <<https://theconversation.com/foreign-fighters-test-the->

2.1.2 Persisting Tensions in International Law

The second theoretical influence on my approach, related to the contested conceptual definitions of foreign fighting, is the associated question of how parts of the doctrine that appear vague and unsettled or even absent should be understood.

As mentioned above, despite the long history of foreign volunteering in armed conflict — or, more accurately, precisely because of it — the exact contours of international legal obligations surrounding foreign fighting have not been squared away today. International legal norms such as non-intervention, the non-toleration of unlawful harm to other states, and self-determination, as well as political norms such as the state's claimed monopoly on force, offer guidance, but these rules, although fundamental, can be elusive and 'uncertain in scope',⁵⁵ or 'too general to offer clear answers to specific problems'.⁵⁶ As this thesis will discuss, the adopted definitions of the mercenary and the foreign terrorist fighter are likewise critiqued as being unclear or unworkable. States are anyway traditionally loath to deal in detail with issues related to the possible legitimacy of the use of force by non-state actors.⁵⁷ International legal instruments are described as being neutral or ambiguous on questions relevant to non-state resort to force, including certain instances of foreign fighting, for example, neither authorising nor clearly prohibiting violence in resistance or revolution, but leaving it to be regulated by domestic law.⁵⁸

An orthodox reading of this silence or neutral position in international law is that it is permissive; alternatively, at least not prohibitive. If there is no identifiable primary rule in international law regarding a hard case of foreign fighting, there is no legal obligation of prevention on states regarding these exceptional cases.⁵⁹ There is no

states-monopoly-on-violence-34305>; Nicole Sunday Grove, 'Weapons of Mass Participation: Social Media, Violence Entrepreneurs, and the Politics of Crowdfunding for War' [2017] *European Journal of International Relations* 1, 9.

⁵⁵ Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention' (2009) 22(2) *Leiden Journal of International Law* 345, 380.

⁵⁶ *Ibid* 352.

⁵⁷ Frédéric Mégret, 'Causes Worth Fighting For: Is There A Non-State Jus Ad Bellum?' 171, 172: 'one of the last taboos of international legal thinking'.

⁵⁸ Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) 82–9; Pål Wrangé, 'Does Who Matter? Legal Authority and the Use of Military Violence' (2017) 31(2) *Ethics & International Affairs* 191, 191; Jan Arno Hessbrügge, *Human Rights and Personal Self-Defense in International Law* (Oxford University Press, 2017) 316, 338, 344; Shannonbrooke Murphy, 'The Right to Resist Reconsidered' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar, 2012) 91, 95; Chiara Redaelli, 'The Right to Rebel against Violations of Human Rights: A New Role for the Responsibility to Protect?' (2016) 19(1) *Palestine Yearbook of International Law* 8, 12, 18ff.

⁵⁹ Jörg Kammerhofer, 'Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice' (2010) 80(1) *British Yearbook of International Law* 333, 335: "If no norm can be found to obligate the respondent ... the prosecutor's case ... fails";

tension; no *ill* of concern to the international level. There may only be a gap in the proscription of certain conduct, and some cases that fall into existing rules and some that do not, or perhaps *not yet*, as we wait for international law to further develop and refine the rules.⁶⁰

In contrast, this thesis approaches the lack of clarity regarding possible prevention duties surrounding certain exceptional or hard cases of foreign fighting, together with the juridical practice of distinguishing instances of foreign fighting described above, as reflecting the inherent structural indeterminacy of international legal argument, as described in critical legal scholarship.⁶¹ This follows Helen Quane who highlights ‘the difficulty in separating out issues relating to silence from broader issues concerning the character, structure and formation of international law’.⁶² What I am proposing, therefore, is that the more positivist approach pays insufficient attention to the tensions observable from the possible positions surrounding regarding foreign fighting, and their nuanced interlacing in legal argument.

Rather than examples of progressive uncovering or realisation of the law, or something that might be able to be settled in future, this thesis reads the instances of international legal regulation selected for this study as moments of argumentation. They are moments of explicit and formal decision-making in which a position was taken to define and regulate a particular manifestation of foreign fighting, or actor of concern, within a predominant framing. International law develops and unfolds, yes, but its articulations in any moment represent a subjective determination of the law; an argument made in a specific time and setting; in the particular. As Vidya Kumar has described regarding the concept of revolution in international law, but equally

Lauterpacht (n 10) 126. Although contested: Kammerhofer at 337, 341–2, 350–2; Helen Quane, ‘Silence in International Law’ (2014) 84(1) *British Yearbook of International Law* 240, 245–6, 253ff.

⁶⁰ Redaelli (n 58) 12 n 8, quoting *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 480–1 [9] (Judge Simma): ‘The neutrality of international law on a certain point simply suggests that there are areas where international law has not yet come to regulate, or indeed, will never come to regulate’. See also Quane (n 59) 244; Kammerhofer (n 59) 353.

⁶¹ Reflecting that laws seeking to govern the liberal international legal order operate simultaneously as claiming authority from the consent of states, or from what states do, as well as from fundamental but more abstract values such as fairness or humanity. See David Kennedy, ‘Theses about International Law Discourse’ (1980) 23 *German Yearbook of International Law* 353; David Kennedy, *International Legal Structures* (Nomos Verlagsgesellschaft, 1987); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, reissue with a new epilogue, 2005); Hilary Charlesworth, ‘Law-Making and Sources’ in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 187, 187, 190, 200.

⁶² Quane (n 59) 270.

applicable to foreign fighting, the question is ‘irresolvable outside the ostensible certainty of a particular geopolitical-temporal frame’.⁶³

This is not to suggest that international law will always and only be a tool of power instrumentalised by states — it *can* be that, but it can also hold space for resistance⁶⁴ and, as explored in this study, perhaps even transnational solidarity with resistance. In simple terms, international law always depends, and since it always depends, observational standpoint matters. It becomes a site for contestation. I will return to discuss the interplay of international law and politics in Chapter Two.

2.1.3 Framing and Transformations

In summary, combining these two ideas, foreign fighting becomes a ‘long-standing facet of war that has manifested itself in different places and at different times’.⁶⁵ It is both old and constantly renewed as a particular *transformed* manifestation of a larger concept. The universally-applicable rules of international law are pinned down only in a particular time and setting.⁶⁶ The question becomes what to make of these transformations;⁶⁷ what this means for the international legal response; and how international lawyers might grapple with the conflicting ideas of a simultaneous broader conceptual whole and a practice of ongoing distinguishing, clarification or new development of the law.

The focus on alternative framings over time in this thesis provides some kind of juncture between these tensions; making the politics of legal determinations more visible as they change but also allowing one to see persisting tensions that carry over across legal debates. International law becomes something with a background that cannot easily be put aside, even regarding an instance of foreign fighting perceived as transformed, and at once something malleable in different times and settings. International legal arguments hold aspects of both the universal and the particular; of stasis and of change; the old and the new.

This means that while this study is shaped by its selected object of study, periodicity and doctrinal focus, part of its method includes the recognition that ‘the choice of what

⁶³ Vidya Kumar, ‘Revolutionaries’ in Jean D’Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2019) 773, 791.

⁶⁴ Martti Koskenniemi, *The Politics of International Law* (Hart, 2011) 265.

⁶⁵ Nir Arielli, *From Byron to bin Laden: A History of Foreign War Volunteers* (Harvard University Press, 2018) 10.

⁶⁶ Reflecting on the universal and the particular related to Koskenniemi’s scholarship, Jeffrey L Dunoff, ‘From Interdisciplinarity to Counterdisciplinarity: Is There Madness in Martti’s Method?’ (2013) 27(2) *Temple International and Comparative Law Journal* 309.

⁶⁷ See also Scheipers (n 38) 228.

to include in such a description is always value-laden'.⁶⁸ Those choices present a certain understanding of the meaning and significance of foreign fighting. The choice of label and definition 'operates to legitimate or discredit various forms of conflict'.⁶⁹ At the same time, studies need to be able to discuss mutually-understandable concepts and require reasonable limits of scope. It therefore becomes both necessary and fraught to attempt to define the collectivities with which one works. With that acknowledgement, I turn now to these methodological determinations.

2.2 The Concept of Foreign Fighting

Since the term *foreign fighter* entered common usage during a period in which the most noticeable instances of foreign fighting involved Muslim volunteers, and because of the present counterterrorism framing of the issue, *foreign fighter* is frequently used informally as shorthand to refer to volunteer fighters with Islamic extremist groups only — the category given most attention in literature and practice currently. Most commonly in scholarship today, however, the term denotes foreign volunteer fighters in non-state armed groups more generally.⁷⁰ In this thesis, I use the term *foreign fighter* in this latter sense (and interchangeably *foreign volunteer fighter*, although I acknowledge that this older term *volunteer* can be loaded).⁷¹

This understanding of foreign fighting includes individuals joining listed terrorist groups but also those joining other organised non-state armed groups involved in armed conflict. I limit this study to persons who directly participate in hostilities, i.e. to fighters, and not to other forms of participation such as providing training, or financial or medical support.⁷² In contrast to some scholarly definitions of foreign

⁶⁸ Anne Orford, 'In Praise of Description' (2012) 25(03) *Leiden Journal of International Law* 609, 624–5.

⁶⁹ Elizabeth Roberts, *'Freedom, Faction, Fame and Blood': British Soldiers of Conscience in Greece, Spain and Finland* (Sussex Academic Press, 2010) 3. See also Ettinger (n 39) 175, 10, 182; Christine G Krüger and Sonja Levsen, 'Introduction: Volunteers, War, and the Nation since the French Revolution' in Christine G Krüger and Sonja Levsen (eds), *War Volunteering in Modern Times: From the French Revolution to the Second World War* (Palgrave Macmillan, 2011) 1, 9 and their analysis of the changing encyclopedia descriptions of the volunteer and the mercenary.

⁷⁰ See, eg, Krähenmann, 'Geneva Academy Briefing' (n 10) 6; Malet, *Foreign Fighters* (n 25) 9 (although referring to insurgencies in his definition of foreign fighting, Malet's case examples reflect foreign fighting in non-state armed groups).

⁷¹ 'Volunteer' needs problematicising like other definitional elements of foreign fighting since the reality of voluntary determinations might involve multiple coercive factors: Arielli, *From Byron to bin Laden* (n 65) 5–8; Nir Arielli and Bruce Collins, 'Introduction: Transnational Military Service since the Eighteenth Century' in Nir Arielli and Bruce Collins (eds), *Transnational Soldiers: Foreign Military Enlistment in the Modern Era* (Palgrave MacMillan, 2013) 1, 7–8. Regarding totalitarian states, W Friedmann, 'The Growth of State Control over the Individual, and Its Effect upon the Rules of International State Responsibility' (1938) 19 *British Yearbook of International Law* 118, 141.

⁷² I note that the Security Council's definition of foreign terrorist fighter includes persons travelling for terrorism training, and participation outside of armed conflict situations. Mercenaries, similarly, operate both within and outside armed conflict situations according to the UN Mercenary Convention. Thus, technically, one could be a foreign terrorist fighter and/or a mercenary without being a foreign

fighting, I include volunteers fighting in support of a government but not forming part of its armed or security forces.⁷³ Hence, *non-state* refers to armed groups outside of the state armed or security forces, even if fighting alongside them.

Scholarship and practice discussed in this thesis distinguishes mercenaries as a different phenomenon from foreign fighting, based largely on the individual's primary financial motivation for fighting.⁷⁴ In this light, foreign fighters, at least certain foreign fighters, are seen as 'soldiers of conscience' as a counterpoint to 'soldiers of fortune'.⁷⁵ While the distinction based on primary financial motivation in the legal definition of the mercenary is clear, my intuition was that the very fact of the separate categorisation of the mercenary entailed a significant part of the story of the international legal response to foreign fighting. The literature recognises the difficulty in establishing an individual's motivation, especially given the mixed push, pull and personal factors affecting decisions to join a foreign armed struggle.⁷⁶ Importantly, then, one novelty of this study is my choice not to distinguish categories based on motivation or payment of the fighters. It therefore includes mercenaries who directly participate in hostilities within the concept of foreign fighters. It is necessary to include mercenaries because they are *foreign, volunteer* (that is, non-conscripted even if remunerated) *fighters*. The international legal response to mercenaries proves to have a significant ongoing impact on legal argumentation surrounding foreign fighting.

By taking into account this broader range of foreign fighters, including mercenaries, I am not suggesting that different instances of foreign fighting necessarily pose the same issues or should be responded to identically; nor that the entire spectrum of private

fighter as I understand them here. See Resolution 2178 (n 24) preamble; *UN Mercenary Convention* (n 24), art 1(2). See also Forcese and Mamikon (n 11) 314; Bílková (n 27) 5.

⁷³ Some works broaden the collectivity being studied further to 'transnational soldiers' or 'volunteers', ie, including individuals serving with foreign state armed forces. See, eg, Arielli, *From Byron to bin Laden* (n 65) 4; de Guttry, Capone and Paulussen (n 27) 2; Arielli and Collins (n 71); Krüger and Levensen (n 69).

⁷⁴ See, eg, Moore and Tumelty (n 27) 412; Krähenmann, 'Geneva Academy Briefing' (n 10) 16; Simon Chesterman, 'Dogs of War or Jackals of Terror: Foreign Fighters and Mercenaries in International Law' (2016) 18(5) *International Community Law Review* 389, 390; Emanuele Sommario, 'The Status of Foreign Fighters under International Humanitarian Law' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 141, 156–7. Exceptions include Chris Holmsted Larsen, 'Danish Foreign Fighters: Past and Present Patterns' in Kacper Rękawek (ed), *Not Only Syria? The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) 12, 13. See also Bílková (n 27) 3, 5, discussing the motivation criterion; Ettinger (n 39) 175, arguing that the properties of mercenaries are analytically indistinguishable from other combatants. See Chapter Four, section 4.3.2, regarding the UN Working Group on Mercenaries' comparison of mercenaries and foreign fighters.

⁷⁵ Roberts (n 69) 3.

⁷⁶ See Chapter Four, section 4.2; Chapter Six, section 3.2 'Motivations and Justness of Cause'.

force could or should be regulated as a single whole.⁷⁷ As discussed above, the point is not whether I have selected the correct divisions in this study, but to explore how those divisions have been deployed, and their contingent nature.⁷⁸ This approach allows me to pay attention to the alternative legal framings of the issue, and how various sub-categories may have arisen — the volunteer, the mercenary, the freedom fighter, the foreign terrorist fighter — without being bound by them.

2.3 Selected Moments and Sources

Focusing on the broader concept of the foreign fighter allows this thesis to approach the research question by examining three selected key “moments” in which an international legal response explicitly related to foreign fighting was adopted:

- (1) the rule on transnational volunteers in the 1907 *Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land* (Fifth Hague Convention),⁷⁹ and the response to foreign volunteer fighters during the Spanish Civil War (1936–1939);
- (2) the definition of mercenary in the 1977 *First Additional Protocol to the Geneva Conventions 1949* (AP I)⁸⁰ and the criminalisation of mercenarism in the UN’s 1989 *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries* (UN Mercenary Convention);⁸¹ and
- (3) the definition of foreign terrorist fighter in Security Council Resolution 2178 (2014) and associated demands placed on states under Chapter VII regarding their diligent prevention, adopted at the height of the hostilities of the Islamic State group in the conflicts in Syria and Iraq.⁸²

The archive for examining these moments consists of legal debate (*travaux préparatoires* and diplomatic exchanges, parliamentary debate and reports on the national level where relevant), the resulting international legal instruments, and institutional history/treatment of these laws, together with related commentary and scholarship. I discuss further in Chapter Two how I have approached these sources in terms of thinking about history and international law.

⁷⁷ See also Sarah Percy, ‘Regulating the Private Security Industry: A Story of Regulating the Last War’ (2012) 94(887) *International Review of the Red Cross* 941, 955 n 54.

⁷⁸ Alain Pottage, ‘Introduction: The Fabrication of Persons and Things’ in Alain Pottage and Martha Mundy (eds), *Law, Anthropology, and the Constitution of the Social* (Cambridge University Press, 2004) 1, 3.

⁷⁹ Opened for signature 18 October 1907, USTS 540, 2 AJIL Supp. 117 (entered into force 26 January 1910) art 6 (‘*Fifth Hague Convention*’).

⁸⁰ AP I (n 24), art 47(2).

⁸¹ UN Mercenary Convention (n 24).

⁸² Resolution 2178 (n 24).

Regarding the experiences of the foreign fighters themselves, and in order to research contemporary examples, I also rely upon memoirs, interviews in the press, and social media sources. The reliability of such sources requires some interrogation, but they offer valuable perspectives not yet part of academic analysis at the time of writing, including expressions of popular sentiment surrounding foreign fighting, and information concerning interactions between state agencies/actors and foreign fighters, which would otherwise be rarely divulged by the relevant authorities.⁸³

This research is therefore based on desk study, but is informed by more than ten years of professional experience in the humanitarian sector in situations of armed conflict from 2005 (Ethiopia, Democratic Republic of Congo, Chad, Sri Lanka, Afghanistan, Yemen, Syria, Israel and Palestine) and involving participation in ICRC visits to detained persons in many of those contexts, including to suspected foreign fighters. This experience supports in particular the appraisal of the counterterrorism framing as it relates to armed conflict.

2.4 Doctrinal Focus

There are multiple ways one could approach international legal issues related to foreign fighting depending on one's area of interest.⁸⁴ Since there is no definition of *foreign fighting* and no stand-alone body of *foreign fighter law*, a range of generally-applicable rules become relevant, relating partly to the conduct of the individual fighters and partly to the conduct of states: non-intervention, respect for human rights and international humanitarian law (IHL), prevention of terrorism and so forth. Those general norms underlie more specific rules such as those imposed by the Security Council to regulate specific country situations,⁸⁵ and adopted to regulate defined sub-categories of fighters more permanently — the mercenary and the foreign terrorist fighter.

My own area of practice has been IHL, but with this study, I did not want to be only 're-arranging furniture in rooms [I'd] already been in' but felt I needed to 'peer behind' shut doors to other rooms 'to see the bleak unspeakable stuff'.⁸⁶ For me, rather than thinking about foreign fighters under IHL, this meant thinking about the broader tensions I could observe, namely, surrounding the legal relations of third

⁸³ Discussing mercenary memoirs but applicable to today's foreign fighting memoirs: Klaas Voß, 'Die Hunde des (Kalten) Krieges: Söldnermemoiren und -zeitschriften als historische Quellen (1960 bis 1990)' [The Dogs of (the Cold) War: Mercenary Memoirs and Magazines as Historical Sources (1960 to 1990)] (2014) 11(1) *Studies in Contemporary History* 134, 139–40.

⁸⁴ For an overview of contemporary interest areas, see de Guttery, Capone and Paulussen (n 10).

⁸⁵ See further Chapter Five, section 2.2.

⁸⁶ Anne Lamott, *Bird by Bird* (Anchor, 1995) 198.

states to the parties to an armed conflict, and rules on private intervening in their support.

Thus, the aspect of the doctrine that I most centre my thinking around — although to which I do not restrict myself — surrounds the diligent non-toleration of unlawful harm to other states. This means the possible responsibility of a state for its *omission* to diligently prevent or regulate private actions within its jurisdiction with an unlawful transnational impact, potentially such as travelling abroad to fight in a non-state armed group. I discuss the non-toleration of harm duty more fully in Chapter Four.

I focus on due diligence rather than breaches of a negative duty to abstain from complicit involvement, or undertaking or encouraging unlawful interventions such as aggression. Of course, at times, allegations of direct facilitation or sending of proxies have been made, for example of Russian fighters into eastern Ukraine from 2014,⁸⁷ or of Chinese ‘volunteers’ into Korea in 1950.⁸⁸ The sending of such forces to carry out acts of armed force against another state constitutes intervention or even aggression;⁸⁹ the combatants not necessarily fitting definitions of foreign fighters, due to their conduct being attributable to a state.⁹⁰ In contrast, at times, states have *merely* had policy interests in knowingly tolerating the movement and activities of foreign fighters, for example, to discredit internal opposition, destabilise a neighbour, as a ‘safety-valve’ for troublemakers at home, to aid a struggle elsewhere in order to avoid the fighting reaching their own territory, or to repay a historic

⁸⁷ András Rácz, ‘The Elephant in the Room: Russian Foreign Fighters in Ukraine’ in Kacper Rekawek (ed), *Not Only Syria: The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) 60.

⁸⁸ *Intervention of the Central People’s Government of the People’s Republic of China in Korea*, GA Res 498(V), UN Doc A/RES/498(V) (1 February 1951); Garcia-Mora, *International Responsibility* (n 10) 75–8.

⁸⁹ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN Doc A/RES/2625 (XXV) (24 October 1970) annex: ‘duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state’; *Definition of Aggression*, GA Res 3314 (XXIX), UN Doc A/9631 (14 December 1974) annex (‘*Definition of Aggression*’) art 3(g): ‘The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State’.

⁹⁰ State responsibility arises ‘where State organs supplement their own action by recruiting or instigating private persons or groups who act as “auxiliaries” while remaining outside the official structure of the State’: International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries’ (United Nations, 2008) 47 commentary to art 8 <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. See also Garcia-Mora, *International Responsibility* (n 10) 56–7; R Pisillo-Mazzeschi, ‘Due Diligence and the International Responsibility of States’ (1992) 35 *German Yearbook of International Law* 9, 25–6, 32, 34. Cf Oktay Bingöl, ‘Foreign Fighters and Turkey’s Problem’, (2016) 1(1) *Journal of Security Strategy Political Studies* 47, 51, defining foreign fighters as being ‘in most cases, under the implicit and in exceptional cases explicit control and direction of ... States’.

fighting debt.⁹¹ As this thesis will demonstrate, scenarios in which a state has allegedly supported or facilitated hostile activities of private individuals but does not control, organise or send them, complicates the categorisation of foreign fighting and the resulting state responsibility.⁹²

2.5 Limitations within the Selected Methodology

Some comments regarding the limitations of this study are warranted.

The selected periodicity of the study spans 1907–2014, plus relevant earlier debates and states' experiences of war contributing to negotiations at the Second Hague Peace Conference 1907, and contemporary debate and scholarship following Security Council Resolution 2178 (2014). As mentioned, I have also opted not to focus on individuals enlisting with foreign state armed forces, which I would refer to as *foreign enlistment*. This is because, for the most part, international law today leaves to domestic discretion whether to allow nationals to enlist with foreign armed forces or foreigners to enlist in one's own armed forces.⁹³

I acknowledge, though, that periodicity here is key. Indeed, my argument asserting the value of examining historical debate in alternative framings would support analysis from earlier periods than I consider here, and also broader categories of foreign volunteering. Issues related to the conduct of one sovereign's subjects affecting another sovereign feature in the early canon.⁹⁴ Early domestic law on this

⁹¹ Sandra Krähenmann, 'The Obligation under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 229, 231 ('Obligation'); Daniel L Byman, 'Frustrated Foreign Fighters', *Brookings* (Blog Post, 13 July 2017) <<https://www.brookings.edu/blog/order-from-chaos/2017/07/13/frustrated-foreign-fighters/>>; David Malet, 'Foreign Fighters in the Syrian Civil War' in David Malet and Miriam J Anderson (eds), *Transnational Actors in War and Peace: Militants, Activists, and Corporations in World Politics* (Georgetown University Press, 2017) 124, 133 (citation omitted) ('Syrian Civil War'); Adam Potočník and Miroslav Mareš, 'Georgian Foreign Fighters in the Conflict in Eastern Ukraine, 2014–2017' (2019) 32(2) *Journal of Slavic Military Studies* 159, 164, 173–4; John Mueller, *The Remnants of War* (Cornell University Press, 2004) 25; Avraham Sela and Robert A Fitchette, 'State, Society, and Transnational Networks: The Arab Volunteers in the Afghan War (1984–1990)' in Dan Miodownik and Oren Barak (eds), *Nonstate Actors in Intrastate Conflicts* (University of Pennsylvania Press, 2013) 56, 58, 65–7.

⁹² *Definition of Aggression* (n 89) art 3(g) continues, vaguely: 'or [the State's] substantial involvement therein'. See also Miles Jackson, *Complicity in International Law* (Oxford University Press, 2015) 179ff; Pisillo-Mazzeschi (n 90) 32–3; Corliss (n 18) 202–3.

⁹³ Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2005) 23. Moreover members of state armed forces are excluded from the mercenary definition: *AP I* (n 24) art 47(2)(e); *UN Mercenary Convention* (n 24) art 1(1)(d).

⁹⁴ Often discussing *fault* in state responsibility, but also concerning the significance of *extra-territoriality* to the debates and developing norms. See, eg, regarding legal arguments offered by Grotius, de Vattel, Wolff and Pufendorf, *inter alia*: Garcia-Mora, *International Responsibility* (n 10) ch 2; Corliss (n 18) 183–91; Thomson, *Mercenaries* (n 50) 3–4, 44–5, 57, 107, 149; James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 7–19; Joanna Kulesza, *Due Diligence in International Law* (Brill, 2016) 44–7.

topic is also highly relevant because it exists both independently of and directly in response to international legal obligations, meaning it has informed and been informed by international law.⁹⁵ Highly relevant, for example, could be a consideration of domestic law and practice surrounding allegiance and treason related to foreign enlistment,⁹⁶ domestic, bilateral or regional legal developments related to neutrality or non-toleration of harm during civil strife,⁹⁷ responses to the practice of filibustering in the Americas in the 1840s,⁹⁸ or the abolition of privateering in the 1865 Paris Declaration.⁹⁹ Even the 1837 incident with the ship *Caroline*, remembered chiefly regarding self-defence rules in international law, involved volunteers from the United States supporting armed rebels in Canada.¹⁰⁰

Moreover, as will be discussed below and illustrated in this thesis, cases such as the International Brigades in the Spanish Civil War or the volunteer brigades fighting in support of Kiev's operations against insurgents in Eastern Ukraine blur the lines between state and non-state forces. Excluding foreign enlistment can be problematic, then, given that the volunteering may be authorised by the destination state but not the parent state, and recognition of statehood or a government's legitimacy can change. For example, how should one consider volunteers supporting Jewish forces in the years before Israel's declaration of independence in 1948,¹⁰¹ or the Rhodesian armed

⁹⁵ See, eg, Thomson, 'State Practices' (n 38); Arielli, *From Byron to bin Laden* (n 65) 124–5.

⁹⁶ See, eg, discussion from the late 1800s on the history of English law relating to private interference in foreign hostilities starting from 1605: Stephen (n 39) 257–62.

⁹⁷ On early domestic neutrality laws, and bilateral and regional *bon voisinage* agreements, see also Chapter Three, section 2.1.

⁹⁸ Filibusters left the US to conduct hostilities abroad, most commonly in Latin America, usually with a recruited volunteer force, around the 1840s–1850s. Their expeditions aimed to attack and claim foreign territory for the US, support revolutionaries in the establishment of independent territory (sometimes offered land as payment), or even to claim territory under their own rule. Filibustering expeditions generally ran counter to US domestic neutrality law, but in several cases, the fact the expeditions had been planned with US Administration knowledge and support made attempts to prevent or prosecute a departure fall flat. See Thomson, *Mercenaries* (n 50) 118ff, 124, 127, 130–1, 135ff, 141–4; Charles H Brown, *Agents of Manifest Destiny: The Lives and Times of the Filibusters* (University of North Carolina Press, 1980) 270–3, 410–11, 427–8.

⁹⁹ *Paris Declaration* (n 51). This perhaps more in relation to overt reliance by states on private actors: Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013) 64. See also n 104 below.

¹⁰⁰ Before the attack on *The Caroline* in American territory, British-ruled Canada accused New York state authorities of not preventing the recruitment of American volunteers within its territory: Edward Collins and Martin A Rogoff, 'The Caroline Incident of 1837, the McLeod Affair of 1840–1841, and the Development of International Law' (1990) 20(1) *American Review of Canadian Studies* 81, 82; Craig Forcece, *Destroying the Caroline: The Frontier Raid That Reshaped the Right to War* (Irwin Law, 2018) 205–6.

¹⁰¹ See Malet, *Foreign Fighters* (n 25) 127ff; Nir Arielli, 'When Are Foreign Volunteers Useful? Israel's Transnational Soldiers in the War of 1948 Re-Examined' (2014) 78(2) *Journal of Military History* 703, 704.

forces in the 1960s–1970s,¹⁰² or volunteers with groups that establish long-term de facto territorial control or that come to be recognised by some states?¹⁰³

My focus on articulations of international law in *multilateral settings* recognises such regulation as claiming global significance for states of the foreign fighting issue, and allows a reasonable limit to this study as a matter of workability. I selected the 1907 Fifth Hague Convention as the appropriate starting point, considering it the first instance of codification in a multilateral treaty of a specific customary rule regarding volunteer fighters who were not overtly state-authorised, as privateers were before their prohibition.¹⁰⁴

That focus means that this thesis pays most attention to selected key moments in which a particular manifestation of foreign fighting had proven sufficiently significant either in terms of number, threat or political interest to warrant international legal attention — which I picture as peaks on a seismograph. I pay less attention, then, to *silences*. These are the many moments in which international law did not specifically respond to foreign fighting — the troughs in the seismograph that I am imagining, in which numbers of fighters or the threat posed were perceived, internationally, as less significant. That lack of response is also meaningful, especially perhaps given the at times ‘exaggerated importance’ ascribed to certain instances of foreign fighting whether through vilification or romanticism;¹⁰⁵ political in itself. This project shows that rather than a slow, steady development of international law on this topic, foreign fighting comes in and out of international law’s line of sight in different contexts. I try to take silences into account where possible, although they are admittedly harder to grasp and analyse.

Finally, the interest in state responsibility and duties of diligent non-toleration of harm could be considered ‘bleak unspeakable stuff’ as noted above,¹⁰⁶ because their vagueness and flexibility renders them difficult to apply, and, in practice, on the topic of foreign fighting, formal action would likely only be taken up by states in situations of significant omission by parent or transit states in which arguments of complicity were possible. Destination states have at times made formal *démarches* to

¹⁰² See, eg, on whether or not British and New Zealand volunteer soldiers in Rhodesia were mercenaries, William Jeffrey Cairns Anderson, ‘Shadow Cultures, Shadow Histories. Foreign Military Personnel in Africa 1960–1980’ (MA Thesis, University of Otago, 2011).

¹⁰³ Bílková (n 27) 3.

¹⁰⁴ Although this needs to be problematised since privateering came to pose a problem due to its non-state nature (even if commissioned, the privateer was not usually incorporated into a state’s navy), privateers’ misconduct at sea and personal profit motivations, and the risk of interstate friction where foreign commissions were awarded: Thomson, *Mercenaries* (n 50) 21ff, 140; Abdy (n 51) 225–30, 243–5.

¹⁰⁵ Arielli, ‘Myth and Reality’ (n 32).

¹⁰⁶ Lamott (n 86) 198.

other states, or to international or regional organisations, complaining of the presence of foreigners who have entered illegally to fight, implying that parent and transit states have not taken sufficient action to prevent the movement of foreign fighters from their territories, to repatriate and prosecute, or may even be actively supporting those movements.¹⁰⁷ Despite such occasional diplomatic interventions, state responsibility claims have not recently been relied upon to enforce state behaviour on this topic. The limited reliance or possibility of enforcement does not, in my view, detract from the relevance of these questions to the international legal relations between parent states, parent state nationals, destination states, destination state nationals and the parties to armed conflict, but it offers a taste of realism and a reminder that foreign fighting issues are sometimes predominantly dealt with as a national matter, and worked out in other non-legal ways between states.¹⁰⁸

3. Chapter Outline and Summary of Argument

3.1 Detailed Chapter Outline

This thesis is divided into three parts. Chapters One and Two introduce the project and its methodology, including theoretical influences relied upon to approach the research question. They also set out the background problem underlying its concerns. Chapters Three, Four and Five examine the three selected moments in which a transformed phenomenon of foreign fighting led to an international legal response within a particular framing of the issue in its period. Chapter Six concludes.

Before presenting the three selected moments, **Chapter Two** explains how I understand framing, and how the framing of an issue sets the scope for possible persuasive international legal argumentation, contributing to how the law is pinned down in a concrete case. Chapter Two reiterates the long-documented risks of the counterterrorism framing of security issues. It acknowledges the limits in its scope regarding other types of foreign fighting and describes the powerful effect of the counterterrorism framing on international legal thinking related to foreign fighting. The approach of paying attention to alternative framings over time makes the politics

¹⁰⁷ See, eg, SC Res 1637, UN Doc S/RES/1637 (11 November 2005) annex I ('*Letter Dated 27 October 2005 from the Prime Minister of Iraq Addressed to the President of the Security Council*') para 2; *Identical Letters dated 23 November 2014 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc S/2014/846 (28 November 2014) paras 18–19, 23; Vuk Velebit, 'Serb Fighters in Ukraine Continue to Worry the West', *European Western Balkans* (online, 29 December 2017) <<https://europeanwesternbalkans.com/2017/12/29/serb-fighters-ukraine-continue-worry-west/>>, regarding Ukraine's communication to Australia, United Kingdom and Italy about nationals fighting in Ukraine.

¹⁰⁸ René Provost, 'Introduction' in René Provost (ed), *State Responsibility in International Law* (Ashgate/Dartmouth, 2002) 3, 7: 'state responsibility is normally applied in a non-jurisdictional setting, in the context of unstructured diplomatic relations'.

within and outside of international law more visible. This Chapter therefore also sets out how politics and international law, and history and international law, are being thought about in this project.

Chapter Three presents the first of three moments of international legal regulation of foreign fighting considered in this thesis, namely the response to volunteer fighters in the early twentieth century and the interwar period. It explores the legal arguments of different actors within the predominant framing of neutrality and non-intervention that coloured those responses. Specifically, Chapter Three considers the codification of neutrality rules on individual foreign volunteers adopted in the Fifth Hague Convention 1907, and the agreement to prevent and withdraw foreign volunteer fighters from Spain as an amendment to the European Non-Intervention Agreement during the Spanish Civil War 1936–1939.

Chapter Four describes the different approach that followed in the second moment of explicit regulation, namely the definition of the mercenary in AP I 1977, and the attempted criminalisation of mercenarism in the UN Mercenary Convention 1989, following the decolonisation-era conflicts from the 1960s onwards. Neutrality and abstention were no longer at play. The legal issues were predominantly framed as a matter of the protection of self-determination, and particularly of national liberation; finding their institutional home within the UN's Human Rights Council. This chapter examines how that framing impacted on the legal issues considered pertinent and their argumentation.

Chapter Five discusses the contemporary moment of regulation within the dominant framing of counterterrorism and security. Starting from around 1989, as the Cold War subsided, it describes the linking of the notion of foreign fighting with Islamic extremist causes that developed, and specifically, the resulting definition of the 'foreign terrorist fighter' in Resolution 2178 (2014). To better consider what a counterterrorism framing of the issue can and cannot achieve, in this chapter, I study in particular the legal discourse around foreign volunteers with Kurdish forces in Syria and Iraq, and those fighting on both sides of the conflict in Ukraine, rather than Salafi-jihadist foreign fighters. The chapter describes how, like the definition of the mercenary in the 1970s, the creation in international law of the 'foreign terrorist fighter' at once *excludes* other foreign fighters, *and* colours how they are perceived and treated.

Chapter Six draws the thesis together by reflecting upon what one can observe from each individual moment studied, and from an examination *across* the three moments. It stresses both the change and stasis in how international law has responded to foreign fighting over the twentieth century to today. While the framing of the legal issues and, therefore, the shape of the debate, has changed over time, this concluding

chapter reflects upon red threads of debate that reappear across the alternative framings. It concludes by returning to the research question; reflecting upon the stakes of the debates examined in this study for the counterterrorism framing of the foreign fighting issue and, more generally, for international law.

3.2 Findings and Argument

This thesis argues that while, presently, foreign *terrorist* fighting has come to epitomise foreign fighting, international legal debate over the twentieth century to today demonstrates a grappling with richer debates and histories surrounding private individuals participating in wars abroad. These debates have been undertaken within alternative dominant framings of the legal issues and relate to broader categories of fighters in many different guises. That is, the debates involve international legal concerns beyond the question of terrorism, especially beyond the form of Islamic extremist violence with which terrorism is most readily identified today. The thesis therefore makes clear that international legal argument is not limited to a counterterrorism approach, and that there is a greater repertoire available in international law for thinking about the hard choices posed by foreign fighting.

This argument unfolds in three steps and can be summarised as follows:

First, as I will set out in detail in Chapter Two, not only has a counterterrorism approach to security proven problematic in its operation, but, as mentioned, the continued participation in warfare of foreign fighters of all categories and persuasions means that a framing of the issue focusing solely on departures to listed terrorist organisations either risks over-extension or reaches limits in terms of providing satisfactory responses to broader questions surrounding foreign fighting with which we are nevertheless confronted.

Second, therefore, paying attention to the present dominant counterterrorism framing of the issue by stepping back from the narrower definition of the *foreign terrorist fighter* allows a broader collectivity of the *foreign fighter* to be considered. This, in turn, makes visible alternative framings of the issue in different times and settings which have affected legal argumentation surrounding foreign fighting. A careful analysis of the three selected moments of foreign fighter regulation between 1907–2014 demonstrates how in each of these different moments and settings, legal debate, assessment of the key issues at stake and resultant determinations took place within a powerful predominant legal framing of the foreign fighter issue: neutrality and abstention at the beginning of the century, self-determination during decolonisation, and counterterrorism in the twenty-first century.

Third, by carefully considering these three moments of international legal debate and determination, and by not immediately distinguishing different foreign fighter case

examples by their facts/features, we see how red threads of debate surrounding foreign fighting reoccur and continue to resonate today. These include questions about the public and private, about foreignness, about just cause and the commercialisation of force, about groups and individuals, harm and required levels of diligence.

What emerges from this project is a view of both the change and the stasis in international law surrounding foreign fighting. That is, changes become obvious, such as legal determinations being made within alternative framings in different moments, and the resultant definitions of specific categories of foreign fighters. We can also see tensions — red threads — that persist and resonate throughout the debates. Reflecting questions as to whether foreign fighting should be understood as ancient or new; as a conceptual historical whole or constantly transforming, the tensions in these debates are not static, but persist in a way that also moves. The tensions are always there but are argued and settled differently in different situations, shaped by the dominant framing of the moment.

Overall, I suggest the complementary explanatory power offered by paying attention to the counterterrorism framing; what it allows and what it obscures. I suggest that seeking critical distance from that framing offers the possibility of thinking more generously and creatively about the continuities of themes that have shaped the debates across different phenomena of foreign fighting, and, thus, the concerns and values *beyond terrorism* upon which determinations about foreign fighting could be based. In short, there is a richer repertoire of possible argument available to international lawyers surrounding foreign fighting than may at first be appreciated.

The findings from this study become important because they suggest, in addition, the need to reflect carefully on certain critical responses to the counterterrorism framing which, in line with this thesis, also pay attention to the powers and limits of that framing and/or its conceptual definitions by pointing out the value of considering foreign fighting more broadly. Those responses, for example, sometimes call for greater definitional clarity to remedy the persistent tensions, or rely on the due diligence standard as a method of finding a reasonable balance between an objective prohibition of foreign fighting and subjective state discretion.

This thesis demonstrates in effect that the goal of properly defining our terms will always remain elusive. Definitions and applicable law are determined within the dominant framing of the moment. While each framing provides scope for a range of arguments, this study shows that states pay careful attention to articulations of the law and their fluidity.

Relatedly, the flexibility, but also the proceduralisation, of the due diligence standard is sometimes argued to offer a pragmatic solution where substantive rules otherwise

cannot be settled, by tempering potentially burdensome duties on states.¹⁰⁹ The conclusion I draw from this study, however, is that, at least on the topic of foreign fighting, the due diligence standard risks contributing to the continuing power of certain states less-affected in a humanitarian sense from foreign fighting — generally parent states — at the expense of states and their populations suffering armed conflict. What emerges is how foreign fighting becomes something with a complex relationship to the state, to the state's positions on authority and solidarity, and to certain power imbalances that are reinforced through state positions on international law surrounding foreign fighting.

Accordingly, the position adopted in this thesis, is that for those engaging with international law on this topic, including those tasked with decision-making, the better approach remains not to believe that one can ultimately resolve the dilemma satisfactorily or finally discover the correct answer, but to acknowledge the tensions and their framing — to see the politics behind them — which have shaped legal responses to these issues. This allows attention to be paid to the questions that are opened up by retrieving earlier contesting views within their alternative framings. It reveals the contemporary interest of those debates to considerations of law and policy surrounding the departure of foreign fighters to armed conflict today. This thesis therefore argues in support of attempting to hold in our thinking at the same time the state and the individual; the *change* and the *stasis*; the distinctly transformed and defined, with the longer-standing conceptual whole; not to pass over the political and historical linkages within a broader concept of foreign fighting; not to reduce thinking to the narrower counterterrorism frame, nor to an idea of increased definitional clarity or the flexibility of due diligence as offering satisfactory comfort for these hard questions.

4. Situating this Project within Scholarship on Foreign Fighting, and its Original Contribution to Knowledge

Neutrality law, the Spanish Civil War and mercenarism all have their own vast literature, within and outside of international law. Foreign fighting, too, or at least foreign terrorist fighting, has also become a subject of intense current interest.¹¹⁰ The contribution of this project is, however, to look *across* these moments of regulation and conceptual delineations. It is the putting together of the different international

¹⁰⁹ See, eg, generally the lecture by Anne Peters, Cambridge Law Faculty, 'The Rise of Due Diligence as a Structural Change of the International Legal Order' (YouTube, 6 May 2020) <<https://www.youtube.com/watch?v=hjWg1-2VYd4>>; Michael N Schmitt, 'In Defense of Due Diligence in Cyberspace' (2015) *Yale Law Journal Forum* 68.

¹¹⁰ See, eg, works listed in Judith Tinnies, 'Bibliography: Foreign Terrorist Fighters' (2018) 12(5) *Perspectives on Terrorism* 121.

legal responses and paying attention to the framing of the debates that offers a redescription of the issue, and, therefore, a novel view.

This thesis therefore makes an original contribution to knowledge by intentionally stepping back to consider in a detailed manner the legal framings of the foreign fighter issue over time and political setting. This approach provides insight into the operation of an issue's framing in international legal argument by bringing alternative moments of regulation and broader categories of foreign fighting into conversation instead of focusing solely on the current moment of 'crisis' under the counterterrorism framing of the issue.¹¹¹ With the normative aim of paying attention to the effect of the present dominant counterterrorism framing, this thesis therefore redescribes foreign fighting by considering involvement in terrorism as one aspect or manifestation of foreign fighting, rather than considering foreign (terrorist) fighting as one aspect of terrorism.

With the exception of including the mercenary within the object of interest as this thesis does, this project is not the first to suggest the relevance of considering both a longer and broader history of foreign fighting as a way of thinking about today's experiences. Nor, of course, is it the first to base itself on problems experienced with the so-called war on terror and the application of its international legal framework, even related to foreign fighting.¹¹² Although fewer in number, two key works in international relations and history have sought to point out, in line with the argument of this thesis, that foreign fighters are not only foreign terrorist fighters by making a similar concept of foreign fighters their object of study, and therefore examining other historical instances of foreign fighting alongside mobilisations of Muslim fighters.

David Malet's *Foreign Fighters: Transnational Identity in Civil Conflicts*,¹¹³ examines selected historical examples of foreign fighting including the Texan Revolution (1830s), Spain (1930s) and the Israeli War of Independence (1940s) from the angle of recruitment to insurgent groups through appeals to a perceived transnational community. It demonstrates that there is a longer and broader history of foreign fighting than the sub-set of Islamic fundamentalist militants receiving much of the attention today, and argues that it is important to examine that history to understand contemporary phenomena.

¹¹¹ See Chapter Two, section 3.3.

¹¹² See generally Kim Lane Scheppele, 'The Empire of Security and the Security of Empire' (2013) 27(2) *Temple International and Comparative Law Journal* 38; Lee Jarvis and Michael Lister (eds), *Critical Perspectives on Counter-Terrorism* (Routledge, 2014). Regarding foreign fighting, see Chapter Two, n 39.

¹¹³ Malet, *Foreign Fighters* (n 25).

The historian Nir Arielli's *From Byron to bin Laden: A History of Foreign War Volunteers*¹¹⁴ likewise seeks to understand today's phenomenon of foreign fighting by examining historical examples of volunteer soldiers and fighters.¹¹⁵ His analysis approaches foreign fighting chiefly through the lens of those fighters' relations with the social and political situation in their parent state. Arielli's underlying message, also in line with the argument of this thesis, is that viewing foreign fighting simply as a security problem, as is often the case in contemporary responses, is too narrow once one considers the varied factors surrounding individual motivation as well as political and social context, including within the parent state.

Other works outside of international law provide broad or comparative historical analysis related to distinct categories of foreign fighters, such as the mercenary,¹¹⁶ the British 'soldier of conscience' in Greece, Spain and Finland,¹¹⁷ or foreign fighters linked with communist causes.¹¹⁸ Recent scholarship examines foreigners linked with anti-communist and/or far right extremist groups, participating, for example, in the wars in Central America during the Cold War period, and state support for private participation in such conflicts.¹¹⁹ Another strand considers Muslim mobilisations of fighters from 1979 in the aim of guiding today's policy decisions surrounding foreign terrorist fighters.¹²⁰ Broader studies consider categories of actor overlapping with foreign fighters, such as irregular combatants,¹²¹ transnational actors,¹²² or

¹¹⁴ Arielli, *From Byron to bin Laden* (n 65).

¹¹⁵ Arielli includes foreign enlistment examples: Ibid 4–6.

¹¹⁶ Sometimes linked to PMSCs. See, eg, Percy (n 38); Walter Bruyère-Ostells, *Histoire des Mercenaires: De 1789 à nos Jours* [History of Mercenaries: From 1789 to Today] (Tallandier, 2011) (includes also discussion of non-mercenary volunteers); Anthony Mockler, *Mercenaries* (MacDonald, 1969); Guy Arnold, *Mercenaries* (Palgrave, 1999).

¹¹⁷ Roberts (n 69).

¹¹⁸ David Malet, 'Workers of the World, Unite! Communist Foreign Fighters 1917–91' (2020) 27(1–2) *European Review of History* 33.

¹¹⁹ Kathleen Belew, *Bring the War Home: The White Power Movement and Paramilitary America* (Harvard University Press, 2018) Chapter 4; Kyle Burke, *Revolutionaries for the Right: Anticommunist Internationalism and Paramilitary Warfare in the Cold War* (University of North Carolina Press, 2018); Klaas Voß, 'Plausibly Deniable: Mercenaries in US Covert Interventions during the Cold War, 1964–1987' (2016) 16(1) *Cold War History* 37.

¹²⁰ Jeanine de Roy van Zuijdewijn and Edwin Bakker, 'Returning Western Foreign Fighters: The Case of Afghanistan, Bosnia and Somalia' (Background Note, International Centre for Counter-Terrorism, June 2014) <<https://www.icct.nl/download/file/ICCT-De-Roy-van-Zuijdewijn-Bakker-Returning-Western-Foreign-Fighters-June-2014.pdf>>; Isabelle Duyvesteyn and Bram Peeters, 'Fickle Foreign Fighters? A Cross-Case Analysis of Seven Muslim Foreign Fighter Mobilisations (1980–2015)' (Research Paper No 8, International Centre for Counter-Terrorism, 2015) <<http://icct.nl/publication/fickle-foreign-fighters-a-cross-case-analysis-of-seven-muslim-foreign-fighter-mobilisations-1980-2015/>>.

¹²¹ Thomson, *Mercenaries* (n 50); Scheipers (n 38).

¹²² David Malet and Miriam J Anderson (eds), *Transnational Actors in War and Peace: Militants, Activists, and Corporations in World Politics* (Georgetown University Press, 2017).

transnational soldiering/volunteering.¹²³ A few works compare today's foreign fighting to volunteering in the Spanish Civil War.¹²⁴

Rarer is scholarship that makes contemporary comparisons across different persuasions of foreign fighting today, although there are studies explicitly pointing out forms of foreign fighting other than Salafi-jihadist fighting. They focus, for example, on Shia mobilisations,¹²⁵ contemporary foreign fighting in Ukraine,¹²⁶ or with Kurdish forces in Iraq and Syria.¹²⁷

While the above works often touch upon international norms and legal responses to foreign fighting, they sometimes assume the illegality of foreign fighting and/or, if acknowledging contingencies in the application of law, assume it is solely a matter of political expediencies.¹²⁸ Of course, once again, illegality depends on definition in the

¹²³ Where 'volunteering' includes non-conscripted state armed forces: Christine G Krüger and Sonja Levsen (eds), *War Volunteering in Modern Times: From the French Revolution to the Second World War* (Palgrave Macmillan, 2011); Nir Arielli and Bruce Collins (eds), *Transnational Soldiers: Foreign Military Enlistment in the Modern Era* (Palgrave MacMillan, 2013); Nir Arielli and Davide Rodogno, 'Transnational Encounters: Hosting and Remembering Twentieth-Century Foreign War Volunteers Introduction' (2016) 14(3) *Journal of Modern European History* 315.

¹²⁴ Although often focusing on today's foreign terrorist fighters only: Beatrice de Graaf, 'De Vlam van Het Verzet. Nederlandse Strijders in Het Buitenland, Vroeger En Nu' [The Flame of Resistance. Dutch Warriors Abroad, Past And Present], *Anton de Kom Lecture* (2014) <http://www.verzetsmuseum.org/uploads/media_items/de-vlam-van-het-verzet-nederlandse-strijders-in-het-buitenland-vroeger-en-nu.original.docx>; Dietrich Jung, 'The Search for Meaning in War: Foreign Fighters in a Comparative Perspective' (2016) 16(2) *Instituto Affari Internazionali Working Papers* 19; Teemu Tammikko, 'The Threat of Returning Foreign Fighters: Finnish State Responses to the Volunteers in the Spanish and Syria-Iraq Civil Wars' (2018) 30(5) *Terrorism and Political Violence* 844.

¹²⁵ Benjamin Isakhan, 'The Islamic State Attacks on Shia Holy Sites and the "Shrine Protection Narrative": Threats to Sacred Space as a Mobilization Frame' (2020) 32(4) *Terrorism and Political Violence* 724; Daniel Byman, 'The Foreign Policy Essay: Syria's Other Foreign Fighters', *Lawfare* (Blog, Post, 12 January 2014) <<https://www.lawfareblog.com/foreign-policy-essay-syrias-other-foreign-fighters>>.

¹²⁶ Kacper Rękawek, 'Why "Not Only Syria?" How an Idea Was Born and Put into Practice' in Kacper Rękawek (ed), *Not Only Syria: The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) v; Michael Cecire, 'Same Sides of Different Coins: Contrasting Militant Activisms between Georgian Fighters in Syria and Ukraine' (2016) 4(3) *Caucasus Survey* 282; 'White Supremacy Extremism: The Transnational Rise of the Violent White Supremacist Movement' (Report, Soufan Center, September 2019) <<https://thesoufancenter.org/research/white-supremacy-extremism-the-transnational-rise-of-the-violent-white-supremacist-movement/>>.

¹²⁷ Nathan Patin, 'The Other Foreign Fighters: An Open-Source Investigation into American Volunteers Fighting the Islamic State in Iraq and Syria' (Report, Bellingcat, 26 August 2015) <<https://www.bellingcat.com/wp-content/uploads/2015/08/The-Other-Foreign-Fighters1.pdf>>; Henry Tuck, Tanya Silverman and Candace Smalley, 'Shooting in the Right Direction: Anti-ISIS Foreign Fighters in Syria & Iraq' (Report, Institute for Strategic Dialogue, 2016) <<https://www.isdglobal.org/isd-publications/shooting-in-the-right-direction-anti-isis-foreign-fighters-in-syria-and-iraq/>>; Ariel Koch, 'The Non-Jihadi Foreign Fighters: Western Right-Wing and Left-Wing Extremists in Syria' [2019] *Terrorism and Political Violence* 1.

¹²⁸ See, eg, Malet, 'Syrian Civil War' (n 91) 124–5: 'violate both national and international laws to travel to civil war zones from other countries ... enjoy no legal rights as combatants or citizens, as their frequent fates in the era of Guantanamo Bay and drone warfare attest'; Arielli, *From Byron to bin Laden* (n 65) 149: 'while de jure there was, and still is, an international norm of preventing the

first place. This project seeks to build on the general conceptual approach in the above works, that is, of focusing on the broader concept of the foreign fighter both today and historically, but by offering a more nuanced international law perspective.

Present international legal scholarship, reflecting the emphasis on counterterrorism and the new development of Security Council Resolution 2178 (2014), focuses largely on issues related to foreign terrorist fighting, primarily through the contemporary situation in the Middle East and North Africa, and especially recruitment into the Islamic State group.¹²⁹ While that growing literature includes critique of the Security Council definition of the *foreign terrorist fighter*, and shares concerns about the risk of abusive responses by states, scholarship attempting to investigate broader and contested underlying norms, concepts, values and assumptions about the foreign and private use of force by individuals is rarer.

Scholarship from the earlier twentieth century *appears* to take a more general stance since the authors discuss general customary rules surrounding neutrality, non-intervention and non-toleration of harm. These works date from before the adoption of the separately defined categories of the mercenary and the foreign terrorist fighter. I am thinking in particular of Manuel Garcia-Mora's 1962 book *International Responsibility for Hostile Acts of Private Persons Against Foreign States*.¹³⁰ Garcia-Mora explores international law related to state responsibility, and then-developing individual criminal responsibility, related to hostile expeditions, armed bands and the departure of volunteers.¹³¹ In terms of present scholarship, Sandra Krähenmann's publications on foreign fighting have similarly noted and explained generally-applicable rules related to state prevention of harm to other states in line with due diligence duties.¹³² Both scholars' works have provided trusted background for this study. Discussing only mercenaries, but in alignment with the approach and argument of this thesis, Liu and Kinsey rely on historical examples to demonstrate that restrictions against mercenaries have not been based on an underlying moral norm

departure of foreign volunteers'; at 121–50, acknowledging the de facto complexities and political expediencies.

¹²⁹ As described in Marnie Lloyd, 'Book Review: Foreign Fighters under International Law and Beyond Edited by Andrea de Guttry, Francesca Capone and Christophe Paulussen' (2017) 18(1) *Melbourne Journal of International Law* 95. See also Rękawek (n 126) vi.

¹³⁰ Garcia-Mora, *International Responsibility* (n 10). See also Eric David, *Mercenaires et Volontaires Internationaux en Droit des Gens* [Mercenaries and International Volunteers in the Law of Nations] (Université de Bruxelles, 1978), focusing on mercenaries but discussing also state rights and obligations regarding international volunteer fighters.

¹³¹ See also Lauterpacht (n 10); CG Fenwick, *International Law* (Appleton-Century-Crofts, 3rd ed, 1948) 301ff. The term armed bands sometimes refers to 'bands of brigands' undertaking criminal incursions, sometimes to those undertaking hostilities: Ian Brownlie, 'International Law and the Activities of Armed Bands' (1958) 7 *International & Comparative Law Quarterly* 712; Fenwick at 301–2.

¹³² Krähenmann, 'Geneva Academy Briefing' (n 10) 49–51; Krähenmann, 'Obligation' (n 91).

against mercenarism, as is sometimes claimed, but on the varied application in different settings of the broader norms of neutrality, self-determination and freedom of movement.¹³³

Only limited contemporary legal scholarship considers in any depth how certain fighters fall outside of the adopted legal definitions, notes the conceptual focus on the binary of the mercenary and foreign terrorist fighter which excludes other persuasions of foreign fighting, or compares the international legal response to the broader concept of foreign fighting across selected times and settings.¹³⁴ One strand within this literature, focusing on domestic responses, has specifically noted the lack of attention given to other types of foreign fighting in a system focusing and relying on anti-terrorism laws, and proposed a reinvigorated application of ‘antiquated’ domestic neutrality/foreign enlistment laws to remedy what is described as an inaccurate lacuna in current coverage.¹³⁵

In particular, I am writing alongside and in some alignment with the above-mentioned approaches which pay attention to the limits of the current counterterrorism framing and point out the value of reflecting upon law potentially applicable to the broader category of *foreign fighting*. As mentioned above, however, the conclusions I draw from this study complicate certain critical responses to the counterterrorism framing where they suggest that greater definitional clarity or a consideration of broader foreign fighting as the category to be diligently prevented (such as through relying on a domestic neutrality law approach) could resolve the relevant dilemmas.¹³⁶ Those works themselves propone, or at least acknowledge, the leeway for state discretion that would be retained by states to temper a rigid objective prohibition.¹³⁷ These are themes reappearing throughout this thesis and to which I will return in the concluding chapter.

¹³³ Christopher Kinsey and Hin-Yan Liu, ‘Challenging the Strength of the Antimercenary Norm’ (2018) 3(1) *Journal of Global Security Studies* 93.

¹³⁴ Works include Linda Darkwa, ‘The African Union and the Phenomenon of Foreign Fighters in Africa’ in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 373; Alice Riccardi, ‘Sull’Esistenza di un Obbligo Generale di Prevenire e Reprimere il Fenomeno dei Foreign Fighters alla Luce della Vicenda della Guerra Civile Spagnola’ [On the Existence of a General Obligation to Prevent and Repress the Phenomenon of Foreign Fighters in the Light of the Spanish Civil War] [2017] (2) *La Comunità Internazionale* 213; Flores (n 34).

¹³⁵ Regarding Canadian law, Forcese and Mamikon (n 11); Tyler Wentzell, ‘Canada’s Foreign Fighters: The Foreign Enlistment Act and Related Provisions in the Criminal Code’ 2016 *Criminal Law Quarterly* (Canada). More generally regarding neutrality, Ip (n 23).

¹³⁶ Darkwa (n 134) 377: ‘the most plausible way to provide an objective characterisation of foreign fighters, lies in definitional clarity’; Forcese and Mamikon (n 11).

¹³⁷ Forcese and Mamikon (n 11) 358–9. Ip (n 23) 133 explains that ‘discretion, and hence the influence of pragmatic considerations, is inescapable’.

Concerns posed by instances of foreign fighting outside of the foreign terrorist fighter rubric may currently seem minor or fringe. However, normatively, determinations regarding foreign fighting are significant in that they place legal duties on states and significantly affect individual rights and protections,¹³⁸ including fundamental aspects of identity such as citizenship — the reason why legal works dedicate time to detailed discussion of definitions and the related scope of duties and rights in the first place.

Moreover, manifestations of foreign fighting are certain to continue transforming in future — think of *causes* such as far-left or far-right extremism, and climate, environment or animal rights protestors, but also *form*, such as vigilantism, incorporation and monetising structures (including charitable), or state deployment of allied non-state forces from one context into new theatres of war — examples to which I will return.

Perhaps most importantly, foreign fighting involves underlying questions surrounding the resort to force by different actors, and, therefore, to the relationship between authority and individual resort to force. International law legitimates some war and violence, while also seeking to restrain war and its effects, *and* ruling on its legality.¹³⁹ More than that, legal language and legal argument is used as one strand of warfare itself, for example, when one belligerent accuses their opponent of war crimes or denies them status as lawful combatants.¹⁴⁰ This includes articulations about who is entitled to participate in the violence (which foreign fighter) and who is not.¹⁴¹ On a personal level, those questions raise intimate questions about what I might be willing to give up or undertake in order to protect my own or others' families; about my own relationship to, and action against, violence and suffering occurring around the world every day. On the international level, as noted above, the stakes remain high, not only because foreign fighters operate in the violent reality of armed conflict, but because international legal argument can appear neutral or universal — especially within the present securitisation of international issues — or at least flexible and pragmatic, while in effect operating to reinforce imbalances in a system theoretically based on sovereign equality.

Although the alternative framings explored here are in line with general developments in thinking and focus in international law over time — the decline of reliance on

¹³⁸ Burmester (n 17) 37.

¹³⁹ David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 158, 160. See also generally Frédéric Mégret, 'Theorizing the Laws of War' in Anne Orford and Florian Hoffmann (eds), *Theorizing the Laws of War* (Oxford University Press, 2016) 762; Kennedy, *Of War and Law* (n 45) 4–6, 8, 22.

¹⁴⁰ See e.g. Kennedy, 'Lawfare and Warfare' (n 139) 161, 163–5.

¹⁴¹ Ibid 166; Kennedy, *Of War and Law* (n 45) 122.

neutrality in the twentieth century, the weakened role of the League in the inter-war period, the importance of decolonisation to the new international order within the UN, the Cold War, the rise of human rights argumentation and political acceptance of the responsibility to protect (R2P) doctrine, and the universal fight against terror — foreign fighters prove interesting because they are individuals entering into those themes; putting themselves materially into those debates and embodying the tensions.

I have found that rather than restricting myself to an IHL analysis, standing on the less firm ground of trying to think about state responsibility and international law more broadly has opened up significant space to think about these examples of solidarity being shown through the resort to violence, and the interplay of the state and its authority with those acts of individual solidarity.¹⁴² All these factors make paying attention to the persisting tensions of definition and determination of the law on this topic highly relevant.

What I would like the reader to take away from this thesis is not only an impression of the contested opinions about foreign fighting — that these questions are hard and definition-dependent, and that the factual and historical background to foreign fighting can be blurred and difficult to grapple with — but an appreciation that the present counterterrorism framing is not ‘natural or unavoidable’ but contingent and potentially powerful.¹⁴³ I am not seeking to propose how I think the tensions should be resolved on this topic. Rather, if, as Martti Koskeniemi has explained, ‘the best histories have demonstrated how lawyers have argued those cases, and what it has been necessary to believe in order to think one or other argument as the more plausible one’,¹⁴⁴ then, I am offering a contribution that supports acknowledging and seeking to better understand those tensions so as to allow more nuanced and generous thinking in international law.

¹⁴² ‘We are accustomed to thinking about wars as armed struggles for control of state power, but not violence as an act of solidarity ... For me, violence provided a window into thinking about the relationship between authority and solidarity in ways rarely appreciated’: Zahra Khalid, ‘XQs XXI: A Conversation with Darryl Li’, *Chapati Mystery* (Blog Post, 11 May 2020) <https://www.chapatimystery.com/archives/xqs_xxi_-_a_conversation_with_darryl_li.html>, quoting Darryl Li. On the ambivalent relationship between universalisms and violence, Darryl Li, *The Universal Enemy: Jihad, Empire, and the Challenge of Solidarity* (Stanford University Press, 2020) 136.

¹⁴³ Koskeniemi (n 61) 606: ‘An astonishing insensitivity to the permissive role of legal rules — the way they liberate powerful actors and reproduce day by day key aspects of the world that, although they are contingent and contestable, have begun to seem natural or unavoidable’.

¹⁴⁴ Martti Koskeniemi, ‘What Should International Legal History Become?’ in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, Order, and International Law* (Oxford University Press, 2017) 381, 386–7. See also Kennedy, ‘Lawfare and Warfare’ (n 139) 173–5, suggesting that lawyers should not assess who is making the ‘correct’ argument in law about warfare, but think about things more dynamically.

Chapter Two

Framing Foreign Fighting: Background Problem and Theoretical Orientations

1. Introduction: The Capabilities and Limits of Framing

Something important is at stake in deciding to talk about a question in one way or another. How we identify something as a policy or regulatory problem — that is, our framing, focus or the way we see the issues involved — is connected not only to our worldview but also to other issues we may be involved in and thinking about. Thinking about foreign fighting primarily as a counterterrorism issue or approaching it as an issue of human rights will lead to different directions of legal focus, and conceptual and institutional approach. Similarly, treating foreign fighting as a question of *jus in bello*, *jus ad bellum*, allegiance or treason, state responsibility and non-toleration of unlawful harm, the non-state use of force, the commodification of armed force, the protection of self-determination; as an example of individual criminal activity or a situation occurring within certain global structures; as political or legal; as limited in time and place, or ongoing and general; as local, regional or global, will all provide different paths of analysis, albeit those different paths might intersect at various interesting points along the way. Is the policy concern about foreign fighting a matter for international political bodies, i.e. only in situations which represent a threat to international peace and security, or do less serious cases nevertheless raise fundamental legal or policy issues regarding human rights, friendly relations between states, or the state's claimed monopoly of force? Where an issue lands determines its treatment and legal life; the vision and understanding of the topic.¹⁴⁵

The determination of legal rules and the categorisation of issues is, at the same time, one way we bring the world into view and are able to talk about it together. In this sense, the technique of viewing issues within a particular framing is standard practice; part of the craft of legal analysis, with necessary or useful legal and material consequences.¹⁴⁶ Legal categories 'name, order and locate lawful relations; they determine the points of institutional limit; and they offer an account of the substance of law'.¹⁴⁷

¹⁴⁵ Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1 ('Fate'); Martti Koskenniemi, *The Politics of International Law* (Hart, 2011) 101–2, 141 ('Politics').

¹⁴⁶ Shaunagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012) 71: 'the central task of the office of the jurist'.

¹⁴⁷ Ibid 75.

We often proceed, though, as if everyone sees the same thing. Yet, these choices, priorities and developments not only reflect different conceptions of law; they embed and prioritise different normative and political concerns and aspirations.¹⁴⁸ While they can be explained, they are not neutral or inevitable, nor ‘elaborated independently of context and historical background’.¹⁴⁹ The viewpoint or ‘enframing’ chosen ‘organize[s] the world and our political responses to it’.¹⁵⁰ It therefore upholds or strengthens a certain system or set of structures, allowing or even creating a certain way of thinking and understanding. In short, the framing, like the law itself, does not exist separately as some truth to be discovered, but is created/argued and comes into being, affected by setting and chosen values in the moment.¹⁵¹

For international law, an adopted frame will describe a matter in a particular way, operating as a driver of thought, or motif, shaping how one envisions or interprets the relevant legal issues. It will hold some aspects more centrally and significantly, and consider others to be more peripheral.¹⁵² For that reason, the framing allows or enables certain things to be achieved, discussed and understood but it also faces limits in what it cannot do, does not discuss or does not help us understand. It works to delineate the relevant legal questions and focus our appreciation of the stakes of the debate, thereby impacting also on their institutional management, while perhaps obscuring other things going on beneath it.

Concretely, in this thesis, and as mentioned in Chapter One, I treat the three selected responses to foreign fighting as legal moments in which a determination was made from the spectrum of possible acceptable arguments. Critical legal scholarship has explained

¹⁴⁸ Kerry Rittich, ‘Rule of Law: Analyzing Distributional Impact’ (Lecture, IGLP Scholars Workshop, Bangkok, 9 January 2018) (cited with permission).

¹⁴⁹ Andrea Bianchi, ‘Terrorism and Armed Conflict: Insights from a Law & Literature Perspective’ (2011) 24(1) *Leiden Journal of International Law* 1, 4. See also Kathryn Marie Fisher, ‘Spatial and Temporal Imaginaries in the Securitisation of Terrorism’ in Lee Jarvis and Michael Lister (eds), *Critical Perspectives on Counter-Terrorism* (Routledge, 2014) 56, 69: ‘not predetermined’; Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2004) 274: ‘recourse to the language of “war” to characterize the [9/11] attacks and the response to them, was not, however, self-evident or inevitable’; Richard Jackson, *Writing the War on Terrorism: Language, Politics, and Counter-Terrorism* (Manchester University Press, 2005) 152; Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Cornell University Press, 2013) 1: The ‘role [that force can or should play in the society members’ collective life] may be large or small, but it is not random’.

¹⁵⁰ Luis Eslava, ‘Istanbul Vignettes: Observing the Everyday Operation of International Law’ (2014) 2(1) *London Review of International Law* 3, 3–4. Discussing Eslava’s work regarding enframing, Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press, 2016) 224–6 (‘*International Law Theories*’). See also Anghie (n 5) 306: ‘different ways of understanding and characterizing [the events of 9/11] had a profound impact on how to address them’.

¹⁵¹ Deborah Z Cass, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’ (1996) 65(3) *Nordic Journal of International Law* 341, 359ff.

¹⁵² Koskeniemi, ‘Fate’ (n 1) 5–6; Kerry Rittich, ‘Theorizing International Law and Development’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 820, 837.

how the subjective, in the form of institutional biases and disciplinary patterns, affects international legal argument, working to ground the possible arguments and counter-arguments.¹⁵³ In the modern liberal international legal order, the structural bias is largely thought of as the reliance on multilateral institutions and a tendency of representatives of international institutions to favour the *status quo* in their legal argumentation.¹⁵⁴

In the abstract, the rule of law, for all its virtues in a stable, liberal democracy, is a form of rule that is likely to favour entrenched elites over resistance groups, vested interests carrying out lawful activity over civil disobedience, official actors over unofficial actors and property owners over protestors.¹⁵⁵

Studying the three selected legal moments brings to light that it was not only institutional bias that seemed to be affecting the determinations made about foreign fighting. Rather, there was also something larger in the air; a predominant legal context, focus, flavour, theme or policy-imperative that coloured perceptions more generally of the harm that had presented itself in the new manifestation of foreign fighting and, therefore, of the stakes of the debate. If structural bias affects where on the spectrum of possible persuasive argument an articulation of the law might be placed, the predominant framing seems to set the scope and position of those possible acceptable arguments in the first place. In this way, the responses to foreign fighting in these different moments represent ‘not so much a change in the world as a change in the way the world could be spoken and thought about’.¹⁵⁶ The framing of foreign fighting has therefore contributed to how the law has been pinned down in the three concrete moments of regulation described in this thesis.¹⁵⁷ Not being able to

¹⁵³ Preventing otherwise endless oscillation between argumentation seeking to claim authority from the consent of states and from fundamental values. See generally Chapter One, n 61. On bias, disciplinary patterns and formalism: David Kennedy, ‘Theses about International Law Discourse’ (1980) 23 *German Yearbook of International Law* 353, 358 (‘Theses’); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, reissue with a new epilogue, 2005) 9, 67–8, 531, 566–7, 606–7 (‘*From Apology to Utopia*’); Martti Koskenniemi, ‘The Politics of International Law: 20 Years Later’ (2009) 20(1) *European Journal of International Law* 7, 9 (‘20 Years Later’); Akbar Rasulov, ‘From Apology to Utopia and the Inner Life of International Law’ (2016) 29(3) *Leiden Journal of International Law* 641, 656–7; Jason A Beckett, ‘Rebel without a Cause: Martti Koskenniemi and the Critical Legal Project’ (2006) 7 *German Law Journal* 1045, 1045, 1070; Sahib Singh, ‘Koskenniemi’s Images of the International Lawyer’ (2016) 29(3) *Leiden Journal of International Law* 699, 720.

¹⁵⁴ Koskenniemi, *From Apology to Utopia* (n 9) 606, 610; Koskenniemi, ‘20 Years Later’ (n 9).

¹⁵⁵ José E Alvarez, ‘International Organisations and the Rule of Law’ (2016) 14(1) *New Zealand Journal of Public and International Law* 3, 46, citing Gerry Simpson, Strengthening the Rule of Law through the United Nations Security Council (Working Paper No 5.4, Australian National University, October 2012) 9.

¹⁵⁶ Amanda Alexander, ‘International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I’ (2016) 17(1) *Melbourne Journal of International Law* 15, 36.

¹⁵⁷ Critiques of structural indeterminacy works argued that the approach ignored context, remaining abstract and static. See, eg, Anne Orford, ‘A Journal of the Voyage from Apology to Utopia’ (2006) 7(12) *German Law Journal* 993, 1004 (‘Voyage’); Rasulov (n 9) 648–9; BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press, 2nd ed, 2017) 263; Justin Desautels-Stein, ‘A Context for Legal History, or, This Is Not Your Father’s Contextualism’ (2016) 56(1) *American Journal of Legal History* 29, 37: ‘structuralists didn’t seem interested in explaining law’s history with

conclusively explain cause and effect or untangle the frayed edges between structural bias and context, it seems simultaneously that the institutional bias — particularly of a dominant institution of the moment — also contributes to the rise and persuasiveness of the predominant context or policy-imperative, i.e. the framing. I rely on the concept of framing as a placeholder term for these necessarily fuzzy, multiple impacts on legal context/background and structural bias.¹⁵⁸

My framing echoes, although does not precisely reflect, debates surrounding the fragmentation of international law into different regimes, which also affects how issues are viewed conceptually.¹⁵⁹ However, framing can apply across different bodies of law. For example, the counterterrorism framing impacts thinking in human rights, IHL, or global and local approaches. My framing is a doctrinal context of sorts; a preoccupation.¹⁶⁰ But it is not *only* that and I do not restrict it to a strictly legal context. Rather, there are notions of how context (made up of history, interest, precedent and other drivers, i.e. ‘the facts and forces that are understood to impinge on a decision or that need to be taken into account’) is interpreted by expert jurists in their background practice, since the framing impacts on the desired policy consequence of the argumentation.¹⁶¹ It is a longstanding weather-front collecting together certain qualities and priorities; a ‘particular constellation of forces’.¹⁶² This gives me a wider view than only the legal texts/decisions and ‘into some context ostensibly “outside” of law and beyond it’.¹⁶³ Yet, regardless of the extra-legal impacts and

reference to the lumber industry, the sex industry ...’. Koskenniemi acknowledged in *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001) 1–2:

[structural indeterminacy] fell short of explaining why individual lawyers had come to endorse particular positions or arguments in distinct periods or places. Even if it claimed that all legal practice was a “politics of law,” it did not tell what the “politics” of international lawyers had been. Like any structural explanation, it did not situate the lawyers whose work it described within social and political contexts, to give a sense that they were advancing or opposing particular political projects from their position at universities, foreign ministries, or other contexts of professional activity.

See similarly regarding Kennedy’s subsequent work, David Kennedy, ‘Critical Theory, Structuralism, and Contemporary Scholarship’ (1985) 21(2) *New England Law Review* 209, 274; Chimni 265ff.

¹⁵⁸ By using the term ‘framing’, I am not referring to ‘(cognitive) frame theory’ in media and communication theory, political science, sociology or linguistics; nor to Heidegger’s *Gestell* [enframing], which I understand to mean how modernity brings about a particular way of gathering and seeing/ordering the world. These ‘framings’ do, though, entail similar notions surrounding ways of perception or organising principles that structure the social world and how it is communicated and understood.

¹⁵⁹ Making this link: Koskenniemi, ‘20 Years Later’ (n 9) 9. See generally Koskenniemi, ‘Fate’ (n 1).

¹⁶⁰ See ‘doctrinal focus’ and ‘preoccupation’ in Kennedy’s mapping exercise: David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016) 134.

¹⁶¹ Ibid 112: ‘The context ... is the settled outcome of background work. Interests and facts relevant for decision are socially constructed. The place where that happens — and could happen differently — is the ‘background’.

¹⁶² Koskenniemi, *From Apology to Utopia* (n 9) 608.

¹⁶³ Justin Desautels-Stein, *The Jurisprudence of Style: A Structuralist History of American Pragmatism and Liberal Legal Thought* (Cambridge University Press, 2018) 181–2.

their sources, the legal argumentation arises within a *legal* framing, and it is into *this* that this thesis seeks to enquire.

I read those framings as being immensely powerful, setting the field as they do for acceptable and convincing argumentation. The selected legal moments illustrate that different phenomena of foreign fighting appearing in different political settings have been treated distinctly depending on the predominant legal concern of the period as well as their specific features. The fluidity of the ideals being debated, and consequently the framing, means that the scope of convincing arguments on the spectrum can narrow or widen and can certainly move.¹⁶⁴ Suddenly the arguments that seem persuasive change in a new or morphed political moment. Thinking about today's foreign fighter policy issue through earlier frames of neutrality or self-determination, for example, no longer comfortably fit within a debate centred on counterterrorism efforts.

This chapter introduces the present dominant counterterrorism framing of the legal and policy issue of foreign fighting. I will return to discuss this contemporary framing in detail in Chapter Five. The purpose here is to describe the background problem and dilemma motivating the thesis by setting out certain challenges presented by the counterterrorism framing, and to demonstrate the value of stepping back to consider the legal framing of foreign fighter issues. I will then return to the theoretical and methodological orientations of the study, which I started discussing in Chapter One. I set out how paying attention to framing across time and setting raises questions surrounding how to approach the interplay of politics and of history with international law.

2. Foreign Fighting as a Matter of Counterterrorism and Security

2.1 A Transformed Phenomenon in Scale and Place of Origin

It was the perceived *transformation* of foreign fighting from around 2013 — the significant numbers of fighters joining listed terrorist groups in Syria and Iraq, the diversity of their countries of origin, the international dimension of their activities and travel patterns, and especially the threat they were considered to pose upon their return home¹⁶⁵ — that caused the United Nations (UN) Security Council to consider the situation as an 'acute and growing threat to international security' requiring an urgent response.¹⁶⁶

¹⁶⁴ Kennedy, 'Theses' (n 9) 368.

¹⁶⁵ Sandra Krähenmann, *Foreign Fighters under International Law* (No 7, Geneva Academy of International Humanitarian Law and Human Rights, October 2014) 3, 12–14; Francesca Capone, 'Countering "Foreign Terrorist Fighters": A Critical Appraisal of the Framework Established by the UN Security Council Resolutions' (2016) 25 *Italian Yearbook of International Law* 227, 228; John Ip, 'Reconceptualising the Legal Response to Foreign Fighters' [2019] *International & Comparative Law Quarterly* 1, 5–6.

¹⁶⁶ Ben Emmerson, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc A/71/384 (13 September 2016) 18 [42]. See also *Analysis and Recommendations with Regard to the Global Threat from Foreign Terrorist Fighters*, UN

The July 2014 declaration of a caliphate in parts of Syria and Iraq by the Islamic State group and its call for *hijra* (emigration)¹⁶⁷ focused international attention squarely on the departures of nationals to Islamic State group-controlled territory and to other listed terrorist groups in Syria. By 2015, the UN had estimated the presence of more than 25,000 foreign terrorist fighters, primarily in Syria and Iraq, originating from over 100 countries.¹⁶⁸ Subsequent estimates were that there were more than 40,000 Sunni Muslims volunteering in Syria, from over 110 countries, of whom more than 6,000 from Western countries.¹⁶⁹ Those figures are comparable with the estimates of foreign volunteers in the Russian Revolution and civil war in the 1910s–1920s (50,000), the Spanish Civil War in the 1930s (60,000), and during the Soviet occupation of Afghanistan (25,000).¹⁷⁰ The European Union’s Counter-Terrorism Coordinator described the foreign terrorist fighter problem as a ‘generational challenge’.¹⁷¹

In response to this transformation, in August 2014, Security Council Resolution 2170 expressed concern about the flow of foreign terrorist fighters for the first time — without defining them but specifically mentioning the Islamic State group, Jabhat Fateh al-Sham¹⁷² and entities associated with Al Qaeda — and condemning those groups’ recruitment of foreigners. The Resolution called upon states to take national measures to suppress the flow of volunteers and prevent the movement of terrorists, and to discourage travel of

Doc S/2015/358 (19 May 2015) annex; SC Res 2170, UN Doc S/RES/2170 (15 August 2014), preamble (‘Resolution 2170’).

On transformation, see Gilles de Kerchove, ‘Foreword’ in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) v, v–vi; Andrea de Guttry, Francesca Capone and Christophe Paulussen, ‘Introduction’ in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 1, 3.

¹⁶⁷ Jessica Stern and JM Berger, *ISIS: The State of Terror* (William Collins, 2015) 75–6, 86; Egdūnas Račius, ‘Caliphate Citizens: Revisiting the Concept of “Foreign Fighters”’ in Kacper Rękawek (ed), *Not Only Syria? The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) 52, 57–8.

¹⁶⁸ *Statement by the President of the Security Council*, UN Doc S/PRST/2015/11 (29 May 2015). For further foreign fighter estimates from this period, see Stern and Berger (n 23) 78–81; Edwin Bakker and Mark Singleton, ‘Foreign Fighters in the Syria and Iraq Conflict: Statistics and Characteristics of a Rapidly Growing Phenomenon’ in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 9, 10, 23; ‘Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq’ (Research Report, Soufan Group, 2015) 25 <<https://www.jstor.org/stable/resrep10784>>.

¹⁶⁹ Daniel Byman, *Road Warriors: Foreign Fighters in the Armies of Jihad* (Oxford University Press, 2019) 2, 171, 180.

¹⁷⁰ David Malet, ‘The European Experience with Foreign Fighters and Returnees’ in Thomas Renard and Rik Coolhaet (eds) ‘Returnees: Who are they, why are they (not) coming back and how should we deal with them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands’ (Egmont Paper 101, Royal Institute for International Relations, February 2018) 9.

¹⁷¹ de Kerchove (n 22) vi.

¹⁷² Formerly Jabhat al-Nusra or the al-Nusra Front.

individuals to join those groups more generally.¹⁷³ One month later, with United States President Barack Obama headlining the meeting, and with little debate, the Security Council unanimously adopted the stronger and more detailed United States–drafted Resolution 2178. States were now compelled under Chapter VII to ensure appropriate domestic legislation to combat the phenomenon of foreign terrorist fighting by criminalising their activities and preventing financing and recruitment.¹⁷⁴

As discussed in Chapter One, the reference to transformation is not to suggest that foreign fighting was being considered as a new phenomenon, nor, that terrorism was considered a new threat. The association of the foreign fighter problem with Islamic causes and the United States–driven war on terror was already well-established from prior decades.¹⁷⁵ Moreover, the chosen term ‘foreign terrorist fighter’ had already been used in 2014, with description but without formal definition, in guidance produced by the *Global Counterterrorism Forum*, a multilateral platform of states and partner organisations established in 2011, which appears to have influenced the Security Council Resolutions.¹⁷⁶ However, the new set of resolutions has worked to cement this connection between foreign fighting and terrorism within international legal thinking; within the concepts and categories with which international lawyers work.

2.2 The New Legal Category of the Foreign Terrorist Fighter: A Further Brick in the Counterterrorism Architecture

The Security Council defined for states the category of ‘foreign terrorist fighter’, subjects of the required diligent preventive actions. Resolution 2178 described foreign terrorist fighters as:

¹⁷³ Resolution 2170 (n 22), preamble, paras 7–10. See also Andrea de Guttry, ‘The Role Played by the UN in Countering the Phenomenon of Foreign Terrorist Fighters’ in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 259, 265–70.

¹⁷⁴ SC Res 2178, UN Doc S/RES/2178 (24 September 2014), preamble, paras 6, 8 (‘Resolution 2178’). See also de Guttry (n 29) 270. Regional bodies followed suit with rules and guidance for member states. See, eg, Council of Europe, Committee of Ministers, *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*, CETS 217, opened for signature 22 October 2015 (entered into force 1 July 2017); European Union, Parliament and Council, Directive (EU) 2017/541 of 15 March 2017 *Combating Terrorism* [2017] OJ L 88/6; African Union, Peace and Security Council, Communiqué, PSC/PR/COMM. (DCCCXII), 812th meeting, 23 November 2018, [7]; OSCE, ‘Declaration on the OSCE Role in Countering the Phenomenon of Foreign Terrorist Fighters in the Context of the Implementation of UN Security Council Resolutions 2170 (2014) and 2178 (2014)’, MC.DOC/5/14, 5 December 2014.

¹⁷⁵ See Chapter Five, sections 2.1 and 2.2.

¹⁷⁶ Global Counterterrorism Forum, ‘The Hague–Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon’ (2014) <<https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/2016%20and%20before/GCTF-The-Hague-Marrakech-Memorandum-ENG.pdf?ver=2016-09-01-150615-977>>. See also Lisa Ginsborg, ‘One Step Forward, Two Steps Back: The Security Council, “Foreign Terrorist Fighters”, and Human Rights’ in *Using Human Rights to Counter Terrorism* (Edward Elgar, 2018) 195, 201.

individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict ...¹⁷⁷

Since Security Council resolutions under Chapter VII are binding on member states, this provided an international legal definition of the foreign terrorist fighter.¹⁷⁸ It operated to carve off one part of the community of past, present and future foreign fighters; identified them and pointed them out as unacceptable.

Although this definition of the foreign terrorist fighter refers generally to ‘terrorist acts’ and ‘terrorist training’, the explicit references to Al Qaeda affiliates, Jabhat Fateh al-Sham and the Islamic State group in Resolutions 2170 and 2178, and the timing of the resolutions, showed the Security Council’s specific concern at this juncture about foreign fighting with Islamic fundamentalist or jihadist groups, and the situation in Syria and Iraq, or at least listed terrorist organisations, rather than with *all* or *any* terrorism, or *all* or *any* foreign fighting.¹⁷⁹ The Security Council’s demands on states regarding foreign terrorist fighters were therefore intimately and intricately linked with the global war on terror and existing anti-terrorism legal architecture.¹⁸⁰ Those demands place state obligations regarding these foreign fighters squarely within counterterrorism efforts and the collective security system of the UN over and above any other legal framework — there is little room for arguments of abstention or neutrality from the conflicts and from this ‘universal enemy’.¹⁸¹ In short, the present counterterrorism and security framing has come to dominate thinking about foreign fighting.¹⁸² That framing proves pervasive and powerful.

¹⁷⁷ Resolution 2178 (n 30), preamble. See also at paras 5–6, 10. Regarding critiques of this definition, see Chapter Five, section 2.2.

¹⁷⁸ *Charter of the United Nations*, arts 25, 48, 103 operate to make binding Security Council resolutions obligations under the UN Charter, which then, according to the Charter, prevail over any conflicting international laws. See Kim Lane Scheppele, ‘The Empire of Security and the Security of Empire’ (2013) 27(2) *Temple International and Comparative Law Journal* 38, 255–6. Regarding the toleration by a state of private hostile activities against other states falling within the mandate of the Security Council, see Manuel R Garcia-Mora, ‘International Responsibility for Subversive Activities and Hostile Propaganda by Private Persons Against Foreign States’ (1960) 35(3) *Indiana Law Journal* 306, 326. Regarding states’ duties to seek to prevent citizens from fighting in contravention of a binding Security Council resolution, Eric David, *Mercenaires et Volontaires Internationaux en Droit des Gens* [Mercenaries and International Volunteers in the Law of Nations] (Université de Bruxelles, 1978) 167. Arguing that Resolution 2178 provides a ‘legal basis for everyone’s obligation not to commit terrorist acts or participate in the armed conflict surrounding ISIL’, Anne Peters, ‘Security Council Resolution 2178 (2014): The “Foreign Terrorist Fighter” as an International Legal Person, Part I’, *EJIL:Talk!* (Blog Post, 20 November 2014) <<https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/>>.

¹⁷⁹ Ip (n 21) 5, 17–18; Capone (n 21) 229; de Guttry (n 29) 260, 277.

¹⁸⁰ Capone (n 21) 231: ‘extensively relies on the existing skeleton of anti-terrorism norms ... it inherits, and even amplifies, a number of problems’. See also at 237–8; de Guttry (n 29) 260–2; Stef Wittendorp, ‘Displacing the National Security-Narrative: On the (De-)Securitization of the Governmental and Legal Response to “Foreign Fighters”’ [2017] *Security and Global Affairs* 18, 21–3.

¹⁸¹ Darryl Li, ‘A Universal Enemy?: “Foreign Fighters” and Legal Regimes of Exclusion and Exemption under the “Global War on Terror”’ (2010) 41 *Columbia Human Rights Law Review* 355. See also, eg, New

3. The Narrow Rush of the Counterterrorism Framing

3.1 The Power of the Counterterrorism Framing

The counterterrorism framing of the foreign fighting issue holds considerable power. It has significant impact on how the stakes of the legal, policy and security issues of foreign fighting are perceived and on how they are managed in practice. It normalises and gives salience bias to a counterterrorism way of thinking, providing a powerful driver of thought. However, that power also brings documented risks within counterterrorism approaches. By this I mean not only regarding the label of terrorism being relied upon to support broad executive actions against any political opposition, or the risk of humanitarian law and human rights protections being eroded in the name of security, but more generally, the way counterterrorism efforts have come to be embedded into institutions and regularised, allowing certain interventions to become normalised or untouchable based on counterterrorism or security needs, which may otherwise be thought to violate or at least test the boundaries of international law and the traditional UN system.¹⁸³ It can affect perceptions of acceptability and pragmatic need in combating the “bad guys”, affecting military operations and their surrounding legal and political argumentation. Certain states and commentators have argued that terrorism threats present an unprecedented situation with which existing international law surrounding armed conflict and law enforcement — that is, the two standard frameworks for the use of force — cannot appropriately respond;

Zealand, *Parliamentary Debates*, 9 December 2014, 702 NZPD 1255 (Christopher Finlayson): ‘fulfilling our role as a good international citizen. ... There is no room for moral ambiguity’.

¹⁸² See generally Wittendorp (n 36).

¹⁸³ See, eg, Scheppele (n 34) 242–6; Antonio Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’ (2001) 12(5) *European Journal of International Law* 993; Jackson (n 5) 6: ‘destabilises the moral community — by making violence, torture and human rights abuses acceptable and “normal” ... damages the functioning of democratic politics — by imposing unity and demonising dissent’; Anghie (n 5) 273–309; at 302–3, discussing how the UN is invited into the project of the war against terrorism; James Cockayne, ‘Counterterrorism and Transnational Crime’ in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press, 2016) 221–4; Fionnuala Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism*, UN Doc A/HRC/37/52 (1 March 2018), discussing correlation between entrenched emergency powers when countering terrorism and human rights violations; Fionnuala Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc A/HRC/43/46 (21 February 2020), describing human rights and rule of law deficiencies in countering violent extremism.

Specifically regarding foreign terrorist fighters, Capone (n 21) 231, 241; Letta Tayler, ‘Foreign Terrorist Fighter Laws: Human Rights Rollbacks Under UN Security Council Resolution 2178’ (2016) 18 *International Community Law Review* 455; Veronika Bílková, ‘Foreign Terrorist Fighters and International Law’ (2018) 6(1) *Groningen Journal of International Law* 1, 2, 19–23; Ip (n 21) 17–24; Martin Scheinin, ‘Back to Post-9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters’, *Just Security* (Blog Post, 23 September 2014) <<https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>> (‘Panic’); *Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc A/HRC/28/28 (19 December 2014) [46ff].

that a third way was needed.¹⁸⁴ Here, I do not mean the ‘third way’ as it has been used to mean (only) some hybrid of law enforcement and armed conflict in tackling terrorism. I mean an exceptional and often opaque third way, which has proven rather unexceptional and permanent, and to have claimed even greater allowances for counterterrorism interventions against the enemy and less protections for individuals caught up in the resulting violence and surveillance.¹⁸⁵ It is, in the first place, the power underlying the counterterrorism/security framing that has contributed to the Security Council adopting a greater role in legislating for states, including on the matter of criminalising foreign terrorist fighters. Scholars have also noted in particular the conflation of the legal regimes governing terrorism and armed conflict in these approaches, including the definition of ‘foreign terrorist fighter’, allowing, for example, for counterterrorism thinking to override traditional IHL thinking about armed conflict. Both techniques were already known and critiqued aspects of the global security legal architecture.¹⁸⁶

The twenty-first century has seen counterterrorism operations which have challenged both the *jus ad bellum* and the *jus in bello*, as well as human rights protections: the respect for

¹⁸⁴ Stephane Ojeda, ‘Global Counter-Terrorism Must Not Overlook the Rules of War’, *Humanitarian Law & Policy* (Blog Post, 13 December 2016) <<https://blogs.icrc.org/law-and-policy/2016/12/13/global-counter-terrorism-rules-war/>>.

¹⁸⁵ Michael Glennon, ‘Forging a Third Way to Fight; “Bush Doctrine” for Combating Terrorism Straddles Divide Between Crime and War’, *Legal Times*, 24 September 2001, 68, discussed in Frédéric Mégret, ‘“War”? Legal Semantics and the Move to Violence’ (2002) 13(2) *European Journal of International Law* 361, 386: ‘neither quite justice nor quite war, but a thoroughly opaque mix of the two ... the scale and the sword can be melded into pantocratic thunderbolts for would-be dispensers of justice to strike the guilty from the skies’; Vaughan Lowe, ‘“Clear and Present Danger”: Responses to Terrorism’ (2005) 54(1) *International & Comparative Law Quarterly* 185, 190–1; Lisa Hajjar, ‘The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US “War on Terror”’ (2019) 44(4) *Law & Social Inquiry* 922.

¹⁸⁶ See generally, Luis Miguel Hinojosa Martínez, ‘The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits’ (2008) 57(2) *International & Comparative Law Quarterly* 333; Scheppele (n 34) 248–9, 253–4, 258–9; José E Alvarez, ‘Hegemonic International Law Revisited’ (2003) 97(4) *American Journal of International Law* 873, 874–6.

On Security Council legislating related to foreign fighting: Scheinin, ‘Panic’ (n 39); Martin Scheinin, ‘A Comment on Security Council Res 2178 (Foreign Terrorist Fighters) as a “Form” of Global Governance’, *Just Security* (Blog Post, 6 October 2014) <<https://www.justsecurity.org/15989/comment-security-council-res-2178-foreign-fighters-form-global-governance/>>; Bibi van Ginkel, ‘The New Security Council Resolution 2178 on Foreign Terrorist Fighters: A Missed Opportunity for a Holistic Approach’ *International Centre for Counter-Terrorism* (Blog Post, 4 November 2014) <<https://icct.nl/publication/the-new-security-council-resolution-2178-on-foreign-terrorist-fighters-a-missed-opportunity-for-a-holistic-approach/>>; de Guttry (n 29) 272. See also at 260–1, 269.

On conflation of IHL and terrorism: Krähenmann (n 21) 3, 23–31, 61–64; Marten Zwanenburg, ‘Foreign Terrorist Fighters in Syria: Challenges of the “Sending” State’ (2016) 92 *International Law Studies* 204, 209–17; Capone (n 21) 236–7, 239; Stephane Ojeda, ‘Out of Balance: Global Counter-Terrorism & the Laws of War’, *Humanitarian Law & Policy* (Blog Post, 15 September 2017) <<https://blogs.icrc.org/law-and-policy/2017/09/15/out-of-balance-global-counter-terrorism-the-laws-of-war/>>; Ginsborg (n 32) 207–10; Hanne Cuyckens and Christophe Paulussen, ‘The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship Between Counter-Terrorism and International Humanitarian Law’ (2019) 24(3) *Journal of Conflict & Security Law* 537. The OSCE noted that the ‘denomination of persons as “foreign terrorist fighters” was without prejudice to the legal status under applicable national and international law, in particular international humanitarian law’: OSCE (n 30).

rules on intervention, the conduct of hostilities, lawful detention operations and the prohibition of torture. Working for the ICRC from 2005 had given me professional experience of how such counterterrorism operations and arguments played out in civil war contexts, both within legal debate and in how local communities experienced their effects. Regarding foreign fighters specifically, this period witnessed significant state practice showing differentiated treatment of foreign fighters in armed conflict. In detention, so-called third country nationals (not of the territorial state nor of the detaining power, such as foreign fighters captured by international coalition forces in Afghanistan or Iraq) faced different practical humanitarian issues, for example related to language, family or consular access, and repatriation. They have also often been held separately from local fighters in detention centres and been subject to different administrative or judicial pathways, such as facing ongoing administrative internment rather than being transferred to local authorities for criminal prosecution.¹⁸⁷

Many of these actions and arguments were made possible by states giving precedence to national (home) security over other legal rights or duties. Since foreign fighters with the Islamic State group became prominent from around 2013, national security concerns have contributed to certain military operations and legal responses being undertaken in arguable violation of international legal duties or standards, and/or domestic law. Examples include public representatives of certain countries expressing the view that all foreign terrorist fighters should be killed on the battlefield so that they do not return home,¹⁸⁸ certain high-profile foreign fighters, even if nationals of the attacking parent state, being targeted with direct lethal force due largely to the threat they may pose at home rather than necessarily on the battlefield,¹⁸⁹ states refusing to repatriate nationals allegedly associated with the Islamic State group who have been captured and detained by Kurdish forces in Northern Syria,¹⁹⁰ some parent states stripping the citizenship of suspected foreign terrorist fighters

¹⁸⁷ Li (n 37); Dick Jackson, 'Interrogation and Treatment of Detainees in the Global War on Terror' in Geoffrey S Corn et al (eds), *The War on Terror and the Laws of War: A Military Perspective* (Oxford University Press, 2015) 102, 110ff: 'The law-of-war interrogation and treatment paradigm adopted for GWOT was changed substantially'; James Ross, 'Black Letter Abuse: The US Legal Response to Torture since 9/11' (2007) 89(867) *International Review of the Red Cross* 561; Kate Clark, 'The 'Other Guantanamo' 7: Foreigners in Limbo at Bagram', *Afghan Analysts Network* (Blog Post, 3 October 2013) <<https://www.afghanistan-analysts.org/en/reports/rights-freedom/the-other-guantanamo-7-foreigners-in-limbo-at-bagram/>>.

¹⁸⁸ 'Minister says IS fighters 'Must be Killed'', RadioNZ (online, 23 October 2017) <<http://www.radionz.co.nz/news/world/342213/minister-says-is-fighters-must-be-killed>>. See critique in, eg, A Dworkin, 'The problem with western suggestions of a "shoot-to-kill" policy against foreign fighters', *Just Security* (Blog Post, 13 December 2017) <<https://www.justsecurity.org/49290/problematic-suggestions-western-shoot-to-kill-policy-citizens-fighting-isis/>>.

¹⁸⁹ See, eg, Ewen MacAskill, 'Drone Killing of British Citizens in Syria Marks Major Departure for UK', *Guardian* (online, 8 September 2015) <<https://www.theguardian.com/world/2015/sep/07/drone-british-citizens-syria-uk-david-cameron>>.

¹⁹⁰ See n 70 below.

even at the risk of rendering them stateless,¹⁹¹ a state justifying extraterritorial military intervention partly on the basis of the Security Council's demands about the prevention of foreign terrorist fighters,¹⁹² and evidence concerning alleged foreign terrorist fighters reportedly being shared between countries for future prosecutorial purposes, without seeking required reassurances regarding the non-application of capital punishment, in contravention of the proffering state's domestic law.¹⁹³

Power also comes from the institutional ownership of a priority policy topic. In the case of foreign terrorist fighters, the UN's Counter-Terrorism Committee (CTC), which works through its Executive Directorate (CTED), is tasked with monitoring state compliance and assisting states regarding their compliance with the foreign terrorist fighter resolutions. The CTC/CTED works closely with the Office of Counter-Terrorism, established in mid-2017. These issues — approaches based on home state security, and institutional ownership — will be returned to at various points throughout the thesis.

Finally, states often responded compliantly with the Security Council's demands, leading to a rush of new or amended legislation, and at times, critiques for having done so with little critical thinking or public debate.¹⁹⁴ In New Zealand, for example, public consultation on foreign terrorist fighter legislative amendments were limited to two days, despite a depth of concern illustrated by the over 600 submissions received in that short timeframe. The Department of the Prime Minister and Cabinet specifically referred to Resolution 2178 to justify the urgency in amending anti-terror-related legislation.¹⁹⁵ Like the Security Council's legislative actions mentioned above, that states relied upon and sourced power from the Security Council's counterterrorism demands, sometimes without deep thinking

¹⁹¹ Laura Van Waas, 'Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 469, 480–2; Capone (n 21) 233–4.

¹⁹² *Letter Dated 24 August 2016 from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council*, UN Doc S/2016/739 (25 August 2016) [7].

¹⁹³ Owen Bowcott, 'UK Cooperation with US Over Two Alleged Isis Killers Ruled Unlawful', *Guardian* (online, 26 March 2020) <<https://www.theguardian.com/law/2020/mar/25/uk-cooperation-with-us-over-two-alleged-isis-killers-ruled-unlawful>>, quoting UK Home Office: 'The government's priority has always been to maintain national security and to deliver justice for the victims and their families'.

¹⁹⁴ See generally, Scheppele (n 34) 247–50, 261; Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) Chapter 6 'Australia Responds: Hyper-Legislation'. Regarding Resolution 2178, Tayler (n 39) 457–8, 462. For actions taken by states since the adoption of Resolution 2178, see Counter-Terrorism Committee Executive Directorate, 'Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters: A Compilation of Three Reports (S/2015/338; S/2015/683; S/2015/975)' (United Nations, 31 August 2016) <https://www.un.org/sc/ctc/wp-content/uploads/2016/09/FTF-Report-1-3_English.pdf>.

¹⁹⁵ 'Departmental Report for the Foreign Affairs Defence and Trade Committee: Countering Terrorist Fighters Bill (December 2014)' [13], cited in Treasa Dunworth, 'International Law' (2015) 2 *New Zealand Law Review* 285, 314–5. See also John Ip, 'The Making of New Zealand's Foreign Fighter Legislation: Timely Response or Undue Haste' (2016) 27 *Public Law Review* 181; Anna Hood, 'International Law and Security' (2015) 13 *New Zealand Yearbook of International Law* 286, 287; Selwyn Fraser, 'What's in a Name? The Calculated Divergence of Rhetoric, Reality and Text in New Zealand's *Foreign Fighter Legislation*' (2016) 3 *Public Interest Law Journal of New Zealand* 188, 199–203.

about effectiveness or international legal compliance, were already known and critiqued aspects of the overall counterterrorism framework.¹⁹⁶ Specifically regarding the rush surrounding the response to foreign terrorist fighting, scholars have noted that:

a danger is looming, similar to what occurred in the post 9/11 period, of governments trying to fight this problem with everything at their disposal, without really knowing first what the problem is and how it can be tackled in the most effective and durable way. Indeed, there is a perceptible trend of adopting many measures to address the problem.¹⁹⁷

Overall, the fact that the UN resolutions on foreign terrorist fighters remind states that in carrying out the Security Council's demands, they were still to respect international humanitarian, human rights and refugee law is at once positive and entirely telling,¹⁹⁸ as is the work of various UN bodies on ensuring respect for law in responses to foreign fighting.¹⁹⁹

3.2 Other Foreign Fighting and the Limits of the Counterterrorism Framing

The counterterrorism framing becomes problematic in a second way due to its intense focus on a priority phenomenon. Earlier manifestations are largely distinguished because, as described above, the framing emphasises the special nature of the transformed phenomenon of foreign terrorist fighting.²⁰⁰ This can obscure the links and commonalities between different types of fighter mobilisations. It reaches limits as a way of thinking about *other* forms of foreign fighting with which we are simultaneously confronted today. Overall, non-priority *other* categories of foreign fighting are left out from the definition and the framing. Although, as I will discuss further in Chapter Five, the framing also colours other categories given its strength and persuasiveness.

The policy salience of the dominant framing can make the required preventive duties seem rather universal, necessary and straightforward — foreign fighters pose a threat and must

¹⁹⁶ Scheppelle (n 34) 250–1; at 247: 'operates ... to change the balance of power between states, to alter the power relations internal to national governments, and to give these national governments far more direct power over their nationals and residents.' See also, generally, Jessie Blackbourn, Deniz Kayis and Nicola McGarrity, *Anti-Terrorism Law and Foreign Terrorist Fighters* (Routledge, 2018) 5–7, regarding the implementation of antiterrorism measures in the UK and Australia with little assessment of effectiveness (citation omitted). Regarding New Zealand, Matthew Palmer 'Counter-Terrorism Law' [2002] *New Zealand Law Journal* 456: 'The UN made me do it ... Much has been made by various governments of the binding requirement of UN Security Council Resolution 1373'.

¹⁹⁷ de Guttry, Capone and Paulussen (n 22) 3. See also Ginkel (n 42); Krähenmann (n 21) 64; Scheinin (n 39).

¹⁹⁸ Resolution 2170 (n 22), preamble; Resolution 2178 (n 30), preamble; SC Res 2396, UN Doc S/RES/2396 (21 December 2017), preamble ('Resolution 2396'). See also Capone (n 21) 243–5; de Guttry (n 29) 268–9.

¹⁹⁹ See, eg, 'Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters' (UN Counter-Terrorism Implementation Task Force, 2018) <<https://www.un.org/sc/ctc/wp-content/uploads/2018/08/Human-Rights-Responses-to-Foreign-Fighters-web-final.pdf>>.

²⁰⁰ But see Chapter One n 33 regarding anachronistic use of terms.

be prevented. However, this ignores other important questions that also merit examination: from what threats posed by foreign fighting, over and above terrorism, might an application of international law be seeking to protect us?

I became particularly interested in the legal response to foreign volunteers with the Kurdish armed group YPG/YPJ in Northern Syria since around 2013 — the so-called anti-ISIS fighters — who were seen to be ‘shooting in the right direction’ by some,²⁰¹ and challenging the state’s monopoly on force by others.²⁰² Less significant in number and posing less of an immediate security threat to their parent states than foreign terrorist fighters, foreign fighters with the YPG/YPJ, as well as those fighting in Ukraine or elsewhere, have received less attention in state and UN practice, in scholarship and in the press. Such fighters are the subject of Chapter Five.

One could, and certain states do, of course, argue that the YPG/YPJ in Syria and armed groups fighting in the name of the separatist Donetsk and Luhansk People’s Republics in Ukraine should be considered terrorist organisations; their foreign volunteer fighters, therefore, foreign terrorist fighters.²⁰³ The lack of settled international agreement as to the meaning of terrorism makes such domestic determinations possible.²⁰⁴ It means that the distinction between foreign terrorist fighters and *other* foreign fighters will always beg the question. Still, as mentioned, at the juncture in which Resolutions 2170 (2014) and 2178 (2014) were adopted, and despite Security Council statements about terrorism not being ‘associated with any religion, nationality or civilization’,²⁰⁵ the focus of the resolutions rested on fighters associated with extremist Islamic groups, or at least listed terrorist groups.²⁰⁶ Therefore, unless there is problematic over-extension, the counterterrorism framing reaches limits in what it can cover, and was intended to cover.²⁰⁷ It cannot satisfactorily resolve all our questions about the scope of possible preventive duties on states regarding broader forms and persuasions of foreign fighting. Ultimately, to address

²⁰¹ Henry Tuck, Tanya Silverman and Candace Smalley, ‘Shooting in the Right Direction: Anti-ISIS Foreign Fighters in Syria & Iraq’ (Report, Institute for Strategic Dialogue, 2016) <<https://www.isdglobal.org/isd-publications/shooting-in-the-right-direction-anti-isis-foreign-fighters-in-syria-and-iraq/>>.

²⁰² See Chapter Five, section 4.1.1.

²⁰³ See Chapter Five, section 5.1.

²⁰⁴ Generally, Scheppele (n 34) 263ff. Regarding ‘foreign terrorist fighters’, Capone (n 21) 234–5, 241–2; Ip (n 21) 18; Scheinin, ‘Panic’ (n 39); de Guttry (n 29) 266; Kai Ambos, ‘Our Terrorists, Your Terrorists? The United Nations Security Council Urges States to Combat “Foreign Terrorist Fighters”, but Does Not Define “Terrorism”’, *EJIL:Talk!* (2 October 2014) <<https://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/>>.

²⁰⁵ See, eg, Resolution 2178 (n 30), preamble.

²⁰⁶ They refer explicitly to ‘Islamic State in Iraq and the Levant (ISIL), the Al-Nusrah Front (ANF) and other cells, affiliates, splinter groups or derivatives of Al-Qaida’: Resolution 2170 (n 22), preamble; Resolution 2178 (n 30), preamble.

²⁰⁷ Ip (n 21) 18: ‘regulating foreign fighting as a form of terrorism will inevitably have blind spots’ (citation omitted).

the research question underlying this study, it becomes important to pay attention to other forms of foreign fighting because looking beyond the counterterrorism framing can help us better observe its operation.

3.3 The Pervasiveness and Persuasion of the Counterterrorism Framing in International Legal Thinking

I described in the introduction to this thesis how jurists have been unable to identify settled rules regarding *all* cases of foreign volunteer fighting. The *existence* (even if not the definition) of the international legal duty to diligently prevent terrorism is ‘so widely recognized that it should not fuel a debate’.²⁰⁸ In comparison, the three moments examined in Part II of this study demonstrate that the existence of a duty to prevent foreign fighting in exceptional situations in which individuals are volunteering to support a cause of self-determination, or to fight against an illegitimate regime, against another armed group or in support of a government, remain highly contested. Substantial parts of how those international legal obligations are to be complied with are therefore left as a matter of domestic determination.

In this light, Resolution 2178 is a rare example of the Security Council determining *for* states that a particular category of individual linked to violence needed to be prevented, with significant detail of the steps to be taken, and monitored by a specially-mandated body. As will be discussed in greater detail in Chapter Five, the Security Council has adopted resolutions throughout its history expressing concern about the presence of foreign groups and fighters, including mercenaries, exacerbating conflict or complicating reconciliation efforts. A number of peace agreements have also made demands regarding the departures of foreign groups and fighters. They put states on notice, as it were, that diligent prevention of nationals intending to participate in a war was required. However, in both cases, these determinations *for* states of problematic transnational participation in warfare have been limited to the specific country and conflict. Alongside the UN’s attempt to criminalise mercenarism (discussed in Chapter Four), the Security Council has now expressed concern about a manifestation of fighters, and defined a category of individual, as a general threat to international peace and security — that is, *anywhere* and *always*.²⁰⁹ Resolution 2178 therefore represents a significant development in international law regarding foreign fighting.

The explicit categorisation of a transformed manifestation of foreign fighting linked with terrorist activity, and its definition on the international level, created a new jurisdictional field for international lawyers; a new conceptual terrain, a new definition to debate and

²⁰⁸ Vincent-Joel Proulx, ‘Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks’ (2005) 23(3) *Berkeley Journal of International Law* 615, 660.

²⁰⁹ Capone (n 21) 243: ‘lacks any space or time limitation’.

apply, with new expertise required. It carved out and labelled one manifestation of foreign fighting — however blurred its edges may be — as clearly to be prevented amidst the pool of some otherwise unclear cases; a seeming clarification regarding this category of individual of the more general rules requiring the diligent prevention by states of terrorism and of other acts of private individuals causing unlawful harm to other states.

As with any predominant legal focus, the framing and the accompanying institutional mandates established within a priority policy concern hold salience. As previously stated, they determine to a large extent the most relevant legal questions and policy goals with which international lawyers work.²¹⁰ The focus of present thinking has been on the new category of the foreign terrorist fighter and the not-so-new counterterrorism jurisdictional field with the specialised legal expertise it demands. Legal scholarship in this period has underscored that the important transformation that foreign fighting has undergone make legal debates within the sphere of counterterrorism of crucial relevance.²¹¹ Some have accepted the authorities' view that 'specific and targeted' responses are required to combat the threats posed, i.e. not treating foreign terrorist fighters like other terrorism issues, nor assimilating them with other foreign fighting precedents.²¹² Some legal discussion turns on technical questions surrounding the definition of 'foreign terrorist fighter'; some turns on the interplay of the Security Council's legislative demands with other bodies of international law such as IHL, or asks how human rights can best be respected within security policies.²¹³ Since late 2018, debate has turned to questions surrounding repatriations of foreign terrorist fighters and justice/impunity of those individuals allegedly associated with the Islamic State group, captured and detained by Kurdish forces in Northern Syria.²¹⁴

These are important questions, salient in the moment, and requiring technical legal expertise. Still, such questions, even those primarily concerned with respect for human

²¹⁰ Koskenniemi, 'Fate' (n 1); Koskenniemi, *Politics* (n 1) 101–2, 141.

²¹¹ de Kerchove (n 22) vi; de Guttery, Capone and Paulussen (n 22) 3; Bakker and Singleton (n 24) 12; Marcello Flores, 'Foreign Fighters Involvement in National and International Wars: A Historical Survey' in Andrea de Guttery, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 27; Francesco Strazzari, 'Foreign Fighters as a Challenge for International Relations Theory' in Andrea de Guttery, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 49, 52–53.

²¹² See Blackburn, Kayis and McGarrity (n 52) 4–5 (citation omitted).

²¹³ See Chapter Five, section 2.2.

²¹⁴ Tanya Mehra and Christophe Paulussen, 'The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking', *International Centre for Counter-Terrorism* (Perspective, 6 March 2019) <<https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/>>; HJ Mai, 'Why European Countries Are Reluctant to Repatriate Citizens who are ISIS Fighters', *NPR* (online, 10 December 2019) <<https://www.npr.org/2019/12/10/783369673/europe-remains-reluctant-to-repatriate-its-isis-fighters-here-s-why>>; Jenny Gesley, 'Germany: Court Obligates Government to Repatriate ISIS Member and Children to Germany' *Library of Congress Global Legal Monitor* (online, 17 December 2019) <<https://www.loc.gov/law/foreign-news/article/germany-court-obligates-government-to-repatriate-isis-member-and-children-to-germany/>>.

rights, often seek an improved, and more compliant, fair, transparent or efficient achievement of counterterrorism policy goals, rather than trying to observe the operation of the counterterrorism framing in the first place.²¹⁵ For clarity, I am not suggesting that efforts need not be made to prevent terrorist violence. My point is that the current dominant framing is pervasive and holds persuasive power over international legal argumentation. It can make lawyers reach first and foremost to tools within a counterterrorism logic as a way of approaching legal questions since the framing of the foreign fighter issue locates the debates of immediate significance and the expertise required to participate in them. The persuasion and pervasiveness of the security and counterterrorism framing can continue to be powerful even when one tries to be mindful of it or step away from its priority impulses. As was presented in the introduction to this thesis, even scholarship referring to foreign fighting not being a new phenomenon, or actively seeking to provide a wider view, often reverts to the here and now; to discussions of foreign terrorist fighting, and the Islamic State group in particular, projecting a predominant sense of place from the eyes of a parent state, spurred to a large extent by the priority policy issue of national security threats at home.²¹⁶

In this way, the 2014 definition of ‘foreign terrorist fighter’ provided by the Security Council supports an approach in which various categories of foreign fighters, as individuals fitting a particular status, are distinguished when appearing in a new manifestation or becoming a priority policy issue, rather than considering foreign fighting as a general conceptual category. Indeed, as a discipline, lawyers are trained to work with the legal definitions and rules that have come into force — obviously not uncritically. International lawyers are busy within this new jurisdictional field within the counterterrorism framing of the dominant policy issue. Technical questions about the new categorisation of person tend to be prioritised over and above any renewed consideration of underlying general norms of international law related to state responsibility and friendly relations that might be helpful for thinking about the scope of diligent prevention duties on states more broadly, to linking the historical examples of foreign participation in war with today’s examples and legal responses, or, history aside, to stepping back to think more broadly about other persuasions of foreign fighting or foreign fighting as a broader conceptual whole today.²¹⁷

Overall, international lawyers may appreciate that there is a broader and more nuanced

²¹⁵ See, eg, the description of the panel ‘Foreign (Terrorist) Fighters: Prospects and Challenges’, 2018 American Society of International Law Annual Meeting (4–7 April 2018, Washington) <<https://www.asil.org/annualmeeting>>: ‘exploring resulting challenges to the coherence of other applicable bodies of law and the impact thereof on the successful achievement of the policy goals underlying the “foreign terrorist fighter” regime’; Resolution 2396 (n 54), preamble: ‘underscoring that respect for human rights, fundamental freedoms and the rule of law are ... an essential part of a successful counter-terrorism effort’.

²¹⁶ See Chapter One, n 129.

²¹⁷ For exceptions in the literature, see Chapter One, section 4.

history to these legal debates but are busy coping with, and too interested in, the present moment and its technicalities, in crisis mode as it were.²¹⁸ One risks getting caught up in the frame, or in the crisis at hand, and therefore constrained in being able to reflect more generously upon foreign fighting as a broader whole (whatever that might look like), or upon the narrow rush of the counterterrorism framing itself, analysing longer-term trends and structural problems, and considering how this moulds the development of international law.²¹⁹ Hilary Charlesworth argues that this can limit international lawyers' enquiries, leading lawyers to 'rediscover an issue constantly and to analyse it without building on past scholarship'; that 'international lawyers are not accustomed to unpacking the layers of meaning' and 'stay glued to specific climatic events and fail to see the larger picture'.²²⁰

3.4 Seeking Critical Distance from the Counterterrorism Framing

In summary, the counterterrorism approach to issues of violence, and specifically the counterterrorism framing of the foreign fighting policy issue, has therefore proven problematic in its application, but can also limit one's vision and thinking about the possible ills of foreign fighting from which international law may be seeking to protect us. Even if continually contested, these possible ills — or benefits — involve a wider and richer set of issues than only counterterrorism and security. Therefore, we run into the problem that the presently dominant counterterrorism approach cannot, on its own terms, satisfactorily resolve all our questions. This demands, in turn, critical reflection about counterterrorism as a way of framing the most relevant legal issues regarding foreign fighting.

To step back from the legally- and often geographically-limited category of foreign terrorist fighters and seek critical distance from the counterterrorism framing, my approach in this project is to flip the object of study and therefore the relevant questions, as was set out in Chapter One. Rather than envisaging foreign fighting as one facet of terrorism, I envisage terrorist activity as one facet of foreign fighting. This changes the outlook and makes visible alternative legal framings of the issue of foreign fighting in different moments — that volunteer fighters during the Spanish Civil War were responded to within a different legal framing than mercenaries during the decolonisation conflicts, and foreign fighters today. In my consideration of the three moments of international legal regulation of foreign fighting that follow in this study, I seek to view the developments in international law relevant to foreign fighting through the lens of the dominant legal framing impacting on the decision-making and approach at each juncture.

²¹⁸ Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65(3) *Modern Law Review* 377.

²¹⁹ *Ibid* 377, 389.

²²⁰ *Ibid* 384, 386 (citation omitted).

Before moving on to those three moments of regulation in the three following chapters, however, the final section of this chapter discusses two preliminary issues related to the theoretical and methodological orientations of the thesis that arise with a view *across* alternative framings.

4. Framing, History, Politics and International Law

4.1 Pragmatic *and* Principled: Politics and International Legal Argument

The study of alternative framings and their impact on the adopted definitions of categories of foreign fighter that I present in this thesis may give the impression that these hard and unsettled questions about foreign fighting are ultimately only a question of power politics in each historical setting.

The framing of the foreign fighter issue in different moments *is* a reflection of politics. National interest undeniably has a significant effect on legal positions put forward by certain speakers — is the state in question a supplier or a receiver of fighters? Is the state one which speedily revokes foreign terrorist fighters' dual nationality or the slower, leftover state of origin? Partnering with Kurdish forces or hoping to restrain them? How well can the state infrastructure cope with the risks those fighters present? A realist approach could assume that states turn a blind eye to citizens who fight overseas when it suits their foreign policy, when there is little threat to the home state, when the person's allegiance is not in question and the causes are considered just. Decisions — such as who is *out* and who is *in* as acceptable/unacceptable foreign fighters — are therefore not random, nor universal. Decisions will always ultimately rely on the subjective and the political,²²¹ especially related to violence and war, which has been a 'central preoccupation' and 'kind of ultimate test' for international law.²²² In turn, that means that assumptions that the law works to constrain politics and state power are lacking required nuance, and do not reflect the conflicting opinions about principles and values considered to be universal, nor the realities of warfare.²²³ The idealism held by large parts of the

²²¹ Kennedy, 'Theses' (n 9) 374; Koskeniemi, *From Apology to Utopia* (n 9) 17–18, 58–67, 387, 591–2, 596; Martti Koskeniemi, 'The Politics of International Law' (1990) 1(1–2) *European Journal of International Law* 4, 9; Martti Koskeniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in Jean d'Aspremont et al (eds), *International Law as a Profession* (Cambridge University Press, 2017) 38, 50–1; Bianchi, *International Law Theories* (n 6) 149.

²²² David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 158, 178. See also Finnemore (n 5) 1: In any society [domestic or international], regulating the use of force among members is a foundational and defining task; Frédéric Mégret, 'Thinking about What International Humanitarian Lawyers "Do": An Examination of the Laws of War as a Field of Professional Practice' in Wouter Werner, Marieke de Hoon and Alexis Galán (eds), *The Law of International Lawyers* (Cambridge University Press, 2017) 265, 268.

²²³ Cass (n 7) 377–8; Martti Koskeniemi, 'International Law in a Post-Realist Era' (1995) 16 *Australian Year Book of International Law* 1, 5–6; Wouter Werner, Marieke de Hoon and Alexis Galán, 'Introduction' in Wouter Werner, Marieke de Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading*

international legal profession presents itself particularly insistently in the humanitarian notions within law related to armed conflict. So, this can be a bitter pill in as much as it suggests there is little point in striving to arrive at better and fairer international legal positions.

At the same time, explaining such choices as mere reflections of national interests is also unsatisfactory because this would ignore that those politics have been articulated through international law over preceding decades, and could not explain the nuances of how international legal practitioners actually operate and assess the convincingness or not of other speaker's arguments.²²⁴ Critical legal theory has demonstrated how international legal argument is inherently indeterminate and therefore ultimately an expression of ideology/politics, but simultaneously made somewhat stable — recognisable as international law argumentation — by professional sensibilities and structural biases identified in the system. International legal professionals experience this directly.²²⁵ In a meeting or negotiation, for example, although it might be anticipated that the lawyer from *this* organisation will argue *this* way, and the lawyer from *that* defence force will argue *that* way, that is, although lawyers can recognise the politics of the thing, they are able to discuss a matter, sharing different viewpoints and trying to persuade.²²⁶ Discussion is pinned down within certain unspoken disciplinary boundaries. Debates are continued to reach a determination or compromise. These unwritten professional sensibilities mean that while argumentation can only be subjective and political, the system in which the argument is spoken is 'distinctly legal'.²²⁷

For my purposes, the point is that whatever international law's weaknesses, its system brings certain limits and rules to the game. Thinking about the questions *legally* provides a frame that at least to some extent avoids 'mere political controversies' despite law's inherent dilemmas and potential instrumentalisation.²²⁸ International law has its own rules of operations that at least in theory provide some comfort and stability.²²⁹

Martti Koskenniemi (Cambridge University Press, 2017) 1, 2; Phillip R Trimble, 'International Law, World Order, and Critical Legal Studies' (1990) 42(3) *Stanford Law Review* 811, 832.

²²⁴ Kennedy, 'Theses' (n 9) 357; Koskenniemi, *From Apology to Utopia* (n 9) 561, 564; Kennedy, *A World of Struggle* (n 16) 109; Rasulov (n 9) 646, 652–4; Wayne Sandholtz, 'Dynamics of International Norm Change: Rules against Wartime Plunder' (2008) 14(1) *European Journal of International Relations* 101, 102.

²²⁵ Kennedy, 'Theses' (n 9) 377. See also David Kennedy, 'The Last Treatise: Project and Person (Reflections on Martti Koskenniemi's *From Apology to Utopia*)' [2006] (12) *German Law Journal* 982, 988.

²²⁶ See also Koskenniemi, *From Apology to Utopia* (n 9) 615–6; Orford, 'Voyage' (n 13) 1008.

²²⁷ Kennedy, 'Theses' (n 9) 357–8; Justin Desautels-Stein, 'International Legal Structuralism: A Primer' (2016) 8(2) *International Theory* 201, 206; Bianchi, *International Law Theories* (n 6) 148, 159.

²²⁸ Frédéric Mégret, 'Causes Worth Fighting For: Is There A Non-State Jus Ad Bellum?' in Aristotle Constantinides and Nikos Zaikos (eds), *The Diversity of International Law* (Brill, 2010) 171, 175.

²²⁹ Christopher Tomlins, 'Law and History' in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, online, September

This means that international law surrounding foreign fighting interlaces the pragmatic and the principled, and that considering only politics and history would tell too simple a story. As mentioned above, this thesis considers that as well as institutional bias, legal arguments are significantly affected by the broader legal framing of an issue. The key interest of the thesis is in thinking about the operation of international law within those political contexts and dominant legal framings; about awareness of the impact of framing on international legal thought.

Importantly, the above means that even if the dominant framing changes over time, legal argumentation on a particular topic cannot always start with a clean slate, but has a precedential history of argument and approach, including in the form of domestic implementation of international legal obligation. In line with my description in Chapter One of the challenge for international lawyers in grasping at once the old and the new, a priority policy issue in the here and now, and a longer history, one thing thinking through different framings offers is that it brings back in a factor of *time* and *movement of ideas* and I turn to this now.

4.2 History and International Law: The Movement of International Legal Argument Through Time and Framings

Viewing these alternative legal framings offers a historical view of legal responses to foreign fighting, albeit for present purposes. Scholarship continues to illustrate and also debate how international legal history can be approached.²³⁰ One question in those debates is the extent to which it is ‘allowed to read a past text, a lawyer, period or institution by reference to considerations that are important today but were not present (in the same form) at that earlier moment?’²³¹ Anne Orford’s scholarship in particular has considered how:

the study of international law requires attention to the movement of meaning. International law is inherently genealogical, depending as it does upon the

2009), 6: ‘indeterminacy understates the fixity and resilience, the stickiness, of the regimes of rules that law sets in place’.

²³⁰ See, eg, Randall Lesaffer, ‘International Law and Its History: The Story of an Unrequited Love’ in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Brill | Nijhoff, 2007) 27; Martti Koskenniemi, ‘Histories of International Law: Significance and Problems for a Critical View Keynote Paper’ [2013] (2) *Temple International and Comparative Law Journal* 215; Anne Orford, ‘On International Legal Method’ (2013) 1(1) *London Review of International Law* 166 (‘Method’); Anne Orford, ‘International Law and the Limits of History’ in Wouter Werner, Marieke de Hoon and Alexis Galan (eds), *The Law of International Lawyers* (Cambridge University Press, 2017) 297 (‘Limits of History’); Lauren Benton, ‘Beyond Anachronism: Histories of International Law and Global Legal Politics’ (2019) 21(1) *Journal of the History of International Law* 7. For a useful overview, see Matilda Arvidsson and Miriam Bak McKenna, ‘The Turn to History in International Law and the Sources Doctrine: Critical Approaches and Methodological Imaginaries’ (2020) 33(1) *Leiden Journal of International Law* 37.

²³¹ Martti Koskenniemi, ‘Imagining the Rule of Law: Rereading the Grotian “Tradition”’ (2019) 30(1) *European Journal of International Law* 17, 20. See also Robert W Gordon, ‘Foreword: The Arrival of Critical Historicism’ (1997) 49(5) *Stanford Law Review* 1023, 1024–5, 1027–8.

transmission of concepts, languages and norms across time and space. The past, far from being gone, is constantly being retrieved as a source or rationalisation of present obligation.²³²

This is certainly the case for the topic of foreign fighters, in regard to which policymakers, lawyers and the fighters themselves regularly refer to historical settings in which states responded to private volunteers and mercenaries as they appeared, even if, in practice, international legal thinking tends to distinguish different manifestations or phenomena of foreign fighting.

More specifically, to refuse to think about the possible ‘movement of meaning’ is, as Anne Orford argues, to refuse an overt engagement with contemporary politics.²³³ Positions on foreign volunteering argued by different actors in different times and contexts may often have served as proxies for deeper underlying political discourses. From within the operation of a dominant framing, the required thinking and response can seem natural, necessary, and neutral — because *legal*. Looking across different framings makes visible that this is not so. In line with the overall argument of this thesis, it is recognisable that different manifestations of foreign fighting have been responded to differently according to the dominant framings, with the resulting treatment of different manifestations as discrete categories within the law. Simultaneously, a historical view helps to highlight that there are persisting tensions — recurring red threads of discourse — in positions taken in legal debates that are not only applicable *here* and *now*, but have existed across different periods of time, political setting and legal framing.

I understand it as an approach attempting to go beyond the strictly technical/doctrinal, treating the discipline and its history ‘as an object of study in its own right’ and ‘refusing to accept smooth or evolutionary histories’.²³⁴ Through considering the key concerns or stakes that drove the legal positioning in the selected political moments and their effects, it is possible to start paying attention to both *change* and *stasis* in how the law and legal debate has responded to foreign fighting in various settings and framings;²³⁵ seeing the legal argumentation within certain social, historical, political but also especially *legal* context settings as they transform. In this way, the snapshots provided by the three selected moments in this thesis are not left as static instances in which international law was determined. The wider view brings to light the impact that one moment — influenced by its background framing — has had and continues to have on the ongoing legal debates.

²³² Orford, ‘Method’ (n 86) 175. See also Orford, ‘Limits of History’ (n 86) 305.

²³³ Orford, ‘Method’ (n 86) 174.

²³⁴ Arvidsson and McKenna (n 86) 8–11.

²³⁵ Discussing reforms in law and development, Rittich argues that ‘attention to both the change and the stasis is critical to understanding the direction of the social agenda and the prospects for transformation’: ‘The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social’ in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development* (Cambridge University Press, 2006) 203, 220.

Therefore, considering different framings impacting on international law in different historical moments provides a way of seeing the politics in action but also to better understand how those politics have played out in international legal argument across time.

One specific aspect representing *change* and *stasis* relates to how international law has at times defined various phenomena of foreign fighters as individuals of concern, i.e. assigned them a particular criminal status, as a repeated juridical technique. In this way, a category of foreign fighter is “born” through legal definition, and lives out its legal life, through an institutional setting determined largely by the legal framing applied to those individuals of concern at the time of regulation. This thesis tries to pay attention to this in the three selected moments of study.

In the spirit of a ‘Koskenniemi-style’ question, then, looking back to consider the effect of framing in different moments of foreign fighter regulation allows me to consider the relationship between international law and politics on *this* topic, at *this* point of time and *that*, and in various places; and to consider where it might be going. In this way, although history will always be viewed from a particular modern standpoint, considering a wider time period and broader category of foreign volunteer fighters than the *foreign terrorist fighter* might allow not only a description of historical tensions in argumentation about foreign volunteers in particular settings, that is, not only a description of history and politics. It might eventually allow an understanding of the operation and interplay of tensions reflected in international law *across* time and setting — of *change* and *stasis* — that continue to resonate in contemporary forms and practices.

While considering historical debate cannot provide a solution to these tensions if they are persisting and therefore unresolvable, my thesis argues that any thinking about the scope of possible duties on the parent state in relation to foreign volunteers in civil war, and about *other* foreign fighting in particular, can benefit from a consideration of earlier practices and contested visions of the law, as well as an appreciation of the operation of framing across those particular moments. Seeing that framing as one of several that have governed legal work in different moments might, then, go some way to finding additional freedom outside of that dominant framing, or even inside of it but more consciously so. It is in this way that both law and history can help one understand the choices faced in legal decision-making.²³⁶

This might offer something more meaningful than either a purely pragmatic/political or purely universalist/principled viewpoint on the rules of state relations and duties regarding foreign volunteer fighters; something appreciating also the effect of arguments relying on definitional clarity or due diligence standards as a method of seeking to balance the two.

²³⁶ Martti Koskenniemi, ‘Epilogue: To Enable and Enchant: On the Power of Law’ in Wouter Werner, Marieke De Hoon and Alexis Galan (eds), *The Law of International Lawyers* (Cambridge University Press, 2017) 393, 407.

This will not allow one to see the *whole world*, but it allows one to seek to ‘see the *world whole*’,²³⁷ eventually leading to ‘better law’.²³⁸ It is also in keeping with Philip Allott’s call to reconceive ‘the future of the past’, that is, to think about the past in making the future.²³⁹

The following three chapters of the thesis step back to consider the framing of the issues related to foreign volunteer fighting in the selected historical moments of neutrality law at the turn of the century and as applied to the Spanish Civil War (Chapter Three); to mercenaries in the national liberation wars of the 1960s–970s (Chapter Four); and to the 2014 definition and criminalisation of the foreign terrorist fighter (Chapter Five).

²³⁷ Matthew Arnold, “To a Friend” in Matthew Arnold, *The Poems of Matthew Arnold 1840–1867* (Oxford University Press, 1913) 40, cited in Claudia Geiringer and Dean R Knight, *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, 2008), xi n 1 (emphasis added).

²³⁸ Arvidsson and McKenna (n 86) 14, discussing Koskeniemi and Orford’s work.

²³⁹ Philip Allott, *Eutopia: New Philosophy and New Law for a Troubled World* (Edward Elgar, 2016) 90.

Chapter Three

Abstention and its Refusers:

Neutrality, Non-Intervention and the Legal Response to Foreign Volunteer Fighters in the Spanish Civil War

1. Introduction: The Romantic Persistence of Catalonia

In July 1936, following political and social upheavals in Spain, a significant part of the military rebelled against the democratically-elected Popular Front coalition government five months into its term. The battle between the insurgent military forces and troops loyal to the Republican government represented more than an internal fight for power. While the picture is complicated by the divided identities fighting on each side,²⁴⁰ in its simplest description, the conflict was depicted as one pitting fascism against communism, rather than a democracy being faced with internal armed opposition.²⁴¹ It was not a civil war that could be considered entirely domestic in nature and therefore of no concern to international law, despite its origin in internal disputes and political upheavals.²⁴² Rather, it was a conflict which set in opposition broader political ideologies, and raised the spectre of a spreading European war, making it of international, or at least wide regional, concern.²⁴³

The opposing ideologies underlying the conflict, as well as the prompt intervention of Germany and Italy in support of the nationalists, contributed to the participation of foreigners on both sides. The conflict ‘took on the coloration of a world war in embryo, becoming “the screen on to which foreigners projected their own concerns with such luminous clarity”’.²⁴⁴

The foreign volunteers formed into the International Brigades supporting the Republican government are remembered fondly and romantically by many in Western countries.

²⁴⁰ The fragmented Republican side was supported by those identifying as liberal centrists, through to more revolutionary Stalinist and anti-Stalinist communists, Catalan separatists, Basque nationalists, anarchists, socialist trade unionists, anti-fascists, and peasants and workers armed by the authorities. The Nationalist side was supported by those identifying as fascist, falangist, Carlist/monarchist, Catholic, anti-communist: SA H, ‘The Spanish Revolt and Non-Intervention’ (1936) 13(4) *Bulletin of International News* 3, 5–6 (‘Revolt’); Christopher Othen, *Franco’s International Brigades: Adventurers, Fascists, and Christian Crusaders in the Spanish Civil War* (Columbia University Press, revised and expanded edition, 2013) 35–7, 69, 263.

²⁴¹ Othen (n 1) 2–3; Jill Edwards, *The British Government and the Spanish Civil War 1936–1939* (Macmillan, 1979) 1.

²⁴² Paul Preston, *Coming of the Spanish Civil War: Reform, Reaction and Revolution in the Second Republic* (Taylor & Francis, 1994).

²⁴³ H, ‘Revolt’ (n 1) 6; Ann van Wynen Thomas and AJ Thomas, ‘International Legal Aspects of the Civil War in Spain, 1936–39’ in Richard A Falk (ed), *The International Law of Civil War* (Johns Hopkins Press, 1971) 111, 112–3 (‘Legal Aspects’).

²⁴⁴ Juliet Gardiner, *The Thirties: An Intimate History* (Harper, 2010) 392 (no citation for original quote).

Memorials to their service, as well as Spain's subsequent offer of citizenship,²⁴⁵ symbolise how fighting abroad can be perceived as an example of solidarity and 'selfless gesture';²⁴⁶ of individuals applying violence on the "right side of history".

Some of today's foreign fighters refer back to 1930s Spain, aligning themselves with historical political causes to give weight and provenance to their actions.²⁴⁷ They fight with the Syrian Kurds against the 'fascism' represented by the Islamic State group 'in the same way that people fought in Spain in 1936'.²⁴⁸ Foreign fighters in Eastern Ukraine have mentioned repayment of a 'historic favour' to Russia due to the Soviet Union's support for the Republican government in the Spanish Civil War, and a wish to fight the 'fascists' of the Ukrainian side.²⁴⁹ Anti-communist and sometimes far-right foreign volunteers joining pro-Kiev militias have also claimed a link to the International Brigades' fight against Franco, describing themselves as 'foreign ideologues ... battling separatists'.²⁵⁰

Policymakers involved in contemporary debates surrounding foreign fighting regularly make similar references to the International Brigades. Parliamentary debate in New Zealand on foreign fighter legislative amendments in 2014, for example, discussed the legitimacy of certain war volunteers compared with others by making a direct comparison with the International Brigades in Spain:

I would not want to see this legislation, in the 21st century, preventing what a former generation did, which was to fight for democracy and for human rights against oppression — as against the legislation here, which quite properly would prevent people from fighting for a terrorist organisation.²⁵¹

This chapter examines the international legal response to the foreign volunteer fighters in the Spanish Civil War, by focusing on the predominant framing of neutrality. The discussion of

²⁴⁵ See, eg, *International Brigade Memorial Trust* (Web Page) <<http://www.international-brigades.org.uk>>; Sam Jones, "'It's a Terrible Thing, Civil War, But You've Got a Job to Do'", *Guardian* (online, 8 June 2009) <<https://www.theguardian.com/world/2009/jun/08/spanish-civil-war-british-irish-veterans>>.

²⁴⁶ Filipe Ribeiro De Menezes, *Franco and the Spanish Civil War* (Routledge, 2001) xiii.

²⁴⁷ See generally Nir Arielli, *From Byron to bin Laden: A History of Foreign War Volunteers* (Harvard University Press, 2018) 219–21.

²⁴⁸ Hisham Aidi, 'Spanish Leftists Join Fight against ISIL' *Al Jazeera* (online, 17 April 2015) <<http://www.aljazeera.com/indepth/opinion/2015/04/spanish-leftists-join-fight-isil-150414115851880.html>>.

²⁴⁹ Patrick Jackson, 'Ukraine War Pulls in Foreign Fighters' *BBC* (online, 1 September 2014) <<http://www.bbc.com/news/world-europe-28951324>>. See also Nahia Sanzo, 'Spanish "Brigadistas Internacionales" in the Donbass' *Slavyangrad.org* (Blog Post, 16 August 2014) <<https://slavyangrad.org/2014/08/16/spanish-brigadistas-internacionales-in-the-donbass/>>.

²⁵⁰ Fausto Biloslavo, 'Ukraine: Far-Right Fighters from Europe Fight for Ukraine' *Eurasianet* (online, 6 August 2014) <<https://eurasianet.org/ukraine-far-right-fighters-from-europe-fight-for-ukraine>>.

²⁵¹ New Zealand, *Parliamentary Debates*, 9 December 2014, 702 NZPD 1207 (Phil Goff). See also United Kingdom, *Parliamentary Debates*, House of Commons, 19 April 2016, vol 608, col 889, regarding citizens returning from fighting against the Islamic State group. Similarly regarding mercenaries, and grappling with the differences between volunteers and mercenaries, United Kingdom, *Parliamentary Debates*, House of Lords, 10 February 1976, vol 368 col 25–30.

the tensions and contestations surrounding the response demonstrates that foreign fighting was thought about in this moment chiefly within a legal framing of neutrality, ultimately interpreted as abstention. It also makes visible the effect of that framing on the scope of the articulations and practice of the law — the stakes of the debate, or what aspects were prioritised by that framing and what it worked to obscure. In line with this study’s research question, this helps bring into view elements of the legal argumentation that persist today, as well as alternative possible argument within international law of which we might lose sight if a counterterrorism framing is adopted too quickly or exclusively. By carefully going back to the debates surrounding an earlier manifestation of foreign fighting, attention can be paid to how the argumentation has moved through time and alternative framings.

In contrast to the romantic persistence of the Spanish Civil War amongst policymakers and fighters, existing legal scholarship has made the connection between neutrality law, the Spanish Civil War and the treatment of foreign terrorist fighters today only to a limited extent.²⁵² Those works do not propose a straightforward re-application of earlier law or suggest ‘[privileging] a particular time and place as having a special authority’ to answer legal questions.²⁵³ Indeed, in post-holocaust thinking, remaining neutral towards the fight against fascism may seem misplaced, and the Spanish Civil War provides a common example of how non-intervention is also an intervention of sorts.²⁵⁴ Rather, as a starting point, neutrality is relevant to any consideration of private volunteering because the codified version of traditional neutrality law included specific rules — in fact an exception — concerning private individuals from the neutral state enlisting with foreign belligerent forces.²⁵⁵ As this chapter illustrates, neutrality law was key to legal debate during the Spanish Civil War, even if not directly relied upon by states. Although applying in international conflict only, neutrality has provided a significant foundation for subsequent legal debate surrounding diligent preventive duties on states under rules of the non-toleration of harm relevant to the regulation of foreign fighting in internal armed conflict. While there had long been an interest in questions related to the application of international law to situations of civil strife, the

²⁵² See, eg, Alice Riccardi, ‘Sull’Esistenza di un Obbligo Generale di Prevenire e Reprimere il Fenomeno dei Foreign Fighters alla Luce della Vicenda della Guerra Civile Spagnola’ [On the Existence of a General Obligation to Prevent and Repress the Phenomenon of Foreign Fighters in the Light of the Spanish Civil War] [2017] (2) *La Comunità Internazionale* 213. Regarding domestic neutrality/foreign enlistment law, Craig Forcese and Ani Mamikon, ‘Neutrality Law, Anti-Terrorism, and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies’ (2015) 48 *University of British Columbia Law Review* 305; John Ip, ‘Reconceptualising the Legal Response to Foreign Fighters’ [2019] *International & Comparative Law Quarterly* 1.

²⁵³ Robert W Gordon, ‘The Struggle Over the Past’ (1996) 44 *Cleveland State Law Review* 123, 125.

²⁵⁴ See, eg, Stephen C Neff, *The Rights and Duties of Neutrals: A General History* (Manchester University Press, 2000) 179–80, 182; Nathaniel Berman, ‘Between Alliance and Localization: Nationalism and the New Oscillationism’ (1994) 26 *New York University Journal of International Law and Politics* 449, 490–1.

²⁵⁵ *Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, opened for signature 18 October 1907, USTS 540, 2 AJIL Supp. 117 (entered into force 26 January 1910) art 6 (‘Fifth Hague Convention’). See section 2.2 below.

Spanish Civil War reignited the interest in these wider questions.²⁵⁶ I read it as a moment in which these tensions came to the surface, and in which the European states found their own way of protecting their national interests.

In this sense, I approach the 1930s as a transition period; a working out of how to apply or adapt the dominant framing of neutrality to a new situation of foreign fighting. The states involved with the Non-Intervention Agreement relied on what was ultimately domestic policy options and what looks like a regional legal arrangement, rather than relying on the existing traditional provisions of neutrality law or the international forum of the League of Nations that could have been applied. This makes the response to volunteering in this moment complex as a precedent regarding international law governing foreign fighting today. It signifies not only the weakness of the attempted collective security mechanisms of the League of Nations, but suggests a period of discontent, mismatch or transition in perceptions of how rules governing third state relations with the parties to internal armed conflict affected international legal rules applicable to the regulation of foreign fighting.

The legal response to volunteer fighters in the Spanish Civil War can, therefore, at first present something of an oddity, tied to time and setting. Yet, once the other two moments examined in this study are considered, those decisions, significantly affected by the dominant framing in question, start to fit an overall “piecemeal” pattern adopted due to the persisting tensions foreign fighting presents for international law.

The chapter proceeds as follows: Section 2 explores the way states described their obligations towards other states in terms of neutrality law vis-à-vis hostile acts of private individuals in their territory. It sets out the traditional rules of neutrality law applying to foreign enlistment and volunteering, as codified in the 1907 Fifth Hague Convention on Neutrality,²⁵⁷ and retrieves selected key legal debates surrounding foreign fighting from the time of its adoption. Sections 3 and 4 then examine the relationship of traditional neutrality with the non-intervention policies adopted by European states during the Spanish Civil War. They detail how the volunteer fighters participating in the Spanish conflict were regulated, and describe the legal debates and role of law within the predominant framing of the issue at the time. Section 5 discusses the broader debates in this period surrounding the role of neutrality and impartial abstention in third state relations with parties to conflict. The concluding Section 6 interrogates the ongoing significance of the legal treatment of the volunteers in the Spanish Civil War within the framing of neutrality and abstention for thinking about international law surrounding foreign fighting today.

²⁵⁶ Richard A Falk, ‘Janus Tormented: The International Law of Internal War’ in James N Rosenau (ed), *International Aspects of Civil Strife* (Princeton University Press, 1964) 185, 185 n 2, 218.

²⁵⁷ *Fifth Hague Convention* (n 16).

2. Retrieving Neutrality Law Regarding Individual Volunteers

Since the early twentieth century, legal and political scholarship has debated the continued application, relevance and transformation of neutrality law in an international system based on collective security.²⁵⁸ As mentioned in Chapter One, a consideration of foreign fighting concerns the relationship of third states to the parties to a conflict, and, indirectly, towards the local population. The actions of a state's nationals could reflect back on it, for better or worse, and in the more extreme cases lead to frictions or complications in international relations.²⁵⁹ Even conflicts perceived to be peripheral could become important for the parent state if its citizens involve themselves in it.²⁶⁰ Therefore, the notion of neutrality represents a crucial stone within the foundations of international legal thinking about the scope of diligence duties on states to regulate the actions of those in their jurisdiction wishing to participate in foreign armed conflicts.

As mentioned, the purpose of retrieving traditional neutrality law related to foreign fighting is not to call for adherence to an original understanding of the Fifth Hague Convention. Nor does neutrality law necessarily provide satisfactory answers to existing questions surrounding foreign volunteers even within its own framework of application: Article 6 of the Fifth Hague Convention on individual foreign enlistment, discussed in detail below, has been described as 'clumsy, uncertain and ineffective', showing 'uncertainties and deficiencies'.²⁶¹ Moreover, as the Fifth Hague Convention applied only to international armed conflicts (including situations in which belligerency had been recognised), such that volunteer enlistment was generally with state (or belligerent) armed forces, this rule cannot simply be applied by analogy to non-international armed conflicts and volunteering with non-state armed groups. Certain conceptual difficulties lead one instead to apply the principle of non-intervention to internal conflicts.

Instead, by considering traditional neutrality law, this chapter attempts to observe and redescribe how the themes that have shaped the relevant legal debates, affected by the

²⁵⁸ See, eg, Philip C Jessup, 'The Birth, Death and Reincarnation of Neutrality' (1932) 26 *American Journal of International Law* 789; Nicolas Politis, *Neutrality and Peace* (Carnegie Endowment for International Peace, 1935); T Komarnicki, 'The Problem of Neutrality under the United Nations Charter' (1952) 38 *Transactions of the Grotius Society* 77; Nils Örvik, *The Decline of Neutrality 1914–1941* (Johan Grundt Tanum Forlag, 1953); CG Fenwick, 'Is Neutrality Still a Term of Present Law?' (1969) 63(1) *American Journal of International Law* 100; Patrick M Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 17 *Harvard International Law Journal* 249; Laurent Goetschel, 'Neutrality, a Really Dead Concept?' (1999) 34(2) *Cooperation and Conflict* 115; Maria Gavouneli, 'Neutrality: A Survivor?' (2012) 23(1) *European Journal of International Law* 267.

²⁵⁹ Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press, 1959) 533–4.

²⁶⁰ See, eg, Geraint Hughes, 'Soldiers of Misfortune: The Angolan Civil War, the British Mercenary Intervention, and UK Policy towards Southern Africa, 1975–6' (2014) 36(3) *International History Review* 493, 506–7.

²⁶¹ Ian Brownlie, 'Volunteers and the Law of War and Neutrality' (1956) 5(4) *International & Comparative Law Quarterly* 570, 570, 574.

dominant legal framing of the moment, may have subsequently travelled through time and setting, viewing it from a particular modern standpoint.²⁶² The duty on states not to tolerate conduct of private individuals causing unlawful transnational harms to other states has shared roots with neutrality law.²⁶³ It becomes important, then, to consider how the notion of neutrality served as ‘inspiration to interpret and refine the traditional obligation not to “interfere in civil strife”’,²⁶⁴ including moulding practice regarding the scope of due diligence duties to prevent the movements of civil war volunteers.

2.1 Traditional Neutrality Law

During an international armed conflict or situation of recognised belligerency, the law of neutrality governed the relationship of a neutral third state towards the parties. A neutral state held two key duties under this framework: *abstention* from participation in the armed conflict in support of either party, that is, not materially supporting the belligerents in their military campaign; and *prevention* of abuses against its neutrality by taking diligent action to defend its territory, for example, by not allowing belligerent forces to pass through it or seek safe haven. In return for complying with these abstention and prevention duties, the neutral state benefited at law from inviolability of its territory; that is, more broadly, not to be affected adversely by the conflict.²⁶⁵

While the *state* was responsible for ensuring abstention and prevention, these duties required it to consider also the actions of *private individuals* within its territory that might impact upon its neutral status.²⁶⁶ This was not due to *attribution* of the private individual’s conduct to the neutral state — although in some cases, the sponsorship of the state was certainly the relevant question regarding ‘volunteers’.²⁶⁷ Rather, the state might be considered no longer neutral through *omission*, that is, if it failed to take sufficient care to prevent certain actions of

²⁶² Anne Orford, ‘On International Legal Method’ (2013) 1(1) *London Review of International Law* 166, 175. See also Chapter Two, section 4.2.

²⁶³ Hersch Lauterpacht, ‘Revolutionary Activities by Private Persons against Foreign States’ (1928) 22 *American Journal of International Law* 105, 127; Manuel R Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (Martinus Nijhoff, 1962) 50 (‘*International Responsibility*’); Hin-Yan Liu, ‘Mercenaries in Libya: Ramifications of the Treatment of “Armed Mercenary Personnel” under the Arms Embargo for Private Military Company Contractors’ (2011) 16(2) *Journal of Conflict & Security Law* 293, 306.

²⁶⁴ Tom Ruys, ‘Of Arms, Funding and “Non-Lethal Assistance”: Issues Surrounding Third-State Intervention in the Syrian Civil War’ (2014) 13(1) *Chinese Journal of International Law* 13, 50. See also R Pisillo-Mazzeschi, ‘Due Diligence and the International Responsibility of States’ (1992) 35 *German Yearbook of International Law* 9, 34.

²⁶⁵ *Fifth Hague Convention* (n 16), arts 1, 5; See also Lassa Oppenheim, *International Law: A Treatise*, ed Hersch Lauterpacht, vol II Disputes, War and Neutrality (Longman, 7th ed, 1952) 684–5, 738–9, 743; Michael Bothe, ‘The Law of Neutrality’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 2nd ed, 2008) 583–4; Erik Castrén, *The Present Law of War and Neutrality* (Suomalainen Tiedeakatemia, 1954) 442, 459ff, 471ff (‘*Neutrality*’).

²⁶⁶ Castrén, *Neutrality* (n 26) 441, 443, 447.

²⁶⁷ Chapter One, section 2.4.

persons within its territory who were militarily supporting either of the belligerents.²⁶⁸ The activities of individual citizens were relevant to debates about neutrality law because states had experienced, both as parent and destination states, the participation of foreign individuals in conflicts of that period — for example, during the American War of Independence (1775–1783), the Latin American wars of independence from Spain in the 1800s, the Greek War of Independence (1821–1833) — most famously, Lord Byron, who died there of illness — and the American Civil War (1861–1865).²⁶⁹

As for the level of care required of states, as Judge Moore in the *SS Lotus* case stated: ‘It is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.’²⁷⁰ Due diligence means reasonable preventive steps would need to be taken by the state in relation to the actions of private individuals within its jurisdiction in order to ensure compliance with the legal duty in question.²⁷¹ Originally discussed regarding the protection of aliens from the actions of private actors, such as during rebellions or other violence,²⁷² it became the standard demanded by neutrality law. ‘Due diligence’ appeared in the 1871 *Treaty of Washington* between the United States (US) and Great Britain, setting out the rules of neutrality to be applied in the Geneva Arbitration of the *Alabama* claims, following allegations of unneutral conduct during the American Civil War.²⁷³ The language was amended to ‘employ means at its disposal’ in the 1907 Hague Conference codifications.²⁷⁴

In practice, preventive measures would require appropriate legislative and administrative frameworks to be in place — an obligation of *result* — which can then be diligently applied in a particular situation — an obligation of *conduct, effort and means*.²⁷⁵

²⁶⁸ Castrén, *Neutrality* (n 26) 447.

²⁶⁹ See, eg, Marcello Flores, ‘Foreign Fighters Involvement in National and International Wars: A Historical Survey’ in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 27; Arielli (n 8).

²⁷⁰ *SS ‘Lotus’ (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 88 (Judge Moore).

²⁷¹ Duncan French and T Stephens, ‘ILA Study Group on Due Diligence in International Law First Report’ (International Law Association, 7 March 2014) 17.

²⁷² Including in relation to diplomatic representatives. See *British Property in Spanish Morocco (Great Britain v Spain) (Award)* (1924) 2 RIAA 615; Malcolm N Shaw, *International Law* (Cambridge University Press, 5th ed, 2003) 705–6, 733–6.

²⁷³ *Washington Treaty for the Amicable Settlement of all Causes of Difference between the Two Countries*, Great Britain–United States, signed 8 May 1871, 143 CTS 145 (entered into force 17 June 1981) art 6.

²⁷⁴ *Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War*, opened for signature 18 October 1907, USTS 545, 2 AJIL Supp 207 (entered into force 26 January 1910) arts 2, 23 (‘*Hague Convention (XIII)*’). See also Pisillo-Mazzeschi (n 25) 34–5; Garcia-Mora, *International Responsibility* (n 24) 61–2.

²⁷⁵ Pisillo-Mazzeschi (n 25) 26–7, 34, 48; Shaw (n 33) 705–6, 770; Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013) 228–30, 247–51.

In significant cases, non-diligent omission could lead to an accusation of the fostering of civil unrest or an interference by the state itself. As Ian Brownlie has argued, ‘[i]n principle, omission to prevent [the departure of private volunteers] to fight against the legitimate government in a civil war ... would engage the responsibility of a State for interference in the internal affairs of the State in which insurrection occurred.’²⁷⁶

The involvement of nationals in wars abroad was therefore an issue that affected inter-state relations, and to which states had anyway long given attention in various ways on the domestic level. Responses were both “permanent” and temporary concerning a particular conflict, for example, through closing borders or placing travel restrictions, resorting to physical force, issuing proclamations of neutrality and enacting related legislation.²⁷⁷ US neutrality law and related practice from 1794, which sought to restrain nationals from becoming involved in wars taking place in Europe, has been especially influential. It provided a model for other foreign enlistment laws, such as those of the United Kingdom (UK) and Canada, and coloured the subsequent codification of neutrality law on the international level. Although referring to neutrality and foreign enlistment, suggesting application in interstate conflicts, such domestic neutrality laws could also be applied to nationals’ involvement in civil strife, sometimes necessitating amended language. Such laws did not require complete abstention, but prohibited foreign volunteer fighting undertaken against a state at peace with the parent state. In other words, they generally prohibited recruitment and enlistment occurring within the parent state territory, but did not entirely prevent individuals from leaving their country to join a foreign force provided allegiance or treason was not at issue.²⁷⁸

The desire to avoid friction between states including in relation to civil strife, and not to be seen as condoning the involvement of one’s nationals, also led to bilateral and regional *bon voisinage* agreements. These included the 1794 Jay Treaty between the US and Great Britain,²⁷⁹ and the 1928 Inter-American Havana Convention concerning the duties and rights

²⁷⁶ Brownlie (n 22) 573–4.

²⁷⁷ Francis Deak and Philip C Jessup, *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries* (Carnegie Endowment for International Peace, 1939); Janice E Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press, 1994) 79–82, text for Table 4.2.

²⁷⁸ See, eg, JT Abdy (ed), *Kent’s Commentary on International Law* (Deighton Bell, 2nd ed, 1878) 269ff; Lauterpacht (n 24) 111ff; Edward Dumbauld, ‘Neutrality Laws of the United States’ (1937) 31(2) *American Journal of International Law* 258; David Riesman Jr, ‘Legislative Restrictions on Foreign Enlistment and Travel’ (1940) 40(5) *Columbia Law Review* 793; Jules Lobel, ‘The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy’ (1983) 24 *Harvard International Law Journal* 1, 18–19; Thomson (n 38) 20; Nir Arielli, Gabriela A Frei and Inge Van Hulle, ‘The Foreign Enlistment Act, International Law and British Politics, 1819–2014’ [2015] *The International History Review* 1, 37.

²⁷⁹ *Treaty of Amity Commerce and Navigation*, Great Britain–United States, signed 19 November 1794, 52 CTS 243 (entered into force 28 October 1795) (‘Jay Treaty’).

of states in the event of civil strife.²⁸⁰ In such treaties, states agreed, within various settings, not to allow their territory to be used for actions against the other state parties, nor for their nationals to become involved in civil uprisings in the neighbouring states.²⁸¹

These experiences led into the twentieth century and the Hague Peace Conferences of 1899 and 1907 in which the codification of neutrality law was debated and the Fifth Hague Convention on neutrality adopted.

2.2 Fifth Hague Convention 1907 on ‘persons crossing the frontier separately’

In neutrality law’s codified form, a neutral state was required to seek to ensure that individuals in its territory did not undertake conduct endangering its neutrality. Articles 4 and 5 of the Fifth Hague Convention 1907 required the neutral state to prevent corps of combatants being formed on its territory to assist either of the belligerents, as well as to prevent recruitment amongst its population by or for the belligerents. Article 6 provided a significant exception to these rules for individuals leaving to participate in the armed conflict:

The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

The Convention therefore made a clear distinction between actions of the state and those of private actors, as well as between actions of organised bodies (‘corps of combatants’, recruitment) and those of isolated individuals.²⁸² Individuals could be ‘considered as acting in an isolated manner when there exists between them no bond of a known or obvious organization, even when a number of them pass the frontier simultaneously’.²⁸³ The description of individuals in the negative sense is noteworthy, that is, as actors who could not be recognised as an organised corps. Since they could not be recruited within the neutral state, the volunteers wishing to enlist overseas could not be in uniform nor leave in ‘close formation’.²⁸⁴ Elements that could help prove the existence of organisation included ‘their number, their attitude, their continuous marching past, or other circumstances’.²⁸⁵ Otherwise,

²⁸⁰ *Inter-American Convention Concerning the Duties and Rights of States in the Event of Civil Strife*, signed 20 February 1928, 134 LNTS 45 (entered into force 21 May 1929) (‘*Havana Convention*’).

²⁸¹ Amongst other things, the *Jay Treaty* prohibited privateers being outfitted in US ports by enemies of Great Britain. The *Havana Convention* required parties to use all means at their disposal to prevent their nationals from participating in or starting civil strife in another party’s territory. See Anne Van Wynen Thomas and AJ Thomas, *Non-Intervention: The Law and Its Import in the Americas* (Southern Methodist University Press, 1956) 234ff (‘*Import*’); Manuel R Garcia-Mora, ‘International Responsibility for Subversive Activities and Hostile Propaganda by Private Persons Against Foreign States’ (1960) 35(3) *Indiana Law Journal* 306, 330–4; Erik Castrén, *Civil War* (Suomalainen Tiedeakatemia, 1966) 80–2; Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge, 2013) 68.

²⁸² James Brown Scott, *Proceedings of the Hague Peace Conferences: Translation of the Official Texts* (Hein, 2000) I 140–1, III 33, 176–7.

²⁸³ *Ibid* I 141. See also Brownlie (n 22) 572.

²⁸⁴ Castrén, *Neutrality* (n 26) 482.

²⁸⁵ Scott (n 43) III 33.

as Ian Brownlie explains, '[p]roviding there is no "organization", whatever this may mean, substantial numbers with individual arms may depart as volunteers.'²⁸⁶

That such individual volunteers did not affect the parent state's neutral status implied that individuals not yet in military formation were unable to offer any real military support to a belligerent, nor cause real harm to its opponent; that they did not pose a substantial threat.²⁸⁷ As the Belgian delegation argued at the 1907 Conference:

If it is a question of a few individuals their case can present no danger. If, on the contrary, the case arises of an attempted passage *en masse* across the frontier of the neutral State, the latter will ... take ... all the measures which the circumstances seem to it to make necessary.²⁸⁸

States present at the 1907 Peace Conference were also concerned about the practical impossibilities of recognising the intentions of individuals where there were no outward trappings of organisation into some kind of military-style unit or other evidence of collective action. 'Constant surveillance' over individuals was considered 'illusory' at the time of codification.²⁸⁹ Arguments have been made that it was impossible for the state to monitor and control the 'secret acts of small groups of persons'.²⁹⁰ More than secrecy, the debates at the Peace Conference touched upon the administrative and legal impact of overly strict monitoring of departing citizens; impliedly also the right of individuals to leave the country and to travel: 'for it is impossible to scrutinize the intentions of each one and an attempt to exercise such control would raise intolerable obstacles to the passage of individuals from one State to another'.²⁹¹ The representatives were clearly discussing the practical scope of the due diligence obligation to be placed on the neutral state.

A related topic of discussion in the 1907 negotiations was the question of how many border crossings of individuals could take place before a meaningful threshold would be reached, particularly as after having crossed separately, volunteers 'would unite on the other side' into an organised unit immediately following their departure.²⁹² Traditional neutrality law was concerned with territorial jurisdiction.²⁹³ This meant that once individuals intending to become involved in the hostilities were outside the neutral state's territory, it was free from

²⁸⁶ Brownlie (n 22) 572.

²⁸⁷ Garcia-Mora, *International Responsibility* (n 24) 69.

²⁸⁸ Scott (n 43) III 196. See also Roy Emerson Curtis, 'The Law of Hostile Military Expeditions as Applied by the United States' [1914] *American Journal of International Law* 1, 14.

²⁸⁹ Statement of the representative of France, Scott (n 43) III 196.

²⁹⁰ CG Fenwick, *International Law* (Appleton-Century-Crofts, 3rd ed, 1948) 301.

²⁹¹ Scott (n 43) III 176–7.

²⁹² *Ibid* III 33.

²⁹³ *Fifth Hague Convention* (n 16), particularly art 5.

questions of responsibility.²⁹⁴ The Turkish delegation advocated making states responsible for individuals who form a military force just beyond the neutral frontier, but this was rejected during the negotiations. The Japanese delegation's suggestion that a neutral should have responsibility for acts occurring 'under its jurisdiction', that is, including in its 'protectorates', was likewise rejected in negotiations, limiting state responsibility.²⁹⁵ Ian Brownlie subsequently described the 'subtle and illogical distinction ... between those enlisting before leaving national territory and those leaving with intent to enlist'.²⁹⁶ Such questions remain highly relevant regarding patterns of recruitment and foreign fighting today since the moment in which the would-be foreign fighter actually joins an armed group and/or can be considered to be directly participating in the armed conflict can be debated.²⁹⁷

3. The Regulation of Foreign Volunteers in the Spanish Civil War 1936–1939

The outbreak of the Spanish Civil War, thirty years after the codification of these rules on private involvement in foreign armed conflicts from within neutral states, saw a new *transformed phenomenon* of foreign fighters, with significant numbers of Europeans and Americans travelling to Spain to show their solidarity with both sides of the struggle, but the government side in particular. The probable factual belligerency of the insurgents — although never recognised — if not the inter-state aspect of the war given the external military intervention by Germany and Italy, could have led to the application of traditional neutrality rules. That is, as far as international law was concerned, separate individuals would have been allowed to cross the border to volunteer with either side, provided they were not recruited/enlisted at home in a neutral state or otherwise departed as organised corps. However, EU states opted for a regulation of this foreign fighting which played out in a very different way.

3.1 A European Policy against Direct and Indirect Intervention in Spain

The Republican side of the war attracted an estimated 35–50,000 foreigners who joined the International Brigades, the loyalist army or lesser-known militias such as the POUM (Workers' Party of Marxist Unification).²⁹⁸ Many were recruited through the auspices of the

²⁹⁴ Scott (n 43) III 33; William Edward Hall, *Rights and Duties of Neutrals* (Longmans Green, 1874) 60–2. See similarly from a later period, United Kingdom, *Report of the Committee of Privy Councillors Appointed to Inquire into the Recruitment of Mercenaries* (Cmnd 6569, 1976) [9], [43]–[44] ('Diplock Report').

²⁹⁵ William I Hull, *The Two Hague Conferences and Their Contributions to International Law* (Athenaeum, 1908) 203–4.

²⁹⁶ Brownlie (n 22) 571–2. See similarly, *Diplock Report* (n 55) [45].

²⁹⁷ See Chapter Six, section 3.2 'Groups and Individuals'.

²⁹⁸ Spanish: *Partido Obrero de Unificación Marxista*. Ann van Wynen Thomas and AJ Thomas, 'Non-Intervention and the Spanish Civil War' (1967) 61 *Proceedings of the American Society of International Law at its Annual Meeting (1921–1969)* 2, 2 ('Non-Intervention'); PAM Esch, *Prelude to War: The International Repercussions of the Spanish Civil War (1936–1939)* (Springer, 1951) 43; William E Watters, *An International Affair: Non-Intervention in the Spanish Civil War, 1936–1939* (Exposition, 1971) 404; Edwards (n 2) 177.

Communist International Organisation (Comintern), through offices in the volunteers' home countries.²⁹⁹ Several were already in Spain at the outbreak of the war.³⁰⁰ The Soviet Union also supported the Republican government with arms and equipment. It did not send troops nor allow citizens to volunteer, however, it reportedly sent approximately 2,000 'technicians' and allowed 600 non-Russian political refugees to leave to fight. Mexico also sent a small amount of military support.³⁰¹

Intervention in support of the nationalist rebels occurred in a different way. From the early stages of the conflict, General Franco secured the direct military support of Italy and Germany, which deployed military assets but also troops, pilots and technicians, also described as 'volunteers'. Many, but fewer, Portuguese soldiers also served. Fewer in number and documented to a lesser extent than the foreigners joining the International Brigades, there were an estimated 1,500–3,000 foreign individuals who separately volunteered to fight on the nationalist side. The overall support in terms of foreign personnel was estimated at 150,000 over the period of the conflict. Early successes meant that the insurgents achieved control over large parts of the country.³⁰²

The Non-Intervention Committee, based in London, was established to bring diplomats together to discuss and make effective the Non-Intervention Agreement, initially discussed between France and Britain, and over the course of August 1936, subsequently entered into by 27 European states.³⁰³ While different countries adhered with slightly different conditions set out in their diplomatic statements, the general commitment was abstention from both 'direct' (state-sponsored) and 'indirect' (toleration of private) interference in Spain in the form of military support such as the provision of weapons.³⁰⁴

As history shows, several states — particularly Italy and Germany, but also Russia and Portugal to some extent — rapidly violated their commitments, despite continuing to

²⁹⁹ SP Mackenzie, 'The Foreign Enlistment Act and the Spanish Civil War, 1936–1939' (1999) 10(1) *Twentieth Century British History* 52, 56–7; Gardiner (n 5) 404–5; David Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford University Press, 2013) 97–102.

³⁰⁰ Malet, *Foreign Fighters* (n 60) 94–5; David Malet, 'Workers of the World, Unite! Communist Foreign Fighters 1917–91' (2020) 27(1–2) *European Review of History* 33, 38; Othen (n 1) 106.

³⁰¹ Thomas and Thomas, 'Non-Intervention' (n 59) 2; Esch (n 59) 45, 50.

³⁰² Esch (n 59) 40, chp IV; H, 'Revolt' (n 1) 4; Judith Keene, *Fighting for Franco: International Volunteers in Nationalist Spain during the Spanish Civil War 1936–1939* (Leicester University Press, 2001) viii; Thomas and Thomas, 'Non-Intervention' (n 59) 2; Norman J Padelford, 'International Law and the Spanish Civil War' (1937) 31(2) *American Journal of International Law* 226, 226 ('International Law'); HA Smith, 'Some Problems of the Spanish Civil War' (1937) 18 *British Yearbook of International Law* 17, 26; Othen (n 1) 2–5, 35–8, 69, 97, 263.

³⁰³ Esch (n 59) 57–8; Watters (n 59) 401; Thomas and Thomas, 'Legal Aspects' (n 4) 116–7.

³⁰⁴ Norman J Padelford, 'The International Non-Intervention Agreement and the Spanish Civil War' (1937) 31(4) *American Journal of International Law* 578, 579ff ('Agreement'). For the differences and reservations: Francis O Wilcox, 'The Localization of the Spanish War' (1938) 32(2) *American Political Science Review* 237, 239 ('Localization').

participate within the Non-Intervention Committee throughout the war. The main advocates for the Agreement, Britain and France, persevered despite this irony and failure of the policy. Descriptions of political opinion in France and Britain indicate divided internal views. For example, internally in Britain, popular and political opinion perceived a threat of Bolshevism *and* of Fascism; or “Rabble against Rebel” as it has been put.³⁰⁵ France, in particular, found itself in an awkward position since, like Spain, it had a Popular Front government.³⁰⁶ It was feared that the contest between ideologies at stake in the conflict meant that the same cleavages could play out in other European countries and lead to broader war erupting with Italy and Germany if the hostilities were not constrained to Spain. Ultimately, Britain’s appeasement policy, as well as its own economic concerns, led Britain to support a policy of non-intervention.³⁰⁷ Seemingly swayed by Britain’s position or not wanting to go it alone, France rapidly opted to prohibit military support being sent to either side of the conflict, closed her border to Spain for all war materials, and started to advocate with other states for equivalent non-intervention in Spain. Shortly after signing the Agreement, Britain likewise prohibited all arms exports to Spain and warned its population not to join the conflict.³⁰⁸

Despite its name, the Non-Intervention Agreement did not take the form of an enforceable treaty or other international or regional instrument. Rather, it was a set of non-identical diplomatic declarations made by the 27 adhering states, replying to an original French communication.³⁰⁹ The Committee also held no executive power, for example through majority decision-making, nor any enforcement mechanism. Instead, the system relied on ongoing diplomatic discourse and the domestic enactment of legal and administrative provisions.³¹⁰ Since the Committee was unable to make any legal determinations regarding responsibility for the alleged interventions into Spain by some of its members, it turned its attention to more practical activities to control and monitor the support being provided.³¹¹ In

³⁰⁵ Gardiner (n 5) 393. See also Richard Veatch, ‘The League of Nations and the Spanish Civil War, 1936–9’ (1990) 20 *European History Quarterly* 181, 186; Ignacio de la Rasilla del Moral, ‘In the General Interest of Peace: British International Lawyers and the Spanish Civil War’ [2016] (2–3) *Journal of the History of International Law* 197, 234; Othen (n 1) 95; Edwards (n 2) 19, 23, 38.

³⁰⁶ Esch (n 59) 52–4; Othen (n 1) 94.

³⁰⁷ Gardiner (n 5) 386, 392, 497; Thomas and Thomas, ‘Non-Intervention’ (n 59) 5; Padelford, ‘Agreement’ (n 65) 578; Esch (n 59) 62; del Moral (n 66) 236–7.

³⁰⁸ There is some debate as to British pressure on France. Edwards (n 2) 32–3; Thomas and Thomas, ‘Non-Intervention’ (n 59) 2; H, ‘Revolt’ (n 1) 147; Esch (n 59) 52, 61; Thomas and Thomas, ‘Legal Aspects’ (n 4) 116. See also Veatch (n 66) 187; Watters (n 59); del Moral (n 66) 235; Enrique Moradiellos, ‘The Allies and the Spanish Civil War’ in Sebastian Balfour and Paul Preston (eds), *Spain and the Great Powers in the Twentieth Century* (Routledge, 1999) 103–5; Wilcox, ‘Localization’ (n 65) 237–9.

³⁰⁹ Thomas and Thomas, ‘Non-Intervention’ (n 59) 2; Padelford, ‘International Law’ (n 63) 234–5; Padelford, ‘Agreement’ (n 65) 580; Esch (n 59) 57.

³¹⁰ Padelford, ‘International Law’ (n 63) 234–5; Padelford, ‘Agreement’ (n 65) 580, 582, 587; Esch (n 59).

³¹¹ H L, ‘Spain and the Policy of Non-Intervention’ (1936) 13(12) *Bulletin of International News* 3, 8–9 (‘Policy’); Padelford, ‘Agreement’ (n 65) 587–8; Wilcox, ‘Localization’ (n 65) 243–4.

the remainder of this chapter, I discuss only those activities related to the participation of foreigners in the war.

3.2 Extension of the Non-Intervention Agreement to Volunteer Fighters

3.2.1 Inclusion of Private Action

As well as the internal political reasons outlined above, it appeared that non-intervention became the favoured approach of many European states as a reaction to the direct intervention of Italy and Germany in Spain. Individual volunteers on the Republican side were not yet being discussed, and in its original form, despite the reference to ‘indirect intervention’, the Non-Intervention Agreement governed support to the parties in the form of weapons and military equipment. It did not yet contemplate foreign volunteers.³¹² However, the issue of the entry of volunteers into Spain through France’s border came up in discussions as early as August 1936. Germany and Italy were the first to suggest that the scope of non-intervention commitments be extended to cover the departure of volunteer fighters. Italy’s initial response even before agreeing to the Non-Intervention Agreement had been clever, delaying its commitment — ultimately to ‘direct intervention’ only — by asking for further discussion of the meaning of ‘indirect intervention’; specifically, whether non-intervention extended only to government action or also to private persons.³¹³

By late 1936, given the significant number of volunteers fighting on the Republican side, as well as the evident presence of German and Italian forces, Britain and France started to discuss the prevention of volunteer fighters within the London Committee.³¹⁴ Similarly to today, where the UN Security Council has declared that foreign terrorist fighters ‘increase the intensity, duration and intractability of conflicts’,³¹⁵ this transformed phenomenon of foreign volunteers in significant numbers was considered to pose a challenge for limiting and ending the Spanish conflict.³¹⁶ There was an ‘urgent need of putting an end to the flow of foreign nationals into Spain’.³¹⁷ In early December 1936, the Committee discussed a Russian proposal regarding the prevention of volunteers.³¹⁸ By February 1937, agreement had been reached within the Committee to extend the Non-Intervention Agreement to foreign

³¹² Non-Intervention Agreement regarding Non-Intervention in Spain 1936, reprinted in Norman J Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (MacMillan, 1939) 205, Appendix 1 (‘*Law and Diplomacy*’).

³¹³ H, ‘Revolt’ (n 1) 7–9; Padelford, ‘Agreement’ (n 65) 581; Wilcox, ‘Localization’ (n 65) 238; Esch (n 59) 56–7; Radharaman Chakrabarti, *Intervention and the Problem of Its Control in the Twentieth Century* (Sterling, 1974) 36–40; Riccardi (n 13) 221–3.

³¹⁴ Padelford, ‘Agreement’ (n 65) 588.

³¹⁵ SC Res 2178, UN Doc S/RES/2178 (24 September 2014), preamble.

³¹⁶ Watters (n 59) 403–4; Wilcox, ‘Localization’ (n 65) 244.

³¹⁷ Wilcox, ‘Localization’ (n 65) 245, quoting *London Times* (28 December 1936).

³¹⁸ L, ‘Policy’ (n 72) 10; Esch (n 59) 78.

volunteers.³¹⁹ That is, the Agreement would cover ‘the recruitment in, the transit through, or the departure from, their respective countries of persons of non-Spanish nationality proposing to proceed to Spain’ to take part in the war.³²⁰ A sub-committee, and subsequently also technical sub-committees, were established to examine ‘indirect intervention’, focusing on the issue of foreign volunteers and their withdrawal from Spain.³²¹

The plan for preventing further foreign fighter involvement was twofold: steps to prohibit the departure of fighters from their parent states in the first place, and, following the warring parties’ lack of agreement about allowing observers within Spain’s borders, establishing external supervision outside the borders to prevent the entry of those who managed to depart.³²² This approach represented an objective prohibition of foreign fighting in Spain, reflecting impartial non-intervention rules governing state and private action, over neutrality, as the chosen framework.

3.2.2 Domestic Implementation

The new provisions of the Agreement were enacted through domestic laws or regulations in each country.³²³ Similar to the UN’s monitoring of state action regarding foreign terrorist fighters today, member states agreed to inform the Committee of the domestic measures taken to bring the extension and the planned supervisory system into effect.³²⁴ As mentioned above, some states had pre-existing domestic neutrality, foreign enlistment or foreign incursion laws that could be applied, amended or extended to cover the Spanish Civil War.³²⁵ Other states enacted new domestic provisions specifically seeking to restrict foreign enlistment in Spain.³²⁶ In terms of domestic steps taken, Britain, for example, issued a public notice already in January 1937 alerting the public that its *Foreign Enlistment Act 1870*

³¹⁹ Thomas and Thomas, ‘Non-Intervention’ (n 59) 3; H L, ‘The Non-Intervention Committee and Control in Spain’ (1937) 13(22) *Bulletin of International News* 3, 8 (‘Control’); Padelford, ‘Agreement’ (n 65) 589; Esch (n 59) 78–9; Wilcox, ‘Localization’ (n 65) 245–246; Vernon A O’Rourke, ‘Recognition of Belligerency and the Spanish War’ (1937) 31(3) *American Journal of International Law* 398, 409–11.

³²⁰ L, ‘Control’ (n 80) 8. See also International Committee for the Application of the Agreement Regarding Non-Intervention in Spain, *Resolution relating to the Scheme of Observation of the Spanish Frontiers by Land and Sea*, adopted 8 March 1937 (‘Observation Scheme’), available in (1937) 31(4) Supp. Official Documents *American Journal of International Law* 163.

³²¹ Technical advisory sub-committee No. 3 on entry of foreign nationals and No. 6 on withdrawal of foreign volunteers: L, ‘Control’ (n 80) 4; Edwards (n 2) 51, 224–5.

³²² L, ‘Control’ (n 80) 9; Padelford, ‘Agreement’ (n 65) 589; Wilcox, ‘Localization’ (n 65) 246–7. See also Edwards (n 2) 32ff.

³²³ Esch (n 59) 79.

³²⁴ L, ‘Control’ (n 80) 8–9.

³²⁵ For example, US law was amended due to American volunteer fighters in Spain: Robert E Cesner and John W Brant, ‘Law of the Mercenary: An International Dilemma’ (1976) 6 *Capital University Law Review* 339, 356.

³²⁶ See, eg, discussing Sweden and Belgium, LC Green, ‘The Status of Mercenaries in International Law’ (1979) 9 *Manitoba Law Journal* 201, 219–20.

applied to the conflict in Spain. France followed by prohibiting departures with the intention of enlistment, and other countries enacted or proclaimed similar domestic provisions in February.³²⁷ Meanwhile, volunteers rushed to enter Spain before the new, or newly insisted upon, prohibitions took effect.³²⁸

Such laws had long been adopted, withdrawn or newly enforced as specific conflicts arose. Historically, for example, Britain had been pro-intervention in the earlier First Carlist War in Spain (1834–1835), explicitly suspending the British foreign enlistment laws so as to allow British subjects to enlist.³²⁹ In contrast, there had been an informal political agreement of non-intervention between several states in response to Spain's Third Carlist War (1873–1875).³³⁰ The Spanish Civil War of the 1930s was therefore no different.

Enforcement of such laws and policies nonetheless remained an issue, especially but not only in relation to Italy and Germany's decrees, which were clearly violated.³³¹ Even in Britain, although would-be fighters were denied visas or new passports where an intention to fight in Spain was suspected, the British Communist Party was able to help volunteers with tickets for weekends in Paris, which did not require a passport or visa. Once there, the volunteers would assemble and eventually take the 'red train' towards the Spanish border. Three-quarters of British volunteers reportedly left for Spain after Britain's proclamation re-enforcing its *Foreign Enlistment Act*.³³²

The second part of the extension of the Non-Intervention Agreement involved an ineffective and short-lived, albeit extremely detailed, monitoring program to detect foreign fighters and military materials crossing into Spain.³³³ This supervisory system involved naval patrols and search stations on the borders manned by observers from the member states. Nevertheless, the agents held no powers of enforcement but only a reporting function to the observers'

³²⁷ Arnold D McNair, 'The Law Relating to Civil War in Spain' (1937) 53 *Law Quarterly Review* 471, 494; Wilcox, 'Localization' (n 65) 245; Esch (n 59) 79; Mackenzie (n 60) 54–8.

³²⁸ 'Recruits Rush to Evade Ban on Aid to Spain', *Chicago Daily Tribune* (Chicago, 17 February 1937) 4; Mackenzie (n 60) 61–3.

³²⁹ *Report of the Neutrality Laws Commissioners* (Great Britain, 1868) 38 <<https://hdl.handle.net/2027/mdp.35112102557263>>; Padelford, 'International Law' (n 63) 235 n 50; Cesner and Brant (n 86) 355–8; Arielli, Frei and Van Hulle (n 39) 5, 7–10.

³³⁰ Padelford, 'Agreement' (n 65) 578–9.

³³¹ Esch (n 59) 79.

³³² Gardiner (n 5) 406–7; Mackenzie (n 60) 56–7, 61–3.

³³³ *Observation Scheme* (n 81); Thomas and Thomas, 'Non-Intervention' (n 59) 3; L, 'Control' (n 80) 9; Wilcox, 'Localization' (n 65) 246ff. Regarding its discontinuation, see SA H, 'Non-Intervention in Spain: A Breakdown Avoided' (1937) 14(9) *Bulletin of International News* 3 ('Breakdown'); Wilcox, 'Localization' (n 65) 249–50.

national governments. Regarding volunteers, but also arms and other aid, the patrols mostly affected the Republican side.³³⁴

3.3 Withdrawal of the Foreign Volunteers from Spain

With the Agreement extended to cover the prevention of future foreign fighters, attention turned to those already present in Spain. Some of the longest and most difficult discussions within the Non-Intervention Committee, going on for close to six months, surrounded the withdrawal of foreign volunteers and troops from both sides of the conflict. Negotiations were complicated by the linking of the withdrawal issue with the question of Italy and Germany's demands for belligerency to be recognised.³³⁵ A recognition of belligerency would have treated the conflict as, effectively, international, rather than internal, making neutrality law directly applicable.³³⁶ Trying to take into account the various demands, Britain submitted what was called a 'compromise plan' in July 1937. Amongst the plan's provisions was agreement for the withdrawal of foreign fighters from Spain, and in return, the recognition of conditional belligerent rights for the parties once 'substantial progress' had been made with the withdrawal.³³⁷

'Foreign volunteers' was the term used in the plan for foreigners participating on both sides of the conflict, that is, the individual volunteers with the Republican side, but also the state-organised troops on the nationalist side.³³⁸ The term was explicitly defined in a report of the technical sub-committee on withdrawal to include individuals who at the outbreak of the conflict were nationals of the adhering states (unless they had enlisted with the parties before the conflict started), and who fell into a number of relatively far-reaching categories. These included not only combatant personnel, but also instructors or advisors, those involved in the manufacture of war material or the arms trade, or in the maintenance of essential services of the parties (except medical or sanitary roles), as well as prisoners of war. A further category included the potentially broad 'persons whose activities are in any way susceptible of prolonging or embittering the present conflict. (As to be defined by the special sub-committee.)'³³⁹ Including the criterion of nationality at the start of the conflict was

³³⁴ L, 'Control' (n 80) 9; SA H, 'Spain: The British Compromise Plan' (1937) 14(3) *Bulletin of International News* 3, 6–7 ('Compromise'); Padelford, 'Agreement' (n 65) 589ff; Thomas and Thomas, 'Legal Aspects' (n 4) 156, 167–9.

³³⁵ H, 'Compromise' (n 95); SA H, 'Spain: The Non-Intervention Committee's Resolutions' (1937) 14(10) *Bulletin of International News* 10 ('Resolutions'); E P, 'The Non-Intervention Committee on Spain' (1938) 15(12) *Bulletin of International News* 9; Esch (n 59) 72, 118, 121ff; Watters (n 59) 404; H, 'Non-Intervention' (n 94); Thomas and Thomas, 'Legal Aspects' (n 4) 171–2; Edwards (n 2) 61–2, 152.

³³⁶ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) 9–20.

³³⁷ H, 'Compromise' (n 95) 10; Esch (n 59) 121–2; Wilcox, 'Localization' (n 65) 252–3; Edwards (n 2) 147ff.

³³⁸ The League of Nations resolutions preferred the term 'non-Spanish combatants': Esch (n 59) 119.

³³⁹ Unpublished report. Authorised summary of relevant part issued in memorandum about the British Plan, adopted 16 July 1937 by the Non-Intervention Committee as the basis for discussion. Extract in Appendix. See

significant, as many volunteers on the Republican side had become naturalised Spanish citizens during the war.³⁴⁰

Again, the approach was objective. No distinction was made on paper between different persuasions of foreign fighting, nor level of state control, although the purpose of the definition was not to criminalise the actions of the fighters but only to organise their withdrawal and repatriation.

Debates surrounding the volunteer fighters went on for months and were used as a political tactic. What could be considered ‘substantial progress’ in withdrawal, such that belligerency could be recognised? Did the withdrawals need to be of equal numbers on each side or proportional? How were the costs of the withdrawal to be equitably met by the rival states?³⁴¹ Political challenges aside, the withdrawal of volunteers from within the armed conflict (as opposed to dealing with them in their parent state prior to departure or upon return) presented massive practical complexities of cooperation between the relevant states and the parties to the conflict,³⁴² as they continue to do in their own way today, for example regarding alleged members of the Islamic State group and their families, captured and detained by Kurdish forces in Syria.³⁴³ The plan finally adopted in November 1937 was extremely detailed, setting out how and where evacuation centres would be established, daily quotas and timeframes for withdrawals to be completed, and arrangement for sea transport home.³⁴⁴

Despite the time and detail that went into the withdrawal plan, its proposed repatriations were never carried out due to a lack of agreement from the Nationalists.³⁴⁵ Instead, the dissolution of the International Brigades ultimately came about through unilateral action by the Republican Government. Ultimately, the League of Nations rather than the Non-Intervention Committee helped monitor the withdrawals.

3.4 The Bystander Role of the League of Nations

3.4.1 Opting for a Rival Body to the League of Nations

Although the League may not have had jurisdiction if the civil war was seen as a purely internal matter, it rapidly became clear that the conflict was of concern to other states and had

Arnold J Toynbee, *Survey of International Affairs 1937*, vol II ‘The International Repercussions of the War in Spain (1936–7)’ (Oxford University Press, 1938) 301–2, 332–3; Padelford, ‘Agreement’ (n 65) 602 n 61. See also Wilcox, ‘Localization’ (n 65) 253.

³⁴⁰ Watters (n 59) 373–4; Edwards (n 2) 149–50. Presumably, an evacuation would have been unenforceable in this circumstance as opposed to only some form of demobilisation.

³⁴¹ H, ‘Non-Intervention’ (n 94) 9ff; P (n 96) 9–10; Esch (n 59) 125ff.

³⁴² Padelford, ‘Agreement’ (n 65) 602; Esch (n 59) 132–4; Wilcox, ‘Localization’ (n 65) 254.

³⁴³ See Chapter Six, section 3.2 ‘Nationalism and Friendly Relations’.

³⁴⁴ ‘The Plan for the Withdrawal of Volunteers from Spain’ (1938) 15(14) *Bulletin of International News* 11.

³⁴⁵ H, ‘Resolutions’ (n 96) 14; Watters (n 59) 373–4.

international ramifications relevant to the League's mandate.³⁴⁶ Yet, already proven weak by Italy's invasion of Abyssinia (Ethiopia) in 1935,³⁴⁷ the League responded less than robustly during the Spanish Civil War. Moreover, Germany was not part of the League and Italy was considering a withdrawal (and did so in December 1937). In contrast, Spain was a member of the League of Nations and not of the Non-Intervention Committee. The League was, therefore, Spain's only available multilateral platform on these issues. Spain tried repeatedly in late 1936 and 1937 to complain to the League regarding its situation and the armed intervention by Germany and Italy within its territory.³⁴⁸ Spain hoped primarily for the League to recognise the Non-Intervention Agreement as an intervention against Spain's interests. It hoped the League might cause the abstention policy to be put aside so that Spain could more easily obtain external support; alternatively, at least for non-intervention to be properly enforced so as to prevent external support to the Nationalists.³⁴⁹

Commentators felt from early on that no useful result could come through the League since Britain and France's strong support for the abstention policy, and their fear of war spreading within Europe, would lead to a veto within the League.³⁵⁰ Certainly, the European states opted to respond to the conflict through a different collective forum than the League, and one which allowed confidential discussion, leaving Spain without European support within the League.³⁵¹ Although the Non-Intervention Committee, being in fact a diplomatic arrangement between states, did not have its own de jure existence, nor enforcement mechanisms, it was nevertheless described by one scholar as a 'rival international body' to the League of Nations.³⁵² In this sense, it has been said that France and Britain may have relied upon the League to further the policy of non-intervention.³⁵³ The Council in effect largely delegated matters to the Non-Intervention Committee and supported the Non-Intervention Agreement by calling for its respect.³⁵⁴ In the circumstances, it was considered by some that the League

³⁴⁶ Francis O Wilcox, 'The League of Nations and the Spanish Civil War' (1938) 198 *Annals of the American Academy of Political and Social Science* 65, 65–7 ('League').

³⁴⁷ Veatch (n 66); Gardiner (n 5) 385, 388; Esch (n 59) 63.

³⁴⁸ Thomas and Thomas, 'Legal Aspects' (n 4) 172–4 citing (1936) (Spec Supp 155) *League of Nations Official Journal*, 48 and (1937) 18(1) *League of Nations Official Journal*, 18–19, 35; L, 'Policy' (n 72) 5; Esch (n 59) Chp VI; Veatch (n 66).

³⁴⁹ Esch (n 59) 65; Veatch (n 66) 183; Thomas and Thomas, 'Legal Aspects' (n 4) 172.

³⁵⁰ L, 'Policy' (n 72) 3. See also Esch (n 59) 62, 66–7; Wilcox, 'League' (n 107) 70–2; Wilcox, 'Localization' (n 65) 257–8.

³⁵¹ Veatch (n 66) 181–2; Watters (n 59) 402; Thomas and Thomas, 'Legal Aspects' (n 4) 172.

³⁵² Ann-Sofie Nilsson, *Political Uses of International Law* (Dialogos, 1987) 69.

³⁵³ Esch (n 59) 71. See also Veatch (n 66) 182.

³⁵⁴ L, 'Control' (n 80) 4–5; Padelford, 'Agreement' (n 65) 588; Esch (n 59) 69–70; Wilcox, 'League' (n 107) 67–9; Thomas and Thomas, 'Legal Aspects' (n 4) 171–3 citing (1937) 18(1) *League of Nations Official Journal*, 18–19, 35; (1937) (Spec Supp 165) *League of Nations Official Journal*; (1937) 18(5–6) *League of Nations Official Journal*, 333, 572; Wilcox, 'Localization' (n 65) 256–7.

would anyway not have been able to do any more or better than the Non-Intervention Committee.³⁵⁵

3.4.2 *The League's Minor Role in the Withdrawal of Foreign Volunteers*

The League did, however, play a role in the eventual withdrawal of some foreign volunteers from Spain.

An attempt by Spain in September 1937 to have the 'non-Spanish combatants' withdrawn led to a more strongly-worded draft resolution acknowledging for the first time the 'veritable foreign army corps on Spanish soil, which [represented] foreign intervention in Spanish affairs'.³⁵⁶ League members, however, could not reach unanimous agreement and the resolution was not adopted.³⁵⁷ Other Spanish appeals for an end to the Non-Intervention Agreement failed.³⁵⁸

One year later, in September 1938, Spain announced to the League its unilateral decision to withdraw the foreign fighters on its own side, and it shortly afterwards disbanded the International Brigades.³⁵⁹ The logic behind this action was the hope that withdrawal of the International Brigades would lead to a corresponding acceptance by Franco's supporters of the British Compromise Plan, and, thus, withdrawal of German and Italian forces.³⁶⁰ Spain requested that the League establish monitors for the withdrawal. In response, the League suggested the Non-Intervention Committee as monitoring body, which Spain rejected.³⁶¹ Instead, on 1 October 1938, the League resolved to establish a commission for this purpose.³⁶² Meanwhile, Mussolini unilaterally withdrew 10,000 Italian soldiers from Spain in October 1938, partially due to national convenience, and partially in the hope that belligerent rights would finally be recognised. Italy's support for Franco continued, though, through the large number of remaining troops.³⁶³

³⁵⁵ L, 'Policy' (n 72) 4 n 1; Esch (n 59) 69; Wilcox, 'League' (n 107) 70–2.

³⁵⁶ Thomas and Thomas, 'Legal Aspects' (n 4) 174 citing (1937) (Spec Supp 169) *League of Nations Official Journal*, 55–9, 99–100.

³⁵⁷ Ibid citing (1937) (Spec Supp 169) *League of Nations Official Journal*, 99–100; Veatch (n 66) 197–8; Wilcox, 'League' (n 107) 69–70.

³⁵⁸ Thomas and Thomas, 'Legal Aspects' (n 4) 174–5 citing (1938) 19(5–6) *League of Nations Official Journal*, 356.

³⁵⁹ Esch (n 59) 137; Edwards (n 2) 176.

³⁶⁰ Veatch (n 66) 201; Watters (n 59) 379, 381–2.

³⁶¹ Thomas and Thomas, 'Legal Aspects' (n 4) 175 citing (1939) 20(2) *League of Nations Official Journal*, 139.

³⁶² Ibid 126 citing (1939) 20(2) *League of Nations Official Journal*, 126; Veatch (n 66) 201.

³⁶³ Esch (n 59) 137–8; John F Coverdale, *Italian Intervention in the Spanish Civil War* (Princeton University Press, 1975) 371–2; Watters (n 59) 382–3, 388–9; Thomas and Thomas, 'Legal Aspects' (n 4) 172.

By the end of 1938, the commission established by the League confirmed the completed withdrawal of foreign fighters from the Republican side. As soon as the Nationalists gained victory in the conflict, the new Spanish authorities withdrew from the League.³⁶⁴

4. Legal Debates Surrounding the Spanish Civil War within the Framing of Neutrality and Non-Intervention

The attempted regulation of the foreign volunteers in the Spanish Civil War provides an example of a strict, objective prevention policy being either brought into existence or re-invigorated in European states — at least on paper if not in practice — and a corresponding detailed practical system of monitoring and withdrawal. In this section, I examine the contested legal debates surrounding the non-intervention policy at the time, as well as how the example of the Spanish Civil War has been perceived subsequently in legal commentary. I think of this interwar moment as one of transition in how international law was considered to apply to internal conflict, and examine argumentation in that moment by paying attention to how the framing of the issue of foreign fighting in that setting affected the legal positions debated and adopted.

At the time of the Spanish Civil War, legal commentators expressed diverse views on the correctness or incorrectness of the approach taken by the states within the Non-Intervention Committee, the role of the League of Nations, and the applicable international legal rules. The Non-Intervention Agreement was not only criticised because in practice it failed to prevent massive violations of its principles.³⁶⁵ Indeed, for some, the approach taken nevertheless did some good since it contributed to constraining the conflict geographically to Spain, at least at that time. The Agreement ‘[stood] as a significant event in the history of international law and organization’.³⁶⁶ Rather, certain commentators expressed concern that the non-intervention policy did not reflect the applicable international rules regarding third state relations in the face of civil strife.³⁶⁷ Regardless of position, these debates — the understanding of the pertinent legal questions and issues at stake — took place within a dominant framing of neutrality and non-intervention.

Legal scholarship at the time of the conflict naturally tended to analyse the situation in accordance with the traditional rules of rebellion, insurgency and belligerency, assessing the

³⁶⁴ Veatch (n 66) 202; Thomas and Thomas, ‘Legal Aspects’ (n 4) 175.

³⁶⁵ Thomas and Thomas, ‘Non-Intervention’ (n 59) 4–5.

³⁶⁶ Padelford, ‘Agreement’ (n 65) 603. See also H, ‘Compromise’ (n 95) 6; Thomas and Thomas, ‘Non-Intervention’ (n 59) 6; Watters (n 59) 400; Wilcox, ‘Localization’ (n 65) 237, 258, 260.

³⁶⁷ Thomas and Thomas, ‘Non-Intervention’ (n 59) 2, 4; Wilcox, ‘Localization’ (n 65) 237: ‘unusual technique employed to localize the Spanish war’. Edwards (n 2) 34–5 provides an overview of the legal implications of the three responses considered available to Britain.

Agreement's conformity or not with the applicable traditional rules.³⁶⁸ There were, in short, two main options regarding how the conflict was legally perceived. Due to the strong position of the nationalist rebels on the ground, the situation could have been recognised as one of belligerency. Given the intervention of Italy and Germany against the interests of Spain, it could also have been considered international in nature.³⁶⁹ In either case, neutrality law would have applied to the relations of third states with the warring parties. As discussed above, neutrality law would not have required neutral states to prevent individual volunteers crossing the border separately to enlist with the parties, although it would have prohibited in-country recruitment and state-sponsored sending of troops.³⁷⁰ Alternatively, belligerency was not recognised, and the situation remained an insurgency.³⁷¹ In this case, non-intervention was the only relevant framework, meaning that normal peacetime relations with Spain were left unaltered, except that the fact of Spain's civil strife needed to be taken into account.³⁷²

Given the politics underlying the conflict, there were of course not only "objective" doctrinal/technical legal debates, but also arguments explicitly based on underlying political views. For example, Le Fur described the Nationalist cause not as a rebellion but as an exercise of the popular right of resistance against an illegitimate government.³⁷³

There were legal uncertainties regarding both of the majority positions. Legal commentators debated whether a recognition of belligerency was *required* based on the facts on the ground, or remained subject to state discretion. Whether third state actions calling for impartial non-intervention amounted to a de facto recognition of belligerency, despite states' clear positions to the contrary, was also discussed. This was because, under one view, no formal declaration of recognition was necessary for belligerency.³⁷⁴ There were also debates about the requirements of non-intervention during civil strife, namely, whether non-intervention

³⁶⁸ See, eg, Padelford, 'International Law' (n 63) 229. For a summary of British international lawyers' opinions see del Moral (n 66) 216–27.

³⁶⁹ See Thomas and Thomas, *Import* (n 42) 225; Wilcox, 'Localization' (n 65) 254.

³⁷⁰ O'Rourke (n 80) 399, 409; Alexandre Berenstein, *La Rébellion Espagnole Devant Le Droit International* [The Spanish Rebellion in International Law] (Association des Amis de l'Espagne Républicaine, 1937) 8; H, 'Revolt' (n 1) 10; McNair (n 88) 491. See also Thomas and Thomas, *Import* (n 42) 2, 4, 220; Thomas and Thomas, 'Legal Aspects' (n 4) 176; Antonio Cassese, *Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press, 2008) 129.

³⁷¹ McNair (n 88) 492. See also Cassese (n 131) 129–30; Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002) 20; Thomas and Thomas, 'Legal Aspects' (n 4) 122–3, 142–5, 128, 158, 176; Thomas and Thomas, *Import* (n 42) 224–5.

³⁷² Norton (n 19) 271 n 98; Sivakumaran (n 97) 14; Thomas and Thomas, 'Legal Aspects' (n 4) 122–3, 128, 142–3. For historical overview, see Castrén, *Civil War* (n 42) 207ff; Wilcox, 'Localization' (n 65) 239–40.

³⁷³ Louis Le Fur, *La Guerre d'Espagne et Le Droit* [The Spanish War and Law] (Editions Internationales, 1938) 4–5. See also discussion in Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001) 339ff.

³⁷⁴ O'Rourke (n 80) 411, 413; Smith (n 63) 26–9. On discretion in recognising belligerency, Moir (n 132) 10–17.

required complete abstention, that is, impartial treatment of the parties, or whether the government side was to be favoured.

For some in the *belligerency* camp, the European non-intervention was, in effect, neutrality but without recognising belligerency. It was therefore considered legally incorrect since the rules of neutrality and non-intervention are not equivalent;³⁷⁵ neutrality being a legal status prohibiting intervention into the conflict, and non-intervention a principle requiring third states not to interfere against the interests of the state.³⁷⁶ However, the majority of commentators agreed that as a matter of domestic policy, states were free to adopt greater restrictions than international law would necessarily require under either neutrality law or the principle of non-intervention; that state policy may surpass international obligations, it must only not violate them.³⁷⁷ For HA Smith, for example, the Non-Intervention Agreement was in fact an unusual kind of collective declaration of neutrality by the European states, but acceptable due to state discretion.³⁷⁸

Meanwhile, for some in the *non-intervention* camp, since the adopted non-intervention policies worked against Spain's interests, effectively putting Franco's forces on the same footing as the elected government in Spain — and collectively so — the approach adopted was contrary to the requirements of international law.³⁷⁹ Under this reading, the Non-Intervention Agreement represented, at best, an inconsistent compromise of law and policy in that *either* the Nationalists should have been recognised as belligerents *or* if not, support to the government should not have ceased.³⁸⁰ At worst, it represented a serious interference into Spain's affairs and its possibilities of obtaining support to combat the rebellion.³⁸¹ It was a 'legal monstrosity' as described by Spain, and supported in particular by Mexico, because by not intervening and encouraging others not to intervene, there was still an interference, but one which chose politics over law, and favoured the insurgents.³⁸²

For others, and representing a majority view in the literature, regardless of one's position on whether a situation of civil war requires abstention, the law could in any event not *require* a third state to support the government side of the conflict. That is, a third state could not be forced to provide weapons or other support, although it could also not support the

³⁷⁵ Berenstein (n 131) 3–4; O'Rourke (n 80) 410.

³⁷⁶ Moir (n 132) 7 n 23.

³⁷⁷ McNair (n 88) 472–3, 498; Wilcox, 'Localization' (n 65) 240.

³⁷⁸ Smith (n 63) 28.

³⁷⁹ See, eg, Thomas and Thomas, *Import* (n 42) 222–4; CG Fenwick, 'Can Civil Wars Be Brought Under the Control of International Law' (1938) 32(3) *American Journal of International Law* 538, 540.

³⁸⁰ Richard Little, *Intervention: External Involvement in Civil Wars* (Martin Robertson, 1975) 129.

³⁸¹ Smith (n 63) 27–8.

³⁸² Berenstein (n 131) 8; Wilcox, 'League' (n 107) 67–8; Thomas and Thomas, 'Non-Intervention' (n 59) 3–4; Thomas and Thomas, 'Legal Aspects' (n 4) 143; Gardiner (n 5) 747–8.

opposition.³⁸³ Thus, the Non-Intervention Agreement has also been described as entirely lawful, even if it departed with previous practice regarding civil wars.³⁸⁴

Looking to the period following the Spanish Civil War, the question arises of the weight or value of the approach taken through the Non-Intervention Agreement as a precedent for regulating the participation of foreign fighters in civil wars. In the early months of the conflict, the non-intervention policy was described as a ‘new departure in international law which raises a number of legal and other problems’.³⁸⁵ Certain states adhering to the Non-Intervention Agreement explicitly described it as an exceptional approach for the unique situation in Spain; that it was not intended to set any general legal precedent that a government could not request and obtain support against internal opposition.³⁸⁶ Even at the time of the conflict, there was an awareness of the period being one of transition and questioning of the rules of international law applying to civil strife — some commentators did look to the future and query the new collective state practice. For example, Smith queried whether the Spanish Civil War example would in future be considered as an anomaly or, more concerning to Smith, a precedent. Even at that time, Smith saw that the anomaly of the Spanish Civil War was not a unique occurrence but highlighted deeper questions regarding international law and its application to internal conflicts.³⁸⁷

The perception of the moment as one of transition in how international law should regulate internal conflict was linked to the question of the desired role for impartiality; in other words, to what extent a notion of impartial treatment of the parties should be translated over from neutrality law (international conflict) to non-intervention (all conflict)?

5. Debates Regarding Impartiality in Neutrality and Non-Intervention

5.1 A Period of Storm and Challenge

Paying attention to the practical details and legal debates surrounding the attempted strict regulation of foreign fighters in this political moment is important if it is viewed as a moment of (attempted) regulation in a wider time setting. The Spanish Civil War provides an example of a turning point in thinking about international law, not only as the League was on its way out, but since international legal thought and practice applicable to armed conflict had to turn its attention from international to internal struggles. The reasons European states opted for a stand-alone Committee rather than relying on the League have been gestured to above in section 3.4. More than that, however, why did states opt for a concerted, stricter non-

³⁸³ Thomas and Thomas, *Import* (n 42) 218; McNair (n 88) 473; Wilcox, ‘Localization’ (n 65) 241.

³⁸⁴ Cassese (n 131) 131, 145.

³⁸⁵ H, ‘Revolt’ (n 1) 9–10.

³⁸⁶ Padelford, ‘Agreement’ (n 65) 581; Thomas and Thomas, ‘Non-Intervention’ (n 59) 3; Thomas and Thomas, ‘Legal Aspects’ (n 4) 175; Wilcox, ‘Localization’ (n 65) 241.

³⁸⁷ Smith (n 63) 30–31.

intervention policy rather than relying on traditional international law? Why did they take a position against all volunteers, even those supporting a government and not necessarily fighting against their parent states' interests, nor involved in terrorism or primarily motivated by payment for their military services, nor posing a significant threat upon return?³⁸⁸

It was a 'period of storm and challenge' according to Britain's Foreign Secretary at the time.³⁸⁹ The 'old doctrines regarding internal armed conflict were, to a certain extent, abandoned' and in this sense, the Spanish Civil War 'did foresee a major development in international law: the emergence of collective, formally organized reactions to internal armed conflicts ... the conflict reflected a system in transition' and a 'new approach ... heavily debated at the time'.³⁹⁰ Thus, legal thinking and state practice regarding non-intervention principles during civil war went through a teething period exemplified by the attempted regulation of foreign volunteers during the Spanish Civil War. For Antonio Cassese, writing in the 1970s, the application of non-intervention to Spain was an 'innovation in the traditional rules of international law' since it worked in effect to the detriment of the Spanish government; the Spanish conflict was 'never elevated to a war proper' (although it could have been), but was not treated as a normal civil war either. It was therefore of a '*tertium genus*' or intermediate status.³⁹¹ Indeed, Britain in 1937 described non-intervention as seeking to 'create a new form of neutrality', a 'form of neutrality [in which] belligerent rights have not been granted'.³⁹²

Firstly, it is not surprising that several states were disinterested in recognising belligerency given that the doctrine was already falling into disuse by the end of the nineteenth century.³⁹³ In this sense, the Non-Intervention Agreement can be seen as an attempt by states to escape the application of the traditional international legal rules operating in civil strife, that is, of rebellion, insurgency and belligerency. Relatedly, the insistence on neutrality law was waning over time. In a system based on collective security, states today choose greater political leeway by being *non-belligerents* rather than enforcing militarily neutral positions regarding international armed conflicts. This reflects the 'ultimate transformation of the abstention rules into self-restriction principles' in neutrality.³⁹⁴

The retrieval of neutrality law in this chapter is not, therefore, intended to signify a call for its reincarnation or application to modern civil wars by analogy; nor to argue that states are free

³⁸⁸ Regarding actions taken against some veterans, see section 6 below.

³⁸⁹ H, 'Breakdown' (n 94) 9, quoting Eden (October 1937).

³⁹⁰ Lieblich (n 42) 8, 113, 116–7. On the Non-Intervention Agreement's collective nature, see Chakrabarti (n 74) ch 2.

³⁹¹ Cassese (n 131) 129–31.

³⁹² Ibid 131, quoting British Foreign Secretary Eden (1 November 1937).

³⁹³ Moir (n 132) 19–20; Sivakumaran (n 97) 9–20.

³⁹⁴ Gavouneli (n 19) 271–2.

under international law to ignore the departure of individual foreign fighters in line with the Fifth Hague Convention. Again, it must be recalled that the type of foreign fighting envisaged in 1907 was still chiefly with state/belligerent armed forces during inter-state conflict, not insurgent armed groups during civil wars.

Rather, concepts and practices from traditional neutrality law, including the dilemmas with which it had to grapple, have provided a backdrop and significant foundation to non-intervention principles and to the development of the due diligence principle regarding prevention of unlawful harm. Similar debates about the appropriate role of abstention/impartiality appeared in relation to *both* of these frameworks and the regulation of foreign volunteers — within neutrality law in its day, and within non-intervention questioning whether the fact of internal armed conflict should change the normal peacetime rules governing state relations.³⁹⁵ In other words, the question became whether there was a place for impartiality and abstention — premises of neutrality law — within non-intervention during civil war. This is relevant to foreign fighting because its toleration might, at least in significant cases, suggest partiality towards one of the parties, at times amounting to unlawful interference.³⁹⁶ To what activities are states required to pay attention and respond? The debates regarding abstention and impartiality in the two frameworks are considered in the following two sub-sections.

5.2 Debates within Neutrality Law: Impartiality Regarding Foreign Enlistment?

While the provision on individual volunteering in the Fifth Hague Convention appears relatively straightforward, and certainly permissive, views remained diverse and unsettled at the time of the 1907 Hague Conference negotiations.³⁹⁷ The debates raised several different issues, but, here, I discuss only the question of the extent to which the law might require abstention from states, that is, diligent prevention of *all* foreign fighters, the policy later adopted through the Non-Intervention Agreement, albeit not pursuant to neutrality law *per se*.

During the 1907 Peace Conference, the German delegation had expressed a view that *all* individuals from neutral countries should be prevented from providing military support to the belligerent forces, and that the belligerent forces should not allow foreigners to serve.³⁹⁸ Despite support from certain states during the debates,³⁹⁹ as is clear from Article 6, this position did not ultimately find acceptance, not even by the UK which had included for several decades such rules in its domestic law and whose law had inspired the proposal. The

³⁹⁵ For a straightforward overview of legal positions see Liebllich (n 42) 114.

³⁹⁶ Brownlie (n 22) 573–4.

³⁹⁷ Ibid 577.

³⁹⁸ Scott (n 43) III 177, 186–7, 191; Antonio S de Bustamante, ‘The Hague Convention Concerning the Rights and Duties of Neutral Powers and Persons in Law Warfare’ (1908) 2(1) *American Journal of International Law* 95, 100, 112–3.

³⁹⁹ Scott (n 43) III 199.

UK preferred to retain domestic prerogative: '[s]uch an interdiction can result from an act of sovereignty but not from stipulations within the domain of international law'.⁴⁰⁰

Two concepts in particular appeared key to the rejection of the German abstention proposal: the question of nationals of the warring parties present in the neutral state, and the nature of the public-private divide in the nineteenth century. Regarding nationals of the warring parties, the neutral state could not ignore the wishes, or duties, of foreign nationals residing in the neutral state to return to their own country to enlist or complete national military obligations.⁴⁰¹ That the Fifth Hague Convention permitted neutral states to be indifferent to the departure of individuals allowed this national military enlistment to take place, assuming the domestic law of the parent state and the receiving state so allowed.⁴⁰² In effect, the Convention reflected a position in which no distinction was made as to whether the departing individuals were citizens or not of the neutral state,⁴⁰³ even though the departure of citizens might logically impact to a greater extent external perceptions of a state's neutrality. The same issue appears in today's debates about foreign fighting by nationals/dual nationals of the state suffering armed conflict, that is, about the scope of state prevention duties, and rights to return home. I will return to these ideas related to *foreignness* in Chapter Six.

Second, this liberty of private action fitted the described logic of the period concerning the divide between the state's public affairs, and the activities of private persons and entities.⁴⁰⁴ Here, there is an important conceptual difference between neutrality in its earlier form of impartiality — treating both belligerents equally — and its development towards abstention — remaining aloof from both belligerents.⁴⁰⁵ The codification of neutrality law in 1907 showed elements of both.⁴⁰⁶ At the time of the adoption of the Fifth Hague Convention, in addition to foreign enlistment, private trade, including even the supply of arms to the belligerents, was expected to continue,⁴⁰⁷ although this regularly led to allegations of unneutral state conduct.⁴⁰⁸ The belligerents were left to police this private commerce for

⁴⁰⁰ Ibid III 197–8.

⁴⁰¹ Ibid I 141, III 176; de Bustamante (n 159) 113–4.

⁴⁰² Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011) 27; Castrén, *Neutrality* (n 26) 446.

⁴⁰³ Scott (n 43) I 141.

⁴⁰⁴ W Friedmann, 'The Growth of State Control over the Individual, and Its Effect upon the Rules of International State Responsibility' (1938) 19 *British Yearbook of International Law* 118.

⁴⁰⁵ Lobel (n 39) 17.

⁴⁰⁶ Örvik (n 19), 34

⁴⁰⁷ *Fifth Hague Convention* (n 16) art 7: 'not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war'. See also *Hague Convention (XIII)* (n 35), art 6; Örvik (n 19), 20; Oppenheim (n 26) 655; Norton (n 19) 297–8; Neff (n 15) 130.

⁴⁰⁸ Elizabeth Chadwick, 'Neutrality Revised?' (2013) 22 *Nottingham Law Journal* 41, 44.

contraband.⁴⁰⁹ The distinction in the rules between public and private activities was not only due to the international legal obligation of neutrality being placed solely on the state. It was also intended to protect economic interests and, thereby, to help maintain friendly relations and contain the spread of violence, through the everyday business relations between the populations of the neutral and belligerent states.⁴¹⁰ In short, neutral states were to abstain from involvement with the war, while private individuals/entities could continue their normal commercial activities with the belligerents.⁴¹¹ Thought of differently, while neutral states had to diligently prevent private unneutral conduct within their territory, little private conduct was considered to endanger the state's neutral status. If state policy placed any restrictions on private actions, however, the domestic law and policy were required to maintain formal impartiality.⁴¹²

The significance of state control and regulation of private affairs, particularly concerning arms and military-related activities changed over time, as did context and values.⁴¹³ Increasing state control of the weapons industry meant that transfers of arms to the belligerents by private entities could eventually no longer be described as neutral. The 'neat separation' between state and civil society became 'intertwined'.⁴¹⁴ Some states with domestic neutrality laws — particularly the US — made political decisions to remain more isolationist, choosing an abstention policy over impartiality. A state's domestic law might, therefore, not only criminalise the carrying out of hostile acts against another state, but might seek to prevent individuals *leaving* the country to enlist rather than only recruitment in-country or departures of organised hostile groups, or might restrict commercial dealings with both sides of the conflict.⁴¹⁵ Such laws would, thus, go further than what was at the time required under international law.⁴¹⁶

⁴⁰⁹ Ibid; AD McNair, *International Law Opinions, Volume III War and Neutrality* (Cambridge University Press, 1956) 136–7; Neff (n 15) 106, 130: 'commercial-adventure doctrine'; Örvik (n 19), 20–2.

⁴¹⁰ A Pearce Higgins (ed), *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War* (Cambridge University Press, 1909) 85; Neff (n 15) 106ff, 130.

⁴¹¹ Lauterpacht (n 24) 106; Friedmann (n 165) 134; Oppenheim (n 26) 738–9, 743; Castrén, *Neutrality* (n 26) 474, 477; Greenspan (n 20) 533; Neff (n 15) 106, 130; Lieblich (n 42) 67 n 61.

⁴¹² Geog Cohn, *Neo-Neutrality*, tr AS Keller and E Jensen (Columbia University Press, 1939), 36–7; Castrén, *Neutrality* (n 26) 482.

⁴¹³ Norton (n 19); Friedmann (n 165) 119–20, 130ff. See also WL Williams, 'Neutrality in Modern Armed Conflicts: A Survey of the Developing Law' (1980) 90 *Military Law Review* 9, 27–33; Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War Law, Book III War and Neutrality* (Rinehard, 1954) 408–13; Greenspan (n 20) 533; Brownlie (n 22) 577.

⁴¹⁴ Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart, 2008) 280. See also Stone (n 174) 408ff.

⁴¹⁵ Lauterpacht (n 24) 115ff; Brownlie (n 22) 575; Neff (n 15) 106.

⁴¹⁶ Oppenheim (n 26) 636, 668, 670; Greenspan (n 20) 533–4, 547, 552; Castrén, *Civil War* (n 42) 114; Chadwick, 'Neutrality Revised?' (n 169) 48, 52; Richard A Falk, 'Introduction' in Richard A Falk (ed), *The*

The thinking behind Article 6 of the Fifth Hague Convention on departures of individuals similarly evolved over time. The individual liberty represented in Article 6 was eventually criticised as representing an approach of impartiality as opposed to abstention. It was perceived as not reflecting the realities of state *knowledge*, at least where significant numbers of individuals departed, which was thought to take some level of organisation, as well as state *control* over individuals in wartime. It was therefore described as outmoded and no longer representative of the law regarding volunteer fighters.⁴¹⁷

5.3 Debates within Non-Intervention: Impartiality Regarding Foreign Volunteers in Civil Wars?

Even during insurgency, some jurists argued for complete abstention by third states as part of non-intervention to seek to limit the escalation of violence or prevent states intervening against a right of revolution.⁴¹⁸ Sometimes such arguments have taken the form of advocating for the usefulness of applying neutrality law to civil wars.⁴¹⁹ However, for others, a situation of internal armed conflict would not change the legal relationship of third states to the territorial state. Non-intervention could not be applied neutrally during non-international armed conflict because of the difference in legal status of the parties. This would allow support to the government side of the fight to continue.⁴²⁰ In this light, Mexico's diplomatic position during the Spanish Civil War arguing for preferred treatment of a lawfully elected government heralded the future mainstream approach towards internal conflicts and the notion of 'intervention by invitation'.⁴²¹ The relevance to foreign fighting is that if states were required to take an impartial stance towards parties to a civil war, they would need to diligently seek to prevent foreign fighters from being able to volunteer with either side of the conflict.

International Law of Civil War (Johns Hopkins Press, 1971) 1, 5: 'The main steps along the trail of intervention in a civil-war situation are prudential and political, not legal' (citation omitted).

⁴¹⁷ Isidro Fabela, *Neutralité* [Neutrality] (Pedone, 1949) 65–6; Brownlie (n 22) 577; Manuel R Garcia-Mora, 'International Law and the Law of Hostile Military Expeditions' (1958) 27(3) *Fordham Law Review* 309, 325–8; Garcia-Mora, *International Responsibility* (n 24) 68; Eric David, *Mercenaires et Volontaires Internationaux en Droit des Gens* [Mercenaries and International Volunteers in the Law of Nations] (Université de Bruxelles, 1978) 170.

⁴¹⁸ Thomas and Thomas, 'Legal Aspects' (n 4) 141; Quincy Wright, 'International Law and the American Civil War' (1967) 61 *Proceedings of the American Society of International Law at its Annual Meeting (1921–1969)* 50, 51, 54; Quincy Wright, 'Subversive Intervention' (1960) 54(3) *American Journal of International Law* 521, 529.

⁴¹⁹ See, eg, Chadwick, 'Neutrality Revised?' (n 169) 42, 45, 47, 51; TJ Farer, 'The Regulation of Foreign Intervention in Civil Armed Conflict' (1974) II *Recueil des Cours Collected Courses* 142, 356.

⁴²⁰ Thomas and Thomas, 'Legal Aspects' (n 4) 141–2, 176; Falk (n 177) 12.

⁴²¹ Liebllich (n 42) 116.

On the domestic level, as described above regarding neutrality in international armed conflict, states' laws on foreign volunteering sometimes took an abstentionist approach also to civil wars. Enforced to varying — often lesser — degrees, domestic law might, for example, prohibit citizens from joining the armed forces of a state involved in *any* type of armed conflict.⁴²² Further, while there was no international convention applying to internal armed conflict before the middle of the twentieth century (and then only in respect of *jus in bello*⁴²³) as mentioned, bilateral and regional treaties guaranteeing the non-toleration on national territory of groups or individuals likely to make armed incursions, or otherwise foment civil strife, in other states, did already exist at the time of the Spanish Civil War. Most relevant to questions of foreign fighting, the 1928 *Havana Convention* required the American states parties to use all means at their disposal to prevent persons in their territorial jurisdiction from participating in civil strife in another party's territory. This included recruitment and/or leaving the territory to start or promote civil strife in the other State.⁴²⁴ If states took a position of abstention from civil wars, such domestic laws or bilateral/regional agreements gave the appearance of a neutral stance, and could fit its ratio. Still, internal policy could not necessarily be equated with *opinio juris* about legal rights and duties in international law, and should not be confused with the legal status of neutrality.⁴²⁵

Legal views throughout the twentieth century have shifted back and forth in favour of and against compulsory abstention in civil wars. Views of experts within the *Institut de Droit International* (IDI) mirror these debates. A 1900 resolution set out rules restricting third states from supporting insurgents with military equipment and required states to prohibit hostile military expeditions against a government being organised in their territory.⁴²⁶ A 1975 resolution prohibited *any* intervention in civil wars, requiring impartial abstention.⁴²⁷ Decades later, the IDI retracted the 1975 position pointing out a 'substantial divergence of views'.⁴²⁸

⁴²² Lobel (n 39) 41–5, 50, describing efforts to enforce such laws, a drop-off in enforcement after WWI and as US military power and the collective security system strengthened, and the deliberate non-enforcement of domestic law due to foreign policy interests.

⁴²³ Namely Article 3 common to the Geneva Conventions 1949.

⁴²⁴ *Havana Convention* (n 41) art 1. See also n 42.

⁴²⁵ Oppenheim (n 26) 740; Green (n 87) 220; Steven Corliss, 'Asylum State Responsibility for the Hostile Acts of Foreign Exiles' (1990) 2(2) *International Journal of Refugee Law* 181, 195.

⁴²⁶ Institut de Droit International, *Droits et Devoirs des Puissances Étrangères, en Cas de Mouvement Insurrectionnel, envers les Gouvernements Établis et Reconnus qui sont aux Prises avec l'Insurrection* [Rights and Duties of Foreign Powers, in the Situation of Insurrectional Movements, Towards Established and Recognised Governments Affected by the Insurrection] (Resolution, Neuchâtel Session, 8 September 1900) art 2 <https://www.idi-iil.org/app/uploads/2017/06/1900_neu_02_fr.pdf>.

⁴²⁷ Institut de Droit International, *The Principle of Non-Intervention in Civil Wars* (Resolution, Wiesbaden Session, 14 August 1975) art 2(1) <https://www.idi-iil.org/app/uploads/2017/06/1975_wies_03_en.pdf>. See Georg Nolte, 'The Resolution of the Institut de Droit International on Military Assistance on Request Chronicles' (2012) 45(1) *Belgian Review of International Law* 241.

⁴²⁸ Visible in the voting results on the 1975 resolution: 16 in favour, 6 against, 16 abstentions: Institut de Droit International, *Annuaire* (Vol 73, 2009) 303 n 11. Institut de Droit International, *Present Problems of the Use of*

The orthodox view, overly simplified, became that third states may support the state party, and not the armed opposition, during non-international armed conflict.⁴²⁹ The non-intervention rules are, though, still debated and complex in practice. They are regularly placed under pressure by state conduct. Despite this apparent developed clarity, certain situations of internal conflict, particularly situations in which broader political ideologies or interests are at play as they were in the Spanish Civil War, face the problem that third states:

can neither deal with the insurgent and incumbent elites on the basis of impartiality nor can they ignore the existence of insurgency. This tends to eliminate neutrality and to polarize participation in internal wars in the factional manner that dominates international politics.⁴³⁰

6. Conclusion: Relevance of the Spanish Civil War for the Regulation of Foreign Fighting Today?

The Non-Intervention Agreement has been described as the first example of an international or collective response to a mobilisation of foreign volunteers.⁴³¹ It was suggested immediately after the war that ‘the European states put themselves formally on record as opposing foreign intervention in the internal affairs of states disrupted by civil strife’,⁴³² and more recently that the Spanish example ‘could be viewed as a manifestation of states’ due diligence requirements, regarding acts of individuals vis-à-vis internal conflicts in other states’.⁴³³ The strict approach during the Spanish Civil War, arguably going beyond the standards of prevention required under either a neutrality or a non-intervention framework, indicates that regardless of cause, at least when there are significant numbers of foreigners participating, states might desire a firmer legal prevention of foreign fighting. Therefore, even if it was largely ineffective, the prohibitions and detailed monitoring and withdrawal regimen established by the European non-intervention policies represent a historic example of a collective system of strict abstentionist prohibition.

An alternative reading is that the Agreement was merely a set of collective domestic policies, either being at odds with international law or at least not representing *opinio juris*, and

Force in International Law Sub-Group C: Military Assistance on Request (Resolution, Rhodes Session 2011) <https://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_10_C_en.pdf>.

⁴²⁹ See, eg, Georg Nolte, ‘Secession and External Intervention’ in Marcelo G Kohen (ed), *Secession* (Cambridge University Press, 2006) 65, 78; Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart, 2010) 129–30, 148; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14, 109 [209], 126 [246]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Merits)* [2005] ICJ Rep 168.

⁴³⁰ Falk (n 17) 226–7.

⁴³¹ Riccardi (n 13) 215.

⁴³² Padelford, *Law and Diplomacy* (n 73) 201.

⁴³³ Lieblich (n 42) 118.

therefore not providing any precedent regarding the content of the due diligence standard.⁴³⁴ In this sense, rather than being an example of international law being applied incorrectly or in a novel way, the Non-Intervention Agreement could be regarded as not being international law at all but merely a ‘concert of policy’.⁴³⁵ Padelford, for example, described the Non-Intervention Agreement as being ‘of an informal nature having no binding force in international law’, and constituting therefore only a ‘moral undertaking’.⁴³⁶ These arguments are supported by state practice illustrating that the commitment to non-intervention was based on policy, not a sense of *opinio juris*. For example, during negotiations in late 1937, both France and Britain were prepared to re-allow support to the Spanish Government, thereby ending the abstention policy, should agreement from other countries regarding the withdrawal of non-Spanish combatants not be forthcoming.⁴³⁷ Moreover, as mentioned, states often enacted, applied more forcefully or ignored domestic laws regulating foreign enlistment/fighting in the light of different political events. Shortly after the Spanish Civil War, for example, several European states offered discrete domestic support to persons within their jurisdiction enlisting to support Finland in the Russo–Finnish war 1939.⁴³⁸

In this light, while the Spanish Civil War did contribute to the development of thinking about international law in several ways, including regarding *jus in bello* in civil wars,⁴³⁹ the Non-Intervention Agreement cannot be taken as confirmation that states suffering armed opposition may not be supported, or conversely that they must be; nor that all foreign fighters must necessarily be prevented.⁴⁴⁰ A related factor is that if the objective approach taken towards all foreign participants in the Civil War was undeniably partly motivated as a response to the presence of German and Italian troops in Spain, the measures taken can be understood as being coloured by a desire to enforce rules on *direct* intervention rather than necessarily a strong concern with *indirect* intervention in the sense of individual volunteer fighters. At least, it becomes more difficult to pinpoint the precise (legal) concerns parent states may have held regarding their individual national volunteers. On its own, it cannot provide an answer to questions about foreign fighting and international law or satisfactorily inform the scope of the customary diligence duty to not to tolerate unlawful harm to other states. But the example does make visible other things about the international legal response.

⁴³⁴ Riccardi (n 13) 229–31, 234–5, 237–8. See also Lieblich (n 42) 118–20.

⁴³⁵ Padelford, ‘Agreement’ (n 65) 598. See also Nilsson (n 113) 69–70; Othen (n 1) 97–8.

⁴³⁶ Padelford, ‘International Law’ (n 63) 234–6.

⁴³⁷ H, ‘Breakdown’ (n 94) 8; Veatch (n 66) 196–200.

⁴³⁸ Elizabeth Roberts, *‘Freedom, Faction, Fame and Blood’: British Soldiers of Conscience in Greece, Spain and Finland* (Sussex Academic Press, 2010) 148ff.

⁴³⁹ Carlos R Fernández Liesa, ‘La Guerra Civil Española y El Derecho Internacional [The Spanish Civil War and International Law]’ (2009) 61(1) *Revista Española de Derecho Internacional* 75.

⁴⁴⁰ See also Riccardi (n 13).

One aspect that becomes visible with the longer view is the growing acceptance of the International Brigades over time — and it is these fighters the collective western memory usually recalls. There, in contrast to the global war on terror today, which establishes terrorism as a unique universal threat, we have to understand the polarised views that existed surrounding the fight against ‘godless communism’ and ‘international fascism’ making neither side ‘good’ nor blameless.⁴⁴¹ Today, the solidarity exhibited by the Republican volunteers can be appreciated⁴⁴² and clearly continues to capture something in the Western imagination, as well as in legal thought surrounding the possibility that some foreign fighting might be acceptable. At the time, volunteers’ perceived links with communism continued to plague some, although not all, veterans upon their return. Some veterans in the US and UK were unable to enlist in the state armed forces or gain other employment.⁴⁴³ Those returning to the Netherlands were met at the border by Military Police and monitored for years; some, like foreign terrorist fighters today, had their citizenship revoked (although they were allowed to return home), making them stateless and limiting civic and employment possibilities. The last surviving Dutch members of the International Brigades had their nationality restored only in 1967.⁴⁴⁴ In Switzerland, Republican volunteer fighters were prosecuted for their participation in the Spanish hostilities; in 2009, all convictions were repealed by Parliament.⁴⁴⁵ Simply put, although the International Brigades are often retrieved to support, or at least suffer, certain types of foreign fighting considered more acceptable or honourable than others, the legal response at the time was the opposite — on paper, the European states opted to seek to prevent *all* such volunteering in Spain. There are, thus, undeniable tensions between the legal response at the time and the legal memories of the event.

Those tensions and changing perceptions can be considered in various ways. One factor, for example, is that the foreigners on the Republican side were volunteering with the government

⁴⁴¹ George Esenwein, ‘Freedom Fighters or Comintern Soldiers? Writing About the “Good Fight” During the Spanish Civil War’ (2010) 12(1–2) *Civil Wars* 156, 156.

⁴⁴² Richard Baxell, ‘Myths of the International Brigades’ (2014) XCI(1–2) *Bulletin of Spanish Studies* 11.

⁴⁴³ Although not all faced such exclusion or punishment, or not to the scale sometimes depicted. Rather, treatment, at least in Britain, was pragmatic, and Finland assisted and amnestied returnees: Richard Baxell, *Unlikely Warriors: The British in the Spanish Civil War and the Struggle Against Fascism* (Aurum Press, 2012) 418–422; Malet, *Foreign Fighters* (n 60) 124–125; Fraser Raeburn, ‘The “Premature Anti-Fascists”? International Brigade Veterans’ Participation in the British War Effort, 1939–45’ [2018] *War in History* 1; Jorge Marco, ‘Transnational Soldiers and Guerrilla Warfare from the Spanish Civil War to the Second World War’ [2018] *War in History* 1, 9–10, 13–14; Teemu Tammikko, ‘The Threat of Returning Foreign Fighters: Finnish State Responses to the Volunteers in the Spanish and Syria-Iraq Civil Wars’ (2018) 30(5) *Terrorism and Political Violence* 844, 853–4.

⁴⁴⁴ Beatrice de Graaf, ‘De Vlam van Het Verzet. Nederlandse Strijders in Het Buitenland, Vroeger En Nu [The Flame of Resistance. Dutch Warriors Abroad, Past And Present]’, *Anton de Kom Lecture* (2014) 7 <http://www.verzetmuseum.org/uploads/media_items/de-vlam-van-het-verzet-nederlandse-strijders-in-het-buitenland-vroeger-en-nu.original.docx>; Samuël Kruizinga, ‘The First Resisters: Tracing Three Dutchmen from the Spanish Trenches to the Second World War, 1936–1945’ [2019] *War in History* 1, 6, 11–12, 14, 16–17.

⁴⁴⁵ *IG Spanienfreiwillige* [Spain Volunteers Community of Interest] (Web Page) <<https://www.spanienfreiwillige.ch/>>.

side of a conflict, albeit largely within non-state armed groups. Consented to by Spain, the rules applicable to such volunteers might today be seen more akin to foreign enlistment, that is, with state armed forces, than to foreign fighting with opposition armed groups. Foreign enlistment, although debated over time, has become a matter of domestic discretion rather than international regulation.⁴⁴⁶

Most importantly for this study, the way the foreign fighter issues during the Spanish Civil War were negotiated and argued illustrates the framing within which these debates were conducted; a framing based on concepts of neutrality and non-intervention, and questions of impartiality and abstention. Although the two determinations were ultimately opposed — that is, Article 6 of the Fifth Hague Convention allowed individual volunteers while the extended Non-Intervention Agreement did not, the framing of neutrality set the scope for the legal arguments being engaged in at the adoption of both. As Elizabeth Chadwick has argued, ‘states protect their nationals and property during civil armed conflicts by observing aspects of traditional neutrality law, and by abiding by neutral rules against the premature recognition of independence of a rebelling faction within a state’.⁴⁴⁷ The relevant domestic laws therefore ‘served much more than only the deterrence of citizens from joining foreign forces or the enforcement of neutrality’, but were important in terms of foreign policy.⁴⁴⁸ This is precisely how the European states involved with the Non-Intervention Committee during the Spanish Civil War made domestic decisions to protect their interests. In other words, the approach taken was due to political interests as mentioned, but also because of the predominant neutrality framing of the issue of foreign fighting in that moment, which set the scope for the pertinent legal issues and approaches, and affected how the rules of non-intervention in civil wars were argued.

Over time, the attention of international law turned from inter-state conflicts and the law of neutrality, to internal/civil wars. With the adoption of Common Article 3 in 1949, the law applicable to those internal/civil wars shifted from a system allowing graduated appreciation by affected states of the civil strife situation (rebellion, insurgency and belligerency) to the application of certain rules of *jus in bello* to all de facto situations of non-international armed conflict. This had been called for by some scholars, frustrated with the political determinations made during the Spanish Civil War.⁴⁴⁹ However, international law lost the subjective choice of application of neutrality law or abstention policies to ‘international-like’

⁴⁴⁶ See Chapter One, text accompanying n 93.

⁴⁴⁷ *Traditional Neutrality Revisited: Law, Theory and Case Studies* (Kluwer Law International, 2002) 181. See also Chadwick, ‘Neutrality Revised?’ (n 169) 48.

⁴⁴⁸ Arielli, Frei and Van Hulle (n 39) 2.

⁴⁴⁹ O’Rourke (n 80) 413. See also Lieblich (n 42) 114; Moir (n 132) 19ff.

civil wars which affected third state interests, at least on the international level.⁴⁵⁰ Incorporation of the concept of the recognition of belligerency was rejected during the negotiations of the 1949 Conventions.⁴⁵¹ So, while international law used to show some ambivalence or provide some space to the possible justness of the insurgents' cause,⁴⁵² Common Article 3 — while enacted with humanitarian reasoning seeking to ensure a minimum of rules of conduct during civil war — in effect also firmly aligned the rules of non-intervention with the state-centred international order. It made explicit that the existence of a conflict not of an international character would not affect the legal status of the parties. That is, a non-state armed group party to an internal armed conflict could no longer reach the status of a recognised belligerent, but would from then on always remain a criminal actor domestically, unless ultimately becoming the recognised, legitimate representatives of the state.

The tensions surrounding the possible legitimacy of some non-state causes nevertheless persisted. As the teething period illustrated by the Spanish Civil War and decline of the League of Nations gave way to the establishment of the United Nations, international law was left with the dilemma of how to treat claims of legitimacy of certain armed rebellions. The coming period of decolonisation reignited questions about the right of peoples to self-determination, third state duties regarding civil conflicts in which governments were perceived to have lost legitimacy, and, relatedly, the rules regulating non-tolerance of foreign fighting.

In the following chapter, I turn from a framing of the issue of foreign fighter participation within notions of neutrality and impartiality, to one framed by a concern for protecting the right of self-determination in the moment of decolonisation conflicts of the 1960s–1970s.

⁴⁵⁰ See also Marko Milanovic and Vidan Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict' in Nigel White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar, 2013) 256, 268.

⁴⁵¹ Els Debuf, *Captured in War: Lawful Internment in Armed Conflict*, (Hart, Paris 2013), 454, citing Final Record of the Diplomatic Conference 1949, Vol II-B.

⁴⁵² Padelford, 'International Law' (n 63) 228; Falk (n 17) 194, 219–20.

Chapter Four

Self-Determination and its Enemies:

National Liberation, Non-Intervention and the Legal Response to Mercenaries and Foreign Freedom Fighters in the Decolonisation Conflicts

1. Introduction: Non-Intervention and National Liberation

Following the Second World War, the adoption of Article 3 common to the four Geneva Conventions 1949 meant that, in practice, all civil wars were to be treated alike once passing the legal threshold of armed conflict. The non-state actor parties to those conflicts operated without any combatant's privilege and their fighters could be prosecuted domestically, reflecting the state's claimed monopoly on the legitimate use of force.⁴⁵³ Apolitical IHL, created by states, was in this way political, favouring the established state structure.

Decolonisation challenged this neat position on internal struggles; challenged their very description as *internal* in the first place. The appearance of mercenaries in the related conflicts also led to debates about what kind of support governments could rely upon. This moment forced the legal relationship of third states to the conflict parties to evolve, and, therefore, the rules on foreign volunteer fighting. Post-World War II, the perceived justness of national liberation causes was given space first within international politics and then within international legal rules; international legal rules that could no longer support colonialism.⁴⁵⁴ Self-determination, at least in the form of national liberation, became a significant exception to rules governing the resort to force and military support provided to states.⁴⁵⁵ Questions of abstention and neutrality towards the parties to such struggles, or of support being offered to the colonial state power, had largely to be put aside.

Mercenaries and their freedom fighter counterparts appearing during the decolonisation conflicts were engaged with as a policy and legal issue chiefly within this self-determination, and more specifically national liberation, framing. This

⁴⁵³ An opposition group has legal personality within *jus in bello*, but not necessarily within *jus ad bellum*: Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart, 2010) 129. IHL does, however, encourage amnesties for IHL-compliant conduct of unprivileged fighters.

⁴⁵⁴ Describing the rise of anti-colonial sensibility and its effect on possible discourse around the law of armed conflict: Amanda Alexander, 'International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I' (2016) 17(1) *Melbourne Journal of International Law* 15, 36–48.

⁴⁵⁵ Georg Nolte, 'Secession and External Intervention' in Marcelo G Kohen (ed), *Secession* (Cambridge University Press, 2006) 65. See also *Definition of Aggression*, GA Res 3314, UN Doc A/9631(XXIX) (14 December 1974) annex ('*Definition of Aggression*') art 7.

chapter explores the tensions involved in the response to mercenaries and foreign freedom fighters within this dominant self-determination framing of the 1960s–1980s. Due to their negative reputation, mercenaries of the decolonisation period are not recalled and relied upon to validate today’s foreign fighting like the International Brigades or historical figures such as de Miranda, de La Fayette, Davy Crockett, Garibaldi or Byron. It could be thought that mercenaries of that era have become a non-issue; their services morphed into corporatised, sanitised and more accountable forms.⁴⁵⁶ The legal regulation of mercenaries appears strongly tied to time and place; to its specific context and framing. As set out in Chapter One, mercenaries are typically distinguished from other armed actors due to this historical image; to the legal categorisation adopted, in particular, based on the mercenary’s primarily financial motivation to fight, and differences in threat posed to the parent state. Nevertheless, mercenaries continue to receive United Nations (UN) attention as a current problem,⁴⁵⁷ attempted coups d’état by bands of foreigners recur,⁴⁵⁸ and contemporary situations of conflict or political unrest have seen renewed commercial and scholarly proposals for, and reports of, private combat forces.⁴⁵⁹ The regulation of

⁴⁵⁶ *Sanitised* in as much as the provision of combat services as compared with security services became a taboo, however blurred the lines between the two may be in practice: Sarah V Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007) 225–31 (‘*Mercenaries*’); Caroline Varin, ‘Mercenaries: Motivations and Functions of a Non-State Combatant’ in Fidel Gómez Ochoa and Daniel Macías Fernández (eds), *El Combatiente a Lo Largo de La Historia: Imaginario, Preceptión, Representación* [The Combatant Throughout History: Imaginary, Precept, Representation] (Universidad de Cantabria, 2012) 243, 258.

⁴⁵⁷ Côte d’Ivoire: SC Res 1464, UN Doc S/RES/1464 (4 February 2003) para 11; SC Res 1584, UN Doc S/RES/1584 (1 February 2005) para 12. Libya: SC Res 1970, UN Doc S/RES/1970 (26 February 2011) para 14; SC Res 1973, UN Doc S/RES/1973 (17 March 2011) para 16. Central African Republic: SC Res 2127, UN Doc S/RES/2127 (5 December 2013), preamble, para 27. See generally OHCHR, ‘Call for Submissions: The Evolving Forms, Trends and Manifestations of Mercenaries and Mercenary-related Activities’ (Web Page, 2020) <<https://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/CallsubmissionsTheevolvingforms.aspx>>.

⁴⁵⁸ See, eg, Nardine Saad, ‘Charges Dropped Against 12 Hmong Men Accused in Plot to Overthrow Laotian Government’, *Los Angeles Times* (online, 10 January 2011) <<https://latimesblogs.latimes.com/lanow/2011/01/charges-dropped-against-12-hmong-men-accused-in-plot-to-overthrow-laotiangovernment.html>>; Craig Whitlock, ‘How a Reviled African Ruler Survived a Coup Hatched in the US’, *Washington Post* (online, 31 May 2015) <https://www.washingtonpost.com/world/national-security/how-a-reviled-african-ruler-survived-a-coup-hatched-in-the-united-states/2015/05/31/a9fc1772-0485-11e5-8bda-c7b4e9a8f7ac_story.html>; Tom Phillips and Julian Borger, ‘Venezuela: Captured US Mercenary Claims He Planned to Abduct Maduro’, *Guardian* (online, 7 May 2020) <<https://www.theguardian.com/world/2020/may/06/venezuela-maduro-abduction-plot-luke-denman-americans-captured>>.

⁴⁵⁹ See, eg, Frauke Renz, ‘Private Military and Security Companies or Mercenaries? Bringing Law Back into the Discussion’, *Intlawgrrls* (Blog Post, 30 October 2017) <<https://ilg2.org/2017/10/30/private-military-and-security-companies-or-mercenaries-bringing-law-back-into-the-discussion/>>; Aram Roston and Matt Spetalnick, ‘Exclusive: Blackwater Founder’s Latest Sales Pitch: Mercenaries for Venezuela’, *Reuters* (online, 30 April 2019) <<https://www.reuters.com/article/us-venezuela-politics-erikprince-exclusi/exclusive-blackwater-founders-latest-sales-pitch-mercenaries-for-venezuela-idUSKCN1S608F>>; ‘Russian Group Wagner “Fighting in Libya”’, *BBC* (online, 7 May 2020) <<https://www.bbc.com/news/world-africa-52571777>>;

mercenaries is constantly retrieved in legal and other scholarship, understandably chiefly related to services offered by private military and security companies (PMSCs)⁴⁶⁰ but also, and as explored in this chapter, more recently regarding contemporary foreign fighting.⁴⁶¹ The repeated retrieval and distinction of the mercenary in the literature and in practice makes taking stock of the international legal responses to mercenaries relevant to an understanding of international law and foreign volunteer fighting. It is part of the story. As set out in Chapter One, I am therefore treating mercenaries as one sub-category of foreign fighter and intentionally bringing the separately-defined category of the mercenary and its undefined counterpart, the foreign freedom fighter, back into my consideration of the international legal regulation of foreign volunteer fighting.

This chapter retrieves the discussion surrounding the legal regulation of mercenarism in order to think about foreign fighting in international law today. The purpose is not to suggest that foreign fighters are necessarily mercenaries (although some may exceptionally fit a definition of mercenary in international or domestic law) or that foreign fighting and mercenarism pose identical problems and should be treated alike. The aim is to demonstrate how the definition of the mercenary and its attempted criminalisation continue to colour international legal thinking, even though the definition itself is critiqued and there is little support for the UN Mercenary Convention.⁴⁶² I consider what the self-determination framing of the mercenary issue during the decolonisation period can help us understand about the counterterrorism framing today and, more generally, about the observable tensions in present legal debates about foreign fighting.

RP DeWitte, 'Let Privateers Marque Terrorism: A Proposal for Reawakening' (2007) 82 *Indiana Law Journal* 131.

⁴⁶⁰ Especially in the earlier phase of PMSC scholarship related to offensive military services: Mirko Sossai, 'Combating the Legal Side Effects of Privatised War', *Völkerrechtsblog* (Blog Post, 9 October 2017) <<https://voelkerrechtsblog.org/combating-the-legal-side-effects-of-privatized-war/>>. From the vast literature, see, eg, Juan Carlos Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1998) 34 *Stanford Journal of International Law* 75; Ellen L Frye, 'Private Military Firms in the New World Order: How Redefining "Mercenary" Can Tame the "Dogs of War"' (2004) 73 *Fordham Law Review* 2607; Sean McFate, *The Modern Mercenary: Private Armies and What They Mean for World Order* (Oxford University Press, 2014).

⁴⁶¹ See, eg, Elzbieta Karska and Karol Karski, 'The Phenomenon of Foreign Fighters and Foreign Terrorist Fighters Introduction' (2016) 18(5) *International Community Law Review* 377; Jose L Gomez del Prado, 'Whether the Criteria Contained in the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries Notably Motivation Apply to Today's Foreign Fighters?' (2016) 18(5) *International Community Law Review* 400 ('Criteria'); Simon Chesterman, 'Dogs of War or Jackals of Terror: Foreign Fighters and Mercenaries in International Law' (2016) 18(5) *International Community Law Review* 389.

⁴⁶² *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, opened for signature 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001) ('UN Mercenary Convention').

This chapter shows how in the legal response to mercenaries, like in the response to foreign volunteers in the Spanish Civil War, specific new regulation was considered necessary rather than relying on existing general rules. The self-determination framing, strengthened by the definition and delegitimisation of the mercenary as a category of natural person, opened the door more widely to other forms of foreign fighting, such as so-called freedom fighters, being considered legitimate. The legal response within the dominant framing of this period also involved the establishment of specific institutional and jurisdictional ownership of the defined manifestation of the mercenary, along with related specialised expertise linked to decolonisation, self-determination and human rights.

Rather than the regulation of mercenaries representing progress in terms of settled and strengthened international law about at least *this* category of fighter, the persisting tensions about the harms posed by foreign fighting, and, thus, about their necessary regulation in the law, provide another illustration of how various themes within the relevant debates linger and continue to reverberate across manifestations of foreign fighting. In this case, the dilemma is that we cannot simply put the legal history of mercenaries aside and move on, but as I will discuss here, we seemingly cannot make much good use of the definition of mercenary regarding foreign fighting today either.

The chapter begins by describing the dominant self-determination framing of the issue of mercenaries appearing in conflicts related to decolonisation/national liberation (Section 2). Section 3 sets out the legal and institutional responses adopted, focusing on the legal definition of mercenary and the attempted criminalisation of mercenarism. The substantive part of the chapter (Section 4) analyses the international legal debates surrounding mercenaries and how argumentation was impacted by the dominant self-determination framing. It considers, in particular, the technique of defining a new, problematic, foreign and private participant in violence. The persisting tensions within these debates are brought to light by a consideration of the institutional response of the UN and the work of the UN's Special Procedure on Mercenaries, together with relevant scholarship. The chapter concludes in Section 5 by arguing that, like the counterterrorism and the neutrality framings, the self-determination framing cannot, on its own, answer all the questions we have surrounding foreign fighting. Considering the legal debates about mercenaries demonstrates, though, that even if the framing of the issue has changed, red threads of debate persist across time and setting. This means that today's thinking and argumentation have a lineage to which the historical legal debates on mercenaries have contributed, impacting on our understanding of the stakes involved in present international legal dilemmas surrounding foreign fighting.

2. The Reappearance of Mercenaries in a Context of Decolonisation Conflicts

2.1 Instability and Opportunity: The Context of National Liberation

The instability that resulted from independence processes in the decolonisation era created space for small bands of fighters, often western, often ex-military, often recruited by a particular mercenary leader, to be hired by foreign state and non-state powers for their combat services.⁴⁶³

General Assembly Resolution 1514 (1960) on the granting of independence to colonial countries recognised the '[ardent] desire [for] the end of colonialism' and that '[a]ll peoples have the right to self-determination'. It showed concern about the 'increasing conflicts resulting from the denial of ... freedom'.⁴⁶⁴

Within that setting, the roots of contemporary international legal attention to mercenarism are typically traced to the set of Security Council resolutions starting in 1961 concerning the situation in the Congo.⁴⁶⁵ Congo's struggle against Belgium's rule and military presence had resulted in its independence in June 1960. A complex set of competing political, economic and social interests saw Congo starting its independent life with the Congolese military successfully demanding changes in its set-up, including the removal of Belgian officers, and the government requesting UN support to capacity-build the national armed forces. It also saw Belgium, threatened by these beginnings of a redistribution of power and resources, sending forces into the resource-rich Katanga region in the south-east, claiming humanitarian intervention. Katanga immediately made a bid for secession, supported by the ongoing presence of Belgian soldiers and the direct military assistance of hired western mercenaries. UN troops deployed to Congo found themselves under attack by foreign combatants in Katanga.⁴⁶⁶

⁴⁶³ For accounts of mercenary operations in this period, see, eg, Walter Bruyère-Ostells, *Histoire des Mercenaires: De 1789 à nos Jours* [History of Mercenaries: From 1789 to Today] (Tallandier, 2011) 151–164; Anthony Mockler, *Mercenaries* (MacDonald, 1969) 143ff; Guy Arnold, *Mercenaries* (Palgrave, 1999) 1–64; Peter Tickler, *The Modern Mercenary: Dog of War or Soldier of Honour?* (Stephens, 1987); Rolf Steiner, *The Last Adventurer*, tr Steve Cox (Weidenfeld and Nicolson, 1978); Al J Venter, *War Dog: Fighting Other People's Wars, The Modern Mercenary in Combat* (Casemate, 2006) 241ff.

⁴⁶⁴ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV) (14 December 1960) preamble, paras 2, 4.

⁴⁶⁵ See, eg, LC Green, 'The Status of Mercenaries in International Law' (1979) 9 *Manitoba Law Journal* 201, 224; Sarah V Percy, 'The Security Council and the Use of Private Force' in Adam Roberts, Vaughan Lowe and Jennifer Welsh (eds), *United Nations Security Council and War* (Oxford University Press, 2008) 624, 624 ('Security Council'). But see also n 79 regarding the Security Council at first being concerned with foreign support to secession, not the status of mercenaries per se.

⁴⁶⁶ Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011) 69–79; Radharaman Chakrabarti, *Intervention and the Problem of Its Control in the Twentieth Century* (Sterling, 1974) 100–7; Mockler (n 11) 155ff; Donald W McNemar, 'The Postindependence War in the Congo' in Richard A Falk (ed), *The International Law of Civil War*

The Security Council's 1961 resolution on 'The Congo Question' urged the immediate withdrawal 'of all Belgian and other foreign military and paramilitary personnel and political advisors not under the United Nations Command, and mercenaries'.⁴⁶⁷ Foreshadowing calls the Security Council would make regarding the movement of foreign terrorist fighters in 2014, Resolution 161 called upon states 'to take immediate and energetic measures to prevent the departure of such personnel for the Congo from their territories'.⁴⁶⁸ A follow-up resolution authorised the use of force if necessary to achieve the withdrawal of these foreign advisors and mercenaries.⁴⁶⁹ Thus, the Security Council directed its attention to the non-UN foreign military actors but chiefly to their parent states. This was in keeping with existing international law on non-intervention and the customary rule requiring non-toleration of unlawful harm to other states.

Portugal's ongoing reluctance to give up its colonies in the late 1960s and the civil wars in Angola from the 1970s provided another key setting in which mercenaries became involved in hostilities, leading to further Security Council resolutions referencing mercenaries.⁴⁷⁰ In this period, mercenaries also supported both sides of the civil war between Nigeria and Biafran secession forces (1967–1970), and were involved in coups d'état in Guinea (1970), the Comoros (1975, 1978, 1995), Benin (1977) and the Seychelles (1981).⁴⁷¹

2.2 A Self-Determination Framing of the Mercenary Issue

The armed conflicts in which mercenaries appeared had arisen due to decolonisation struggles and/or instability following independence. Relatedly, self-determination

(Johns Hopkins Press, 1971) 244, 278–80; Green (n 13) 224–5; Evan Luard, *A History of the United Nations, Volume 2: The Age of Decolonization 1955–1965* (MacMillan, 1989) 217ff, especially 285–7; Bruyère-Ostells (n 11) 151–5.

⁴⁶⁷ SC Res 161, UN Doc S/4741 (21 February 1961) para 2.

⁴⁶⁸ Ibid para 3.

⁴⁶⁹ SC Res 169, UN Doc S/5002 (24 November 1961).

⁴⁷⁰ SC Res 226, UN Doc S/RES/226 (14 October 1966); SC Res 239, UN Doc S/RES/239 (10 July 1967); SC Res 241, UN Doc S/RES/241 (15 November 1967) ('Resolution 241'). See also *Question of Territories under Portuguese Administration*, GA Res 2395, UN Doc A/RES/2395 (XXIII) (29 November 1968); Geraint Hughes, 'Soldiers of Misfortune: The Angolan Civil War, the British Mercenary Intervention, and UK Policy towards Southern Africa, 1975–6' (2014) 36(3) *International History Review* 493.

⁴⁷¹ See, eg, SC Res 289, UN Doc S/RES/289 (23 November 1970) para 2; SC Res 405, UN Doc S/RES/403 (14 April 1977) paras 3–5; SC Res 496, UN Doc S/RES/496 (15 December 1981); SC Res 507, UN Doc S/RES/507 (28 May 1982); Steiner (n 11); Mike Hoare, *The Seychelles Affair* (Bantam, 1986); Tickler (n 11) 100–15; Samantha Weinberg, *Last of the Pirates: The Search for Bob Denard* (Pantheon, 1994); Arnold (n 11) 18–25. Depending on the facts, foreign manpower conducting coups d'état might be considered more akin to hostile expeditions or armed bands than foreign fighting as it is commonly understood if working as a single unit rather than supporting the efforts of an existing opposition group.

became further entrenched as a legal right of peoples in this same period.⁴⁷² The mercenary issue therefore came to be predominantly framed in international legal debate as one linked to the importance of protecting self-determination. While the exact scope of self-determination remains contested — something I will return to — in this period, it was chiefly understood as ensuring national liberation from colonial rule and ongoing foreign meddling, but also, in the UN's approach, in holding together the unity of newly-independent states.⁴⁷³

Although some mercenaries/mercenary bands acted independently, the connection with colonial powers that often existed was a factor that did not go unfelt. Parent state involvement in the form of sufferance, if not support, in line with ongoing colonial political interests and/or linked to Cold War politics, including contact between intelligence services and mercenaries, blurred the lines between state and individual intervention.⁴⁷⁴ I will return to this theme in Chapters Five and Six. Moreover, the image of the white mercenary fighting against black Africans was a powerful one, a 'symbol of racism and neo-colonialism within the Afro-Asian bloc', even though mercenaries had also been relied upon by some African governments.⁴⁷⁵ The activities of mercenaries were strongly condemned by the Organisation of African Unity

⁴⁷² *Charter of the United Nations* arts 1(2), 55; *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514, UN Doc A/RES/1514(XV) (14 December 1960); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN Doc A/RES/2625(XXV) (24 October 1970) annex, princ 5 ('*Friendly Relations Declaration 1970*'); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, entered into force 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1; *African (Banjul) Charter on Human and Peoples' Rights* (adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force 21 October 1986) art 20.

⁴⁷³ Nolte (n 3) 68: 'anti-secessionist attitude of the United Nations'.

⁴⁷⁴ See, eg, regarding respective British and French interests and links with mercenaries in the Nigeria-Biafra conflict: Steiner (n 11) 117, 139–40, 150–62; Arnold (n 11) 22. Regarding the CIA and mercenary operations in Congo, Angola, Rhodesia and Nicaragua linked to anti-communism: 'Telegram from the Station in the Congo to the Central Intelligence Agency, Leopoldville, 10 August 1964' in Nina D Howland, David C Humphrey and Harriet D Schwar (eds) *Foreign Relations of the United States 1964–1968, vol XXIII, Congo 1960–1968* (Government Printing Office, 2013) Doc 208 <<https://history.state.gov/historicaldocuments/frus1964-68v23/d208>>; Piero Gleijeses, "'Flee! The White Giants Are Coming!': The United States, the Mercenaries, and the Congo, 1964–65" (1994) 18(2) *Diplomatic History* 207; Klaas Voß, 'Plausibly Deniable: Mercenaries in US Covert Interventions during the Cold War, 1964–1987' (2016) 16(1) *Cold War History* 37; Kathleen Belew, *Bring the War Home: The White Power Movement and Paramilitary America* (Harvard University Press, 2018) ch 4; Kyle Burke, *Revolutionaries for the Right: Anticommunist Internationalism and Paramilitary Warfare in the Cold War* (University of North Carolina Press, 2018) 43–8.

⁴⁷⁵ James L Taulbee, 'Myths, Mercenaries and Contemporary International Law' (1985) 15 *California Western International Law Journal* 339, 342. See also Zarate (n 8) 116; Dino Kritsiotis, 'Humanitarian Warfare: Towards an African Appreciation' in Jeremy Levitt (ed), *Africa: Mapping New Boundaries in International Law* (Bloomsbury, 2008) 149, 160 ('Humanitarian Warfare'); Voß (n 22) 52.

(OAU).⁴⁷⁶ Linking the harm to Europe's toleration of these situations, the OAU referred to the fact that 'to prepare their crimes against Member States, the mercenaries often use African territories still under foreign domination'.⁴⁷⁷

On top of potential breaches of non-interference in the state's internal affairs and threats to peaceful state relations, the ongoing connection to colonial powers contributed to mercenaries gaining a reputation as 'fundamental and irredeemable enemies of post-colonial Africa'.⁴⁷⁸ In 1976, the death penalty was, controversially, carried out against western mercenaries captured and tried in Angola.⁴⁷⁹ Even countries that were not strictly opposed to mercenaries had to pay attention to such consular headaches and foreign relations issues regarding their nationals.⁴⁸⁰ Within this self-determination framing, and with its membership expanded by newly independent states, the General Assembly described mercenaries in a 1968 resolution as 'outlaws' whose actions were to be criminalised.⁴⁸¹

In addition to condemning colonialism and violence inhibiting self-determination, General Assembly resolutions started to recognise wars of national liberation as legitimate and in need of support. The same 1968 resolution urged states 'to provide moral and material assistance' to national liberation movements.⁴⁸² By 1973, rather than being recognised only as the *victims* of violence and injustice, the reality of national liberation movements needing to *resort* to violence was recognised. General Assembly Resolution 3070 (1973) reaffirmed, although not unanimously, 'the legitimacy of the peoples' struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle'.⁴⁸³

⁴⁷⁶ The Organisation of African Unity was established in 1963 and replaced in 2002 by the African Union.

⁴⁷⁷ *Declaration on the Activities of Mercenaries in Africa*, OAU Doc CM/St. 6-XVII (23 June 1971) preamble. See also regarding the failure of Portugal to prevent mercenary participation in Congo, Resolution 241 (n 18) preamble, paras 2–4. See also Laura A Dickinson, 'Mercenarism and Private Military Contractors' in Cherif M Bassiouni (ed), *International Criminal Law* (Brill, 2008) 355, 355, 358, 360; Michael Bothe, Karl Josef Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts* (Brill, 2013) 305.

⁴⁷⁸ Kritsiotis, 'Humanitarian Warfare' (n 23) 159. See also Green (n 13) 224.

⁴⁷⁹ W Burchett and D Roebuck, *The Whores of War: Mercenaries Today* (Penguin, 1977) 212 on sentencing; Mike J Hoover, 'The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War' (1977) 9(2) *Case Western Reserve Journal of International Law* 323.

⁴⁸⁰ See, eg, United Kingdom, *Report of the Committee of Privy Councillors Appointed to Inquire into the Recruitment of Mercenaries* (Cmnd 6569, 1976) [2]–[4] ('*Diplock Report*'); United Kingdom, *Parliamentary Debates*, House of Commons, 10 February 1976, vol 905, col 236–47; Hughes (n 18) 506–7.

⁴⁸¹ *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 2465, UN Doc A/RES/2465 (XXIII) (20 December 1968) para 8 ('Resolution 2465').

⁴⁸² *Ibid* para 5.

Resolution 3103 (1973) then recognised such hostilities as international armed conflicts to which the Geneva Conventions 1949 applied.⁴⁸⁴

This political support for national liberation movements led shortly afterwards to legal recognition in a provision of the 1977 First Additional Protocol to the Geneva Conventions (AP I), adopted a generation after the negotiation of the 1949 Geneva Conventions. Although dealing strictly with *jus in bello*, the new provision treated armed struggles against colonial domination, alien occupation and racist regimes in the exercise of a right to self-determination as international conflicts.⁴⁸⁵ This indicated an acceptance of the legitimacy of national liberation movements, treating them as state-like and privileged for the purposes of IHL. This logically opened the possibility for third states not only to support (legitimate) governments militarily, but in defending self-determination, also to support national liberation movements. For my purposes, this translates to a question of whether a parent state might not be required to prevent departures of volunteer fighters supporting such movements, akin to allowing foreign enlistment in state armed forces.

The debate on mercenaries and negotiation of the definition of the mercenary took place within these more general concerns surrounding the status of national liberation movements in armed conflict. Reflecting this setting, in the 1960s, discussion about the use of mercenaries on the agenda of the General Assembly was included under the work of the Special Committee on Decolonization,⁴⁸⁶ and therefore under the Fourth Committee (Special Political and Decolonization). General Assembly resolutions mentioning mercenaries within this self-determination framing continued in the following decades, although they also took on a greater focus on the general respect for human rights over time.⁴⁸⁷ Still today, the reports of the UN Working Group on

⁴⁸³ *Importance of the Universal Realization of the Right of Peoples to Self-determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, GA Res 3070, UN Doc A/RES/3070 (XXVIII) (30 November 1973) para 2.

⁴⁸⁴ *Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*, GA Res 3103, UN Doc A/RES/3103 (XXVIII) (12 December 1973) paras 1–4 ('Resolution 3103').

⁴⁸⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), art 1(4) ('AP I'). See generally Heather A Wilson, *International Law and the Use of Force by National Liberation Movements* (Clarendon, 1988) 127, 135; Georges Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979) 165(IV) *Recueil des Cours* 366–92; Corten (n 1) 135–7.

⁴⁸⁶ Full title is Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples.

⁴⁸⁷ Cf *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 51/83, UN Doc A/RES/51/83 (28 February 1997, adopted 12 December 1996) para 3: 'planning of activities designed to destabilize or overthrow the Government of any State ... or to promote secession or fight the national liberation movements'; Shaista Shameen, Special Rapporteur, *Report on the Question of the Use of Mercenaries as a Means of*

Mercenaries (introduced in Section 3.3 below) are tabled at the General Assembly under the self-determination agenda item, although now in the Third Committee (Social, Humanitarian and Cultural). This continues despite the fact that the Working Group's reports discuss mercenaries, PMSCs and, more recently, foreign fighters.

3. Legal Categorisation and Institutionalisation of the Mercenary

3.1 Defining the Mercenary in International Law

In line with the political sentiments surrounding African states' experiences of mercenarism, the push to include a provision on mercenaries during negotiations for AP I at the 1974–1977 Humanitarian Conference was led by Nigeria on behalf of African states.⁴⁸⁸ Negotiations settled on indicating disapproval of the practice of mercenarism by explicitly removing any requirement for a state party to treat mercenaries as prisoners of war (PoW) upon capture.⁴⁸⁹ Like any unprivileged non-state armed actor, a mercenary could be domestically prosecuted for mere participation in the conflict. That meant that AP I simultaneously granted national liberation movement fighters the possibility of combatant and PoW status, while removing that right from mercenaries.⁴⁹⁰

The term *mercenary* had been used in international instruments for a large part of this period without legal definition, but with some common understanding as to the persons referred to, particularly in context-specific Security Council resolutions. Yet, given that IHL operates on the basis of distinctions between categories of persons and objects — those protected and unprotected from direct attack — a definition of mercenary was logically required; a definition precise enough to ensure that the denial of humanitarian and legal protection offered by PoW status was appropriately circumscribed.⁴⁹¹ Yet, the detailed definition adopted appears to have been built over

Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination, UN Doc A/60/263 (17 August 2005) [30] ('Shameen Report 2005'): 'mercenarism is a human rights issue, with implications for violations of, inter alia, the right to life and the integrity of the person and to national security, as well as for the right to self-determination'. See also Jonas Hagmann and Moncef Kartas, 'International Organisations and the Governance of Private Security' in Alan Bryden and Marina Caparini (eds), *Private Actors and Security Governance* (LIT, 2006) 285, 287–8; Green (n 13) 224–8.

⁴⁸⁸ Official Records of the Diplomatic Conference on the Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974–1977, Vol XV Committee III Report, CDDH/236/Rev.1 [95] ('Committee III Report').

⁴⁸⁹ AP I (n 33) art 47.

⁴⁹⁰ Mercenaries are unlikely to have been combatants/PoWs anyway because of the operation of AP I (n 33) art 43 regarding armed forces. See Katherine Fallah, 'Corporate Actors: The Legal Status of Mercenaries in Armed Conflict' (2007) 88 *International Review of the Red Cross* 599, 606; Bothe, Partsch and Solf (n 25) 304.

⁴⁹¹ Claude Pilloud et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, 1987) [1794]; Bothe, Partsch and Solf (n 25) 305–306; Percy, *Mercenaries* (n 4) 171.

a foundation of fundamental and unresolved dilemmas surrounding foreign fighting.⁴⁹² Despite the lengthy debates, one commentator on the 1974–1977 Diplomatic Conference noted regarding the definition of the mercenary that ‘[w]hat the deeper reasons were for taking one position or the other was never brought to the surface’.⁴⁹³

The key factors of the definition ultimately adopted were that the mercenary was *foreign*, primarily motivated by *financial benefit*, and private and unaccountable because *not enlisted into state armed forces*.⁴⁹⁴ The adoption of the narrow definition can also be read more cynically as a compromise position, whereby western states — who were at heart not in favour of a mercenary provision — accepted the definition as part of negotiations, ensuring it would not cover foreign or colonial legions within their own armed forces, and assuming that it would be unworkable technically.⁴⁹⁵ Indeed, the narrow definition was rapidly criticised in scholarship as being unworkable. Common critiques include that obtaining evidence of primary financial motivation proves difficult, that the requirement of foreignness from the parties leaves significant gaps, for example, regarding diaspora citizens, and that states could evade the criteria of foreignness and non-enlistment by offering citizenship/residency, or incorporating hired foreign forces into national armed forces.⁴⁹⁶ Moreover, in practice, each of these three key elements is, on its own, a common occurrence in conflict — being foreign, earning money, not being an enlisted soldier — such that the criteria only make some sense in combination.

In terms of IHL, AP I’s mercenary article has had little effect and application — the denial of the right to PoW status only applies in international armed conflict, and the cumulative definitional criteria are hard to fulfil and simple to evade. However, the fact of categorisation and definition — that is, the bringing to life of the mercenary as a legal category in AP I — has had a significant and lasting impact on the treatment of other forms of foreign fighting in international law, especially because it was relied upon for the subsequent criminalisation of mercenarism.

⁴⁹² See summary of debate and lack of agreement on each element of the proposed mercenary provision during negotiations for AP I: Committee III Report (n 36) [95]–[108].

⁴⁹³ Henry W Van Deventer, ‘Mercenaries at Geneva’ (1976) 70(4) *American Journal of International Law* 811, 814.

⁴⁹⁴ AP I (n 33) art 47(2).

⁴⁹⁵ Bothe, Partsch and Solf (n 25) 307; del Prado, ‘Criteria’ (n 9) 415; Van Deventer (n 41) 813; Françoise J Hampson, ‘Mercenaries: Diagnosis Before Proscription’ (1991) 22 *Netherlands Yearbook of International Law* 3, 37–38. Cf Percy, *Mercenaries* (n 4) 169–79, making the less persuasive argument that the moral norm against mercenarism was so strong that states included the financial motivation criterion despite knowing its application would be difficult.

⁴⁹⁶ See, eg, Pilloud et al (n 39) [1792], [1809], [1813]; *Diplock Report* (n 28) [7]; del Prado, ‘Criteria’ (n 9); Aaron Ettinger, ‘The Mercenary Moniker: Condemnations, Contradictions and the Politics of Definition’ (2014) 45(2) *Security Dialogue* 174, 177–9. See also Percy, *Mercenaries* (n 4) 169–79.

3.2 Criminalising the Mercenary in International Law

The criminalisation of mercenarism at the international level appeared several years after AP I. In 1980, the General Assembly, once again on the initiation of Nigeria acting on behalf of several African states, established an ad hoc committee to draft an international convention regulating mercenarism.⁴⁹⁷ After a decade of work and debate, the UN Mercenary Convention opened for signature in 1989.⁴⁹⁸

The UN Convention replicated almost identically the definition of mercenary in AP I, despite criticism of the AP I definition and the very specific context of its drafting — evidence that, in practice, it was the individual mercenary which had captured people’s imaginations. Once carved out, it came into existence and has been living out its legal life. The establishment of a monitoring body for the specific category (Section 3.3 below) also strengthened the legal life of the mercenary “born” in AP I. It has been argued that there was little choice of definition for the UN Convention since having different definitions for different purposes in two international instruments was undesirable.⁴⁹⁹ The issue is that, as mentioned, a definition based on *status* fits IHL’s logic, which distinguishes categories of person for the purpose of their privileged combatancy and protection from attack. However, although the two aspects of status and conduct are clearly linked,⁵⁰⁰ an approach leaning heavily on individual *status* becomes problematic when framing a criminal offence.⁵⁰¹

AP I deprived *all* mercenaries of a right to PoW status, without regard to the cause they were supporting which could not have had a place in an IHL treaty.⁵⁰² Similarly, the UN Convention outlawed mercenarism *per se* for state parties. Thus, the Convention prohibits the recruitment and use of mercenaries even for what might otherwise be considered unobjectionable causes, such as if a legitimate government hires additional support to counter a rebellion.⁵⁰³ This objective prohibition avoids tensions about the meaning of self-determination but creates a new problem in the form of tensions about the definition of mercenary. The position taken in the UN

⁴⁹⁷ *Drafting of an International Convention Against Activities of Mercenaries*, GA Res 34/140, UN Doc A/RES/34/140 (14 December 1979); *Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, GA Res 35/48, UN Doc A/RES/35/48 (4 December 1980).

⁴⁹⁸ *UN Mercenary Convention* (n 10).

⁴⁹⁹ Hampson (n 43) 30.

⁵⁰⁰ In technical terms, the UN Convention avoided a status offence by making direct participation in hostilities part of the offence and no longer part of the definition of the category of person: Tullio Trêves, ‘La Convention de 1989 sur les Mercenaires [The 1989 Convention on Mercenaries]’ (1990) 36(1) *Annuaire Français de Droit International* 520, 528–9; Hampson (n 43) 31.

⁵⁰¹ Percy, *Mercenaries* (n 4) 178–9.

⁵⁰² Pilloud et al (n 39) [1795]. See also Section 4.2 below.

⁵⁰³ *UN Mercenary Convention* (n 10) arts 1–3. See Dino Kritsiotis, ‘Mercenaries and the Privatization of Warfare’ (1998) 22(2) *Fletcher Forum of World Affairs* 11, 13, 19 (‘Mercenaries’).

Convention suggests that mercenarism is morally objectionable either intrinsically due to its private, foreign, commercialised and perhaps ill-disciplined nature, or because of the threat it (always) poses to self-determination, or to non-intervention or non-toleration of unlawful harm. If the commodification of the use of force and lack of ‘right ideological approach’⁵⁰⁴ was the mischief about which international law was concerned, then all mercenaries would need to be prevented, regardless of their activities or the cause they supported.

The objective prohibition adopted in the UN Mercenary Convention can be contrasted with the regional-level criminalisation of mercenarism in the 1977 OAU Convention for the Elimination of Mercenarism.⁵⁰⁵ Adopted immediately after AP I, it adopted a near-identical definition of mercenary.⁵⁰⁶ Rather than treating all mercenaries equally, though, the OAU Convention distinguishes between different underlying causes. Echoing the UN’s earlier expressed concern about the threat mercenarism posed to self-determination, the OAU Convention only criminalises mercenarism carried out ‘with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another state’.⁵⁰⁷ Therefore, the OAU Convention does not absolutely prevent national liberation movements from hiring mercenary support, nor governments from relying on mercenary forces for extra manpower if facing secession attempts or rebellion, as occurred for example in the Nigeria–Biafra conflict (1967–1970) and Zaire (1996–1997).⁵⁰⁸

Uptake of the UN Convention’s approach prohibiting mercenaries in all situations has been slow. The Convention did not come into force until 2001, 12 years after its adoption, once 22 states had joined.⁵⁰⁹ As of August 2020, there were only 36 parties and 17 signatories, and none of the five permanent members of the Security Council is a party.⁵¹⁰

⁵⁰⁴ Green (n 13) 230 (citation omitted).

⁵⁰⁵ Organisation of African Unity, *Convention for the Elimination of Mercenarism in Africa*, opened for signature 3 July 1977, 1490 UNTS 96 (entered into force 22 April 1985) (‘OAU Convention’).

⁵⁰⁶ One slight difference regards payment which, unlike AP I, does not have to be substantially in excess of that received by the armed forces: Ibid art 1(c).

⁵⁰⁷ OAU Convention (n 53) art 2.

⁵⁰⁸ See Kofi Oteng Kufuor, ‘The OAU Convention for the Elimination of Mercenarism and Civil Conflicts’ in Abdel-Fatau Musah and Kayode Fayemi (eds), *Mercenaries: An African Security Dilemma* (Pluto, 2000) 198, 202–4; Todd S Milliard, ‘Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies’ (2003) 176 *Military Law Review* 1, 55–6; Christopher Kinsey, ‘International Law and the Control of Mercenaries and Private Military Companies’ [2008] *Cultures & Conflicts (online)* 4 <<http://conflits.revues.org/11502>>. Democratic Republic of Congo was renamed Republic of Zaire 1971–1997.

⁵⁰⁹ As per UN Mercenary Convention (n 10) art 19(1).

⁵¹⁰ ‘International Convention Against the Recruitment, Use, Financing and Training of Mercenaries’ *United Nations Treaty Collection* (Web Page)

3.3 Institutionalising Ownership of the Mercenary

In 1987, two years before the UN Mercenary Convention was adopted, the UN Commission on Human Rights (now Human Rights Council) established a Special Procedure to monitor the impact of mercenary use as a means of violating human rights and of impeding the exercise of the right of peoples to self-determination.⁵¹¹ This institutionalisation reflected the link with decolonisation/self-determination *and* the focus on mercenaries as a category of individual. The chosen approach was to mandate the monitoring of a single type of defined actor and covering all possible impacts on human rights, with a special focus on self-determination. This is somewhat atypical as most other Special Procedures are thematic, focusing on a particular human rights violation (such as enforced disappearance or torture), or are geographical in scope.⁵¹² The narrowly-focused mandate on mercenaries has since been made more flexible by including the responsibility to monitor ‘mercenary-related activities in all their forms’, as well as identifying ‘emerging issues, manifestations and trends’.⁵¹³

Enrique Bernales Ballesteros, a Professor of law and political science from Peru, was appointed the first Special Rapporteur and carried out the role for 16 years.⁵¹⁴ He held uncompromising and widely-encompassing views on mercenarism, connecting mercenaries not only with threats to self-determination, human rights and democratic controls on violence, but also with terrorism and organised crime. His opinions treating PMSCs as mercenaries or surrounding foreign volunteers supporting state forces were not always appreciated by states.⁵¹⁵ In 2004, Fijian human rights lawyer Shaista Shameem took over the role. She took a less stringent position more

<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-6&chapter=18&clang=_en>.

⁵¹¹ Commission on Human Rights, *The Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-determination*, UN Doc E/CN.4/RES/1987/16 (9 March 1987) (‘CHR Res 1987/16’).

⁵¹² Penny Parker and David Weissbrodt, ‘Major Developments at the UN Commission on Human Rights in 1991’ (1991) 13 *Human Rights Quarterly* 573, 593; Jose L Gomez del Prado, ‘Private Military and Security Companies and the UN Working Group on the Use of Mercenaries’ (2009) 13(3) *Journal of Conflict & Security Law* 429, 429 (‘Private Military’).

⁵¹³ See, eg, renewing the mandate, Human Rights Council, *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, UN Doc A/HRC/RES/33/4 (5 October 2016, adopted 29 September 2016) [19]–[20] (‘HRC Res 33/4’).

⁵¹⁴ A former Senator, and Professor at the Pontificia Catholic University of Peru, Ballesteros wrote on socialism, nationhood, democracy and constitutional rights: Martin Garay Seminario, ‘Enrique Bernales Ballesteros’ in *Perfiles Humanos: Los Hombres que Hacen Historia en el Peru [Human Profiles: The Men Making History in Peru]* (M Garay Seminario, 1985) 129; Percy Medina-Masas, ‘Enrique Bernales Ballesteros’ in Mario Gulmarey (ed), *Quien es Quien: Congreso de la Republica 1985–1990* [Who is who: Congress of the Republic 1985–1990] (MGS & MGS Editores, 1986) 205.

⁵¹⁵ See section 4.3.3 below.

favourable to the private security industry and was less insistent on using the term ‘mercenary’ to describe such transformed versions of commercialised security.⁵¹⁶

In 2005, the post of Special Rapporteur was replaced by a Working Group of five regional experts (including Shameem) with an extended mandate also covering PMSCs.⁵¹⁷ The Working Group on Mercenaries continues its work monitoring the use of mercenaries and PMSCs today, while also discussing the phenomenon of foreign fighters since 2014, to which I will return below.

4. International Legal Debates Surrounding the Response to Mercenaries

In this section, I discuss three features of the legal response to mercenaries: first, that specific new law was enacted for the category of the mercenary; second, that, in turn, the treatment of mercenaries contributed to reinforcing the notion that freedom fighting was more acceptable; and, third, that the new jurisdictional ownership through a monitoring institution created required technical knowledge related to the newly defined category. I map out the debates and confusions within the legal discourse in order to demonstrate the persisting tensions within international legal argument in practice, and to examine how the self-determination framing of the issue affected how those tensions were grappled with in legal argumentation and in the adopted response. I have separated the key debates into three key themes, but note that this is challenging since the points of contention overlap and arguments tend to operate in combination.

4.1 Specific Law for a Transformed Phenomenon: Arguments about State Responsibility and Individual Criminal Responsibility

Rather than relying on existing general international legal duties and institutions, the legal response to mercenaries, like the response to Spanish Civil War volunteers, reflected a perceived need for new specific regulation of the current manifestation of foreign fighting. In contrast to the response during the Spanish Civil War, that new specific regulation resulted in a focus on the problematic individuals as a legal category on the international level, on paper alongside — and in practice taking precedence over — state due diligence duties.

One issue in the debates has been the question of whether the prevention of mercenaries should have remained solely a matter of national responsibility, leaving states to determine domestically how best to comply with general duties of diligent

⁵¹⁶ Victor-Yves Ghebali, ‘The United Nations and the Dilemma of Outsourcing Peacekeeping Operations’ in Alan Bryden and Marina Caparini (eds), *Private Actors and Security Governance* (LIT, 2006) 213, 216–19; Percy, ‘Security Council’ (n 13) 625.

⁵¹⁷ Human Rights Council, *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, UN Doc E/CN.4/RES/2005/2 (7 April 2005) para 12(e) (‘HRC Res 2005/2’).

prevention of unlawful transnational harm, or whether criminalising mercenarism on the international level has been a necessary approach.

4.1.1 Existing Doctrine of Diligent Prevention of Unlawful Harm

As demonstrated in Chapter Three, at the time that mercenaries appeared, international law already included state diligence duties not to tolerate activities emanating from their territory that would breach their claimed neutrality or otherwise unlawfully harm another state.

The application of neutrality law to mercenary activity in this period proves somewhat unsatisfying because neutrality applied only in international conflicts and had already lost much significance in a UN system premised on collective security. Moreover, as discussed in Chapter Three, the Fifth Hague Convention 1907 did not demand the prevention of individuals departing separately to fight but only recruitment and organised expeditions. In addition to recruitment in the mercenary's parent state, then, with wars of national liberation being recognised as international, and also regarding coups d'état carried out by bands of mercenaries, neutrality law might have had greater relevance. Domestic neutrality/foreign enlistment laws are also of relevance to the regulation of mercenaries. Still, neutrality law is only rarely discussed in the literature regarding mercenaries.⁵¹⁸ As this chapter shows — indeed, this thesis as a whole — neutrality law and its embedded determinations regarding groups and individuals, the potential harm that volunteer fighters might pose, and realistic standards of fore-knowledge and diligent prevention required from states, did, however, continue to colour legal argumentation and approach surrounding mercenaries and foreign freedom fighters.

More directly relevant than neutrality law were duties of non-intervention and non-toleration of unlawful harm. Restrictions on the resort to force would prevent states from relying on mercenary or other volunteer forces to unlawfully intervene forcefully in another state, i.e. as proxies.⁵¹⁹ As introduced in Chapter One, more relevant for this study is that states are also obliged to diligently prevent unlawful harm occurring to other states through the acts of private individuals in their territory.

The customary no harm principle, as a corollary to the notion of sovereign equality,⁵²⁰ was described most notably in the International Court of Justice's 1949 *Corfu*

⁵¹⁸ Exceptions include Green (n 13) 221–3; David Mugadu Isabirye, 'State Responsibility for Nationals Who Serve as Mercenaries in Armed Conflicts' (1986) 26 *Indian Journal of International Law* 405, 407, 413, 416, 423; Dickinson (n 25) 356–7; Hin-Yan Liu, *Law's Impunity: Responsibility and the Modern Private Military Company* (Bloomsbury, 2015) 161–2.

⁵¹⁹ See Chapter One, section 2.4.

⁵²⁰ *Charter of the United Nations* art 2(1); *British Claims in the Spanish Zone of Morocco Case (Spain v Great Britain) (Award)* (1925) 2 RIAA 615, 649; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14, [202] ('*Nicaragua Case*'); *Island*

Channel case as requiring every state ‘not to allow knowingly its territory to be used for acts contrary to the rights of other States’.⁵²¹ The rule was given further description in the series of General Assembly Resolutions setting out key principles of inter-state relations throughout the 1960s–1980s, the most authoritative of which due to its consensus in adoption — even representing customary law⁵²² — is the Friendly Relations Declaration 1970. It is referenced in the preamble to the UN Mercenary Convention 1989. The 1970 Declaration mentions mercenaries, without defining them, relating to the threat or use of force, and refers more generally to the non-toleration of armed activities:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands *including mercenaries*, for incursion into the territory of another State.

...

Also, no State shall organize, assist, foment, finance, incite or *tolerate* subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State ...⁵²³

As set out in Chapter Three, section 2.1, the standard of care to be taken by the state in its non-toleration of such risks of harm is the positive duty of due diligence.

When the Security Council was initially dealing with the situation in the Congo in the early 1960s, it condemned states that persisted ‘in permitting or tolerating the recruitment of mercenaries ... with the objective of overthrowing the governments of [member states]’. It called upon states to ensure that their territories were not used for

of *Palmas (Netherlands v US) (Award)* (1928) 2 RIAA 829, 839. See also the general principle of using your own property so as not to injure others: Jutta Brunnée, ‘Sic utere tuo ut alienum non laedas’ in Rüdiger Wolfrum et al (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, at March 2010).

⁵²¹ *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 9, 22. See also *United States Diplomatic and Consular Staff in Tehran (US v Iran) (Judgment)* [1980] ICJ Rep 3. Regarding environmental issues in which the rule has the firmest footing, see *Trail Smelter (US v Canada) (Decision)* [1938 and 1941] 3 RIAA 1911, 1963, citing Clyde Eagleton, *Responsibility of States in International Law* (New York University Press, 1928) 80: state ‘owes at all times a duty to protect other states against injurious acts by individuals from within their jurisdiction’.

⁵²² The Declaration states that it reflects international law: *Friendly Relations Declaration 1970* (n 20) [3]. See also *Nicaragua Case* (n 68) [202]–[203]; Maziar Jamnejad and Michael Wood, ‘The Principle of Non-Intervention’ (2009) 22(2) *Leiden Journal of International Law* 345, 351–5.

⁵²³ *Friendly Relations Declaration 1970* (n 20) paras 1(8), 3(2) (emphasis added). See also at para 1(9). Similar provisions were included in *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 2131(XX), UN Doc A/RES/20/2131 (21 December 1965) para 2; *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res 36/103, UN Doc A/RES/36/103 (9 December 1981) annex, paras 2(II)(b), 2(II)(g); *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, GA Res 42/22, UN Doc A/RES/42/22 (18 November 1987) annex, para I(6). See also *Essentials of Peace*, GA Res 290, UN Doc A/RES/4/290(IV) (1 December 1949) para 2.

the ‘planning of subversion, and the recruitment, training and transit of mercenaries designed to overthrow the government of the Democratic Republic of the Congo’.⁵²⁴ Such an approach therefore conformed with existing international norms of state responsibility related to the actions of private individuals within the state’s jurisdiction.

At the same time, as noted, UN resolutions in much of this period referenced mercenaries explicitly, even before the mercenary was defined in international law in AP I in 1977. These resolutions could refer to mercenaries without legal definition precisely because they concerned state duties of non-intervention and of diligent prevention of unlawful harm, rather than individual criminal responsibility, which was at the time still left to the determination of the domestic authorities.⁵²⁵ On the domestic level, and due to various interests, many states had legislative control on recruitment of their nationals and/or their nationals’ involvement in foreign wars. Although the earliest of such domestic laws had been enacted in response to concerns about ensuring neutrality, later enactments and amendments in several countries — some enacted in response to the Spanish Civil War — sought to restrict foreign fighting more generally including in civil wars, which would help them comply with such diligence duties.⁵²⁶

4.1.2 A Problem of State Diligence or Rogue Individuals?

Some scholars preferred an approach relying on existing rules of state responsibility over developing new, specific law to criminalise the mercenary. It was argued that if one looks more broadly than only wars of national liberation — that is, if one looks beyond the dominant framing of the moment — a consideration of broader rules regulating intervention and state obligations regarding the actions of nationals could be a more useful starting point.⁵²⁷ Actions countering self-determination were one of those key underlying concerns. By stepping back to focus on duties of prevention by the state, the approach was more generic and could be applied to a variety of situations beyond national liberation wars. A state responsibility approach could also

⁵²⁴ SC Res 239, UN Doc S/RES/239 (10 July 1967) paras 2–3. See also Green (n 13) 225, 229–30; Zarate (n 8) 79–80; Leszek Sosnowski, ‘The Position of Mercenaries under International Law’ (1979) 19 *Indian Journal of International Law* 382, 385.

⁵²⁵ Similarly, privateering was abolished by treaty without defining privateering: *Declaration Respecting Maritime Law*, 115 CTS 1 (signed and entered into force 16 April 1856) art 1. This led to debate whether the meaning was recognised and accepted, or whether the vagueness was problematic. See Llewellyn Pfankuchen, *Documentary Textbook in International Law, with Questions and Problems* (Farrar & Rinehart, 1940) 27; Francis R Stark, *Abolition of Privateering and the Declaration of Paris* (Columbia University, 1897) 153, 159 (citation omitted); JT Abdy (ed), *Kent’s Commentary on International Law* (Deighton Bell, 2nd ed, 1878) 232.

⁵²⁶ See Chapter One, section 2.5; Chapter Three, section 2.1.

⁵²⁷ See, eg, HC Burmester, ‘The Recruitment and Use of Mercenaries in Armed Conflicts’ (1978) 72(1) *American Journal of International Law* 37, 40, 44, 56. See also Milliard (n 56) 4–5, 34, 38, 56.

be pragmatic in that it sought to cut off the recruitment and departures of mercenaries at the source, as was attempted in the Spanish Civil War. Moreover, it reflected that recruitment was occurring in (western) parent states, often with parent state knowledge and in line with parent state interests. That is, that certain states were not taking sufficient action to prevent the harm being caused, or were offering covert state support.

One part of this debate regarding state involvement revolved around the notion of *foreignness*. On the one hand, it was pointed out in negotiations that, in practice, foreign states/groups could be involved in recruiting *local* fighters as mercenaries, suggesting that the definitional criteria of the mercenary being foreign should be dropped.⁵²⁸ That the mercenary was foreign was integral to other positions taken in scholarship which linked the mercenary's foreignness to the argument that their participation in the conflict likely represented third state interference in the territorial state and was thus a relevant element.⁵²⁹ As is known, foreignness was retained as a key criterion of mercenarism. This effectively downplayed any convincing concern about primary financial motivation, since such a motivation would in the logic of the definition be acceptable for nationals of a belligerent; alternatively, it assumes that national allegiance resolves the problem of a fighter being primarily financially motivated.

At its heart, the tension within this debate centred on whether international law considered mercenaries an ill in themselves, or only when taking certain actions, such as when being used by states to intervene unlawfully, or operating against a right of self-determination.⁵³⁰ The position subsequently adopted by a majority of states in the General Assembly has been described as a 'telling contradiction in policy terms' since the threat or concern that the General Assembly debates and Security Council resolutions were initially responding to was the *cause* that the mercenary was supporting — the attack on national liberation and breach of non-interference —

⁵²⁸ See, eg, *Report of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, UN Doc A/42/43 (24 March 1987) [23] ('Drafting Committee Report 1987'); *Report of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, UN Doc A/43/43 (3 March 1988) [93]–[94]; Trêves (n 48) 526–7.

⁵²⁹ Therefore, Hampson, even if finding the UN Mercenary Convention 'mis-diagnosed', argued for a position which would effectively prohibit all mercenarism given concern about intervention, signaled by the fighters' foreignness: (n 43) 37.

⁵³⁰ For an approach arguing that the anti-mercenary norm was itself as important as national liberation, see Percy, *Mercenaries* (n 4) 180–3, 188. Cf Christopher Kinsey and Hin-Yan Liu, 'Challenging the Strength of the Antimercenary Norm' (2018) 3(1) *Journal of Global Security Studies* 93, 95, 108, making the more persuasive argument for a broader framework that appreciates international norms such as neutrality, self-determination and the freedom of movement as underlying the attempted international prohibition of mercenarism.

rather than the *presence per se* of a mercenary in an armed conflict.⁵³¹ As such, the symptoms the General Assembly decided to seek to alleviate with the UN Mercenary Convention appeared to have ‘mis-diagnosed’ the mischief posed by mercenarism by taking a moral and political view condemning all mercenaries, and being out of kilter with where legal argument about private involvement in armed conflict was going.⁵³² In this light, the OAU Convention’s position, i.e. tying the criminalisation of mercenarism to attacks on self-determination, has been considered to have gauged international law more accurately than the UN Convention,⁵³³ although, the difficulties in determining the contours of self-determination persist. Once again, all of these debates turn on how one defines a mercenary or the offence of mercenarism in the first place.

AP I, the OAU Convention and the UN Convention all represent a legal response that opted for a specific new regulation and definition of the mercenary as a problematic category of actor, rather than relying on existing general rules. As explained above, legal opinion has queried the need for a new, more specific regulation or definition if mercenarism was problematic under international law only when it impinged on other legal rights, and if those legal duties already existed in international law, regardless of the identity of the perpetrator.⁵³⁴

Showing similar unsettled tensions, the explicit mention of mercenaries in the 1970 Friendly Relations Declaration is only included in the provision regarding their *sending* by the state, not their *toleration* which instead refers to ‘terrorist or armed activities’.⁵³⁵ That language has led to an argument that attempts to apply the customary non-toleration rules set out in the 1970 Friendly Relations Declaration to foreign fighters would be inaccurate, as these norms only apply to the diligent prevention of hostile groups, not individuals.⁵³⁶

⁵³¹ Kritsiotis, ‘Mercenaries’ (n 51) 14. See also Green (n 13) 224–5; Kinsey and Liu (n 78) 100–1, reiterating that the Security Council’s original concern regarding Congo in 1961 lay with all non-UN military personnel ‘with “mercenaries” seemingly inserted as an afterthought’.

⁵³² Hampson (n 43). See also Milliard (n 56) 4–5, 76; Sarah Percy, ‘Regulating the Private Security Industry: A Story of Regulating the Last War’ (2012) 94(887) *International Review of the Red Cross* 941 (‘Regulating’).

⁵³³ Hampson (n 43) 26–7.

⁵³⁴ Burmester (n 75) 56; Paul W Mourning, ‘Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries’ (1981) 22 *Virginia Journal of International Law* 589, 594–5; Kinsey and Liu (n 78) 98.

⁵³⁵ See n 71 above and Appendix. See similarly Resolution 2465 (n 29); *Definition of Aggression* (n 3).

⁵³⁶ Alice Riccardi, ‘Sull’Esistenza di un Obbligo Generale di Prevenire e Reprimere il Fenomeno dei Foreign Fighters alla Luce della Vicenda della Guerra Civile Spagnola’ [On the Existence of a General Obligation to Prevent and Repress the Phenomenon of Foreign Fighters in the Light of the Spanish Civil War] [2017] (2) *La Comunità Internazionale* 213, 215, 235–8.

In the period following decolonisation, there were contesting visions of mercenaries and of how and why they operated, and this continues today more generally regarding foreign fighting. Firstly, in this moment of change and violence linked to decolonisation and new independence, the realities regarding the organised or individual nature of mercenary action, as well as the level of state involvement, were blurred. Mercenaries were relied upon for both state and non-state interests: to fight against self-determination movements, to destabilise newly independent states, to support secession attempts following independence, as well as at times to conduct coups. Yet, it remains typical to envisage mercenaries as rogue individuals; guns for hire, whose pecuniary self-interest meant that military skills were transferable and suggested that the fighters were not necessarily loyal to their home states.⁵³⁷ They challenged the state's monopoly on the legitimate use of force and acted against (African) state interests generally by supporting secession or opposition causes. However, such an impression is insufficiently nuanced because mercenaries often operated as small organised units, at least in terms of recruitment and entry into the destination state. The reality is the blurred nature of state involvement with mercenaries, and distinctions between mercenaries acting as individuals and as recruited, organised bands.⁵³⁸ As noted above, Security Council resolutions since 1948 have made reference to states preventing their nationals — that is, as individuals — from departing to participate in certain conflicts, including as mercenaries. I will return to discuss in Chapters Five and Six how, today, the non-toleration rules can be interpreted as not, or at least no longer if they ever were, being strictly limited to the prevention of groups.

Secondly, at the time of the legal response to mercenaries, contesting visions of mercenaries as individuals, or as state-controlled or at least state-tolerated, could *both* support arguments that new, separate regulation of mercenaries was required. The first because one could argue that the existing rules did not clearly require states not to tolerate the departure of mercenaries *as* individuals, as just mentioned. This was except when the Security Council had determined to bring down the level-crossing barriers, so to speak, for volunteer participation in a particular situation. The second because one could argue that the existing rules had proven inadequate to induce states not to rely upon or facilitate mercenarism.⁵³⁹ Rather than relying on the Security Council to make a determination in each case, defining and regulating mercenaries on

⁵³⁷ Montgomery Sapone, 'Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence' (1999) 30(1) *California Western International Law Journal* 1, 6.

⁵³⁸ See, eg, Gleijeses (n 22); Voß (n 22) 59.

⁵³⁹ Arthur John Armstrong, 'Mercenaries and Freedom Fighters' (1978) 30(2) *JAG Journal* 125, 158.

the international level could make clear the need for a more objective prevention of mercenaries. I turn to this now.

4.1.3 Definition/Criminalisation on the International or Domestic Level?

The question of individual criminal responsibility of the fighters was previously a matter of domestic law — of the territorial state, as well as the parent state to the extent that relevant offences applied extraterritorially. However, the international legal response to mercenaries adopted a mercenary definition on the international level, rather than continuing to delegate such determinations to states.

Already in 1968, states were called upon in a significant General Assembly resolution on decolonisation to ensure domestic legislation prohibiting service as a mercenary, and punishing the recruitment, financing and training of mercenaries in their territory:

*Declares that the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries themselves are outlaws, and calls upon the Governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries.*⁵⁴⁰

The language is striking. The first half of the paragraph cites the practice of using mercenaries (and acting as a mercenary) against national liberation movements as the punishable act, while the language in the second half of the paragraph requesting domestic legislation is ambiguous, appearing to request that mercenarism be prohibited outright. Several European states recorded reservations about the ‘outlaws’ paragraph of this resolution.⁵⁴¹ Nevertheless, similar (although ever-narrowing) wording appeared in resolutions between 1968 and 1973, i.e. shortly before the 1974–1977 Diplomatic Conference in which ‘mercenary’ was defined internationally.⁵⁴²

Perhaps because of the difficulties inherent in these questions, because of the negative reputation mercenaries had gained, and reflecting that a state responsibility approach was unlikely to prove useful for enforcement, it was the mercenary as an unacceptable

⁵⁴⁰ Resolution 2465 (n 29) para 8.

⁵⁴¹ Burmester (n 75) 54.

⁵⁴² See, eg, *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2548, UN Doc A/RES/2548(XXIV) (11 December 1969) para 7, using identical language; *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2708, UN Doc A/RES/2708(XXV) (14 December 1970) para 8, referring to mercenaries in ‘colonial territories’ and calling on states to ‘take the necessary measures’ to prevent mercenarism; Resolution 3103 (n 32) para 5, limiting the criminal nature of mercenarism to their use by ‘colonial and racist regimes against the national liberation movements struggling for their freedom and independence’.

individual that became the dominant vision.⁵⁴³ The responsibility of home states not to allow recruitment or organisation on their territory, was not the priority focus, nor the aspect of the story that captured the imagination. Several Western countries did not want state responsibility to be mentioned within the UN Mercenary Convention at all.⁵⁴⁴ That appears cynical but makes some sense in as much as state duties were already prescribed in the general international law norms of non-intervention and non-toleration of unlawful harm.⁵⁴⁵ Over time, reflecting general developments in international criminal law, there was ‘a significant move away from the idea of collective liability of the traditional law toward individual criminal liability’.⁵⁴⁶ Of course, individual criminal offences can and do sit alongside state prevention duties. They are one method of complying with international diligence duties. States or groups employing or tolerating mercenaries were not ignored in the UN and OAU Mercenary Conventions: states can also violate these instruments by relying upon mercenaries.⁵⁴⁷ There seems, though, to be a tendency for interest in state duties to drop away once one’s imagination is directed towards individuals. The focus on the individual rogue helps states disavow their own possible connections or aspirations.⁵⁴⁸ A counter-view argued that, because the mercenary was not per se committing an international offence by participating in a conflict,⁵⁴⁹ it was not the mercenary, as an individual, that international law should be describing and proscribing (meaning that an objective prohibition of all mercenaries did not reflect existing international law at the time). Rather, to ensure compliance with non-intervention, states ‘should be required to make unlawful participation in a conflict, irrespective of motive, an offence in domestic law’.⁵⁵⁰ During negotiations for AP I’s mercenary provision, and for the UN Mercenary Convention, some states had indeed expressed a preference to leave such determinations for national law.⁵⁵¹ Leaving determinations to the domestic level would help gloss over the unsettled tensions within international law surrounding foreign fighting; over what exactly the ‘*unlawful* participation in a conflict’ just mentioned actually means.

⁵⁴³ Hagmann and Kartas (n 35) 287.

⁵⁴⁴ Trêves (n 48) 531. See also del Prado, ‘Private Military’ (n 60) 440.

⁵⁴⁵ *UN Mercenary Convention* (n 10) art 16 includes a provision confirming the Convention shall be applied without prejudice to the rules relating to the international responsibility of states. See Trêves (n 48) 531.

⁵⁴⁶ Kinsey (n 56) 3.

⁵⁴⁷ *UN Mercenary Convention* (n 10) art 2; *OAU Convention* (n 53) arts 1(2), 5–6.

⁵⁴⁸ Belew (n 22) 93; Voß (n 22) 40, 47–9, 59.

⁵⁴⁹ See n 161 below.

⁵⁵⁰ Hampson (n 43) 16; see also at 23.

⁵⁵¹ Pilloud et al (n 39) [1799]; Drafting Committee Report 1987 (n 76) [24], [33].

The International Law Commission (ILC) also changed tack regarding inclusion or not of the use of mercenaries in its draft Code of Offences against the Peace and Security of Mankind — early thinking about a statute for a world criminal court. Mercenaries were not referred to in the ILC's 1954 draft.⁵⁵² However, the ILC's 1985 report included reliance on mercenaries in the definition of aggression, and stated an intention to prepare a future provision on mercenarism.⁵⁵³ The 1991 draft included a separate offence where a state recruits, uses, finances or trains mercenaries, although, unlike the UN Mercenary Convention, neither the act of working as a mercenary, nor the use of mercenaries by non-state actors were criminalised.⁵⁵⁴ In the subsequent 1996 draft, this reference to mercenaries had disappeared⁵⁵⁵ and no such offence was included in the 1998 Rome Statute of the International Criminal Court.⁵⁵⁶ The African Union's 2014 Malabo Protocol, outlining proposed changes to the statute of the African Court of Justice and Human Rights, retrieves this issue by re-including the offence of mercenarism as a proposed crime.⁵⁵⁷

4.2 Mercenaries and Freedom Fighters: Arguments about Commodification versus Right Ideological Approach

The focus prioritising the unacceptable individual over certain unacceptable conduct committed by anyone strengthened the notion that some *other* forms of foreign fighting were acceptable or, at least, less unacceptable.

The OAU Council of Ministers' 1971 resolution on mercenaries, although talking about the 'scourge' that the 'mercenary system' represented in Africa, appealed to member states:

⁵⁵² Although it included as offences the organisation, encouragement or toleration by the state of armed bands, terrorist activities and 'organized activities calculated to foment civil strife in another State': 'Draft Code of Offences against the Peace and Security of Mankind (1954)' (Summary, United Nations, 2005) arts 2(4)–2(6) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_3_1954.pdf>.

⁵⁵³ *Report of the International Law Commission on the Work of its Thirty-Seventh Session* (1985) II(2) *Yearbook of the International Law Commission*, [85], [97].

⁵⁵⁴ *Report of the International Law Commission on the Work of its Forty-Third Session* (1991) II(2) *Yearbook of the International Law Commission*, draft art 23.

⁵⁵⁵ 'Draft Code of Offences against the Peace and Security of Mankind (1996)' (Summary, United Nations, 2005) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf>.

⁵⁵⁶ Opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002). Although the General Assembly's 1974 definition of aggression, which refers to sending mercenaries against another state, was subsequently included through the Kampala Amendments: Review Conference of the Rome Statute, International Criminal Court, Resolution RC/Res.6: The Crime of Aggression, ICC Doc RC/11 (11 June 2010) annex I ('*Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*').

⁵⁵⁷ *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* opened for signature 27 June 2014 (not in force) art 28H.

to increase their assistance in all fields to freedom fighters in order to accelerate the liberation of African territories still under foreign domination, as this is an essential factor in the final eradication of mercenaries from the African Continent.⁵⁵⁸

‘As distinct from terrorists and guerrilleros who are favoured “in-groups” of “progressive” thinking, mercenaries are definitely *out*, especially in quarters susceptible to pressure from the “third world”’, Georg Schwarzenberger wrote in 1971.⁵⁵⁹

Some delegations at the 1974–1977 Diplomatic Conference, and subsequent commentators, felt that AP I’s provision on mercenaries was not appropriate for an IHL treaty. The argument was that IHL must remain neutral to the political motivations of combatants and *jus ad bellum* rules.⁵⁶⁰ Linked to IHL’s neutrality, on its face, AP I treats all mercenaries, as defined, equally and objectively; that is, regardless of the side for which they fight, and whether that party is state or non-state.⁵⁶¹ AP I did not need to define mercenaries by the cause or state/non-state nature of the party they were supporting since mercenaries and foreign freedom fighters could not be readily confused in this setting. The differentiation with foreign freedom fighters was ensured by, firstly, the criterion that mercenaries be primarily motivated by money,⁵⁶² meaning freedom fighters easily eluded the mercenary definition as a matter of law.⁵⁶³ Secondly, it was because national liberation movements in AP I were anyway to be considered state-like for the purposes of IHL.

It was this objective and neutral opposition to mercenaries, based chiefly on their primary financial motivation, which was then adopted into the UN Mercenary Convention. The Special Rapporteur Ballesteros repeatedly drew a distinction between paid mercenaries and those engaged in violence for ideological reasons. He stated that when one is investigating accusations of mercenarism, one must, amongst

⁵⁵⁸ *Declaration on the Activities of Mercenaries in Africa*, OAU Doc CM/St. 6-XVII (23 June 1971) paras 1, 10.

⁵⁵⁹ Georg Schwarzenberger, ‘Terrorists, Hijackers, Guerrilleros and Mercenaries’ (1971) 24 *Current Legal Problems* 257, 280 (emphasis added).

⁵⁶⁰ Pilloud et al (n 39) [1791]–[1792]; Hampson (n 43) 28.

⁵⁶¹ Pilloud et al (n 39) [1795].

⁵⁶² See also Percy, *Mercenaries* (n 4) 177; Bothe, Partsch and Solf (n 25) 306–7.

⁵⁶³ *AP I* (n 33) art 47(2)(c). See also Dickinson (n 25) 359; Chesterman (n 9) 390, 399; Abdulqawi A Yusuf, ‘Mercenaries in the Law of Armed Conflicts’ in Antonio Cassese (ed), *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, 1979) 113, 115–16; Robert E Cesner and John W Brant, ‘Law of the Mercenary: An International Dilemma’ (1976) 6 *Capital University Law Review* 339, 339; Bothe, Partsch and Solf (n 25) 306–7.

other things, ‘rule out altruistic voluntary enlistment’.⁵⁶⁴ The pecuniary motivation criterion was compared by Ballesteros, even up to the 1990s, with ‘*noble international combatants for peace*’ who fought for ideological reasons and did not ‘profit from war without any concern about the justice of the cause for which they are fighting’.⁵⁶⁵

Such argumentation, together with the legal recognition of a people’s right of self-determination and AP I’s treatment of wars of national liberation as international, provided space, in these limited circumstances, for national liberation movements to resort to force against a state as a last resort.⁵⁶⁶ In theory, then, it might be possible for foreigners to act in solidarity with that right; that is, to (forcefully) support the fight by analogy with enlistment with foreign state armed forces, and not be diligently prevented by their parent states. That said, it has also been suggested that whether the provision of military support even by *states* to national liberation movements without UN authorisation represents customary international law remains uncertain under the UN charter.⁵⁶⁷ Thus, tensions remain, even regarding national liberation.

Part of the problem is that self-determination involves competing “selves” or nationalisms. One struggles for national liberation even outside of colonialism, for example for minority populations, and, therefore, supports secession. Another strives to hold together national state unity. In other words, while international law has recognised the principle of self-determination,⁵⁶⁸ outside of decolonisation or anti-apartheid struggles accepted by the UN as national liberation movements, the practice surrounding self-determination does not provide a clear answer regarding its scope.⁵⁶⁹

⁵⁶⁴ Enrique Bernales Ballesteros, Special Rapporteur, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, UN Doc E/CN.4/1997/24 (20 February 1997) [75] (‘Ballesteros Report 1997’).

⁵⁶⁵ Enrique Bernales Ballesteros, Special Rapporteur, *Preliminary Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, UN Doc A/47/412 (23 September 1992) [105]–[106] (emphasis added) (‘Ballesteros Report 1992’).

⁵⁶⁶ For a summary of arguments: Chiara Redaelli, ‘The Right to Rebel against Violations of Human Rights: A New Role for the Responsibility to Protect?’ (2016) 19(1) *Palestine Yearbook of International Law* 8, 22ff. See also *Definition of Aggression* (n 3) art 7; Green (n 13) 231; Corten (n 1) 135ff; Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (Oxford University Press, 2017) 323.

⁵⁶⁷ Hessbruegge (n 114) 323; Corten (n 1) 137, 148–9; Nolte (n 3) 89; Steven Corliss, ‘Asylum State Responsibility for the Hostile Acts of Foreign Exiles’ (1990) 2(2) *International Journal of Refugee Law* 181, 203–6; Christine D Gray, *International Law and the Use of Force* (Oxford University Press, 4th ed, 2018) 69–72. See also dissent regarding obiter on a self-determination exception to non-intervention: *Nicaragua Case* (n 68) [178]–[181] (Judge Schwebel).

⁵⁶⁸ See n 20 above.

⁵⁶⁹ Amongst the vast literature on self-determination, see, eg, Deborah Z Cass, ‘Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories’ (1992) 18 *Syracuse Journal of International Law and Commerce* 21; Martti Koskenniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’ (1994) 43(2) *International & Comparative Law Quarterly*

The pecuniary/ideological motivation distinction in the definition of the mercenary has not played out sustainably in practice. Given the multi-layered push and pull factors leading to foreign fighting, individuals labelled as mercenaries often expressed solidarity with a cause, while still accepting payment for their efforts, or sometimes claimed not to receive any significant reward at all.⁵⁷⁰ Over time, condemnation of the commercialisation of military services has also softened due to the increased reliance of states on PMSCs in conflict situations, although their use for offensive combat services rapidly became a taboo, in line with the UN's approach to mercenaries.⁵⁷¹ The taboo is the delegation of the authority to resort to force which may otherwise be considered an inherent state function, however inexact their scope may be, and however blurred the lines in reality with a firm offering security services who may then find itself directly participating in hostilities even if defensively.⁵⁷² Finally, views about ideological rather than financial motivations based within the framing and policy concerns of the era proved less useful as a distinguishing feature once terrorism became the key policy concern.⁵⁷³ It was not *that* kind of ideology that was meant.

Despite these issues, proposed working definitions of the foreign fighter in law and political science scholarship remain tied to the notion of ideological motivation, proposing that a foreign fighter's 'principal motivation is ideological rather than material reward'⁵⁷⁴ or that a foreign fighter is 'primarily motivated by ideology, religion, and/or kinship'.⁵⁷⁵ In the present counterterrorism framing of the foreign fighter issue, the fighter's ideology and personal motivation now count towards their unacceptability as a foreign terrorist fighter. The Security Council's definition of foreign terrorist fighter requires the individual to be acting with terrorist intent.⁵⁷⁶ As mentioned in Chapter One, mercenaries are routinely distinguished and set aside. Yet,

241; Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47(3) *International & Comparative Law Quarterly* 537; Corten (n 1) 126–47.

⁵⁷⁰ Ideological motivations of mercenaries could involve protecting civil rights or co-religionists, or anti-communist beliefs: Belew (n 22) ch 4; Voß (n 22) 39, 52–3. On wanting to aid Biafra: Steiner (n 11) 62, 274–5. Describing Swedish pilot von Rosen undertaking humanitarian food drops and bombing raids in Biafra: Venter (n 11) 335; Mockler (n 11) 269–75.

⁵⁷¹ See n 4 above.

⁵⁷² Working Group on the Use of Mercenaries, 'Concept Note on a Possible Legally Binding Instrument for the Regulation of Private Military Security Companies' (OHCHR, 14 April 2015) 2 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session4/WG_MercenariesCN_14April2015.pdf>; Lindsey Cameron and Vincent Chetail, *Privatizing War – Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013) ch 4.

⁵⁷³ See similarly Milliard (n 56) 61.

⁵⁷⁴ Sandra Krähenmann, *Foreign Fighters under International Law* (No 7, Geneva Academy of International Humanitarian Law and Human Rights, October 2014) 6, citing J Colgan and T Hegghammer, 'Islamic Foreign Fighters: Concept and Data' (Conference Paper, 2011) 6.

⁵⁷⁵ *Ibid* 6.

⁵⁷⁶ SC Res 2178, UN Doc S/RES/2178 (24 September 2014) preamble: 'for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts'.

the way jurists hold on to earlier legal distinctions makes debates on mercenaries and foreign freedom fighters, and the conceptual distinction between different motivations behind volunteer fighting, of significant continued relevance to discussions about foreign fighting today.

4.3 Specialised Expertise for a Separately-Defined Actor: Arguments about Institutional Ownership and Definitional Categories

A final element linked to the self-determination framing and treatment of the mercenary as a new phenomenon requiring separate legal definition was that the mercenary issue required specific new expertise.

The jurisdictional ownership of an issue boils down to the politics of how certain policy issues come to be framed and defined. The framing of the mercenary issue affected the choice of institutional placement and mandate. That choice, in turn, or rather conjointly, has affected how the issue of mercenarism has been approached, the bodies of law considered most relevant, and the perception of who is considered best placed to consider its technical issues. Are those with the necessary technical expertise for the policy issue human rights bodies, international law specialists, or now with the turn to foreign (terrorist) fighters, security and counterterrorism experts? The determination of jurisdiction becomes vital to our understanding of the issue and our recognition of technical expertise.

4.3.1 Establishment and Scope of Jurisdiction

Disagreement about the mandate of the UN Special Procedure on Mercenaries dates to its very establishment. Some states had unsuccessfully proposed to have the pre-existing Ad Hoc Working Group of Experts on the Situation of Human Rights in Southern Africa monitor the issue of mercenaries, rather than establishing a special procedure with a more general remit.⁵⁷⁷ This would have treated mercenarism as a local, at best regional, problem. While Africa leaps to mind regarding mercenaries in this era, it has been suggested that by 1987, United States support for the Contras in Nicaragua contributed to the political desire to establish the role of the Special Rapporteur on Mercenaries.⁵⁷⁸ Throughout the life of the Special Procedure, resolutions of the General Assembly, and the Commission on Human Rights/Human Rights Council, including those establishing the role of the Special Rapporteur and

⁵⁷⁷ Commission on Human Rights, *Report on the Forty-Third Session*, UN ESCOR, Supp No 5, UN Docs E/1987/18 and E/CN.4/1987/60 (1987) 194.

⁵⁷⁸ Theo van Boven, “‘Political’ and ‘Legal’ Control Mechanisms: Their Competition and Coexistence” in Asbjørn Eide and Bernt Hagtvat (eds), *Human Rights in Perspective: A Global Assessment: Nobel Symposium 74* (Blackwell Business, 1992) 36, 45. See also Enrique Bernales Ballesteros, Special Rapporteur, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc E/CN.4/2004/15 (24 December 2003) [26] (‘Ballesteros Report 2004’).

subsequently the Working Group, have been put to a vote rather than being adopted unanimously. Western countries have repeatedly voted against the resolutions.⁵⁷⁹ In this way, the more powerful states can be seen to have constantly sought to constrain the role of the Special Procedure. The votes against resolutions establishing the mandate in the first place could also support the suggestion that several Western states have, at heart, not been in favour of international regulation of mercenaries from the outset, or at least that different blocs of states had different preferred approaches and preoccupations regarding the UN Convention and the ongoing institutionalisation of the mercenary.⁵⁸⁰

Another recurring argument, particularly from the United States and European countries, has been one of conceptual approach related to institutional ownership. Some Western states argue that the issue of mercenarism and other types of private use of force, especially PMSCs, is not primarily a human rights problem but encompasses more general issues of international law. As such, the Human Rights Council and the Third Committee of the General Assembly are not considered the most appropriate fora.⁵⁸¹ Rather, only the Sixth Committee (Legal) could appropriately discuss the interplay of the applicable branches of international law.⁵⁸² It was the Sixth Committee that had produced the 1970 Friendly Relations Declaration which refers to mercenaries, and the 1989 Mercenary Convention.⁵⁸³ For other states, it was precisely the link to the protection of self-determination that made the question of ‘mercenary-related’ PMSCs fall squarely within the ambit of the Human Rights Council.⁵⁸⁴ Moreover, it has been argued that dealing with these issues

⁵⁷⁹ See, eg, CHR Res 1987/16 (n 59): 30 for, 11 against, 1 abstention; HRC Res 2005/2 (n 65): 35 for, 15 against, 2 abstentions; Human Rights Council, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/RES/42/9 (26 September 2019) (‘HRC Res 42/9’): 29 for, 14 against, 4 abstentions.

⁵⁸⁰ Trêves (n 48) 521–2; Caroline Varin, *Mercenaries, Hybrid Armies and National Security* (Routledge, 2014) 144: ‘governments are not seriously concerned with the threat of mercenaries, or that they want to keep open the option of using these non-state resources themselves’.

⁵⁸¹ *Regional Consultation for Western European and Others Group on the Activities of Mercenaries and Private Military and Security Companies: Regulation and Monitoring (14 April 2010)*, UN Doc A/HRC/15/25/Add.6 (5 July 2010) [21], [26].

⁵⁸² During the review of the Commission on Human Rights in 1999, it was proposed to end the Special Procedure and have mercenarism dealt with by the Sixth Committee. The Working Group undertaking the rationalisation work found itself unable to make a recommendation on the proposal: *Report of the Inter-sessional Open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights*, UN Doc E/CN.4/2000/112 (16 February 2000) [21].

⁵⁸³ Jose L Gomez del Prado, ‘A United Nations Instrument to Regulate and Monitor Private Military and Security Contractors’ (2011) 1 *Notre Dame Journal of International Comparative & Human Rights Law* 1, 43, 52–3.

⁵⁸⁴ *Ibid* 43.

only through the Sixth Committee would not have allowed the collection of country information and reporting, nor ongoing dialogue with states.⁵⁸⁵

Within this contested space, the Special Procedure on Mercenaries has at times attempted a more all-encompassing approach, linking various situations of violence involving mercenaries with underlying issues such as the state's monopoly on the use of force, terrorism, or the risks of a world where money or power can buy loyalty and violence. Most recently, from around 2014, the experts of the Working Group on Mercenaries have considered the impact on human rights of the rapidly rising phenomenon of foreign fighters heading to the wars in Syria and Iraq — not without contention.⁵⁸⁶ Of any authority, the Working Group appears well-placed to do so. While other UN and regional bodies have been involved in issues related to the private use of force, such as the UN Office on Drugs and Crime regarding transnational private security services, and the EU Counter-Terrorism Coordinator and UN Counter-Terrorism Committee Executive Directorate regarding foreign terrorist fighters,⁵⁸⁷ the Special Procedure on Mercenaries is a body which has been uniquely engaged in all of these legal debates over three decades of work — mercenaries, PMSCs, terrorism, volunteer fighters, and now foreign fighters. Questions about who, how and why to categorise and criminalise, for what reasons, and what constellations, which plague any analysis of individual volunteer participants intervening in armed conflict, have been lived out through the life of this Special Procedure.

4.3.2 Mercenaries and Contemporary Foreign Fighting

The attention of the Working Group to foreign fighters does not arise from a formal request of the Human Rights Council, but reflects an interpretation of the Council's instruction for the experts 'to continue to study and identify sources and causes, emerging issues, manifestations and trends regarding mercenaries or mercenary-related activities'.⁵⁸⁸ The Working Group experts have reflected upon the relevance of foreign fighting to the Working Group's mandate rather than demanding ownership of

⁵⁸⁵ Leonard Gaultier et al, 'The Mercenary Issue at the UN Commission on Human Rights: The Need for a New Approach', (Briefing, International Alert, 2001) 22 <http://www.operationspaix.net/DATA/DOCUMENT/6041~v~The_Mercenary_Issue_at_the_UN_Commission_on_Human_Rights.pdf>.

⁵⁸⁶ See, eg, *Comments of the Government of Belgium to the Report of the Working Group*, UN Doc A/HRC/33/43/Add.5 (14 September 2016) [6], [9], [12]; *Report of the Working Group on the Use of Mercenaries*, UN Doc A/71/318 (9 August 2016) [62]–[70] ('Working Group Report 2016').

⁵⁸⁷ See Chapter Five, section 2.3.

⁵⁸⁸ *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, UN Doc A/HRC/RES/30/6 (12 October 2015, adopted 1 October 2015) para 21.

this jurisdictional turf.⁵⁸⁹ The experts acknowledge that differences in financial and ideological motivations between mercenaries and foreign fighters lead to different patterns of participation in armed conflict.⁵⁹⁰ Still, the Working Group argues that foreign fighters can also be partially motivated by material benefit including financial support.⁵⁹¹ In 2015, it concluded that ‘the assertion may be tentatively made that foreign fighters are a contemporary form of mercenarism or mercenary-related activities’.⁵⁹² By 2018, the Working Group ‘deem[ed]’ foreign fighters a mercenary-related activity.⁵⁹³

Throughout their tenure, the Working Group experts and the Special Rapporteurs have had to regularly defend the mandate of the Special Procedure in response to arguments based on legal definitions and the perceived disadvantages of linking existing categorisations (the mercenary) to new manifestations (the PMSC, the foreign terrorist fighter). The EU has been a particularly persistent critic, arguing that the activities of mercenaries are not the same as those of PMSCs or foreign fighters, and that the similarities that do exist are insufficient to justify the adaptation in the mandate of the Working Group. In what has become a standard intervention, the EU has shared its reservations about ‘the lack of clarity, leading to confusion’ caused by the extension of the mandate.⁵⁹⁴

It is not the first time that the Special Procedure has discussed links between mercenarism and other forms of foreign fighting. There is a lineage in seeking a more inclusive view of the stakes of the debates. As mentioned, Special Rapporteur Ballesteros’ reports regularly recognised complex links between mercenarism, transnational crime, and terrorism.⁵⁹⁵ He urged the international community to ‘take into account the connection existing between terrorism and mercenary activities and

⁵⁸⁹ See, eg, ‘Concept Note: Panel on “Foreign Fighters and New Forms of Mercenarism”’ (OHCHR, 14 April 2015) <<http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Event2016/ConceptNote.pdf>>.

⁵⁹⁰ Working Group Report 2016 (n 134) [62]–[64].

⁵⁹¹ Ibid [69]; *Report of the Working Group on the Use of Mercenaries*, UN Doc A/70/330 (19 August 2015) [13], [26] (‘Working Group Report 2015’); *Report of the Working Group on the Use of Mercenaries on its Mission to European Union Institutions*, UN Doc A/HRC/33/43/Add.4 (11 July 2016) [7], [16]–[18].

⁵⁹² Working Group Report 2015 (n 139) [88].

⁵⁹³ *Report of the Working Group on the Use of Mercenaries*, UN Doc A/73/303 (6 August 2018) [9].

⁵⁹⁴ *Comments of the EU Institutions to the Report of the Working Group*, A/HRC/33/43/Add.7 (14 September 2016) [3(b)]. See also EU intervention: *Third Committee, 37th meeting: 70th General Assembly* (UN Video, 2 November 2015) <<http://webtv.un.org/search/third-committee-37th-meeting-%E2%80%9370th-general-assembly/4594171730001/?term=2015-11-02&sort=date>> 01:14:00–01:15:00.

⁵⁹⁵ See, eg, ‘Mercenaries Often a Presence in Terrorist Attacks, Special Rapporteur Tells Third Committee’, GA Press Release, UN Doc GA/SHC/3650 (31 October 2001); Ballesteros Report 2004 (n 126) [30], [32]–[33], [35]–[36].

the participation of mercenaries in criminal acts of a terrorist nature'.⁵⁹⁶

In 2016, the Human Rights Council reflected Ballesteros' original arguments about the links between terrorism and mercenarism by continuing to call upon states 'to investigate the possibility of mercenary and mercenary-related involvement whenever and wherever criminal acts of a terrorist nature occur'.⁵⁹⁷ The link between terrorism and mercenarism had been made far earlier in Nigeria's original request to the General Assembly proposing that an International Convention against Mercenaries be drafted. Nigeria stated that international efforts to reduce international terrorism were incomplete without attention on mercenaries, and that a Mercenary Convention would 'complement the various conventions on international terrorism'.⁵⁹⁸

While this might provide some lineage to thinking about mercenarism and foreign terrorist fighting, the Special Procedure's thinking about mercenaries and 'ideological' volunteers — or today what might be thought of more broadly as foreign fighters not involved with prohibited terrorist organisations — was, as previously mentioned, traditionally different, accepting 'noble international combatants for peace'. This indicates how the mandate of the Special Procedure, being based on the definition of mercenary in AP I and the UN Convention, reaches practical limits of jurisdiction.

In the 1990s, for example, reports of 'foreigners, mercenaries, volunteers and Islamic fighters or mujahidin' being involved in the armed conflicts in the former Yugoslavia, particularly in Bosnia, including foreign volunteers in the national armies, had led Ballesteros to follow up on those issues. The remit was complicated in practice by the states in question sometimes offering citizenship to their foreign volunteers, and the nature of payments to fighters being impossible to ascertain in practice.⁵⁹⁹ The Special Procedure's work regarding state reliance on foreign volunteer or hired manpower were, unsurprisingly, unappreciated by some states.⁶⁰⁰ Ballesteros had communicated with certain countries regarding foreign mercenaries serving alongside regular troops on the government side.⁶⁰¹ In 1996, Bosnia and Herzegovina made rather pointedly clear that although 'some years previously ... a certain number of foreigners, mainly

⁵⁹⁶ Ballesteros Report 1997 (n 112) [125].

⁵⁹⁷ HRC Res 33/4 (n 61) [11].

⁵⁹⁸ *Letter from the Permanent Representative of Nigeria to the United Nations addressed to the Secretary-General*, UN Doc A/34/247 and Corr.1 (5 December 1979) Annex 1 [1], [12].

⁵⁹⁹ Enrique Bernales Ballesteros, Special Rapporteur, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, UN Doc E/CN.4/1995/29 (21 December 1994) [55]–[68] regarding an official visit to Croatia; Ballesteros Report 1997 (n 112) [11]. See also Ballesteros Report 1992 (n 113) part V.

⁶⁰⁰ See, eg, United Kingdom Foreign Office, *Private Military Companies: Options for Regulation* (Green Paper, HC 577, 2001–2) [37], [39]: 'extreme point of view ... inchoate concerns'.

⁶⁰¹ See, eg, Ballesteros Report 1997 (n 112) [24], quoting letter to Zaire Foreign Minister.

volunteers' reportedly served alongside the Army, the Rapporteur's work should support the actions of state armed forces.⁶⁰²

Also regarding ideological volunteers, a later report from the Working Group's official visit to Afghanistan in 2009 refers only to PMSCs operating in Afghanistan and makes no mention of any kind of individual foreign fighter, not even a passing historical reference to the mujahidin forces of the 1980s or foreigners joining the Taliban or Al Qaeda.⁶⁰³ It appears that, at that juncture, and differently to today, foreign fighters or foreign volunteers in the broad sense were not considered a category of concern or at least not falling under the remit of the Special Rapporteur or Working Group.

4.3.3 Definitional Mandate and Conceptual Thinking

Reflecting the weak state support for the approach in the UN Mercenary Convention, Ballesteros was at times criticised for his assertions that PMSC operations represented mercenarism, his arguments that there are no 'good or bad mercenaries depending on who they fight for or against',⁶⁰⁴ and for the theoretical and legal questions in his reports.⁶⁰⁵ As set out above, for complex reasons linked to how different instances of foreign fighting are framed, the Working Group has also been criticised by states for bringing together thinking on mercenaries and foreign fighters. But Ballesteros' stance is appealing at least in the sense of not shying away from a consideration of the evolving contexts, political realities and more confronting issues and value judgments involved in the question of foreign, private interventions. His approach of attempting to step back to take stock of broader, and theoretically and historically deeper, underlying issues reminds one not to ignore linkages and long-standing questions about different forms of foreign fighting and the scope of states' obligations regarding their nationals. It offers a thoughtful and sometimes radically principled approach to these contested categories of foreign volunteers. In this sense, the attempt at a broader institutional view starts to shed some light on underlying conceptual dilemmas. In line with the overall argument of this thesis, it is therefore an approach with which I have sympathy, because it recognises the value of trying to grasp a fuller picture.

Although I do not find it possible to determine a specific cause and effect regarding framing — I see the institutional placement and mandate being both *affected* by the framing and *contributing* to it over time — what becomes visible regarding

⁶⁰² Ibid [12].

⁶⁰³ *Mission to Afghanistan*, UN Doc A/HRC/15/25/Add.2 (14 June 2010).

⁶⁰⁴ Enrique Bernales Ballesteros, Special Rapporteur, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, UN Doc E/CN.4/2000/14 (21 December 1999) [66] ('Ballesteros Report 2000').

⁶⁰⁵ Gaultier et al (n 133) 18; Ghebali (n 64) 215 (citation omitted); Percy, *Mercenaries* (n 4) 221–2; Percy, 'Security Council' (n 13) 628; Percy, 'Regulating' (n 80) 946, 952–3; Zarate (n 8) 119, 145–6.

mercenaries is that the original self-determination framing does not sit comfortably with the Working Group's attention to new phenomena of foreign fighting. This is because the legal definition of the mercenary, and the related mandate of the Special Procedure, were conceived within a self-determination framing of the issue of foreign fighting. In contrast, the issue posed by today's foreign fighters is chiefly understood within a counterterrorism framing. That suggests that not only the scope of pertinent and persuasive legal argumentation will sit in a different space on the spectrum compared with the earlier framed scope regarding mercenaries, but that, as mentioned, the expertise regarded authoritative for a particular manifestation of foreign fighting will also change.

In this sense, the argumentation, and ultimately impact, of the Working Group remain circumscribed by the limits of its mandate and position of its institutional structure, the historical context and legal framing in which the mandate was conferred, and the definition of the mercenary. Any link between mercenarism and terrorism, or mercenarism and ideological volunteers, is restricted by the criterion of primary financial motivation in the mercenary definition. It proves difficult to discuss the issue of mercenarism in a world focused on foreign fighting, particularly foreign terrorist fighting.⁶⁰⁶ The point the Special Procedure had to make was that a foreign volunteer could have a strong ideological impetus for volunteering such as supporting a terrorist group, while also being financially motivated. In short, it was of course possible to fall into both categories.⁶⁰⁷ In this sense, the Working Group's 2015 and 2016 reports on foreign fighters did not make a convincing argument for or against the legal correctness or practical usefulness of treating various categories of actors separately or together, simply stating that there are 'significant similarities and differences between mercenaries and foreign fighters that can usefully inform any approach to their regulation.'⁶⁰⁸ That, I suggest, would require the more radical step of the Working Group achieving its own demise or reincarnation by advocating for the definition of mercenary on the international level to be set aside.

There have been some suggestions for re-thinking in this regard. In his final report, Ballesteros proposed a new legal definition of the mercenary, seeking to clarify and close loopholes within the definition, specifically by relaxing the foreignness and financial motivation criteria.⁶⁰⁹ A subsequent and different argument to revamp or

⁶⁰⁶ See, eg, *Report of the Working Group on Mercenaries on Its Mission to Ukraine*, UN Doc A/HRC/33/43/Add.3 (29 July 2016) describing the lack of domestic prosecutions for mercenarism despite a new mercenarism law, and blurred information about alleged foreign fighters, mercenaries or foreign terrorist fighters.

⁶⁰⁷ See, eg, Ballesteros Report 2000 (n 152) [49], [54], [65] regarding terrorist attacks in Cuba.

⁶⁰⁸ Working Group Report 2016 (n 134) [77].

⁶⁰⁹ Ballesteros Report 2004 (n 126) [37]–[47].

even revoke the UN Mercenary Convention by the second Special Rapporteur Shameem followed, motivated by the lack of state support for the Convention, its perceived unhelpfulness regarding the private security industry, and related unresolved questions about the acceptability of state-sanctioned private participation in force.⁶¹⁰ The Human Rights Council continues to ask the Working Group on Mercenaries to take into account the work of the two previous mandate holders, but particularly Ballesteros' concrete proposal for a revised definition, in their efforts to strengthen the international legal framework on mercenaries.⁶¹¹ Most recently, in debate in 2019, UN Secretary-General António Guterres, while calling on states to ratify the UN Mercenary Convention, and notably also considering mercenaries and foreign fighters together, remarked that the legal regime regulating mercenarism needs greater precision and that 'the definition of a mercenary is very narrow, and therefore poses a challenge to effective investigations and prosecutions'.⁶¹²

5. Conclusion: The Treatment of Mercenaries and the Regulation of Foreign Fighting?

Legal positions adopted into international treaties through the UN system sometimes represent a codification of customary law, or a settled or at least compromised, majority view. The carving out of the category of mercenary in the law can therefore give the impression that within the unsettled scope of state duties to prevent unlawful harm emanating from their territories, there is at least this bright-line case which has been agreed upon as deserving specific regulation; that at least *this category* must be diligently prevented by parent states. Under this logic, the definition of mercenarism should provide some guidance as to the scope of states' preventive duties, and the reasoning and values standing behind their articulation.

However, the UN Mercenary Convention does not provide this comfort. This chapter has demonstrated that the categorisation of mercenaries remains highly contested. That leaves its significance in identifying the problematic cases of foreign fighting equally contested. Rather than finally representing a settled solution to debates on the mercenary problem, there is a sharp difference between the General Assembly's adopted legal position on mercenaries and the concerns shown by the large majority of member states. Despite popular understanding of the nefariousness of mercenarism, neither the UN Mercenary Convention nor earlier General Assembly resolutions

⁶¹⁰ Shameem Report 2005 (n 35) [45], [61]. See also Ghebali (n 64) 222–3.

⁶¹¹ HRC Res 42/9 (n 127) para 16.

⁶¹² 'Mercenary Activities Undermine Rule of Law, Perpetuate Impunity, Secretary-General Stresses During Security Council Debate', UN Doc SG/SM/19452-SC/13689 (Press Release, 4 February 2019).

condemning mercenarism can be considered to represent customary international law given this weak state support.⁶¹³

Instead, then, of representing progressive development in the clarification of international law, the response to the mercenary problem appears keenly tied to the political setting and legal framing of the conflicts related to decolonisation and racist rule, i.e. to a particular form of mercenarism and foreign enlistment, not foreign fighting as a whole or even mercenarism as a more general category. By the time of the adoption of AP I's mercenary definition in 1977, and certainly by the time of the establishment of the UN Special Procedure in 1987 and the 1989 UN Mercenary Convention, the situation on the ground had evolved and the concerns posed by mercenaries, or rather by a commodified use of force, had morphed.⁶¹⁴ Tensions arise because as soon as one looks at situations other than national liberation, an objective position against mercenarism risks persuasive counter-argument. While UN resolutions on mercenaries originated in a concern about decolonisation, they were also concerned with the holding together of the political integrity of new states, reflecting states' fears of possible secessionist actions by minorities or regions in their own territories.⁶¹⁵ Relevant to foreign fighting/mercenarism, there was a corresponding tension regarding third state relations to parties to a conflict in the sense of states needing to determine in each case which party could be supported. For example, another question became whether support could be given to populations fighting against totalitarian or otherwise abusive or offensive regimes?⁶¹⁶ The self-determination framing of the foreign fighter issue was also reaching a transition point, as the Cold War ended, and perceptions of foreign volunteers with the mujahidin in Afghanistan as having the right (anti-communist) ideological approach eventually gave way to concerns surrounding foreign jihadist fighters in Bosnia and elsewhere.

Therefore, instead of the definition of the mercenary providing further clarification of the law, once those struggles of national liberation were largely over, the tensions inherent to legal argumentation about non-intervention and self-determination in a post-colonial world immediately returned.

⁶¹³ Mercenarism *per se* is not prohibited under international law. See SA de Freitas and WF Ellis, 'Mercenarism and Customary International Law' [2006] *African Yearbook on International Humanitarian Law* 17, 18; Hagmann and Kartas (n 35) 287; Kinsey (n 56) 2, 9; Cameron and Chetail (n 120) 74, 429. On the General Assembly resolutions regarding mercenarism representing at most *de lege ferenda*: Schwarzenberger (n 107) 280.

⁶¹⁴ See Percy, 'Regulating' (n 80).

⁶¹⁵ See, eg, Resolution 2465 (n 29); Green (n 13) 224. See also Taulbee (n 23) 347 discussing OAU Convention; Kinsey (n 56) 4; Lasse Heerten, *The Biafran War and Postcolonial Humanitarianism: Spectacles of Suffering* (Cambridge University Press, 2017) 74–82.

⁶¹⁶ Manuel R Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (Martinus Nijhoff, 1962) 10 (citation omitted).

The value of considering the response to mercenaries in international law is found in the persisting red threads of theme and argument which link to today's discourse about foreign fighters. As much as the definition of mercenary in AP I, and the position taken by the UN Mercenary Convention, are criticised or even ignored, they also remain persistently present; a constant point of comparison and recalling of the possible mischief that foreign fighting can pose, somewhat strengthened by their institutional monitoring through the Human Rights Council. As such, the legal response to mercenaries in the 1960s–1980s provides part of the background for thinking about other types of private and foreign participation in collective violence. Instead of automatically or uncritically distinguishing mercenaries from foreign fighters based on the financial motivation criterion, mercenaries must be re-embraced within our thinking in order to better understand the legal story surrounding foreign fighting.

By stepping back to take a longer and broader view, pre-existing questions about whether all foreign volunteering should be prevented in favour of abstention also come back into view. As discussed in Chapter Three, an objective prohibition was proposed but rejected in negotiations in The Hague in 1907. During the Spanish Civil War, that *laissez-faire* approach of allowing individuals freedom to fight overseas was negated or at least temporarily ignored, and it was ultimately agreed that all volunteers were to be prevented and withdrawn. Similarly, the hiring of PMSCs to carry out offensive military operations quickly became a taboo, however blurred the lines between defensive security work and offensive operations may be in practice. Rather than simply being 'mis-diagnosed', or sitting contrary to a line of argumentation focusing on state-control, then, the General Assembly's adopted position in support of objective prohibition, its concern about the deeper significance of the mercenary actor itself, has a significant lineage.

Overall, the legal response to mercenarism — understood within the dominant self-determination framing of its period but also as linked to past debates within their own framings — remains significant for a consideration of the legal response to foreign fighting more generally. As such, it is a response that holds within it all the same persisting tensions as for all foreign fighting. In the years following the decolonisation conflicts, foreign fighters and mercenaries, state-supported or otherwise, continued to participate in conflicts, for example in Burma/Myanmar, Nicaragua and Afghanistan. Self-determination issues, such as the fight against the Soviet occupation of Afghanistan, mixed well with Cold War politics, but foreign fighting soon fell within the new dominant legal framing of counterterrorism, as I turn to in Chapter Five.

Chapter Five
Counterterrorism and its Agents:
Protection, Solidarity and the Legal Response to Foreign Fighters
as Part of the ‘War on Terror’

1. Introduction

The significant numbers of foreigners travelling to participate in the conflicts in Syria and Iraq from around 2012 saw the establishment of specific new law and institutional ownership regarding the newly-defined category of the *foreign terrorist fighter*. This was in place of reliance on existing legal prevention duties, as occurred also during the Spanish Civil War and in the international response to mercenaries. Once again, the threat and response required have been understood in their own time and setting.

The Security Council’s set of foreign terrorist fighter resolutions starting in 2014 were previously introduced in Chapter Two. That chapter described the persuasive power of the counterterrorism framing in which they were adopted, that framing’s long-demonstrated risks, and the limits it imposes on thinking about foreign fighting. This chapter briefly considers how legal questions surrounding foreign fighting came to be predominantly framed as matters of counterterrorism and security, before exploring the effects of that framing on international legal argument. Rather than focusing on the fighters joining listed Islamic extremist groups with which the Security Council’s foreign terrorist fighter resolutions were clearly concerned, I study legal debate surrounding *other* examples of foreign fighting: foreign volunteers with Kurdish forces in Syria, and those fighting on both sides of the conflict in Ukraine. These examples help me to better explore the operation of the counterterrorism framing of the foreign fighting issue; what it accomplishes but also its limits.

I find that this powerful framing and the recently-adopted definition of the foreign terrorist fighter logically *exclude* and *obscure* thinking about *other* manifestations of foreign fighting without a clear link to terrorist activity, obstructing the view of other approaches, and legal issues and histories; *other* manifestations with (at least) a long twentieth century tradition and, in my view, offering and demanding challenging and morally intimate reflection related to international law.

At the same time, I discuss here how the interplay between the specifically defined and the generally overlooked examples of foreign fighting in international law is, in practice, more complex than simple exclusion. As explored in this chapter, much volunteer fighting justifies its value not only through solidarity with a political cause but by using the language of humanitarian protection. Today more than ever, this can sit comfortably within the

counterterrorism frame. This means that rather than simply providing a definition and distinguishing which cases have policy salience and which do not, the dominant counterterrorism framing, although narrow in one sense, colours legal thinking and responses to *other* persuasions of contemporary foreign fighting. As Daphne Richemond-Barak and Victoria Barber argued in 2016, ‘[t]he emerging legal framework governing foreign fighters, whose importance is set to grow, epitomizes assumptions we’ve made about the good, the bad and the ugly in Syria’.⁶¹⁷ The counterterrorism framing operates as a powerful driver of thought and conceptual understanding of the legal issues at play; of good and bad; moderate and radicalised; of *peaceful* or at least *peace-loving* violence, and *violent* violence.⁶¹⁸

Section 2 that follows describes how perceptions surrounding foreign volunteer fighters with certain ideological underpinnings morphed over time, from a narrative of these actors being cosmopolitan, if violent, freedom fighters to being unacceptable (Islamic extremist) terrorists. I return briefly to discuss the legal significance of Security Council Resolution 2178 (2014), previously introduced in Chapter Two, as a response to the transformed phenomenon of foreign fighting, and explain the institutional ownership accompanying the newly defined category. Section 3 introduces the two selected instances of foreign fighting occurring alongside the transformed phenomenon of foreign terrorist fighting, and Section 4 examines the most relevant legal debates and responses to them. Section 5 explores how both the global war on terror and the notion of humanitarian protection have interplayed with understandings and legal discourse surrounding contemporary foreign fighting. Section 6 concludes by considering the constant transformation of foreign fighting manifestations, and the potential value (or not) of the present international legal definition and response to the foreign terrorist fighter for those future transformations.

2. Transforming Narratives of Foreign Volunteer Fighting

2.1 From Right Ideological Approach to Terrorist Intention

In 1980s Afghanistan, the mujahidin’s armed struggle against the Soviet presence was supported by thousands of foreign volunteers. Fitting the United States’ Cold War anti-communist policy, these forces secured military support from the United States, Saudi Arabia and other countries.⁶¹⁹ Because of the Soviet Union’s intervention, the situation in

⁶¹⁷ ‘Foreign Volunteers or Foreign Fighters? The Emerging Legal Framework Governing Foreign Fighters’, *Opinio Juris* (Blog Post, 6 June 2016) <<http://opiniojuris.org/2016/05/06/foreign-volunteers-or-foreign-fighters-the-emerging-legal-framework-governing-foreign-fighters/>>.

⁶¹⁸ See Darryl Li, ‘A Universal Enemy?: “Foreign Fighters” and Legal Regimes of Exclusion and Exemption under the “Global War on Terror”’ (2010) 41 *Columbia Human Rights Law Review* 355, 373 (‘Foreign Fighters’).

⁶¹⁹ David Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford University Press, 2013) 158–94; Mustafa Hamid and Leah Farrall, *The Arabs at War in Afghanistan* (Hurst, 2015) 21ff; Tom Lansford, *A Bitter Harvest: US Foreign Policy and Afghanistan* (Routledge, 2003) 127–9; Andrew Hartman, ‘“The Red Template”: US Policy in Soviet-Occupied Afghanistan’ (2002) 23(3) *Third World Quarterly* 467; Robert D

Afghanistan fitted for many within a self-determination framing;⁶²⁰ the role of foreign volunteers a continuation of the thinking that distinguished between mercenaries motivated chiefly by personal profit and freedom fighters with the ‘right ideological approach’, including the international brigades during the Spanish Civil War.⁶²¹ This is not to say that departures of foreigners to join the mujahidin in Afghanistan were necessarily embraced or did not start to pose concerns for some parent states, including accusations from some states of support being provided to terrorists. Rather, at that juncture, alternative political interests of the international supporters of the mujahidin, such as the United States’ concern regarding communist influence, trumped threats posed by Islamic fundamentalism or foreign fighting more broadly.⁶²² Still, concerns were growing in a particular direction.

Throughout the same period of the 1980s–1990s, during and after the Cold War and into the new century, foreign fighting of different forms and persuasions continued in conflicts around the world. In lesser numbers, foreigners have volunteered as fighters, for example, to support the Contras in Nicaragua,⁶²³ ethnic militias in Burma/Myanmar,⁶²⁴ the FARC in Colombia,⁶²⁵ and in the wars surrounding the break-up of the Soviet Union and Yugoslavia in the early 1990s.⁶²⁶ Foreign fighting in this period involved Cold War patterns of East and

Kaplan, *Soldiers of God: With the Mujahidin in Afghanistan* (Houghton Mifflin, 1990) 29–30, describing Japanese, East German and British fighters in addition to the ‘Afghan Arabs’.

⁶²⁰ *The Situation in Afghanistan and its Implications for International Peace and Security*, GA Res ES-6/2, UN Doc A/RES/ES-6/2 (14 January 1980) preamble, recognising the need for people to ‘determine their own destiny without outside interference’; W Michael Reisman, ‘The Resistance in Afghanistan Is Engaged in a War of National Liberation’ (1987) 81(4) *American Journal of International Law* 906; Hartman (n 3) 478–9; Kyle Burke, *Revolutionaries for the Right: Anticommunist Internationalism and Paramilitary Warfare in the Cold War* (University of North Carolina Press, 2018) 166–7.

⁶²¹ LC Green, ‘The Status of Mercenaries in International Law’ (1979) 9 *Manitoba Law Journal* 201, 230 (citation omitted); Steve Coll, *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001* (Penguin, 2005) 155: ‘U.S. government looked favourably on the Arab recruitment drives. An international brigade of volunteers – modelled on the international socialist volunteers who had joined the Spanish civil war’.

⁶²² Hartman (n 3) 476–8, 480–2; Coll (n 5) 201, 230; Hamid and Farrall (n 3) 312–13.

⁶²³ Kathleen Belew, *Bring the War Home: The White Power Movement and Paramilitary America* (Harvard University Press, 2018) 77–100; Burke (n 4) 118ff; Klaas Voß, ‘Plausibly Deniable: Mercenaries in US Covert Interventions during the Cold War, 1964–1987’ (2016) 16(1) *Cold War History* 37, 48ff.

⁶²⁴ David Everett, *Shadow Warrior* (Penguin, 2009); Thomas James Bleming, *War in Karen Country: Armed Struggle for a Free and Independent Karen State in Southeast Asia* (iUniverse, 2009).

⁶²⁵ Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*). A 2017 study identified 85 foreigners in the demobilising FARC: Universidad Nacional de Colombia, ‘Caracterización comunidad FARC-EP, Resultados generales 6 July 2017’ [Community Characterisation FARC-EP, General Results 6 July 2017] <<https://imgcdn.larepublica.co/cms/2017/07/06230747/Presentaci%C3%B3n-rueda-de-prensa-Julio-6-2017-1.pdf?w=auto>>.

⁶²⁶ Paul Hockenos, *Homeland Calling: Exile Patriotism and the Balkan Wars* (Cornell University Press, 2003) 238ff; Cerwyn Moore and Paul Tumelty, ‘Foreign Fighters and the Case of Chechnya: A Critical Assessment’ (2008) 31(5) *Studies in Conflict & Terrorism* 412, 414–18; Stanislav Secieru, ‘Come and Go: Trajectories of Foreign Fighters in and out of Moldova’ in Kacper Rękawek (ed), *Not Only Syria: The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) 108, 109–15.

West, and left and right political positioning, as well as support for co-religionists and co-ethnics.

State tolerance or active support for such opposition forces, including their foreign components, has historically ebbed and flowed as political settings have changed.⁶²⁷ The principle of non-intervention has been placed under pressure by increasingly overt or outed foreign state actions supporting selected opposition groups within civil wars, such as the exposure of the United States' Iran–Contra arms deals in 1986 or the United States-led coalition's acknowledged military cooperation with the non-state Syrian Democratic Forces in Syria from 2015.

Outside of struggles for national liberation or against foreign occupation, determining which persuasions of foreign fighting might have the right ideological approach and might, therefore, not require diligent prevention by parent states was puzzling and instrumentalised. In parallel to state toleration or facilitation, for example, domestic criminal proceedings were sometimes initiated against foreign fighters, although not always successfully, once the foreign fighter's actions were becoming too noticeable, too difficult to disavow, were causing foreign relations headaches or criminal activity at home, or, more recently, if they involved alleged terrorism offences such as hostage-taking.⁶²⁸ The 'mess and [the] mystery'⁶²⁹ of today's national responses to foreign fighting is nothing new — the scope and intended purpose of domestic laws has proved confusing for state officials since at least the 1830s.⁶³⁰

The changing response to the foreign volunteer fighters in Bosnia in the 1990s illustrates how the so-called global war on terror eventually provided a powerful new framing for the understanding and conceptualising of the mischief posed by foreign fighting with which international law should be concerned.

⁶²⁷ See, eg, W Michael Reisman, 'Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice' (1988) 13(1) *Yale Journal of International Law* 171; Voß (n 7); Belew (n 7) 85.

⁶²⁸ Belew (n 7) 94–5; Everett (n 8); United States Department of Justice, 'Dutch Woman and 17 Other Members of FARC Terrorist Organization Indicted on Hostage-taking and Weapons Charges' (News Release, 14 December 2010) <<https://www.justice.gov/opa/pr/dutch-woman-and-17-other-members-farc-terrorist-organization-indicted-hostage-taking-and>>.

⁶²⁹ Nora Martin, 'Terrorism Policing: The YPG/YPJ, an Ally Abroad but a Danger at Home?', *openDemocracy* (online, 9 January 2019) <<https://www.opendemocracy.net/en/can-europe-make-it/terrorism-policing-ypgypj-ally-abroad-but-danger-at-home/>>, regarding UK prosecutorial responses to YPG foreign fighters. See also regarding inconsistent treatment of YPG volunteers: United Kingdom, *Parliamentary Debates*, House of Commons, 19 April 2016, vol 608, col 889 ('UK Citizens Returning from Fighting Daesh'); United Kingdom, *Parliamentary Debates*, House of Commons, 29 June 2017, vol 626, col 730 ('British Nationals: Foreign Armies and Militias').

⁶³⁰ Richard Little, *Intervention: External Involvement in Civil Wars* (Martin Robertson, 1975) 63, describing confusion about the UK Foreign Enlistment Acts 1819 and 1870; SP Mackenzie, 'The Foreign Enlistment Act and the Spanish Civil War, 1936–1939' (1999) 10(1) *Twentieth Century British History* 52, 54–5, 59, 61, 64, describing confusion/discord regarding the application of the UK Foreign Enlistment Act 1870 to the Spanish Civil War.

2.1.1 Bosnia

The war in Bosnia (1992–1995) attracted foreigners volunteering to protect Bosnian Muslims, including some veterans of the Afghan–Soviet war. Tolerated by Bosnia and within its Muslim communities, albeit perhaps for pragmatic reasons, over time, the Bosnian army sought greater command over the foreign fighters, leading to the creation of a mujahidin battalion of Arab volunteers fighting within the Bosnian armed forces.⁶³¹ However, the 1995 Dayton Peace Agreement concerning Bosnia–Herzegovina demanded the departure of non-UN combat forces ‘not of local origin ... including individual advisors, freedom fighters, trainers, volunteers, and personnel from neighboring and other States’, even those fighting on the side of a recognised government.⁶³²

Bosnia had not originally been in favour of tough action against the foreign mujahidin. The battalion was demobilised at the end of the war by Bosnia, at the United States’ request. Still, after Dayton, although many volunteer fighters did leave Bosnia, some with local links such as through marriage, and those with no safe country for repatriation or resettlement, were able to avoid the Dayton Accords’ demands by obtaining naturalisation, seemingly granted in gratitude for their military services.⁶³³ Yet, the dramatic shift in thinking illustrated by the Dayton Agreement’s demands was only strengthened by the United States–led war on terror from 2001. It set its own demands and could no longer tolerate a group of former Islamist fighters in Bosnia who might no longer fight only in the country of destination, but also become involved in transnational acts of terrorism or other wars, including in Western states.⁶³⁴ The right ideological approach that justified foreign fighting in support of self-determination causes, however interpreted by political interest, had a new characterisation in the form of unacceptable terrorist intent.

With increasing pressure and international acceptance of the war on terror, by 2006–2007, Bosnia began to cooperate with counterterrorism demands by revoking naturalisations granted in the period following the war, i.e. affecting the former foreign mujahidin, pursuant to new national legislation drafted in consultation with the United States embassy in

⁶³¹ Jennifer Mustapha, ‘The Mujahideen in Bosnia: The Foreign Fighter as Cosmopolitan Citizen and/or Terrorist’ (2013) 17(6–7) *Citizenship Studies* 742, 746–8; Malet (n 3) 185–9; Darryl Li, *The Universal Enemy: Jihad, Empire, and the Challenge of Solidarity* (Stanford University Press, 2020) 29ff; Evan Kohlmann, *Al-Qaida’s Jihad in Europe: The Afghan-Bosnian Network* (Berg, 2004) 15ff.

⁶³² *General Framework Agreement for Peace in Bosnia and Herzegovina*, Bosnia and Herzegovina–Croatia–Federal Republic of Yugoslavia (signed and entered into force 14 December 1995) Annex 1-A (‘Military Aspects of the Peace Settlement’) art III.

⁶³³ Mustapha (n 15) 747–8; Li, *The Universal Enemy* (n 15) 192; Li, ‘Foreign Fighters’ (n 2) 382–3; Kohlmann (n 15) 163, 171, 174–5. Estimates of volunteer fighters vary from 300–3000 and between 100–1000 subsequently granted Bosnian citizenship: Mustapha (n 15) 753 n 2.

⁶³⁴ Daniel Byman, *Road Warriors: Foreign Fighters in the Armies of Jihad* (Oxford University Press, 2019) 4–6; Li, *The Universal Enemy* (n 15) 151–2, 190–1; Li, ‘Foreign Fighters’ (n 2) 381–2; Kohlmann (n 15) 149, 155, 160–3, 170, 217.

Sarajevo.⁶³⁵ As with national liberation causes during decolonisation discussed in Chapter Four, but pulling in the opposite direction, there was no space for neutrality, or often even non-belligerency, towards the global war on terror. The changing narrative and context had worked to turn the former ‘cosmopolitan citizens’ into the unsympathetic figure of the terrorist.⁶³⁶

2.2 From Foreign Volunteering and Mercenarism to Foreign Terrorist Fighting

The legal debate about foreign fighting was no longer taking place within a framing based upon considerations of neutrality and abstention from conflict, nor of decolonisation, national liberation and ‘noble international combatants for peace’.⁶³⁷ Instead, the contemporary response and dominant conceptual understanding of foreign fighting became firmly situated within a counterterrorism and security framing. This framing was cemented by the Security Council’s set of foreign terrorist fighter resolutions from 2014. Amongst them, Resolution 2178 (2014) defined the ‘foreign terrorist fighter’ and, focusing chiefly on the prevention of movement, required states to ensure legislation to criminalise their activities.⁶³⁸ Resolution 2396 (2017) focused on issues related to the return and relocation of foreign terrorist fighters to their parent or third states.⁶³⁹

Of course, applying the label of terrorism to national liberation or resistance movements was nothing new. Still, during this earlier period, the various foreign fighter mobilisations in conflicts around the world, even those involving mobilisations of Muslim fighters, did not spark sufficient concern to lead to developments in international law explicitly regarding foreign fighting. As discussed in Chapter Four, explicit references to the non-tolerance of ‘subversive, terrorist or armed activities’ and the non-reliance on ‘armed bands including mercenaries’ for incursion were included in the General Assembly’s 1970 Friendly Relations Declaration. Otherwise, in the 1980s, negotiations for the UN Mercenary Convention continued until its adoption in 1989. Foreign fighting was not explicitly mentioned in the significant anti-terrorism legal architecture developed throughout the later twentieth century and ramped up after 11 September 2001. This growing framework did, though, affect

⁶³⁵ Mustapha (n 15) 749–51; Li, *The Universal Enemy* (n 15) 2–3, 194–5, 198, 201ff; Li, ‘Foreign Fighters’ (n 2) 382–92; Stephanie Zosak, ‘Revoking Citizenship in the Name of Counterterrorism: The Citizenship Review Commission Violates Human Rights in Bosnia and Herzegovina’ (2010) 8(2) *Northwestern Journal of Human Rights* 216; Kohlmann (n 15) 126–7, 162, 218–25; Nicholas Wood, ‘Bosnia Moving to Deport Foreign Veterans of 1992–95 Balkan War’, *New York Times* (online, 1 August 2007) <<https://www.nytimes.com/2007/08/01/world/europe/01iht-bosnia.4.6942502.html>>.

⁶³⁶ Mustapha (n 15). See also Mark Urban, ‘Bosnia: The Cradle of Modern Jihadism?’, *BBC* (online, 2 July 2015) <<https://www.bbc.com/news/world-europe-33345618>>: ‘[T]he West and the Salafists ... were on the same side in Afghanistan, but became enemies in Bosnia’.

⁶³⁷ See Chapter Four, n 113.

⁶³⁸ SC Res 2178, UN Doc S/RES/2178 (24 September 2014) (‘Resolution 2178’).

⁶³⁹ SC Res 2396, UN Doc S/RES/2396 (21 December 2017) (‘Resolution 2396’).

involvement with proscribed terrorist organisations, and, thus, the participation of foreigners, as well as states' diligent prevention duties related to terrorism.

Therefore, before the adoption of Resolution 2178 (2014), both terrorism- and non-terrorism-related foreign fighting was potentially subject to the general non-intervention and non-toleration of harm duties, including the diligent prevention of terrorism, and of mercenary activities breaching non-intervention norms. Meanwhile, as it had done in the 1960s regarding the situation in the Congo,⁶⁴⁰ the Security Council expressed concerns about particular situations of conflict involving foreigners or foreign armed groups. At times, this included concern about foreigners on the side of a government, usually due to their battlefield conduct, the exacerbation of an already violent situation, and the effect of the presence of foreigners on peace processes or calls for restraint.⁶⁴¹ This practice has continued. The Security Council has requested that states prevent the movement of nationals, armed groups and mercenaries that could contribute to the violation of human rights, hinder a peace process or undermine the peace in Côte d'Ivoire in 2003,⁶⁴² Libya in 2011,⁶⁴³ and the Central African Republic in 2013.⁶⁴⁴ Ceasefires and peace agreements during this period have likewise demanded the departure of non-UN foreign forces, mercenaries and other volunteer fighters, considering that their continued presence could delay stability. Examples include the 1995 Dayton Agreement regarding Bosnia–Herzegovina mentioned above, the 2003 ceasefire agreement regarding Côte d'Ivoire⁶⁴⁵ and 2015 Minsk II Agreement regarding Ukraine which will be discussed below.⁶⁴⁶

Such Security Council resolutions make the determination *for* states of problematic contexts and armed forces and groups; bringing down the level-crossing barriers for transnational

⁶⁴⁰ Urging states to prevent the travel into Congo of non-UN 'foreign military and paramilitary personnel and political advisors' as well as mercenaries. See Chapter Four, section 2.1.

⁶⁴¹ Earlier examples include SC Res 46, UN Doc S/723 (17 April 1948), para 1(b), calling upon certain entities, the UK as mandatory power and countries neighbouring Palestine to refrain from 'assisting and encouraging the entry into Palestine of armed bands and fighting personnel, groups and individuals, whatever their origin'; SC Res 47, UN Doc S/726 (21 April 1948), para A(1)(a), requiring Pakistan to prevent members of tribes and other Pakistanis from entering into the state of Jammu and Kashmir if not ordinarily resident there. See also Eric David, *Mercenaires et Volontaires Internationaux en Droit des Gens* [Mercenaries and International Volunteers in the Law of Nations] (Université de Bruxelles, 1978) 168.

⁶⁴² SC Res 1464, UN Doc S/RES/1464 (4 February 2003) para 11. See also SC Res 2000, UN Doc S/RES/2000 (27 July 2011).

⁶⁴³ SC Res 1970, UN Doc S/RES/1970 (26 February 2011) para 14 ('Resolution 1970').

⁶⁴⁴ SC Res 2127, UN Doc S/RES/2127 (5 December 2013) para 27.

⁶⁴⁵ *Accord de Cessez-le-feu entre Les Forces Armées Nationales de Côte d'Ivoire (FANCI) and les Forces Nouvelles* [Ceasefire Agreement between the Ivory Coast Armed Forces and the Forces Nouvelles], signed 3 May 2003 (entered into force 4 May 2003) art 5, in which the parties agreed to abstain from the recruitment of mercenaries and the employment of non-citizens outside of state authorisation.

⁶⁴⁶ Note that, at times, references to foreign fighters or foreign forces in such peace agreements are to *armed groups* intervening in conflict in another country rather than *individual* foreign volunteer fighters joining an armed group *in situ*.

participation with particular belligerents or in particular situations. Third states are thereby put on notice regarding duties of diligent prevention of unlawful harm to the destination state caused by departures of aspiring foreign fighters.⁶⁴⁷ Although peace agreements only bind the parties, or in practice may be aspirational, they impact similarly on a third state's diligent prevention duties, alerting the state of the harm such foreign armed actors are considered to pose.

The defining of the foreign terrorist fighter in Resolution 2178, binding under Chapter VII of the Charter, together with the requirement that states ensure appropriate legislation to diligently prevent those individuals' travel and activities, represents, then, a significant development in international law regarding foreign fighting. The country-specific resolutions calling for action/restraint were naturally limited in geography, time and scope. In contrast, by defining the foreign terrorist fighter as a category of individual, unacceptable anywhere and at any time, Resolution 2178 worked similarly to the definition of mercenary in international law. It defined for states on the international level something that had previously been left for domestic determination when complying with more general international legal duties of diligent prevention.

As illustrated above regarding Afghanistan and Bosnia, the association of foreign fighting with Islamic extremist causes and the United States-driven war on terror was already well-established from prior decades.⁶⁴⁸ Yet, the prevention of *this* particular form of terrorist activity can be seen as one further step in the existing international counterterrorism architecture; one through which Resolution 2178's specific concern regarding designated Islamic terrorist groups operating in Syria and Iraq⁶⁴⁹ secured the existing predominant identification of foreign fighting with Muslim, particularly Salafi-jihadist, fighters, and gave the new category salience as a key security threat and topic of international legal interest.

At first glance, the new rules on foreign terrorist fighters could be seen as a development that helps to clarify the broader rules of diligent prevention of harm, at least regarding the newly-defined category. However, as occurred with the legal definition of the mercenary, commentators quickly pointed out inadequacies and confusions within the adopted definition — about what it really meant to be 'foreign', a 'terrorist' and a 'fighter'⁶⁵⁰ — as well as

⁶⁴⁷ Regarding states' duties to seek to prevent citizens from fighting in contravention of a binding Security Council resolution, David (n 25) 167.

⁶⁴⁸ See also Thomas Hegghammer, 'The Rise of Muslim Foreign Fighters, Islam and the Globalization of Jihad' (2010) 35(3) *International Security* 53.

⁶⁴⁹ Resolution 2178 (n 22) para 10 is explicitly concerned with the Islamic State group, the Al-Nusrah Front and Al-Qaida-affiliated bodies.

⁶⁵⁰ Particularly useful is the close reading offered by Sandra Krähenmann, 'The Obligation under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 229, 234–41 ('Obligation'). See also Martin Scheinin, 'Back to Post-9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters', *Just Security* (Blog Post, 23

within Resolution 2178 more broadly, especially concerns about the conflation between IHL and anti-terrorism laws.⁶⁵¹ How did the definition apply to dual nationals or foreigners already present in the conflict zone and therefore not travelling?⁶⁵² How should foreignness be understood regarding persons belonging to a perceived transnational community rather than a national state and/or persons naturalised into a declared Caliphate?⁶⁵³ Moreover, why should such technicalities matter, assuming that *any* person associated with a listed terrorist organisation would risk the application of anti-terrorism laws at home or abroad?

As always, then, tensions persist about foreign fighting, although now within the narrower sphere of the counterterrorism framing. Over and above the lack of settled definition of terrorism in international law, once again, the pragmatic need and grasping for a determinate and reliable definition of a new policy priority in international law becomes recognisable, but also how the dominant framing has led to the adopted law, and how quickly such attempts at definitions of categories of fighters could be instrumentalised or slip back into being over- or under-inclusive.

2.3 Institutional Jurisdiction

Institutionally, the monitoring of state efforts regarding this newly-defined category of harmful individual was delegated to the Security Council subsidiary body established after the 9/11 attacks, the Counter-Terrorism Committee (CTC), which works through its

September 2014) <<https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>>; Kai Ambos, ‘Our Terrorists, Your Terrorists? The United Nations Security Council Urges States to Combat “Foreign Terrorist Fighters”, but Does Not Define “Terrorism”’, *EJIL:Talk!* (2 October 2014) <<https://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/>>; Francesca Capone, ‘Countering “Foreign Terrorist Fighters”: A Critical Appraisal of the Framework Established by the UN Security Council Resolutions’ (2016) 25 *Italian Yearbook of International Law* 227, 232–7; Lisa Ginsborg, ‘One Step Forward, Two Steps Back: The Security Council, “Foreign Terrorist Fighters”, and Human Rights’ in *Using Human Rights to Counter Terrorism* (Edward Elgar, 2018) 195, 202–7; Veronika Bílková, ‘Foreign Terrorist Fighters and International Law’ (2018) 6(1) *Groningen Journal of International Law* 1, 11–15.

⁶⁵¹ See Chapter Two, n 42.

⁶⁵² On dual nationals, see Resolution 2178 (n 22), preamble, which mentions individuals of more than one nationality who travel to their states of nationality for terrorist purposes. On persons already present, there are multiple examples of individuals going to a warzone as journalists, medics or aid workers, or already living there, before taking up arms. See, eg, Sarah Rainsford, ‘Tanja Nijmeijer: Dutch FARC Rebel at Peace Talks’, *BBC* (online, 31 January 2013) <<https://www.bbc.com/news/world-latin-america-21237362>>; Adam Potočňák and Miroslav Mareš, ‘Georgian Foreign Fighters in the Conflict in Eastern Ukraine, 2014–2017’ (2019) 32(2) *Journal of Slavic Military Studies* 159, 174; Li, *The Universal Enemy* (n 15) 1–2; *Report of the Working Group on Mercenaries on Its Mission to Ukraine*, UN Doc A/HRC/33/43/Add.3 (29 July 2016) [24] (‘*Mission to Ukraine*’). See also Chapter Three, n 61.

⁶⁵³ See, eg, on jihad, the *umma*, the declared Caliphate and transnational communities more generally, Byman (n 18) 8, 13; Malet (n 3) 165–8, 192, 205; Egdūnas Račius, ‘Caliphate Citizens: Revisiting the Concept of “Foreign Fighters”’ in Kacper Rękawek (ed), *Not Only Syria? The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) 52; Darryl Li, ‘Jihad in a World of Sovereigns: Law, Violence, and Islam in the Bosnia Crisis’ (2016) 41(2) *Law & Social Inquiry* 371; Li, *The Universal Enemy* (n 15) 83–5.

Executive Directorate (CTED).⁶⁵⁴ The CTC/CTED now works closely with the Office of Counter-Terrorism, established in mid-2017 by the General Assembly as part of UN reforms surrounding counterterrorism issues, and headed by an Under-Secretary-General.⁶⁵⁵ The CTC/CTED also cooperates with other bodies involved in counterterrorism policy, especially the multiple entities of the UN Global Counter-Terrorism Coordination Compact working on foreign terrorist fighter issues.⁶⁵⁶ As well as monitoring state compliance with Resolution 2178 and other relevant resolutions, the CTC/CTED has worked to produce guidelines to support states in their legal and administrative responses to foreign terrorist fighters.⁶⁵⁷

Other parts of the UN system outside of these bodies also work on issues related to foreign fighting. This includes the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, but also the UN Human Rights' Council Working Group on Mercenaries, which has been discussing foreign fighters for a number of years, through its anti-mercenarism mandate. As discussed in Chapter Four, this claim of jurisdiction and relevance has been challenged by certain states, which consider mercenarism and foreign fighting to present different threats requiring different expertise, responses and jurisdictional ownership.

The jurisdictional ownership of this category of armed actor by a Security Council body reflects that foreign terrorist fighters are considered an ongoing threat to international peace and security *in all circumstances*, as compared with foreign fighters more broadly (and sometimes foreign enlistment with state armed forces) which present concerns for the UN only in concrete situations. Significant resources are therefore dedicated to the foreign terrorist fighter issue, and the narrow focus of that institutional assignment and ownership might be necessary given the heavy demands on that counterterrorism expertise. Nevertheless, this not only highlights that the Security Council is presently concerned only

⁶⁵⁴ Resolution 2178 (n 22) paras 21, 24–6; SC Res 2395, UN Doc S/RES/2395 (21 December 2017) ('Resolution 2395'); Resolution 2396 (n 23), preamble, paras 44–50; *Strengthening the Capability of the United Nations System to Assist Member States in Implementing the United Nations Global Counter-Terrorism Strategy*, GA Res 71/291, UN Doc A/RES/71/291 (15 June 2017, adopted 19 June 2017) ('GA Res 71/291'); *Statement by the President of the Security Council*, S/PRST/2014/23 (19 November 2014); *Statement by the President of the Security Council*, S/PRST/2015/11 (29 May 2015).

⁶⁵⁵ GA Res 71/291 (n 38).

⁶⁵⁶ 'UN Global Counter-Terrorism Coordination Compact Entities', *Office of Counter-Terrorism* (Web Page) <<https://www.un.org/counterterrorism/global-ct-compact/entities>>. See, generally, Andrea de Guttry, 'The Role Played by the UN in Countering the Phenomenon of Foreign Terrorist Fighters' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 259, 262–4, 277.

⁶⁵⁷ Counter-Terrorism Committee Executive Directorate, 'Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters: A Compilation of Three Reports (S/2015/338; S/2015/683; S/2015/975)' (United Nations, 31 August 2016) <https://www.un.org/sc/ctc/wp-content/uploads/2016/09/FTF-Report-1-3_English.pdf> ('CTED Compilation Report'). See generally de Guttry (n 40), 271–2.

with foreign terrorist fighters,⁶⁵⁸ but means that those expertise and resources are not being deployed to consider international legal debates surrounding a broader range of categories of fighter, nor the dominant counterterrorism framing of the issue itself.⁶⁵⁹ It risks also a lack of collaboration with other bodies relevant to foreign fighting more broadly, such as the UN Working Group on Mercenaries. Dominant framings of any moment can obscure potential points of interest and interlocking history and legal concerns. This becomes visible by considering the contemporary legal responses to *other* foreign fighters.

3. *Other* Foreign Fighting

The insistence on action in response to foreign terrorist fighters reflects current security concerns and explains the present salience bias in policy and academic analysis. However, it reaches limits regarding other instances of foreign fighting with which we are nevertheless confronted. Being so firmly centred within the counterterrorism framing — a framing limited even further by a conception of terrorism being linked to Islamic fundamentalism — the approach appears disengaged from much of what continues to go on in the world of foreign fighting. *Other* foreign fighting is obscured; international law is largely unmoved.

I describe here two selected manifestations of contemporary foreign fighting, and go on in Sections 4 and 5 below to examine the relevant legal debates and responses.

3.1 ‘When you’re in, you’re in’:⁶⁶⁰ Volunteering with Kurdish Forces

A few months after the adoption of Security Council Resolution 2178, media reports noted the presence of foreigners, including from Western countries, within the Syrian Kurdish People’s Protection Units (YPG and YPJ)⁶⁶¹ in Syria, as well as with the *Peshmerga* and Assyrian Christian militia *Dwekh Nawsha* in Iraq.⁶⁶² Estimates suggest foreign volunteers

⁶⁵⁸ See Chapter Two, n 35.

⁶⁵⁹ Although see the Counter-Terrorism Committee Executive Directorate’s 2020 report on right-wing terrorism related to foreign fighting in Ukraine, n 188.

⁶⁶⁰ Tweet by American YPG foreign fighter quoted in Seth Harp, ‘The Anarchists vs. the Islamic State’, *Rolling Stone* (online, 14 February 2017) <<https://www.rollingstone.com/politics/politics-features/the-anarchists-vs-the-islamic-state-109047/>>.

⁶⁶¹ Kurdish: *Yekîneyên Parastina Gel/Jin*, being the male and female units of the armed wing of the Democratic Union Party (Kurdish: *Partiya Yekîtiya Demokrat*, PYD).

⁶⁶² Jim Muir, ‘Islamic State: The US Volunteers Who Fight with Syria’s Kurds’, *BBC* (online, 21 October 2014) <<https://www.bbc.com/news/world-middle-east-29705167>>; Adam Taylor, ‘How Western “Foreign Fighters” Are Being Recruited Online to Join Kurds against Islamic State’, *Washington Post* (online, 25 November 2014) <<https://www.washingtonpost.com/news/worldviews/wp/2014/11/24/how-western-foreign-fighters-are-being-recruited-online-to-join-kurds-against-islamic-state/>>; Hillary Mintz, ‘Lawyer Not Surprised by Racine Native Joining Fight Against ISIS’, *WSIN 12* (online, 2 October 2014) <<https://www.wisn.com/article/lawyer-not-surprised-by-racine-native-joining-fight-against-isis/6323565>>.

fighting *against* the Islamic State group in at least the high hundreds if not the low thousands.⁶⁶³

Alongside the limited scholarship on these examples of foreign fighting, the press has published interview-style exposés, diaries and photo essays featuring individual volunteer fighters.⁶⁶⁴ A number of memoirs of volunteer fighters with the Syrian Kurdish and Assyrian Christian forces in Syria and Iraq also quickly appeared from 2015 and provide another way to examine the phenomenon.⁶⁶⁵

Decision taken to become involved in the war, the administration and logistics for joining the Kurdish forces has operated similarly to the recruitment, contacts and travel of foreign terrorist fighters.⁶⁶⁶ Networking was possible through social media; contacts made, questions asked. A particular Facebook group established in 2014 by a returned American YPG fighter, the ‘Lions of Rojava’, provided a key hub for prospective volunteers.⁶⁶⁷ Some of the foreign volunteers were ex-military, especially initially, but many had no prior combat experience. Recruits were often met upon arrival in Erbil or Suleymaniye in Iraq and taken to drop off points by handlers and, for YPG, often onward to mountain training camps.⁶⁶⁸ Part of the training of YPG/YPJ members involved the political philosophy of the movement. Perceptions and motivations appeared mixed amongst foreign fighters in this regard. For some, the social and political philosophy, the egalitarianism and involvement of women,

⁶⁶³ Ariel Koch, ‘The Non-Jihadi Foreign Fighters: Western Right-Wing and Left-Wing Extremists in Syria’ [2019] *Terrorism and Political Violence* 1, 8 (‘Non-Jihadi’). Note that, like in Ukraine, foreigners also reportedly joined the Syrian government side of the conflict: at 2 (citation omitted).

⁶⁶⁴ See, eg, Harp (n 44); Reeves Wiedeman, ‘The Dirtbag Left’s Man in Syria’, *New York Magazine* (online, 3 April 2017) <<https://nymag.com/intelligencer/2017/04/brace-belden-pisspiggranddad-syria-isis.html>>; Kimberley Taylor, as told to Matt Blake, ‘Surprising Things I learned as a Woman Fighting ISIS’, *Vice* (online, 18 May 2017) <https://www.vice.com/en_us/article/qvdk8v/surprising-things-i-learned-as-a-woman-fighting-isis>.

⁶⁶⁵ Tim Locks, *Fighting ISIS* (Sidgwick & Jackson, 2016); Jim Matthews, *Fighting Monsters* (Mirror, 2019); Ed Nash, *Desert Sniper: How One Ordinary Brit Went to War Against ISIS* (Little Brown, 2018); Joanna Palani, *Freedom Fighter* (Atlantic, 2018); Mike Peshmerganor, *Blood Makes the Grass Grow*, tr Bjarte Abildsnes (Independent, 2018).

⁶⁶⁶ Henry Tuck, Tanya Silverman and Candace Smalley, ‘Shooting in the Right Direction: Anti-ISIS Foreign Fighters in Syria & Iraq’ (Report, Institute for Strategic Dialogue, 2016) 31–7 <<https://www.isdglobal.org/isd-publications/shooting-in-the-right-direction-anti-isis-foreign-fighters-in-syria-and-iraq/>>; Koch, ‘Non-Jihadi’ (n 47) 11–12. On foreign terrorist fighter online recruitment, see Gabriel Weimann, ‘The Emerging Role of Social Media in the Recruitment of Foreign Fighters’ in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 77. On travel, see Byman (n 18) 165, 184–5.

⁶⁶⁷ See @TheLionsOfRojavaOfficial (FaceBook) <<https://www.facebook.com/TheLionsOfRojavaOfficial/>>; Tuck, Silverman and Smalley (n 50) 34–7; Locks (n 49) 14–15, 20–1, 114–15; Peshmerganor (n 49) 36–7, 39–40; Matthews (n 49) 12–19; Nash (n 49) 14; Nathan Patin, ‘The Other Foreign Fighters: An Open-Source Investigation into American Volunteers Fighting the Islamic State in Iraq and Syria’ (Report, Bellingcat, 26 August 2015) 14 <<https://www.bellingcat.com/wp-content/uploads/2015/08/The-Other-Foreign-Fighters1.pdf>>. Cf Palani (n 49) 65ff. See also Taylor (n 46); Rebecca Collard, ‘Meet the Americans Who Have Joined an Iraqi Militia to Fight ISIS’ (27 March 2015) *Time* <<https://time.com/3761211/isis-americans-iraqi-militias/>>.

⁶⁶⁸ Tuck, Silverman and Smalley (n 50) 39; Peshmerganor (n 49) 46ff; Locks (n 49) 28ff; Matthews (n 49) 20–1, 32ff; Nash (n 49) 27–30; Palani (n 49) 186–93, 278.

attracted volunteers interested in socialism, but many were agnostic in this regard or were attracted to the chance to fight or the chance to help. Right-leaning fighters — including those with far right or anti-Muslim views — have reportedly also joined the Kurdish and Assyrian forces. For some, volunteering with the Christian Assyrian group Dwekh Nawsha better suited their political views and religious traditions, and/or posed less of a risk of a terrorism prosecution upon return than fighting with the YPG.⁶⁶⁹

The YPG treated foreigners differently from local Kurdish fighters. Unless they were ex-military or had otherwise proven themselves, they were seemingly not entirely trusted as effective fighters, and were also protected from the dangers of the frontline. Several memoirs portray foreigners repeatedly requesting involvement with the action at the front, with some leaving for home sooner than expected in frustration or trying with another group/unit.⁶⁷⁰ Others saw combat and paid with their lives.⁶⁷¹ Another key difference was that Kurdish YPG fighters were expected to commit themselves to soldiering until the death, while it was accepted that foreigners could serve for a period and return home. Those with dual nationality or at least of Kurdish heritage thus straddled aspects of both sets of rules and expectations.⁶⁷² Some volunteers returned several times to Syria over the course of 1–2 years, and those with military skills could negotiate to form small units with other experienced veterans, which has been described as being safer than relying on the sometimes dangerous tactics and skill level of the local forces.⁶⁷³

Only very rarely called mercenaries in the press, this volunteer fighting with Kurdish or Assyrian militias, including travel and purchase of equipment and weapons, was generally self-funded, although private donations, and corporate sponsorship in the form of free military equipment — to be displayed in footage on the fighter’s social media profile — were

⁶⁶⁹ Collard (n 51); Locks (n 49) 22, 36; Nash (n 49) 19–25; Palani (n 49) 109–17; Kyle Orton, ‘The Secular Foreign Fighters of the West in Syria’ (2018) 20(3) *Insight Turkey* 157, 162, 165–6 (‘Secular’); Koch, ‘Non-Jihadi’ (n 47); Ariel Koch, ‘The New Crusaders: Contemporary Extreme Right Symbolism and Rhetoric’ (2017) 11(5) *Perspectives on Terrorism* 13, 18–20; Taylor, as told to Blake (n 48); ‘Christian Foreign Fighters Deserting Kurdish YPG in Syria Because They’re “Damn Reds”’, *Middle East Eye* (online, 7 August 2017) <<https://www.middleeasteye.net/news/christian-foreign-fighters-deserting-kurdish-ypg-syria-because-theyre-damn-reds>>.

⁶⁷⁰ Palani (n 49) 121–2, 190–2, 281–2; Matthews (n 49) 41–4, 152–6; Locks (n 49) 292–4; Mat Wolf, ‘Americans “Fighting ISIS” Are Just Props’, *Daily Beast* (online, 13 March 2015) <<https://www.thedailybeast.com/americans-fighting-isis-are-just-props>>; Collard (n 51). See also Tuck, Silverman and Smalley (n 50) 40–1.

⁶⁷¹ Mulga Rat, ‘Sehid Namirin [Martyrs Never Die]: In Memory of the Fallen Volunteers of Rojava’ (YouTube, 3 September 2016) <<https://www.youtube.com/watch?v=74sHiSY5SOU&feature=youtu.be>>.

⁶⁷² Nash (n 49) 30; Palani (n 49) 117–20, 190–5, 207; Peshmerganor (n 49).

⁶⁷³ See, eg, Peshmerganor (n 49) 78–9, 97–8, 109–10; Nash (n 49) 30–1, 208–12, 218ff; Matthews (n 49) 165–6, 261–2.

also received. Food, shelter and a basic weapon could usually be provided by the group. The YPG sometimes covered a foreign fighter's return ticket home after six months' service.⁶⁷⁴

3.2 East and West, Left and Right, and Historical Fighting Debts: Foreigners Volunteering on Both Sides of the Ukraine Conflict

Relatively limited academic attention has likewise been given to the less 'in' volunteers attracted to both sides of the Ukraine conflict. This is, as with the YPG/YPJ volunteers, partly because of their relatively small numbers and minimal impact on the fighting, as well as, at least initially, a perceived lack of threat to Western states.⁶⁷⁵ The majority of foreigners are involved with the separatist armed groups of the declared Donetsk and Luhansk Republics — estimates range from 5,000–15,000. On that side, Russians make up the largest percentage of foreigners, some of whom are reportedly members of the Russian Armed Forces.⁶⁷⁶ Many other volunteers with the separatists originate from the region or wider Europe. Their numbers are far less significant. An early estimate suggested approximately 100–300 from 27 nationalities.⁶⁷⁷

On the Ukraine government side, there have been estimates of approximately 100–1000 foreigners from 18 nationalities supporting Kiev in volunteer battalions.⁶⁷⁸ At the time of Russia's entry into Crimea in 2014, the Ukrainian armed forces lacked capacity, and civil

⁶⁷⁴ Nicole Sunday Grove, 'Weapons of Mass Participation: Social Media, Violence Entrepreneurs, and the Politics of Crowdfunding for War' [2017] *European Journal of International Relations* 1; Tuck, Silverman and Smalley (n 50) 37–9; Nash (n 49) 30; Locks (n 49) 44, 58; Peshmerganor (n 49) 41–3, 55–6, 64, 98, 110, 132; Collard (n 51); Joanna Paraszczuk, 'The American Vets Fighting Against IS (And They're Not Mercenaries)', *Radio Free Europe* (online, 19 February 2015) <<https://www.rferl.org/a/american-veterans-fighting-against-islamic-state/26858199.html>>.

⁶⁷⁵ Kacper Rękawek, 'Why "Not Only Syria?" How an Idea Was Born and Put into Practice' in Kacper Rękawek (ed), *Not Only Syria: The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) v, vii; Chris Holmsted Larsen, 'Danish Foreign Fighters: Past and Present Patterns' in Kacper Rękawek (ed), *Not Only Syria? The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) 12, 17; Miroslav Mareš, 'Foreign Fighters in Ukraine: Risk Analysis from the Point of View of NATO' in Kacper Rękawek (ed), *Not Only Syria: The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) 31, 36 ('NATO').

⁶⁷⁶ They are therefore technically not foreign fighters as understood for the purposes of this thesis. András Rácz, 'The Elephant in the Room: Russian Foreign Fighters in Ukraine' in Kacper Rękawek (ed), *Not Only Syria: The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) 60; Arkadiusz Legieć, 'Profiling Foreign Fighters in Eastern Ukraine: A Theoretical Introduction' in Kacper Rękawek (ed), *Not Only Syria? The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) 22, 24–6; Mareš, 'NATO' (n 59) 34; *Mission to Ukraine* (n 36) [22], [60].

⁶⁷⁷ Kacper Rękawek, *Neither "NATO's Foreign Legion" Nor the "Donbass International Brigades": (Where Are All the) Foreign Fighters in Ukraine?* (Policy Paper No 6(108), Polish Institute of International Affairs, March 2015) 5 <[https://www.files.ethz.ch/isn/189979/PISM%20Policy%20Paper%20no%206%20\(108\).pdf](https://www.files.ethz.ch/isn/189979/PISM%20Policy%20Paper%20no%206%20(108).pdf)>. See also Mareš, 'NATO' (n 59) 34; *Mission to Ukraine* (n 36) [27]–[28], [60].

⁶⁷⁸ Rękawek (n 61) 7–8; *Mission to Ukraine* (n 36) [51]. Later estimates counted 1,500 foreign fighters (excluding Russians) on both sides of the conflict from 54 nationalities: Legieć (n 60) 26. A 2019 estimate is 17,000 from 50 countries (including Russians): 'White Supremacy Extremism: The Transnational Rise of the Violent White Supremacist Movement' (Report, Soufan Center, September 2019) 8 <<https://thesoufancenter.org/research/white-supremacy-extremism-the-transnational-rise-of-the-violent-white-supremacist-movement/>>.

committees as well as volunteer fighting battalions were created to support the national army. Certain of those volunteer battalions accepted foreigners.⁶⁷⁹ This included the participation of small numbers of volunteer fighters formed into national groupings, such as the ‘Georgian Legion’.⁶⁸⁰ Subsequent law changes allowed foreign nationals and stateless persons to enlist in Ukraine’s armed forces on contract. Ukraine also offered citizenship to some foreign volunteers who had come to support its struggle against Russia and the separatists, and, indeed, some volunteers had already been resident in Ukraine in 2013 when protests started.⁶⁸¹ Effectively turning some foreign fighters into foreign enlistees, this helped Ukraine comply with requirements of the 2015 Minsk II Agreement which had specified that all foreign armed formations and mercenaries were to be withdrawn under OSCE monitoring.⁶⁸² Law changes also officially recognised certain volunteer territorial defence battalions that had accepted foreign volunteers. Over time, state command of these volunteer battalions increased but remained somewhat partial.⁶⁸³

Like the volunteer fighters in Syria and Iraq, recruitment generally occurred through social media. Russia is also implicated in supporting recruitment and entry into Eastern Ukraine, and travel into the separatist areas is usually from Russia.⁶⁸⁴ Some of the foreign fighters received military training after arrival in Ukraine.⁶⁸⁵ The presence of mercenaries has been

⁶⁷⁹ Anna Bulakh, Grigori Senkiv and Dmitri Teperik, ‘First on the Front Lines: the Role of Volunteers in Countering Russia’s Military Aggression against Ukraine’ (Report, International Centre for Defence and Security, August 2017) 47, 1, 4–6 <https://icds.ee/wp-content/uploads/2018/ICDS_report_First_on_the_front_lines_ukraine.pdf>; Margarete Klein, ‘Ukraine’s Volunteer Battalions: Advantages and Challenges’ (Report No 27, FOI/Swedish Defence Research Agency, April 2015) <<https://www.foi.se/rapportsammanfattning?reportNo=FOI%20MEMO%205312>>; Rosaria Puglisi, ‘Heroes or Villains? Volunteer Battalions in Post-Maidan Ukraine’ (Working Paper No 8, Istituto Affari Internazionali, March 2015) <<http://www.iai.it/sites/default/files/iaiwp1508.pdf>>; Chris Dunnett, ‘Ukraine’s “Battalion” Army, Explained’ (Report, Hromadske International, 18 September 2014) <<https://medium.com/@Hromadske/ukraines-shadow-army-b04d7a683493>>; Andreas Umland and Kostiantyn Fedorenko, ‘Zwischen Front Und Parlament: Freiwilligenverbände Und Parteien in Der Ukraine’ [Between the Front and Parliament: Volunteer Associations and Parties in Ukraine] (2019) 69(3–4) *Osteuropa* 163, 163.

⁶⁸⁰ Potočňák and Mareš (n 36) 164–171; *Mission to Ukraine* (n 36) [68].

⁶⁸¹ Legieć (n 60) 25; Illia Ponomarenko, ‘Rada Passes Bill Simplifying Residency, Citizenship for Foreign Fighters’, *KyivPost* (online, 6 June 2019) <<https://www.kyivpost.com/ukraine-politics/rada-passes-bill-simplifying-residency-citizenship-for-foreign-fighters.html>>; *Mission to Ukraine* (n 36) [24].

⁶⁸² Trilateral Contact Group, ‘Package of Measures for the Implementation of the Minsk Agreements’, 12 February 2015, <https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_150212_MinskAgreement_en.pdf>. Overview in *Mission to Ukraine* (n 36) [11]–[14].

⁶⁸³ *Mission to Ukraine* (n 36) [25], [50]–[56]; Potočňák and Mareš (n 36) 161–2, 166–7; Klein (n 63); Bulakh, Senkiv and Teperik (n 63) 1, 4–6; Puglisi (n 63); Deborah Sanders, ‘“The War We Want; The War That We Get”: Ukraine’s Military Reform and the Conflict in the East’ (2017) 30(1) *Journal of Slavic Military Studies* 30; Dunnett (n 63); Umland and Fedorenko (n 63) 163.

⁶⁸⁴ Rácz (n 60) 66–7; Andrew Foxall, ‘The Ceasefire Illusion: An Assessment of the Minsk II Agreement Between Ukraine and Russia’ (Policy Paper No 8, Russia Studies Centre, December 2015) 9–10 <<http://henryjacksonsociety.org/wp-content/uploads/2015/12/Minsk-II-FINAL-For-Website.pdf>>; *Mission to Ukraine* (n 36) [43]–[44], [48], [62], [91], [94].

⁶⁸⁵ *Mission to Ukraine* (n 36) [47].

alleged but remains difficult to qualify. Foreign fighters on both sides of the conflict appear to receive salaries but may have had to cover other costs such as travel and equipment.⁶⁸⁶

The complexity of motivations and ideological stances represented in the foreign fighting in Ukraine is striking. Scholarship describes a broad mix of values and drivers of the fighters that are difficult to read, but also at times undefinable by the fighters themselves.⁶⁸⁷ As well as being attracted to the warzone for the chance to fight, for adventure or to earn some money if otherwise unemployed, fighters' geopolitical positioning surround European integration, 'Euroatlanticism' and pro- and anti-Russian sentiment. These appear in views that can involve nationalism, racism, fascism, anti-semitism or communism.⁶⁸⁸ Opposing left and right stances appear amongst fighters on the same side, just as common stances can appear across opposing sides.⁶⁸⁹ For example, amongst the foreign volunteers with the separatists, there are those from the political right, and those from the political left, including some who expressly recall the International Brigades in Spain, linking their service to Russia's historical support to Spain.⁶⁹⁰ More recent wars – Abkhazia, South Ossetia, Chechnya – have also motivated fighters to repay a 'debt' owed to Ukraine or Russia which supported different sides of those conflicts in the 1990s.⁶⁹¹

Amongst this blend of political and social views, recent international attention has centred on groups in Ukraine with far-right outlooks, particularly amongst those supporting the government side. The *Azov Battalion*, for example, which had accepted foreign volunteers and was subsequently incorporated into the Ukrainian National Guard and deployed to Eastern Ukraine,⁶⁹² was reportedly refused training and arming by a US-run program for Ukrainian forces because it was considered 'openly neo-Nazi' and 'fascist'.⁶⁹³ *Right Sector*

⁶⁸⁶ See, eg, contradictory information/allegations received during the UN Working Group on Mercenaries visit to Ukraine regarding whether foreign fighters were motivated financially or not: Ibid [26]–[67].

⁶⁸⁷ Legieć (n 60) 23–4.

⁶⁸⁸ Ibid 23, 28–9. See also Rácz (n 60) 67–8; Michael Cecire, 'Same Sides of Different Coins: Contrasting Militant Activisms between Georgian Fighters in Syria and Ukraine' (2016) 4(3) *Caucasus Survey* 282, 289–90.

⁶⁸⁹ Legieć (n 60) 23, 29.

⁶⁹⁰ *Mission to Ukraine* (n 36) [35]–[36]; Mareš, 'NATO' (n 59) 35; Miroslav Mareš, 'Czech Foreign Fighters in the Ukrainian Conflict: Legal Aspects and Propagandist Use' (2017) 26(5) *Vojenské rozhledy* 71, 77 ('Czech'); Mirren Gidda, 'Disbanded Brothers: What Happens When Ukraine's Foreign Fighters Return Home', *Newsweek* (online, 4 November 2015) <<https://www.newsweek.com/2015/11/13/disbanded-brothers-what-happens-when-ukraines-foreign-fighters-return-home-390551.htm>>. See also Chapter Three, nn 9–11.

⁶⁹¹ *Mission to Ukraine* (n 36) [36]; Potočňák and Mareš (n 36) 173–4.

⁶⁹² Klein (n 63); Andreas Umland and Tetjana Bezruk, 'Der Fall Azov: Freiwilligenbataillone in Der Ukraine' [The Case of Azov: Volunteer Battalions in Ukraine], tr Anna Njuyen (2015) 65(1–2) *Osteuropa* 33; Umland and Fedorenko (n 63) 167–9; Dunnett (n 63).

⁶⁹³ 'Growing Number of German & Intl Fighters Join Ukrainian Neo-Nazi Azov Battalion: Report', *RT International* (online, 12 November 2017) <<https://www.rt.com/news/409605-germans-join-ukrainian-azov/>>; Rebecca Kheel, 'Congress Bans Arms to Ukraine Militia Linked to Neo-Nazis' *The Hill* (online, 27 March 2018) <<https://thehill.com/policy/defense/380483-congress-bans-arms-to-controversial-ukrainian-militia-linked-to-neo-nazis>>.

(*Pravyi Sektor*) is another organisation with an armed wing that has accepted foreign volunteers and whose members include those with right-wing, neo-fascist and nationalist views. Officially, the fighting battalions of Right Sector are illegal (as opposed to Right Sector as a political organisation), and the Ukrainian government generally publicly disavows it. However, investigative reporters have described military cooperation between its fighting battalions and government forces – for example, responding to calls for reinforcement or arranging weapons for the group – thereby accusing Ukraine of non-compliance with aspects of Minsk II.⁶⁹⁴ Right Sector opposes Russian involvement in Ukraine, but, while nationalist, is also not strictly pro-Kiev. As Ukraine’s volunteer battalions were brought under increasing ministerial control, Right Sector remained independent.⁶⁹⁵

4. Legal Debates and Responses Surrounding *Other* Foreign Fighting

Lesser in number presently than foreign terrorist fighters, and generally considered to pose less of a threat to international peace and security and to their parent state upon their return home, *other* mobilisations of foreign fighters have received little attention in legal debate on the international level. Even if these debates were not occurring within the Security Council, they *were* taking place in popular conversation and, to a limited extent, also on the domestic level. Parliamentarians discussed YPG cases,⁶⁹⁶ opinion pieces in the press queried whether fighting for the Kurds or in Ukraine was legal or illegal,⁶⁹⁷ and public exchanges on Facebook summed up opposing pragmatic views: Do such volunteers *help* the situation by joining the fight or merely *escalate* it?⁶⁹⁸

⁶⁹⁴ Alexander Clapp, ‘American Right-Wingers are Joining a Pro-Ukrainian Militia’, *VICE* (online, 20 June 2016) <https://www.vice.com/en_au/article/exk4dj/nationalist-interest-v23n4>.

⁶⁹⁵ Right Sector is also known for homophobic and misogynist stances. BBC Newsnight, ‘The Far-Right Group Threatening to Overthrow Ukraine’s Government: Newsnight’ (YouTube, 23 July 2015) <<https://www.youtube.com/watch?v=sEKQsnRGv7s>>; Vyacheslav Likhachev, ‘The “Right Sector” and Others: The Behavior and Role of Radical Nationalists in the Ukrainian Political Crisis of Late 2013 – Early 2014’ (2015) 48(2) *Communist and Post-Communist Studies* 257; Puglisi (n 63) 7–8, 10–11; Umland and Fedorenko (n 63) 164–5; Dunnett (n 63).

⁶⁹⁶ See, eg, ‘UK Citizens Returning from Fighting Daesh’ (n 13).

⁶⁹⁷ Emine Saner, ‘Brits Abroad: Is it Against the Law to Fight Isis?’, *Guardian* (online, 26 February 2015) <<https://www.theguardian.com/world/shortcuts/2015/feb/25/brits-abroad-against-law-fight-isis>>; Kevin Maurer, ‘Is It Legal to Go Overseas to Fight ISIS?’, *Men’s Journal* (online, undated) <<http://www.mensjournal.com/adventure/collection/is-it-legal-to-go-overseas-and-fight-isis-20150324>>; ‘Joining Kurdish Forces “Is Legal”’, *Australian* (online, 1 June 2016) <<http://at.theaustralian.com.au/link/b4f14f73ea714e6038361a218bd7fb64?domain=theaustralian.com.au>>; Stewart Bell, ‘Governments Must Clarify Whether Citizens Can Legally Volunteer with Anti-ISIL Forces: Study’, *National Post* (online, 9 August 2016) <<https://nationalpost.com/news/canada/governments-must-clarify-whether-citizens-can-legally-join-anti-isil-volunteer-forces-study>> (‘Governments’).

⁶⁹⁸ See, eg, comments in response to *The Guardian*, ‘The All-Women Militia Taking on Isis’ (FaceBook, 17 April 2017 19.00 AEST) <<https://www.facebook.com/theguardian/videos/676239365897163/>>, regarding a British YPJ volunteer fighter (anonymised): ‘A: Hypocrisy is calling what she is doing “helping”!!! B: How is she not helping? A: Helping is when you stop the problem, not joining it. Simple!!’.

On the domestic level, while it is rare for states to overtly condone foreign fighting, even by those whose allegiances align with national state policy such as the present conflict against the Islamic State group, government and other political statements have utilised mixed messages. In Australia, for example, the Attorney-General reiterated publicly that it was illegal to engage in fighting for *either* side in the Syrian war.⁶⁹⁹ Still, messaging also relied on softer arguments such as that any foreign fighting can put Australians in danger, or that there are other ways to help.⁷⁰⁰ The Australian National Counter-Terrorism Strategy explains that travelling to conflict zones to fight *against* the Islamic State group ‘is not an acceptable way for an individual to seek to improve the situation in Syria or Iraq either’.⁷⁰¹ At the same time, less formal statements by Australian politicians have outlined a ‘moral difference’ between fighting *for* or *against* the Islamic State group, and no fighters with the YPG or in Ukraine have been prosecuted.⁷⁰² Statements and practice from the United Kingdom, Canada and the United States have echoed these sentiments.⁷⁰³

In practice, the Security Council’s demand that states ensure appropriate legislation to prevent foreign terrorist fighting, together with related regional obligations, saw many states responding dynamically, focusing, as instructed, on the prevention of foreign fighters involved in terrorism or listed terrorist organisations, however interpreted.⁷⁰⁴ Yet, reflecting the above-noted tensions, some countries found themselves grappling with broader questions related to the scope of new or amended laws; with the participation in armed violence that

⁶⁹⁹ In addition to Australia’s foreign incursion provisions and declared area offence covering parts of Syria and Iraq, Australia’s sanctions against Syria prevent service with the Syrian state armed forces: *Autonomous Sanctions Act 2011 (Cth)*; *Autonomous Sanctions Regulations 2011 (Cth)*.

⁷⁰⁰ Max Opray, ‘Criminalising Those Who Fight against IS’, *Saturday Paper* (online, 7 March 2015) <<https://www.thesaturdaypaper.com.au/news/law-crime/2015/03/07/criminalising-those-who-fight-against/14256468001578>>, quoting Australian Attorney-General’s Department statement.

⁷⁰¹ Commonwealth of Australia, *Australia’s Counter-Terrorism Strategy: Strengthening Our Resilience 2015* (2015) 3.

⁷⁰² *Australian Associated Press*, ‘Reece Harding’s Mother Says Locking up Fighters Battling Isis Is “Farcical”’, *Guardian* (online, 6 July 2015) <<https://www.theguardian.com/australia-news/2015/jul/06/reece-hardings-mother-says-locking-up-fighters-battling-isis-is-farcical>>, quoting former Australian Prime Minister Tony Abbott; Lauren Williams, ‘Awkward Contradictions in Australian Foreign-Fighter Laws’, *Interpreter* (online, 25 March 2015) <<https://www.lowyinstitute.org/the-interpreter/awkward-contradictions-australian-foreign-fighter-laws>>.

⁷⁰³ ‘Iraq Crisis: PM Urges UK Kurds Not to Travel to Fight IS’, *BBC* (online, 3 September 2014) <<http://www.bbc.com/news/uk-29038981>>: ‘The prime minister said said (sic) there was a “fundamental difference” between fighting for the Kurds and joining IS’; Stewart Bell, ‘Canadians Who Travel Abroad to Fight ISIL Get Little Scrutiny upon Return, Suggesting Canada Isn’t Keen on Stopping Them’, *National Post* (online, 1 June 2015) <<http://news.nationalpost.com/news/canada/canadians-who-travelled-abroad-to-fight-isil-get-little-scrutiny-upon-return-suggesting-canada-isnt-keen-on-stopping-them>>; Bell, ‘Governments’ (n 81); ‘Syria Travel Advisory’, *US Department of State* (Web Page, updated to 30 April 2020), <<https://travel.state.gov/content/travel/en/traveladvisories/syria-travel-advisory.html>>: ‘warns private U.S. citizens against traveling to Syria to engage in armed conflict. U.S. citizens who undertake such activity face extreme personal risks ... The U.S. government does not support this activity. Our ability to provide consular assistance ... is extremely limited’.

⁷⁰⁴ See Chapter Two, section 3.1.

was to be prevented. Who, and/or which conduct and situations, must be included, or might be excluded, from laws prohibiting participation in armed conflict by individuals? More fundamentally, should criteria be objective or subjective?⁷⁰⁵ Similar to the questions posed by the mercenary dilemma: was *all* foreign fighting to be considered inherently harmful, or only in certain situations?

The persisting tensions in international law surrounding foreign fighting are visible precisely through the dissimilar responses to foreign terrorist fighters and *other* foreign fighters, that is, through the distinction made between the intensely focused-upon and the generally overlooked, but also through the lack of uniformity in domestic positions. This lack of uniformity appears even in regard to the prevention of foreign terrorist fighters given the lack of settled international definition of terrorism, and particularly regarding *other* types of foreign fighting.⁷⁰⁶ In short, outside of anti-terrorism provisions (and anti-mercenarism provisions where relevant), the resulting domestic response might seek to prevent participation with a non-state armed group abroad objectively so as to encompass all foreign fighter manifestations; alternatively, it might prohibit only subjectively-determined types of foreign fighting — terrorism, perhaps mercenarism, and unneutral or treasonous conduct. A similar variety in approach is reflected in laws empowering states to revoke citizenship or withdraw passports of certain foreign fighters.⁷⁰⁷ The chosen approach depends on political determinations but also local context, social and political history, collective memories of previous wars and foreign fighting, and the country's resulting legislative precedents governing the protection of neutral status, foreign enlistment, foreign incursion, mercenarism and terrorism.⁷⁰⁸

⁷⁰⁵ Helene Højfeldt, 'Prohibiting Participation in Armed Conflict' (2015) 54 *Military Law and the Law of War Review* 13, regarding Norway; Christophe Paulussen and Eva Entenmann, 'National Responses in Select Western European Countries to the Foreign Fighter Phenomenon' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 394–5, regarding Belgium.

⁷⁰⁶ European Union, Council, 'Observations of the Presidency on Strengthening Information Exchange/ Information Systems, especially SIS', (7412/16, 5 April 2016) 2: 'lack of common criteria defining foreign fighters in the Member States is a concern'; Christopher Hope, Matthew Holehouse and Camilla Turner, 'Extremists Free to Travel to UK Because EU States Cannot Agree on the Definition of "Foreign Fighter"' *Telegraph* (online, 22 April 2016) <<https://www.telegraph.co.uk/news/2016/04/22/extremists-free-to-travel-to-uk-because-eu-states-cannot-agree-o/>>.

⁷⁰⁷ That is, whether citizenship could be stripped from *any* foreign fighter or only those engaged in hostilities against the parent state or in terrorism. See Laura Van Waas, 'Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 469, 473, 475 n 29, 484.

⁷⁰⁸ See similarly Paulussen, Christophe and Kate Pitcher, 'Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges' (Research Paper, International Centre for Counter-Terrorism, 2018) 16 <<https://icct.nl/wp-content/uploads/2018/01/ICCT-Paulussen-Pitcher-Prosecuting-Potential-Foreign-Fighters-Legislative-Practical-Challenges-Jan2018.pdf>>; Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (Oxford University Press, 2017) 329.

The following sections consider how different perceptions of the applicable international legal obligations regarding diligent prevention of harm have played out in debates and legal responses to the selected *other* examples of foreign fighting.

4.1 State Responsibility and Diligent Prevention of Harm

4.1.1 A Universal Non-Toleration of the Uncontrolled Taking Up of Arms by Private Individuals?

The more objective approach bases itself on a traditional reading of the state as the primary actor in the international legal order; on territorial sovereignty and state consent. This is buoyed by, and reinforces, the notion of the state holding the monopoly of the legitimate use of force.⁷⁰⁹ The understanding that warring parties believe their own cause is just, combined with the perceived risks of non-state uses of force, means modern international law has traditionally leaned towards greater restrictions and formalism, with higher-level decision-making relying on states and the Security Council. Mainstream argument has accepted the notion that ‘[d]ecisions on war and peace should not be taken by just anyone’,⁷¹⁰ and balances any notion of resistance with the idea of protecting the state-based international legal order, and of not having civilians becoming involved in armed conflict – a logic and distinction at the core of IHL.⁷¹¹

Taken strictly, under this vision of international law, there are no good or bad foreign fighters; no moral or political judgments to make; or, rather, the judgments required have already been made and settled in favour of a universal agreement to avoid the participation of private foreign volunteers in armed groups; that the uncontrolled taking up of arms by private individuals cannot be tolerated, neither at home nor abroad. This would suggest that, to a large extent, the phenomenon of foreign fighting is itself seen as an ill affecting the interests of the receiving state and being ‘offensive to the peace and security of foreign

⁷⁰⁹ Max Weber, *From Max Weber: Essays in Sociology*, trs & eds Hans Gerth and Charles Wright Mills (Oxford University Press, 1946), 77.

⁷¹⁰ Pål Wrange, ‘Does Who Matter? Legal Authority and the Use of Military Violence’ (2017) 31(2) *Ethics & International Affairs* 191, 197. See also Hessbruegge (n 92) 301; Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Cornell University Press, 2013) 1: ‘Like any society, international society has shared notions that shape the use of force. One is that large-scale force is the prerogative of states. ... Violence by non-state actors is branded as illegitimate, and its perpetrators are hunted down by states, often acting collectively in the name of ‘the international community’ (citation omitted).

⁷¹¹ Illustrating the positions taken in IHL that civilians were not to take part in hostilities and that the right to resist by levée en masse was always limited in time and nature: Emily Crawford, ‘Tracing the Historical and Legal Development of the Levée En Masse in the Law of Armed Conflict’ (2017) 19(3) *Journal of the History of International Law* 329. Although note again IHL’s encouragement of amnesties for IHL-compliant conduct.

nations’,⁷¹² which parent and transit states therefore have a duty to diligently seek to control.⁷¹³

Legislative and prosecutorial practice in some countries follows this vision of the law by objectively prohibiting foreign fighting/foreign incursion in addition to specific terrorism or mercenarism offences because of its hostile, private and, therefore, unprivileged nature. This is combined with related policy reasons such as allegiance, military neutrality, avoidance of foreign relations discomfiture and consular headaches, or internal and external security.⁷¹⁴ Examples include several countries regionally close to Ukraine, such as states in the Balkans, prompted since the outbreak of fighting in Ukraine in 2014 to adopt laws objectively penalising unauthorised participation in an armed conflict abroad.⁷¹⁵ Such objective provisions have been relied upon in prosecutions or administrative orders undertaken against foreign fighters with the YPG and the separatist groups in Eastern Ukraine.⁷¹⁶

Geographic sanctions related to a particular conflict or the presence of a particular proscribed terrorist group, such as Australia’s declared area offence enacted in October 2014, represent one sub-category of objective prohibition. This renders defined areas of foreign states out of bounds, making entry or continued presence a criminal offence, with the exception of certain

⁷¹² Manuel R Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (Martinus Nijhoff, 1962) 2.

⁷¹³ See, eg, Sandra Krähenmann, *Foreign Fighters under International Law* (No 7, Geneva Academy of International Humanitarian Law and Human Rights, October 2014) 49–51 which tends in this direction because of the relatively broad definition of foreign fighter relied upon. See at 6: ‘an individual who leaves his or her country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who is primarily motivated by ideology, religion, and/or kinship’; Krähenmann, ‘Obligation’ (n 34) 257: ‘dense web of obligations ... that require all States involved ... to prevent their movement, in particular when those foreign fighters are linked ... to terrorist groups. ... the interplay of these obligations highlights that there is no gap in international law when it comes to ... foreign fighters’.

⁷¹⁴ Examples include the Norwegian Straffeloven [Penal Code] (LOV 1902:10), amended July 2016, art 145: ‘illegitimate participation in military activity in an armed conflict abroad ... unless the person participates as member of a State’s armed force’ (tr Højfeldt (n 89) 30); Australian *Criminal Code Act 1995 (Cth)* (*Criminal Code*), Part 5.5, ss 119.1(1–2), 119.4, 119.6, 119.7, making preparing, engaging in, or entering a foreign country with the intention of engaging in, hostile activities an offence. While ‘hostile activity’ is defined in the Code with some reference to an objective of overthrowing a government by force, it includes conduct with the intention of serious physical harm, damage to property or death, and which would constitute a serious offence if engaged in within Australia: s 117.1. See also generally Manuel R Garcia-Mora, ‘International Responsibility for Subversive Activities and Hostile Propaganda by Private Persons Against Foreign States’ (1960) 35(3) *Indiana Law Journal* 306, 312, 318–24 (‘Subversive Activities’); Tuck, Silverman and Smalley (n 50) 46–7.

⁷¹⁵ CTED Compilation Report (n 41) 108 [142]; Vlado Azinović and Muhamed Jusić, *The Lure of the Syrian War: The Foreign Fighters’ Bosnian Contingent* (Preliminary Report, The Atlantic Initiative, 2015) 86, Annex 3 <<https://images.derstandard.at/2015/08/06/The-Lure-of-the-Syrian-War---The-Foreign-Fighters-Bosnian-Contingent.pdf>>.

⁷¹⁶ See, eg, Jorge A Rodríguez, ‘Eight Spaniards Arrested after Returning from Combat in Ukraine’, *El País* (online, 27 February 2015) <https://english.elpais.com/elpais/2015/02/27/inenglish/1425033238_750840.html>; ‘Issuance of Orders of Detention and Restriction Orders under the Internal Security Act’ (Press Release, Singapore Ministry of Home Affairs, 16 March 2016) (case of Wang Yuandongyi) <<https://www.mha.gov.sg/newsroom/press-release/news/issuance-of-orders-of-detention-and-restriction-orders-under-the-internal-security-act>>; Kenneth R Rosen, ‘Harsh Homecoming’, *Foreign Policy* (2 July 2019) <<https://foreignpolicy.com/2019/07/02/harsh-homecoming-islamic-state-denmark-european-union-syria/>>.

legitimate purposes such as humanitarian activities or making a ‘bona fide visit to a family member’.⁷¹⁷ Although in Australia’s case, this offence was clearly enacted in relation to the activities of the Islamic State group, the scope of the prohibition makes it unlawful to participate in any group in those areas.⁷¹⁸ Geographical offences avoid the prosecutorial challenges of proving terrorist intent and/or extraterritorial criminal conduct.⁷¹⁹

Even without an objective criminalisation of foreign fighting, there remains the possibility of prosecutions relying on standard crimes in the territorial state, as well as extraterritorially in some parent states’ laws – assault, murder, vandalism, weapons offences.⁷²⁰ For example, upon his return home from fighting with the YPG, a Dutch–Kurdish man was charged with manslaughter for killing a fighter of the Islamic State group.⁷²¹ A statement from the prosecutor’s office explained that ‘Dutch law — apart from in exceptional circumstances like self-defence — does not give citizens the right to use force and particularly not deadly force’. The public prosecutor publicly emphasised the ‘important difference between people who travel to Syria under their own steam to fight Isis and the Dutch military, which is training fighters and carrying out bombing missions in neighbouring Iraq’ with the consent of the Iraqi government.⁷²²

4.1.2 Primary Legal Duties Regarding Other Foreign Fighters

This approach appears clean and straightforward, and the counter-terrorism framing contributes to a sense that the approach is universal. States may certainly choose such an approach domestically, but as this thesis explores, international law has not clearly developed a norm requiring diligent prevention of *all* foreign fighting. Different manifestations have

⁷¹⁷ *Criminal Code* (Cth), ss 119.2(3), 119.3. Al-Raqqa province in Syria, and Mosul district in Ninewa province in Iraq were declared off-limit areas in December 2014 and March 2015 respectively: ‘Australian National Security: Declared Area Offence’, *Australian Government* (Web Page) <<https://www.nationalsecurity.gov.au/Whataustraliaisdoing/pages/DeclaredAreaOffence.aspx>>.

⁷¹⁸ Its declared purpose was to respond to the ‘threat posed by Australians fighting with overseas *terrorist and insurgent groups* and returning here (“foreign fighters”); that is, a concern not only with terrorism: Cat Barker et al, ‘Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014’, *Bills Digest* (Digest 34 of 2014–15, 17 October 2014) 6–7, 9 (emphasis added). See also Commonwealth of Australia (n 85) 22. However, at the time of writing, returning YPG volunteers have not been prosecuted for conduct related to this possible offence. See text accompanying n 83.

⁷¹⁹ But raise other legal issues such as fair trial rights. See Ben Emmerson, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc A/71/384 (13 September 2016) [50].

⁷²⁰ See, eg, ‘Straffrättsliga åtgärder mot deltagande i en väpnad konflikt till stöd för en terroristorganisation’ [Criminal Measures Against Participation in Violent Conflict in Support of a Terrorist Organisation], Statens Offentliga Utredningar (SOU) [Government Report] 2016:40 (Sweden, 15 June 2016) <<http://www.regeringen.se/49d6b7/contentassets/fde512ceb1444e85a7be662142f9bcd3/sou-2016-40-del-1-av-4---betankandet-och-bilagor-1-2.pdf>>, 22; Rodríguez (n 100).

⁷²¹ Example taken from Holmsted Larsen (n 59) 17.

⁷²² Agence France-Presse, ‘Dutch Man Suspected of Killing ISIS Fighter Could Face Murder Charge’, *Guardian* (online, 16 January 2016) <<https://www.theguardian.com/world/2016/jan/15/dutch-man-suspect-killing-isis-fighter-arrest>>. The case was subsequently dropped, see n 112 below.

been treated differently. Thus, this ostensibly clean and straightforward argument is challenged by historical practice as well as legal counter-argumentation surrounding the applicable prevention duties and the understanding of the harm caused by foreign fighting. Here, I look at four key aspects that arise in the legal debates surrounding today's *other* foreign fighting.

Parent State Participation and Partnering

One of the most common arguments challenging a universal and principled approach occurs when the fight with which certain *other* foreign volunteers are engaged is one in which their parent states are also participating, notably, in the case of the Kurdish forces, as part of the international anti-Da'esh coalition.⁷²³ That already places the foreign fighters and their parent states on the same side. More than that, some coalition countries are militarily supporting and partnering with the Syrian Democratic Forces — a coalition of armed groups in northern Syria, of which the Syrian Kurdish forces form the significant part.⁷²⁴ So while a parent state might not publicly condone any form of foreign fighting — indeed investigative journalism from the earlier period of foreign fighting in Syria and Iraq around 2014 reports that American soldiers told Kurdish forces to 'disband foreigners from their ranks or risk losing American cooperation' because they might share operational secrets on social media and would increase foreign relations tensions with Turkey⁷²⁵ — memoirs recount some isolated close cooperation between certain western foreign fighters and coalition forces, including intelligence services of Western militaries. Coalition forces fighting the Islamic State group have in practice ended up fighting alongside foreign fighters, and have reportedly relied on foreign fighters with the Kurdish forces as translators, as well as establishing more formal relationships of intelligence gathering about the Islamic State group and its positions which has been used in airstrike targeting.⁷²⁶ A YPG volunteer has also provided evidence to investigators for use in prosecuting an Islamic State group fighter.⁷²⁷ As such, any straightforward argument relying on the state's monopoly of force is put under pressure in the situation of a parent state not only intervening militarily in the

⁷²³ *Global Coalition to Defeat Daesh/ISIS* (Web Page) <<https://theglobalcoalition.org/en/>>.

⁷²⁴ Carla E Humud and Christopher M Blanchard, 'Armed Conflict in Syria: Overview and U.S. Response' (Report, Congressional Research Centre, 12 February 2020) 24 <<https://fas.org/sgp/crs/mideast/RL33487.pdf>>.

⁷²⁵ Clapp (n 78). See also Dave Philipps, 'American Volunteers Fighting ISIS in Syria Worry About a U.S. Pullout', *New York Times* (online, 16 February 2019) <<https://www.nytimes.com/2019/02/16/us/american-civilian-volunteers-syria.html>>: '[the foreign fighters] would sometimes encounter American Special Operations troops who were working closely with the Kurds, but the American troops were careful to steer clear of volunteers like him'.

⁷²⁶ Lizzie Dearden, 'Joshua Walker: Student who Fought Against Isis in Syria Cleared of Terror Charges Over Book he Owned', *Independent* (online, 26 October 2017) <<http://www.independent.co.uk/news/uk/crime/joshua-walker-verdict-anarchists-cookbook-isis-syria-trial-uk-fighter-ypg-role-play-game-a8022126.html>>; Paraszczuk (n 58); Peshmerganor (n 49) 75–7, 98, 138–41.

⁷²⁷ @joshuamallo101 (Twitter, 5 July 2020, 7.37am AEST <<https://twitter.com/joshmolloy101/status/1279529727330574347>>.

same armed conflict, but training, supporting or conducting partnered operations with the armed group in question.

On the international level, the issue is linked to broader questions related to state approaches towards non-intervention and self-defence norms within the counterterrorism framing, in the form of support and partnering with non-state armed groups abroad, and how this interplays with diligent prevention duties.

On the domestic level, that pressure becomes visible through difficulties in prosecution arguments and in opposing public opinion in parent states, finding it ‘unconscionable’ to prosecute someone for fighting with the same armed group supported by the parent state, and seeing states reluctant to divulge to the court details of their support to a non-state armed actor.⁷²⁸ In Australia, for example, high-level opinion argued that since in the fight against the Islamic State group there is an enemy common to the government, ‘we can presumably gazette a notice that fighting for the Kurds is OK’.⁷²⁹ In late 2019, a British Judge remarked during sentencing of a YPG fighter that it was ‘not irrelevant to ... YPG activity that it was supporting the policy of the United Kingdom and other allies by fighting ISIS’.⁷³⁰

State–Non-state Distinction?

A second challenge therefore relates to the orthodox legal argument that fighting within state armed forces (foreign enlistment) is legitimate, while fighting in non-state formations (foreign fighting) is not. For a start, examples such as the Spanish Civil War, the mercenary period or Libya in 2011 illustrate that fighting on the side of a government can be considered problematic, especially in situations in which that government has lost legitimacy or is breaching other international norms. Moreover, the state/non-state distinction proves unclear in some foreign fighting scenarios.

Kurdish authorities in Syria — the Democratic Union Party, of which the YPG/YPJ is its military arm — have had during the conflict a special relationship with the Syrian Government which has amounted to some local autonomy.⁷³¹ The Syrian Democratic Forces,

⁷²⁸ See, eg, Richard Norton-Taylor, ‘Terror Trial Collapses After Fears of Deep Embarrassment to Security Services’, *Guardian* (online, 1 June 2015) <<https://www.theguardian.com/uk-news/2015/jun/01/trial-swedish-man-accused-terrorism-offences-collapse-bherlin-gildo>>; Agence France-Presse, ‘Netherlands Drops Case against Man Suspected of Killing Isis Fighters’, *Guardian* (online, 22 June 2016) <<https://www.theguardian.com/world/2016/jun/21/netherlands-drops-case-against-man-suspected-of-killing-isis-fighters>>; ‘Terror Charges Dropped Against UK Ex-soldier’, *BBC* (online, 31 July 2018) <<https://www.bbc.com/news/uk-45017016>>.

⁷²⁹ Paul Maley, ‘Kurds Volunteers Need Exemption from Foreign Fighters Law: QC’, *Australian* (online, 31 May 2016) <<http://at.theaustralian.com.au/link/62c3572472f318bebe0e2d8e96c2c879?domain=theaustralian.com.au>> quoting former Australian Independent National Security Legislation Monitor.

⁷³⁰ Judiciary of England and Wales, Central Criminal Court, *R v Aidan James*, Sentencing remarks (Justice Edis, 7 November 2019) 2 <<https://www.judiciary.uk/wp-content/uploads/2019/11/SENTENCING-REMARKS.pdf>>.

⁷³¹ Rana Khalaf, ‘Governing Rojava: Layers of Legitimacy in Syria’ (Research Paper, Royal Institute of International Affairs, 2016) <<https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-12-08-governing-rojava-khalaf.pdf>>; ‘Flight of Icarus? The PYD’s Precarious Rise in Syria’ (Report No

of which the YPG forms a major part, is described as the defence force of the unilaterally-declared (and unaccepted by the Syrian Government) Autonomous Administration of North and East Syria in its constitutional document.⁷³² The situation of the Peshmerga in northern Iraq presents a stronger example of local autonomy, given their role as the official security forces in Iraqi Kurdistan, although control over parts of that region remains contested. Foreign fighter memoirs describe needing to be granted permits from the Peshmerga for movement in the region, and explain that local armed groups needed to be registered and licensed by the Kurdish regional government in Iraq to operate in certain locations.⁷³³ In Australia, defence counsel for an aspiring YPG volunteer made arguments based on Kurdish de facto governing authority over an area.⁷³⁴ The British Prime Minister described a difference between joining the ‘recognised Kurdish authority’ and the Islamic State group.⁷³⁵ Such arguments perceive the foreign fighting more akin to foreign enlistment with state armed forces, about which, except in the face of war crimes or other abuses, international law has no general concerns and delegates decision-making to states.⁷³⁶

In Ukraine, volunteers with non-state groups fighting on the side of the government also present a particular dilemma, in as much as volunteer and civilian battalions are fighting on the side of a government and, as mentioned above, have been largely legalised as auxiliary forces by Ukraine.⁷³⁷ In addition, while the agreed measures for implementing the Minsk Agreement specified that all foreign armed formations and mercenaries were to be withdrawn under OSCE monitoring, a law change in late 2015 meant that some foreigners supporting

151, International Crisis Group, 8 May 2014) 2, 7–9 <<https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/flight-icarus-pyd-s-precarious-rise-syria>>; Orton, ‘Secular’ (n 53) 160–2.

⁷³² ‘Kurds Declare Autonomous “Federal Region” in Syria’, *New Arab* (online, 17 March 2016) <<https://www.alaraby.co.uk/english/news/2016/3/17/kurds-declare-autonomous-federal-region-in-syria>>; ‘Syria Kurds Adopt Constitution for Autonomous Federal Region’, *New Arab* (online, 31 December 2016) <<https://www.alaraby.co.uk/english/news/2016/12/30/syria-kurds-adopt-constitution-for-autonomous-federal-region>>.

⁷³³ Locks (n 49) 210–11, 257; Palani (n 49) 216–17, 334.

⁷³⁴ Kyle Orton, ‘The Forgotten Foreign Fighters: The PKK in Syria’ (Report, Henry Jackson Society, 2017) 134, 75 <<http://henryjacksonsociety.org/wp-content/uploads/2017/08/3053-PYD-Foreign-Fighter-Project-1.pdf>> (‘Forgotten’); Chip Le Grand, ‘Fighting for Kurds Against Islamic State “May Be Legal”’ *Australian* (online, 2 June 2016) <<http://at.theaustralian.com.au/link/b4f14f73ea714e6038361a218bd7fb64?domain=theaustralian.com.au>> archived at <<https://perma.cc/2V6K-L9JD>>. Similarly, in Denmark, a defence lawyer advised a foreign fighter to focus on her service with the Peshmerga rather than with the YPJ, since the Peshmerga were a ‘state army’: Palani (n 49) 255.

⁷³⁵ ‘Iraq Crisis: PM Urges UK Kurds Not to Travel to Fight IS’, *BBC* (online, 3 September 2014) <<http://www.bbc.com/news/uk-29038981>>.

⁷³⁶ Chapter One, n 93.

⁷³⁷ See, eg, regarding Australia grappling with this question concerning its nationals, Sean Rubinsztein-Dunlop, Suzanne Dredge and Michael Workman, ‘From Neo-Nazi to Militant: The Foreign Fighters in Ukraine who Australia’s Laws Won’t Stop’, *ABC* (online, 1 May 2018, updated 7 May 2018) <<https://www.abc.net.au/news/2018-05-01/foreign-fighters-return-to-australia-with-military-training/9696784>>.

Kiev were able to comply with this provision by enlisting within the Ukrainian Armed Forces.⁷³⁸

In such scenarios, a more accurate question would turn on whether or not the territorial state authorises involvement in the hostilities outside of the state armed forces structures. At its heart, given the purpose of the no harm/non-toleration rules to protect fellow states, logically, there would be no need for a parent state to prevent its nationals joining a force (even a non-state group) if the territorial state consented to that volunteer fighting.⁷³⁹ The parent state may nevertheless choose to do so for other policy reasons, or be obliged to do so if other international obligations arose linked to the participation in hostilities, such as non-intervention or the need to ensure respect for IHL.

Related to recognition and legitimacy, even if highly contested, both the Kurdish and the Eastern Ukraine situations have generated arguments surrounding the right of a people to self-determination.⁷⁴⁰ Such arguments lack international consensus, and are unlikely to succeed within a system favouring the maintenance of national unity through present state boundaries. They nevertheless potentially impact on perceptions of just cause, and legal argumentation about foreign fighting in support of such a claimed right, as was demonstrated regarding national liberation in Chapter Four.

Unlawful Harm? Fighting against State Interests

The blurred distinction between state and non-state actors, and the question of the possible legitimacy of certain armed groups aside, the question of the *harm* caused to the territorial state by the foreign fighting is also up for debate. A parent state does not have a general obligation to prevent *any* criminal activity or harm caused by its citizens abroad. It must only protect its territory from being used ‘for purposes injurious to the interests of other States *in a manner contrary to international law*’.⁷⁴¹ The articulations of the non-intervention and non-toleration principles in the 1970 Friendly Relations Declaration raise two relevant questions.

⁷³⁸ See section 3.2 above.

⁷³⁹ See, eg, *Deutsche Staatsbürgerinnen und Staatsbürger in der Ostukraine* [German Citizens in East Ukraine] (No 19/15670, Deutscher Bundestag, 4 December 2019) 6 (Question 11) <<http://dip21.bundestag.de/dip21/btd/19/156/1915670.pdf>>, stating that formations in Ukraine subordinated to the Defence or Interior Ministries do not harm the state’s monopoly of force.

⁷⁴⁰ See, eg, Sofia Cavandoli, ‘The Unresolved Dilemma of Self-Determination: Crimea, Donetsk and Luhansk’ (2016) 20(7) *International Journal of Human Rights* 875; John JA Burke and Svetlana Panina-Burke, ‘Eastern and Southern Ukraine’s Right to Secede and Join the Russian Federation’ (2015) 3(1) *Russian Law Journal* 33; Milena Sterio, ‘Do Kurds Have the Right to Self-Determination and/or Secession?’, *Opinio Juris* (28 September 2017) <<http://opiniojuris.org/2017/09/28/kurds-right-self-determination-andor-secession/>>; Richard Falk, ‘Problems and Prospects for the Kurdish Struggle for Self-Determination After the End of the Gulf and Cold Wars’ (1994) 15(2) *Michigan Journal of International Law* 591; Ove Bring, ‘Kurdistan and the Principle of Self-Determination’ (1992) 35 *German Yearbook of International Law* 157.

⁷⁴¹ International Law Commission, *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, UN Doc A/CN.4/1/Rev.1 (10 February 1949) 34 (emphasis added).

Firstly, the principle of non-toleration as described in the 1970 Friendly Relations Declaration refers only to ‘armed activities *directed towards the violent overthrow of the regime of another State*’.⁷⁴² Based on this wording, it is difficult to argue that foreign fighters supporting groups which fight against another armed group (such as against the Islamic State group) rather than against government armed forces, or foreign fighters in pro-government militia, would need to be prevented by states under this principle.⁷⁴³ On the other hand, the subsequent 1981 resolution relied on a broader concept of harm; the reference to ‘toleration’ was also omitted. The duty of the state was to *ensure* that its territory was not used in any manner which would, amongst the usual harms, also ‘disrupt the political, economic and social stability of another State’.⁷⁴⁴ That Declaration was not adopted unanimously and is not considered as authoritative as the 1970 Friendly Relations Declaration.⁷⁴⁵ Nevertheless, one can appreciate the view that the illegal entry and unauthorised, or at least irregular/non-state, contribution to violence from foreign fighters of any persuasion can, by their very presence, be ‘disruptive to the social stability’ of the destination country, and a threat to the notion of the state’s monopoly on the legitimate use of force, even where that violence is not specifically directed against the state. This is reminiscent of the debate about military intervention by a foreign state against an armed group without the consent of the territorial state, namely, whether such military action should be classified as an international as well as a parallel non-international armed conflict, since even if the government forces are not being directly attacked, the effects of the violence are felt by the state as well as the targeted group.⁷⁴⁶

Complicating matters, since Turkey has at times intervened militarily in Syria, the YPG/YPJ have also fought against Turkish forces. Such situations become significant for an international legal analysis because they bring in the element of attacks of a group against a *state* rather than only against another armed group, which fit more cleanly within rules of non-intervention and diligent non-toleration of harm. Even so, there may be complicated questions of fact – whether the foreign fighter directly participated in those hostilities – and

⁷⁴² *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN Doc A/RES/2625(XXV) (24 October 1970) annex, princ 3(2) (emphasis added) (‘Friendly Relations Declaration 1970’).

⁷⁴³ See also the point that such volunteer fighters do not fall within certain definitions of ‘foreign fighter’ if they are based on participation with an insurgency: Patin (n 51) 1 n 5.

⁷⁴⁴ *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res 36/103, UN Doc A/RES/36/103 (9 December 1981) annex, princ 2(II)(b).

⁷⁴⁵ Maziar Jamnejad and Michael Wood, ‘The Principle of Non-Intervention’ (2009) 22(2) *Leiden Journal of International Law* 345, 353, 355.

⁷⁴⁶ See ‘International Armed Conflicts in Syria’, *Geneva Academy Rule of Law in Armed Conflicts Project* (Web Page, last update 23 May 2019) <<http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria>>, classifying parallel international and non-international conflicts regarding the US-led coalition’s intervention in Syria. Cf Terry D Gill, ‘Classifying the Conflict in Syria’ (2016) 92 *International Law Studies* 353, 366–7, finding no such international armed conflict.

of law related to the lawfulness of the third state intervention, any possible right of resistance or self-defence of the population, the consent or not of the territorial state for the armed group's actions, and whether only the foreign fighter's direct participation is relevant or also her involvement with a group engaged in unlawful hostilities against a state.

Unlawful Harm? Groups and Individuals

Secondly regarding harm, there are uncertain demarcations between groups and individuals, and the perception of international law's concern surrounding the potential threat an individual or a group may pose to the destination state. Relatedly, at stake is the knowledge or constructive knowledge a parent state is expected to have to inform its diligent response.

The diligent prevention of harm duty has often been relied upon — anew following 9/11 — in international legal argument regarding self-defence against *groups* enjoying safe haven in one country, and planning or conducting attacks against another, traditionally known as the duty to prevent hostile expeditions, and today often discussed regarding a state being 'unable or unwilling'.⁷⁴⁷ I discussed in Chapter Four how, relatedly, it has been argued that applying the customary non-toleration rules to today's foreign fighters is inaccurate, as these norms only apply to the diligent prevention of hostile groups, not individuals.⁷⁴⁸ It is true that the articulation in the 1970 Friendly Relations Declaration of state duties to refrain from the threat or use of force refers to 'organized activities within its territory', diminishing the strength of an argument that an individual foreign fighter, through her planning to join an armed group, is thereby involved in organised activities.⁷⁴⁹ On the other hand, the reference to 'subversive, terrorist or armed activities' in the articulation of the non-toleration duty, in contrast to that concerning the direct or attributable use of force, does not necessarily exclude individuals and remains open to arguments about foreign fighters' preparatory steps fitting within the rule.⁷⁵⁰ As discussed in Chapter Three, even before the adoption of the 1970 Friendly Relations Declaration, scholars argued that the Fifth Hague Convention's exception for volunteers crossing the border separately was a loophole that needed closing; that is, that states should also diligently prevent individual volunteers, at least where numbers were significant enough to presume state knowledge.⁷⁵¹ Similarly, as noted in Chapter Four, Security Council resolutions since 1948 have made reference to states preventing their

⁷⁴⁷ Krähenmann, 'Obligation' (n 34) 232–3. On hostile expeditions generally, see Manuel R Garcia-Mora, 'International Law and the Law of Hostile Military Expeditions' (1958) 27(3) *Fordham Law Review* 309 ('Hostile Military Expeditions').

⁷⁴⁸ Alice Riccardi, 'Sull'Esistenza di un Obbligo Generale di Prevenire e Reprimere il Fenomeno dei Foreign Fighters alla Luce della Vicenda della Guerra Civile Spagnola' [On the Existence of a General Obligation to Prevent and Repress the Phenomenon of Foreign Fighters in the Light of the Spanish Civil War] [2017] (2) *La Comunità Internazionale* 213, 215, 235–8.

⁷⁴⁹ Friendly Relations Declaration 1970 (n 126) princ 1(9).

⁷⁵⁰ *Ibid* princ 2(2).

⁷⁵¹ See Chapter Three, section 5.2. See also Garcia-Mora, 'Subversive Activities' (n 98) 328.

nationals, as individuals, from participating in certain conflicts, as have regional *bon voisinage* treaties and domestic laws.⁷⁵² State practice in targeting individual national foreign fighters with lethal force — such as the killing of a British national in Syria in late 2015⁷⁵³ — also indicate that states justify the lethal use of force on an argument of the threat an individual poses. In light of such argumentation, the practice of treating mercenaries as individuals, and in particular the recent UN Security Council resolutions on foreign terrorist fighters, in which States are required to diligently prevent the movement and activities of *individuals* joining listed terrorist groups, the doctrine can be understood to have developed today towards greater duties on states to diligently prevent certain conduct of individuals with transnational effect, or at least certain defined categories of individual. The non-toleration rules can be interpreted as not, or at least no longer if they ever were, being strictly limited to the prevention of groups.

Even if that were not the case, conceptually, one must consider how a group is understood and differentiated from individuals travelling abroad to participate in conflict. Contemporary foreign fighting examples raise factual questions about the organised or individual nature of the activity. Take, for example, small groups of volunteer fighters which form in the parent state in order to travel together to Syria,⁷⁵⁴ or more formally, so-called combat charities or not-for-profit PMSCs. *Sons of Liberty International*, for example, is an American organisation run on a not-for-profit model which, through church and other private donations, has arranged for American veterans to train Assyrian Christian militias in Iraq.⁷⁵⁵ *Shadows of Hope* is another organisation, registered in the United States as a charity, which undertakes various activities internationally, most controversially including military training to non-state groups and ‘combat interventions and humanitarian defense’.⁷⁵⁶ A third and different

⁷⁵² See Chapter Four, section 4.1.2; Garcia-Mora, ‘Hostile Military Expeditions’ (n 131) 317, 326–8.

⁷⁵³ Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, UN Doc S/2015/688 (8 September 2015). See also United Kingdom *Parliamentary Debate*, House of Commons, 7 September 2015, vol 599, col 25–7; Christine Gray, ‘Targeted Killing Outside Armed Conflict: A New Departure for the UK?’ (2016) 3(2) *Journal on the Use of Force and International Law* 198.

⁷⁵⁴ Mariam Karouny, ‘Exclusive: Libyan Fighters Join Syrian Revolt’, *Reuters* (online, 14 August 2012) <<https://www.reuters.com/article/us-syria-crisis-rebels/exclusive-libyan-fighters-join-syrian-revolt-idUKBRE87D06G20120814>>; Lizzie Dearden, ‘A Group of Former British Army Soldiers Are Going to Fight Isis’, *Independent* (online, 16 March 2015) <<http://www.independent.co.uk/news/uk/home-news/former-british-army-soldiers-form-international-volunteer-force-to-fight-isis-in-syria-10111054.html>>.

⁷⁵⁵ *Sons of Liberty International* (Web Page) <<https://www.sonsoflibertyinternational.com/>>; Adam Linehan, ‘Exclusive Report: Meet the American Taking the Fight to ISIS’ *Maxim* (online, 9 June 2015, updated 21 December 2015) <<https://www.maxim.com/maxim-man/exclusive-report-meet-american-taking-fight-isis>>; Pavol Kosnác, ‘Combat Charities or When Humanitarians Go to War: Influence of Non-State Actors on Local Order of Partially Governed Spaces’ (Paper No 6, Brookings, April 2017) 42 <https://www.brookings.edu/wp-content/uploads/2017/04/fp_201704_combat_charities.pdf>; Grove (n 58) 7–9, also discussing historical precedents.

⁷⁵⁶ ‘What we do’, *Shadows of Hope* (Web Page) <<https://www.shadowsofhope.org/what-we-do-1>>. Another charity, Humanitarian Defense Abroad, which had been arranging for military specialists to support Kurdish

example is provided by the *Free Burma Rangers*, a network of local and some foreign volunteer ‘rangers’ providing medical care, *temoignage*, and military training and support to ethnic militias in Burma/Myanmar, and also having supported armed forces fighting the Islamic State group in Northern Iraq.⁷⁵⁷ The first two offer military support described as humanitarianism. It is unclear to what extent their deployed soldiers only advise and train or also directly participate in hostilities.⁷⁵⁸ The Free Burma Rangers offer both humanitarian assistance (medical and other) and the direct participation of some representatives has been documented.⁷⁵⁹ In all three cases, the level of territorial state and parent state consent for their activities remains unclear.⁷⁶⁰ Such ‘combat charities’ could be seen to have incorporated the previously informal networks for the recruitment and deployment of *other* foreign fighters wishing to fight with — or at least offer training and military support to — non-state militias combating the Islamic State group.

Those specific examples aside, even standard cases concerning attempted departures of individuals to join a foreign armed group raise the question of the level of organisation that is considered to already exist. Could, for example, an aspiring foreign fighter be considered to be using the parent state territory for ‘subversive or armed activities’ as per the non-toleration rules? How should an armed group’s involvement in the volunteer’s recruitment and movement be taken into account? Such dilemmas replicate debates surrounding the departure and enlistment of volunteers at the time of the 1907 Hague Peace Conference, discussed in Chapter Three — such as that volunteers may group immediately across the border.

Considering the articulations of the non-toleration of harm rule, further aspects requiring consideration include the nature and level of injury the territorial state suffers from the illegal entry and use of violence by foreign fighters, and the level of constructive knowledge of the risk of harm by the parent or transit state. In addition, one could reflect upon the level of ‘neighbourly toleration’ and prevention expected from the territorial state itself, including as part of its own duties to protect its population from violations committed by private actors, such as through its own border controls and criminal justice system.⁷⁶¹

forces, based on an argument that security is the greatest humanitarian need, merged with Shadows of Hope in 2018. See also Kosnác (n 139).

⁷⁵⁷ *Free Burma Rangers* (Web Page) <<https://www.freeburmarangers.org/>>.

⁷⁵⁸ Shadows of Hope, for example, claims that it ‘never deploys with the intent of combat, yet ‘combat interventions’ are also promoted as an activity: ‘How we do it’, *Shadows of Hope* (Web Page) <<https://www.shadowsofhope.org/why-we-do-it>>.

⁷⁵⁹ *Free Burma Rangers* (Deidox Films, 2020); Nash (n 49) 8–11.

⁷⁶⁰ See, eg, regarding Sons of Liberty International, Jenna McLaughlin, ‘This Guy from Baltimore Is Raising a Christian Army to Fight ISIS... What Could Go Wrong?’, *Mother Jones* (online, 28 May 2015) <<https://www.motherjones.com/politics/2015/05/matthew-vandyke-isis-assyrian-army/>>.

⁷⁶¹ *Velásquez Rodríguez v Honduras (Judgment)* (Inter-American Court of Human Rights, Series C No 4, 29 July 1988) [172]. See also Krähenmann, ‘Obligation’ (n 34) 229, 254–5; historically re: prevention of incursions by armed bands, CG Fenwick, *International Law* (Appleton-Century-Crofts, 3rd ed, 1948) 302.

Overall, one may instinctively feel that if an individual cannot join a militia or take up arms against terrorists at home, their parent state should not tolerate them doing so overseas. However, an approach assuming universal application of the non-toleration of harm rule, while possible in domestic law, in international law risks conflating the various categories of foreign fighting and would pay insufficient attention to the confronting questions and conceptual matters at the heart of wider legal debate and practice that arise with the private taking up of arms across borders. It may also feel unreasonable and undesirable to demand that states enlarge their control over their citizens. The imposition placed on states by the diligence standard, and human rights issues surrounding restrictions on movement, come into play.

As the Kurdish and Ukraine examples illustrate, each foreign fighting scenario involves unique elements on an international, regional, state, group and personal level. In consequence, the universalising or encapsulating power of this first possible argument requires nuancing. The answers to specific problems might need to be considered through a more contextual, local reading; prioritising human rights protections and global justice reasoning, in which foreign fighting could be perceived as raising different concerns in different settings. We want *just the right amount* of order and *just the right amount* of solidarity with foreign populations that are suffering. Perhaps a middle ground can be found — fighting with *this* group is acceptable but with *that* group is not? But on what basis should those decisions be determined? These arguments, too, appear in the legal debates responding to *other* foreign fighting.

4.2 Protection, Solidarity and Global Justice

This second possible approach looks beyond the state to consider specific local circumstances more subjectively. It presents legal issues within a more idealistic world, albeit a more political one, made up of humans, groups and problems. It recognises that the state itself can be problematic or become illegitimate through its conduct, and sees issues of concern caused by foreign fighters as demonstrably distinguishable in different times and spaces. There can be good and bad foreign fighters, and moral, political and legal judgments to make in different contexts. This raises the question of a possible right of armed resistance in international law and a foreign fighter's right to resort to violence in solidarity with it.

4.2.1 A Right of Resistance and Responsibility to Protect?

Chapter Four of this thesis discussed the orthodox position in international law that non-state armed actors have no right or privilege to take up arms against a government, and how national liberation struggles complicated this base-line rule. Given the limited application of national liberation situations today, and the contested meaning and consequences of enforcing a right to self-determination, a more relevant situation is now one in which a population is *merely* in need of protection from abuse, oppression or mass atrocity. The fact that, in the

particular circumstance of the wars in Syria and Iraq, the Islamic State group had been accused not only of war crimes and crimes against humanity, but also genocide,⁷⁶² raises the question of the (local) right of self-defence and (international) responsibility to protect (R2P). Amongst mixed push, pull and personal motivations,⁷⁶³ today's foreign fighters have at times described their ambition to help a cause of self-determination or protect human rights, through their participation in armed violence.⁷⁶⁴ For those volunteering in Syria or Iraq, the 2014 attacks by the Islamic State group on Yazidi communities in Sinjar, Northern Iraq, and/or the battle for Kobani, appear as common flash points for several prospective volunteers who then determined that they wanted to join the fight. This was combined with a feeling that states were not doing enough to help, a specific motivation of wishing to protect women and girls from sexual violence, and for several joining the Christian Assyrian militias, wishing to help co-religionists.⁷⁶⁵

While the application of the right of self-determination remains contested, the question of foreign fighting in solidarity with force used in resistance or to protect a population from atrocity crimes is even more unsettled. The R2P doctrine has been acknowledged by the UN as an exception to the principle of non-intervention, allowing the Security Council to authorise intervention in the limited situations of genocide, war crimes, ethnic cleansing and other crimes against humanity.⁷⁶⁶ Debates on R2P and arguments regarding humanitarian intervention have in the twenty-first century re-exposed the much-analysed tensions of the UN Charter's dual commitments of upholding sovereignty and non-intervention on the one hand, and ensuring humanitarian protection on the other. As Anne Orford has demonstrated, 'judgments about the form and ends of lawful authority are not technical or universally agreed upon, but contested'.⁷⁶⁷ Moreover, the description of the R2P principle, at least in the 2005 World Summit Outcome document adopted by the General Assembly, does not oblige

⁷⁶² Independent International Commission of Inquiry on the Syrian Arab Republic, "'They came to destroy'": ISIS Crimes Against the Yazidis', UN Doc A/HRC/32/CRP.2 (15 June 2016); Council of Europe, Parliamentary Assembly, *Foreign Fighters in Syria and Iraq*, Resolution 2091, 6th Sitting, 27 January 2016, para 2.

⁷⁶³ Patin (n 51) 19ff; Malet (n 3); Orton, 'Secular' (n 53) 162–4.

⁷⁶⁴ Dara Conduit and Ben Rich, 'Foreign Fighters, Human Rights and Self-Determination in Syria and Iraq: Decoding the Humanitarian Impact of Foreign Fighters in Practice' (2016) 18 *International Community Law Review* 431, 431.

⁷⁶⁵ See, eg, Palani (n 49) 152–3, 155–6; Locks (n 49) 12–13; Matthews (n 49) 2–6; Peshmerganor (n 49) 15–16; Patin (n 51) 23–5.

⁷⁶⁶ 2005 *World Summit Outcome*, GA Res 60/1, UN Doc A/RES/60/1 (24 October 2005, adopted 16 September 2005) [138]–[139]. See also regarding Libya, SC Res 1973, UN Doc S/RES/1973 (17 March 2011) ('Resolution 1973').

⁷⁶⁷ Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011) 212 ('*International Authority*').

states to take any specific action. Rather, it acknowledges that each context must be considered on its facts.⁷⁶⁸

Regardless of where the limits to such humanitarian interventions are set, two key questions arise regarding foreign fighting. The first — inherent within the R2P debate but often receiving less attention — is how such interventions interplay with the population's own right or abilities of self-defence or resistance. That is, more broadly, considering the possible existence and scope of a right to resistance by oppressed populations, in relation to which organised force could be used for its realisation.⁷⁶⁹ While resistance can take many forms, here I mean organised armed opposition. Anne Orford and Frédéric Mégret have both pointed out that debates and operationalisation of R2P and humanitarian intervention have strongly focused on sovereign duties and the international community, recognising local actors only for a certain more civil role, such as seeking intervention, 'rather than a more pugnacious one involved in defiance, resistance, civil disobedience or struggles against oppression'.⁷⁷⁰ Being based upon the notion of responsible *sovereignty*, and given the 'deep-seated reluctance to allow for the very possibility of legitimate use of non-state violence',⁷⁷¹ the premise of R2P is that *states* would intervene, via the Security Council (or through regional delegation), to help protect a population from mass atrocities. 'There is no mention, for example, of civil society acting in ways that could be conceived as unlawful or clandestine.'⁷⁷² Nevertheless, scholarship has raised the possible legitimacy of the resort to violence by the affected population itself, including as a form of group self-defence or defence of others.⁷⁷³

If there were such a right and the conditions for it to come into being could be agreed, these questions would, secondly, need to be transposed to an external actor, asking whether the

⁷⁶⁸ 2005 *World Summit Outcome* (n 150) [139].

⁷⁶⁹ Frédéric Mégret, 'Causes Worth Fighting For: Is There A Non-State Jus Ad Bellum?' in Aristotle Constantinides and Nikos Zaikos (eds), *The Diversity of International Law* (Brill Nijhoff, 2010) 171 ('Causes'); Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart, 2010) ch 3; Shannonbrooke Murphy, 'The Right to Resist Reconsidered' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar, 2012) 91; Aleksandar Marsavelski, 'The Crime of Terrorism and the Right of Revolution in International Law' (2012) 28(2) *Connecticut Journal of International Law* 243, 276–9; Wrangle (n 94) 196; Hessbruegge (n 92) ch 7; Chiara Redaelli, 'The Right to Rebel against Violations of Human Rights: A New Role for the Responsibility to Protect?' (2016) 19(1) *Palestine Yearbook of International Law* 8.

⁷⁷⁰ Frédéric Mégret, 'Beyond the "Salvation" Paradigm: Responsibility to Protect (Others) vs the Power of Protecting Oneself' (2009) 40(6) *Security Dialogue* 575, 580 ('Salvation'). See also Anne Orford, 'Moral Internationalism and the Responsibility to Protect' (2013) 24(1) *European Journal of International Law* 83, 695 ('Moral'); Orford, *International Authority* (n 151) 209; Redaelli (n 153) 27ff.

⁷⁷¹ Frédéric Mégret, 'Causes' (n 153) 171, 173. See also Redaelli (n 153) 15 citing Grotius: 'it would be fraught with the greatest dangers if subjects were allowed to redress grievances by force of arms'.

⁷⁷² Mégret, 'Salvation' (n 154) 580.

⁷⁷³ Hessbruegge (n 92) ch 7; Redaelli (n 153); Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) 107–8; Murphy (n 153); Wrangle (n 94).

resort to force could be extended to private foreign actors (foreign fighters) acting in solidarity with the affected population's cause. This, by analogy of a kind with foreigners joining national liberation movements. If so, foreign fighting with such a group or movement in these very exceptional circumstances might become generally unproblematic and there might be no diligence duty on states to prevent it. If not, unless the foreign fighters were already present and part of the community, they would not hold such a right based on self-defence because they would not have been directly suffering the oppression or atrocities.⁷⁷⁴

This line of enquiry relies on R2P authorising help from *all* actors, including foreign individuals, given the severity of the situation, rather than it being restricted only to states as is usually described, or only to the local population who hold a right of personal self-defence. Is there otherwise any space in international law for transnational collective self-defence by individuals? For jurists supporting a right of revolution in international law, transnational support for revolutionaries became something to be protected.⁷⁷⁵ Yet, in its *Nicaragua* decision, the International Court of Justice did not find a development of non-intervention in customary international law which would enable even *states* to intervene in support of insurgent forces whose cause they found ideologically just, despite the 'number of instances of foreign intervention for the benefit of forces opposed to the government of another State' in recent years.⁷⁷⁶ The Security Council's decisions regarding Libya in 2011, which authorised the use of force to support the opposition in order to protect the civilian population and called on states to prevent their nationals joining the Libyan state armed forces,⁷⁷⁷ led to questions in scholarship as to whether, in contrast, foreign fighting on the side of the Libyan opposition would therefore not need to be prevented by parent or transit states.⁷⁷⁸ Similarly, certain legal commentary on the domestic level has argued that prohibition should be limited to those active with armed groups designated as human rights abusers or terrorist groups and not 'for [those who] join rebel, revolutionary or insurgent movements in countries in which such groups are opposing authoritarian or rights-abusing governments'.⁷⁷⁹ Violations of orthodox rules on non-intervention, such as military support provided by states to non-state actors likewise indicate the persistence of an idea of legitimate resistance.

⁷⁷⁴ See similarly Marsavelski (n 153) 279–80.

⁷⁷⁵ At least non-armed support such as financial assistance: Quincy Wright, 'Subversive Intervention' (1960) 54(3) *American Journal of International Law* 521, 530.

⁷⁷⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14 [206], [257]–[268].

⁷⁷⁷ Resolution 1970 (n 27); Resolution 1973 (n 150).

⁷⁷⁸ Murphy (n 153) 107.

⁷⁷⁹ Letter from Ben Saul to Anthony Whealey, 4 December 2012, submitted to the COAG 2012 Review of Counterterrorism Legislation in Australia <www.ag.gov.au> 10.

Certainly, private external support adds a layer of complexity, since the foreign fighter's actions also risk friction in the parent state's foreign relations, and, as discussed above, challenge the state's own monopoly on the use of legitimate force from the start. The significant point is that a pervasive line of argument or moral reckoning about foreign fighters, based on cause and solidarity with humanitarian motivations, persists; a regeneration of the moral, legal and definitional differences made between mercenaries and freedom fighters with national liberation movements in the 1960s–1980s. This thinking suggests that traces of a right to resistance persist in international law and it cannot be entirely ruled out that in some circumstances other actors may have some level of legitimate authority to use force. At least, we might be 'quite far from the neat picture of classical international law in which states and only states have the authority to resort to force'.⁷⁸⁰

4.2.2 *Persisting Tensions in Domestic Implementation of International Law*

These lines of argument on the international level showing persisting ideas of self-defence, resistance and just cause, combined with arguments surrounding human rights issues and reasonable limits to diligence duties, are reflected within domestic debates and practice surrounding how states interpret their duties pursuant to the non-toleration of harm norm. Certain domestic legislation opts not to criminalise in a general way travelling abroad to fight with a non-state armed group, but only in specific cases such as when that fighting is related to terrorism and sometimes mercenarism, or involves the taking up of arms against the parent state or sometimes an ally. The law may otherwise be silent regarding foreign fighting as a general offence, whether by design or through lack of modernisation to take into account volunteering with non-state armed groups, i.e. covering only foreign enlistment.⁷⁸¹ New Zealand parliamentary debate, for example, indicated a clear desire to ensure that legislative amendments in response to Resolution 2178 would only cover terrorism-related activity, and not prevent those with national or ethnic ties to an area of conflict, such as those of Kurdish descent, to return 'to defend his or her home'.⁷⁸² For states with anti-mercenarism provisions such as New Zealand, such a position creates a binary for prevention — terrorism and mercenarism — reflecting the only two legal categorisations of

⁷⁸⁰ Wrange (n 94) 208.

⁷⁸¹ See, eg, regarding Sweden, *Statens Offentliga Utredningar* (n 104). I am grateful for discussion with Pål Wrange (Stockholm University) on this point. Regarding France and Germany, Paulussen and Entenmann (n 89) 102, 105. Regarding Czech Republic, Mareš, 'Czech' (n 74) 79; Peter Kozák, 'Nové Možnosti Trestného Postihu Cudzích Bojovníkov? Niekoľko Poznámok k Právnej Úprave § 419a Trestného Zákona (New Ways to Prosecute Foreign Fighters? Some Notes on the Regulation of Section 419a of the Criminal Code)' (2016) 155(9) *Pravnik* 754. I am grateful for discussion with Miroslav Mareš (Masaryk University, Brno) updating me on Czech amendments (as at 28 December 2017).

⁷⁸² New Zealand *Parliamentary Debates*, 9 December 2014, 702 NZPD 1208 (Christopher Finlayson).

fighters under international law. The broader concept of ‘foreign fighting’ as a category is left ‘unpacked’.⁷⁸³

Rather than remaining silent, some regional laws are explicit in recognising certain fundamental values that may require protection. When the EU’s Framework Decision on Combating Terrorism was adopted in 2001, a separate statement was issued by the Council explaining that the purpose of the Framework:

cannot be construed so as to argue that the conduct of those who have acted in the interest of preserving or restoring ... democratic values, as was notably the case in some Member States during the Second World War, could now be considered as ‘terrorist acts’.⁷⁸⁴

Although focused on the definition of terrorism, such provisions have the effect of leaving some space for sympathy for, and perhaps even acknowledgement of the lawfulness of, the violent actions of groups organising themselves to counter abusive states in very specific circumstances. Such laws also suggest the impact and availability of human rights arguments surrounding more objective restraints on foreign fighting, as well as on related views of the reasonable parameters of diligent prevention of transnational harm.

4.2.3 The ‘Common Good’ Standing for Something

Overall, this second approach analyses security threats and other interests primarily based on the context — the *cause* one is fighting for, who one is associated with, which side of (present) history and politics one aligns oneself with, and the security risks presented, rather than the mere fact of fighting in a foreign country, or the interests and rights of other states. The foreign fighting might be considered not to pose unlawful harm to the territorial state, or if it does, it is a temporary harm worth accepting for the greater common good. This approach stands up for what it believes in; choosing sides and favouring solidarity over abstention. At certain times and places in history, or in collective memories, this second contending approach has fitted well with the perceived importance of the battle and values at stake — against fascism, against colonialism, in support of self-determination, against terrorism.

The problem is that although one might try to discuss the delimitation of protection needs and authority to intervene in objective ways, based on strictly humanitarian and value-based considerations, its operationalisation, or the toleration of its operationalisation, requires political will. Certain countries may be able to more successfully manage possible domestic

⁷⁸³ Linda Darkwa, ‘The African Union and the Phenomenon of Foreign Fighters in Africa’ in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 373, 375.

⁷⁸⁴ European Union, Council, Outcome of Proceedings of 6 December 2001 (14845/1/01 REV 1, 7 December 2001) 15. The statement is not binding but persuasive: EJ Husabø and I Bruce, *Fighting Terrorism through Multilevel Criminal Legislation* (Brill, 2009) 369–70 391–2. See also Georg Gesk, ‘Right to Resistance and Terrorism: the Example of Germany’ (2012) 13(9) *German Law Journal* 1075, 1086–8, discussing German Criminal Code §129b.

threats posed by (returning) foreign fighters and therefore be less vulnerable to the phenomenon, resulting in a higher tolerance threshold or a stronger articulation of individual rights. This also means that certain conflicts and causes are given priority and attention based on levels of exposure, alignment and social linkages. Relying on Security Council determinations regarding situations of violence and the actors involved in them likewise involves the politics of the veto right of the five permanent member states. As the selected moments for study in this thesis demonstrate, responses to foreign fighter mobilisations have been different in different moments rather than being universal. This has included states adopting, renewing, withdrawing or enforcing with new vigour (or not) domestic legislation regarding foreign enlistment and incursion as specific political situations and conflicts arose.⁷⁸⁵ Limitations on human rights, such as the rights to leave or return to a country, or of expression or association, might be considered by a state more or less reasonable, necessary and proportionate depending on the circumstances. Both historically and today, favoured in-groups and troublesome out-groups change, or may not be clear in the first place. Non-state actors are perceived as ‘illegitimate combatants’ or ‘useful auxiliaries’ depending on the scenario, the state’s strategic interests and, of course, the framing of policy concerns.⁷⁸⁶ Foreign fighters, as a particular sub-set of the irregular fighter, are no different.

Perceptions of earlier foreign fighting phenomena have also shifted over time and setting. Volunteers with the International Brigades during the Spanish Civil War are remembered fondly and commemorated in Western countries. However, at the time of their return home from Spain, some faced citizenship revocations like persons involved in international terrorism today, blocks to employment with state armed forces or other agencies, or jail time.⁷⁸⁷ As mentioned above, the support of the Afghan mujahidin by foreign fighters in the 1980s did not initially receive international criticism as posing a future threat. Similarly, in the early stages of the Syrian conflict from around 2012, recognition and support provided to the Syrian opposition, including in the form of foreigners volunteering as fighters, received some international acceptance. Opinions shifted with the rise of groups proscribed as terrorist, especially the Islamic State group.⁷⁸⁸

It can be recognised, then, that this second approach is not necessarily impartial or innocent in its solidarity; that values are fluid, not necessarily held in common, and can change with

⁷⁸⁵ See Chapter Three, section 3.2.2.

⁷⁸⁶ Sibylle Scheipers, *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford University Press, 2015) 232.

⁷⁸⁷ See Chapter Three, section 6.

⁷⁸⁸ Steven Erlanger and Rick Gladstone, ‘France Grants Its Recognition to Syria Rebels’, *New York Times* (online, 13 November 2012) <<https://www.nytimes.com/2012/11/14/world/middleeast/syria-war-developments.html>>; Scheipers (n 170) 190–1, 217–21 discussing ‘rebel’ auxiliaries in Afghanistan, Libya and Syria; at 191: ‘Only in the context of the civil war in Syria did the West begin to debate the question of whether the anti-government “rebels” are really “good” irregulars: are they worthy of Western support, or are they in fact “unlawful combatants” in disguise.’

hindsight; that there have been certain ‘lopsided global arrangements in which some forms of suffering are recognized while a great many more are not’.⁷⁸⁹ Thus, global justice and claims to be acting in the interests of humanity or a common good are used under a particular understanding, and with particular authorities being able to make determinations. Such a determination ‘strengthens the authority of new actors and justifies their resort to force’.⁷⁹⁰ The claim of authority to respond ‘will necessarily stand for something’.⁷⁹¹

5. Impact of the Counterterrorism Framing on Legal Argumentation

Amidst these tensions in legal argument, the counterterrorism framing of the foreign fighter issue interplays with more general arguments in two main ways: directly and indirectly.

5.1 Foreign Fighters as Terrorist Fighters

Directly, it could be argued that the foreign fighters fall *within* the counterterrorism framing’s category of primary concern. Ukraine refers to the separatists of the Donetsk and Luhansk People’s Republics as terrorists, and their operations against them as counterterrorism.⁷⁹² The relationship between Syria and the PYD and its armed wing, the YPG/YPJ, is more complex, involving certain aspects of agreed non-aggression and local power-sharing during the conflict.⁷⁹³ However, the YPG/YPJ is proscribed as a terrorist organisation by Turkey because of alleged links with the PKK, which is similarly listed in Turkey, the European Union and elsewhere.⁷⁹⁴ For Ukraine and Turkey at least, the respective foreign volunteer fighters with whom they are concerned are ‘foreign terrorist fighters’. Foreign fighters with the YPG/YPJ, for example, describe the risk of arrest by Turkey on their return home if flights transit via Istanbul.⁷⁹⁵

While automatically including broader foreign fighting in antiterrorism provisions would be over-inclusive, national decisions to treat a case of foreign fighting as a terrorism offence might be more or less appropriate in any particular case, and always political. Dupuy and Hoss describe the ‘absence of any universally accepted definition of terrorism and the absence of any possibility of defining it without making political judgments on the moral

⁷⁸⁹ Darryl Li, “‘Afghan Arabs,’ Real and Imagined’ [2011] (260) *Middle East Report* 2, 7.

⁷⁹⁰ Orford, ‘Moral’ (n 154) 104.

⁷⁹¹ Orford, *International Authority* (n 151) 193.

⁷⁹² *Mission to Ukraine* (n 36) [56], [66].

⁷⁹³ See nn 115–116 above.

⁷⁹⁴ See, eg, Council Decision (CFSP) 2019/1341 of 8 August 2019 *Updating the List of Persons, Groups and Entities Subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism, and Repealing Decision (CFSP) 2019/25* [2019] OJ L 209/15, Annex II(13).

⁷⁹⁵ Peshmerganor (n 49) 46; Damien Gayle, ‘British Ex-Soldier Jailed in Turkey for Fighting Alongside Banned Kurdish Militia’, *Guardian* (online, 16 September 2018) <<https://www.theguardian.com/uknews/2018/sep/15/british-ex-soldier-jailed-in-turkey-for-fighting-alongside-banned-kurdish-militia>>.

validity of armed activities'.⁷⁹⁶ In the majority of countries, neither the YPG nor the separatists in Eastern Ukraine are listed, although alleged links between the YPG and the PKK feature in policy papers and legal argumentation, and the perception was strong enough for the United States to reportedly demand a 'branding' change before going ahead with its military partnering with the newly-minted Syrian Democratic Forces, a coalition of groups largely made up of the YPG/YPJ.⁷⁹⁷

Regardless, there have been attempts to rely on national antiterrorism legislation considered broad enough to potentially encompass training or volunteering with the YPG or other opposition groups. As the Syrian war progressed, and possibly in deference to Turkish interests,⁷⁹⁸ YPG volunteer fighters were increasingly investigated in Germany, and faced prosecutions in the United Kingdom, pursuant to national antiterrorism laws.⁷⁹⁹ Yet, such initiatives have often been dropped through prosecutorial discretion, have otherwise proved unsuccessful, or have demanded and/or secured only mild punishments.⁸⁰⁰ In the UK, for

⁷⁹⁶ Pierre-Marie Dupuy and Cristina Hoss, 'Trail Smelter and Terrorism: International Mechanisms to Combat Transboundary Harm' in Rebecca M Bratspies and Russell A Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press, 2006) 225, 231.

⁷⁹⁷ 'Flight of Icarus?' (n 115) 4, 5, 16–17; Orton, 'Forgotten' (n 118); Orton, 'Secular' (n 53); Abdullah Keşvelioğlu et al, 'Legitimising Terror: The PYD/YPG, Syrian Kurds and the Myth of Representation' (Policy Outlook, TRT World Research Centre, January 2019) <<https://researchcentre.trtworld.com/publications/policy-outlook/legitimising-terror-the-pyd-ypg-syrian-kurds-and-the-myth-of-representation>>; Williams (n 86); Palani (n 49) 336–7 explaining that she understood the issue in the charges against her was the link between the YPG with whom she had fought and the PKK; 'U.S. General Told Syria's YPG: "You Have Got to Change Your Brand"', *Reuters* (online, 21 July 2017) <<https://www.reuters.com/article/us-mideast-crisis-usa-ypg-idUSKBN1A62SS>>.

⁷⁹⁸ Orton, 'Secular' (n 53) 171; Matt Blake, 'British Man Who Fought Isis in Syria Charged with Terror Offences', *Guardian* (online, 17 February 2018) <<https://www.theguardian.com/uk-news/2018/feb/16/british-man-aidan-james-fought-isis-syria-charged-terror-offences>>; Matthews (n 49) xi–xii.

⁷⁹⁹ Esther Felden and Matthias von Hein, 'YPG Returnees: Counterterrorist Fighters under Suspicion', *Deutsche Welle* (online, 5 January 2020) <<https://www.dw.com/en/ypg-returnees-counterterrorist-fighters-under-suspicion/a-51884403>>; Lizzie Dearden, 'James Matthews: Former British Army Soldier who Fought Against Isis in Syria Faces Terror Charge', *Independent* (online, 7 February 2017) <<http://www.independent.co.uk/news/uk/crime/isis-fighters-anti-british-uk-ypg-charged-terror-offence-james-jim-matthews-kurds-training-camp-a8199796.html>>. In the UK, prosecutions of YPG volunteers were initially unlikely but this changed from around 2017: Tuck, Silverman and Smalley (n 50) 44–5; Orton, 'Secular' (n 53) 171; Blake (n 182): 'significant shift'.

⁸⁰⁰ Michael Safi, 'Foreign Fighter Case Dropped against Man Accused of Trying to Fight with Kurdish Rebels', *Guardian* (online, 9 February 2016) <<https://www.theguardian.com/australia-news/2016/feb/09/foreign-fighter-case-dropped-against-man-accused-of-trying-to-fight-with-kurdish-rebels>>; 'Terror Charges Dropped against Ex-Soldier', *BBC* (online, 31 July 2018) <<https://www.bbc.com/news/uk-45017016>>; Lizzie Dearden, 'Former British Soldier Who Fought against Isis Attacks "Incoherent" Terror Charge', *Independent* (online, 11 February 2019) <<https://www.independent.co.uk/news/uk/home-news/james-matthews-isis-british-soldier-terror-charge-syria-army-uk-a8770781.html>>; Australian Associated Press, 'Ashley Dyball, Australian Who Fought against Isis in Syria, Released after Return', *Guardian* (online, 7 December 2015) <<https://www.theguardian.com/australia-news/2015/dec/07/ashley-dyball-australian-fought-against-isis-syria-released-after-return>>; Orton, 'Forgotten' (n 118) 75–79; Felden and von Hein (n 183); Martin (n 13); Pippa Woodrow and Jessie Smith, 'It is Unjust to Brand the Kurds as Terrorists', *Telegraph* (online, 8 July 2020) <<https://www.telegraph.co.uk/news/2020/07/08/unjust-brand-kurds-terrorists/>>. Certain attempted prosecutions of foreign fighters with separatist groups in Eastern Ukraine have also faltered: Vuk Velebit, 'Serb Fighters in Ukraine Continue to Worry the

example, one YPG volunteer was convicted of terrorism offences but due only to attending a training camp where PKK fighters were present, rather than his fighting with the YPG, which the judge determined was ‘not terrorism at all’.⁸⁰¹

A specific variant of the definitional problem surrounding terrorism has arisen regarding foreign fighting in Ukraine. Warnings have been issued by think tanks and in other scholarship about transnational far right extremist networks supporting recruitment of fighters for the conflict in Ukraine, of the risks of such extremist violence in parent states, and the role in particular of foreign fighting in Ukraine as a training ground for future armed violence. Foreign fighters represent a visible, material link between the international and the local; between such groups with far-right views and growing concern about transnational networks supporting far right extremism. Over time and following far right-inspired mass shootings such as in Christchurch, New Zealand in March 2019, parent states of volunteers with such battalions started to pay greater attention to the possibility that nationals with far-right views could be radicalised through their experiences and networks gained in Ukraine. Commentary queried whether far right extremist organisations could/should be listed as prohibited terrorist organisations, such that existing domestic anti-terrorism laws could be applied to certain foreign fighters in Ukraine, and how the UN’s Office of Counter-Terrorism and CTED could become more involved in the issue.⁸⁰²

The new attention being directed to a present phenomenon within foreign fighting can make this feel like a new issue, but links between far right and anti-communist organisations and foreign fighting has a lineage, especially throughout the 1980s, such as the ‘plausible deniability’ of the involvement of Americans in their private capacity through white supremacist and anti-communist organisations with the Contras in Nicaragua.⁸⁰³

Although Resolution 2178 was predominantly concerned by foreign fighting with Islamic extremist groups, the definition of ‘foreign terrorist fighter’ is broad enough to encompass terrorist activity in support of any cause. In 2020, the UN CTED acknowledged the need to turn its gaze to right-wing terrorism.⁸⁰⁴

West’, *European Western Balkans* (online, 29 December 2017) <<https://europeanwesternbalkans.com/2017/12/29/serb-fighters-ukraine-continue-worry-west/>>.

⁸⁰¹ *R v James* (n 114) 2.

⁸⁰² See, eg, ‘White Supremacy Extremism’ (n 62). See also Jeff Seldin, ‘White Supremacists Lead New Wave of Foreign Fighters’, *Voice of America* (online, 29 September 2019) <<https://www.voanews.com/usa/white-supremacists-lead-new-wave-foreign-fighters>>; Tim Hume, ‘Far-Right Extremists Have Been Using Ukraine’s War as a Training Ground. They’re Returning Home’, *VICE* (online, 1 August 2019) <https://www.vice.com/en_us/article/vb95ma/far-right-extremists-have-been-using-ukraines-civil-war-as-a-training-ground-theyre-returning-home>.

⁸⁰³ Belew (n 7) ch 4; Voß (n 7).

⁸⁰⁴ Counter-Terrorism Committee Executive Directorate, ‘Member States Concerned by the Growing and Increasingly Transnational Threat of Extreme Right-Wing Terrorism’ (Trends Alert, April 2020) <https://www.un.org/sc/ctc/wp-content/uploads/2020/04/CTED_Trends_Alert_Extreme_Right-Wing_Terrorism.pdf>.

5.2 Foreign Fighters as Counterterrorist Fighters

I argued above and in Chapter Two that the counterterrorism framing, and especially the definition of the foreign terrorist fighter, obscures other forms and persuasions of foreign fighting. While a particular manifestation of foreign fighting can be argued to fall within the definition of foreign terrorist fighter as we saw above, situations in which individuals are volunteering to support a cause of self-determination, or to fight against a regime perceived as illegitimate, against another armed group or in support of a government, do not in and of themselves fall obviously within anti-terrorism preventive duties. Contemporary examples of *other* foreign fighting have been largely ignored on the international level, at least in terms of international law, which has since 2001 been near-exclusively concerned with foreign fighting with Islamic fundamentalist groups.

Here, I want to add to that argument. Even if they fall outside of the counterterrorism framing in terms of legal definition of the foreign terrorist fighter, certain foreign fighters are nevertheless given space and identity precisely through that same framing. Foreigners with the YPG/YPJ in particular are regularly given the badge of being counterterrorist fighters in legal and political debates. The use of the terms ‘anti-ISIS fighter’, even ‘*other* foreign fighter’ to some extent, and retrieval of the terms ‘freedom fighter’ and ‘volunteer’ to describe the foreigners fighting with the Kurds, relies on the provenance of earlier manifestations of foreign volunteer fighting, such as with national liberation movements in the decolonisation period, as well as volunteers/auxiliary forces with state armed forces.⁸⁰⁵ At a time in which members of the Islamic State group were provoking outrage by filming brutal murders — often featuring foreign fighters — fighting *against* the Islamic State group, which the United States-led Global Coalition against Da’esh was also doing, meant that, for many, these *other* foreign fighters came across as ‘shooting in the right direction’.⁸⁰⁶ It presented a strong image of action, admittedly through individual prerogative and through violence, being taken in line with the universal fight against terrorism, and the fighters’ parent states’ national policy and values, as well as being in direct solidarity with the protection needs of a local community.

In several of the instances occurring today, this can equate to a narrative to be understood *within* the counterterrorism framing, and of the universal fight against terror. Several of the fighters may see themselves as acting independently; rebelliously. In this reading, though,

⁸⁰⁵ See, eg, Palani (n 49); Tuck, Silverman and Smalley (n 50); Jason Fritz and Joseph K Young, ‘Transnational Volunteers: American Foreign Fighters Combating the Islamic State’ (2020) 32(3) *Terrorism and Political Violence* 449. The terms ‘mercenary’ and ‘vigilante’ have also been rarely used: Jennifer Percy, ‘Meet the American Vigilantes who are Fighting ISIS’, *New York Times Magazine* (online, 30 September 2015) <<https://www.nytimes.com/2015/10/04/magazine/meet-the-american-vigilantes-who-are-fighting-isis.html>>; Mark Townsend, ‘Revealed: UK “Mercenaries” Fighting Islamic State Terrorist Forces in Syria’, *Guardian* (online, 23 November 2014) <<https://www.theguardian.com/world/2014/nov/22/uk-mercenaries-fighting-islamic-state-terrorist-syria>>.

⁸⁰⁶ Tuck, Silverman and Smalley (n 50).

they follow, whether consciously or not, state politics to some extent and become cogs of a sort in that machinery; in that powerful counterterrorism framing. The counterterrorism framing helps to legitimise their decisions.⁸⁰⁷ As Philip Allott notes more generally, an individual's values may reflect 'a core of shared ideas designed by and for the holders of public power'.⁸⁰⁸ Some foreign fighters report having alerted parent state authorities of their plans, or being interviewed by police or intelligence, before departure and not being stopped.⁸⁰⁹ As mentioned, some collaborated with coalition forces and intelligence in theatre. We 'carried out counterterrorism in Germany's interest' argued one German YPG volunteer who came under Federal investigation.⁸¹⁰ One Danish defendant explains in her memoir that she 'had fought on the frontline with people from the international coalition to defeat *Daesh*, so there was no way any court could find that [she] wasn't a part of this sanctioned coalition'.⁸¹¹

And that framing calls for violence in order to protect. 'Part of the reason why I came here was to try and find and kill any Australian Da'esh that I could', said one Australian foreign fighter.⁸¹² Regarding Ukraine, it has been said: 'As long as this conflict lasts, it will be a factory producing various radicals, fascinated by the military, steeped in brutality.'⁸¹³

Fighters involved in proscribed terrorist organisations also rely on humanitarian narratives, for example, defending populations suffering invasion or airstrikes from foreign powers, fighting against an occupying force or a regime otherwise perceived to be discriminatory, as well as spreading the Islamic faith or fulfilling a religious duty to live in an Islamic state.⁸¹⁴

⁸⁰⁷ Similarly discussing alignment between the global counterterrorism rhetoric and claims of extreme right groups: Benjamin Lee, 'Why We Fight: Understanding the Counter-Jihad Movement' (2016) 10(10) *Religion Compass* 257, 262.

⁸⁰⁸ Philip Allott, *Eutopia: New Philosophy and New Law for a Troubled World* (Edward Elgar, 2016) 83 [5.16].

⁸⁰⁹ See, eg, Robert Young Pelton, 'The All-American Life and Death of Eric Harroun', *VICE* (online, 12 April 2014) <https://www.vice.com/en_us/article/7xj7eq/the-all-american-life-and-death-of-eric-harroun>; Ian Cobain and Randeep Ramesh, 'Moazzam Begg was in Contact with MI5 about his Syria Visits, Papers Show', *Guardian* (online, 3 October 2014) <<https://www.theguardian.com/world/2014/oct/02/moazzam-begg-contact-mi5-agents-papers>>; Locks (n 49) 184–5; Peshmerganor (n 49) 75.

⁸¹⁰ Quoted in Felden and von Hein (n 183).

⁸¹¹ Palani (n 49) 336. See similarly Matthews (n 49) x. See also on veterans wishing to 'finish the job' that Western states had started: Tanya Silverman, 'Why are There So Many Veterans Fighting Against ISIS?', *Institute for Security Dialogue* (Blog Post, 2020) <<https://www.isdglobal.org/why-are-there-so-many-veterans-fighting-against-isis/>>.

⁸¹² Quoted in Matt Brown, 'Australian Foreign Fighter Jamie Williams Describes "Block by Block" Battle against Islamic State in Raqqa', *ABC* (online, 25 July 2018) <<https://www.abc.net.au/news/2018-02-19/australian-reveals-he-fought-is-in-syria/9456102>>. See also Palani (n 49) 333: '[Being on the frontline] intoxicates me like nothing else in the world'.

⁸¹³ Legieć (n 60) 22–3.

⁸¹⁴ Byman (n 18) 9, 171–2, 257; David Malet, 'Foreign Fighters in the Syrian Civil War' in David Malet and Miriam J Anderson (eds), *Transnational Actors in War and Peace: Militants, Activists, and Corporations in World Politics* (Georgetown University Press, 2017) 124, 136; Beatrice de Graaf, 'De Vlam van Het Verzet. Nederlandse Strijders in Het Buitenland, Vroeger En Nu' [The Flame of Resistance. Dutch Warriors Abroad, Past And Present] *Anton de Kom Lecture* (2014) 10 <http://www.verzetmuseum.org/uploads/media_items/de-

However, such narratives fail to hold within a counterterrorism framing in which terror is the enemy. If, as Robert Fisk has written, a ‘warrior’ is ‘someone whose business and profession and vocation and mere existence is to destroy our enemies’, and since we now live in the ‘age of terror’ meaning our enemies are the ‘terrorists’ — ‘above all else, use the word “terrorist”’. Terror, terror, terror, terror, terror, terror, terror’⁸¹⁵ — then, thinking about these issues surrounding foreign fighting can help reflect upon a question posed by Anne Orford: ‘Who decides what protection will mean in a particular time and place, how it can be realized, and which claimant to authority is able to provide it?’⁸¹⁶

6. Conclusion: A Meaning for the Future?

The Security Council approach towards foreign terrorist fighters provides another example of an international legal response to a particular, transformed phenomenon of foreign fighting, rather than relying on existing international legal obligations on states and individuals. Like the definition of the mercenary, the attention centred on this instance of foreign fighting feels tied to a specific setting and understanding of the problem. It represents an attempt to grasp a reliable definition of the category and conduct of priority policy concern. The dominant framings in which such definitions are adopted, though, describe the world in a particular, not a neutral, way.

In the same way that the need for a definition of mercenary was questioned, if pre-existing diligence duties surrounding terrorism and unlawful transnational harm cover the conduct of concern, the need for a definition of foreign terrorist fighter is also questionable.⁸¹⁷ Indeed, while many states rushed to enact new legislation, it does not appear that the definition of foreign terrorist fighter has been enacted verbatim given pre-existing anti-terrorism or foreign incursion legislation. New Zealand, for example, considered that it did not require any amendments to criminal offences to comply with Resolution 2178.⁸¹⁸ The United States has also continued to make use of its existing offence of providing material support to terrorism.⁸¹⁹ Security Council Resolution 2396 (2017) referred at times to state duties/cooperation regarding ‘terrorists’ or ‘terrorists including suspected foreign terrorist fighters’, reflecting the broader nature of the state duties of prevention and prosecution, and

vlam-van-het-verzet-nederlandse-strijders-in-het-buitenland-vroeger-en-nu.original.docx>. Dutch FARC volunteer Tanja Nijmeijer, wanted on terrorism charges in the US, said: ‘I am showing my solidarity with people who have been very very maltreated by the Colombian government’: Rainsford (n 36).

⁸¹⁵ Robert Fisk, *The Age of the Warrior* (Harper 2008), xv.

⁸¹⁶ Orford, ‘Moral’ (n 154) 105.

⁸¹⁷ See similarly Chiara Ragni, ‘International Legal Implications Concerning “Foreign Terrorist Fighters”’ (2018) 101 *Rivista di Diritto Internazionale* 1052, 1082.

⁸¹⁸ New Zealand passed other amendments related to executive and administrative powers: Countering Terrorist Fighters Legislation Bill 2014.

⁸¹⁹ Kent Roach, ‘The Continued Exceptionalism of the American Response to Daesh’ in Pierre Auriel, Olivier Beaud and Carl Wellman (eds), *The Rule of Crisis* (Springer, 2018) 71.

perhaps the difficulties that had already been noted by experts regarding the definition of foreign terrorist fighter in Resolution 2178.⁸²⁰

In this sense, is there a risk of making too much of Resolution 2178 and its definition of the foreign terrorist fighter? On the one hand, as I have suggested here, the definition of a category of individual in a binding resolution, to be prevented anytime and anywhere, represents a significant development for international law regarding foreign fighting. On the other hand, being defined in a Security Council resolution, albeit a ‘legislating’ resolution and adopted unanimously, may not hold the same sticking power as a definition or offence in a multilateral treaty.⁸²¹ Notably, Resolution 2178 does not itself criminalise the foreign terrorist fighter offences but demands domestic legislative action, thus, still offering some level of state prerogative in terms of how that compliance is ensured.⁸²²

Nevertheless, based on experience with the definition of the mercenary, which has continued to live out its legal life once brought into existence, despite — or perhaps precisely because of — its failings, the notion of the foreign terrorist fighter is likely to lead a long life. Its persistence will be buoyed by the ongoing pervasive and persuasive counterterrorism framing, and the power and flexibility within the notion of terrorism itself, which can adapt as notions of terrorism change, unlike the more specific mercenary definition. Resolution 2178 can portray an important clarification or development of international law; helping by providing necessary toughness and clarity in identifying the categories of foreign fighters with which international law must be concerned and towards which states have a duty of diligent prevention. However, as with the mercenary definition, that grasping for a reliable and just definition is rapidly challenged by its indeterminate or problematic nature, by other contemporary manifestations of foreign fighting, and by the realities of political and legal responses to historical examples of foreign fighting which it works to distinguish.

Despite its power and its flexibility, then, it is not yet possible to know what kind of precedent the foreign terrorist fighter definition may offer in future, since how precisely the phenomenon of foreign fighting might continue to transform is unknown. But certainly it *will* transform; it is constantly transforming, and with it, legal argumentation. The legal response

⁸²⁰ Although the preamble also recalls the definition of foreign terrorist fighter in Resolution 2178: Resolution 2396 (n 23), preamble, paras 2–3. See also SC Res 2258, UN Doc S/RES/2258 (22 December 2015), preamble: ‘movement of foreign terrorist fighters and other terrorists and terrorist groups into and out of Syria’. I note that Resolution 2178 (n 22) para 2, already ‘reaffirm[ed] that all States shall prevent the movement of terrorists or terrorist groups’ in certain ways, and para 3 mentioned ‘actions or movements of terrorists or terrorist networks, including foreign terrorist fighters’.

⁸²¹ But see also Chapter Two, n 34; Kim Lane Scheppele, ‘The Empire of Security and the Security of Empire’ (2013) 27(2) *Temple International and Comparative Law Journal* 38, 255–6: ‘One might imagine that ... Security Council resolutions issued under Chapter VII could not be as powerful a source of international law as treaties ... But that would be wrong — or at least not clearly right’.

⁸²² Anne Peters, ‘Security Council Resolution 2178 (2014): The “Foreign Terrorist Fighter” as an International Legal Person, Part II’, *EJIL:Talk!* (21 November 2014) <<https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-ii/>>; Ragni (n 201) 1078–9, 1083.

to earlier manifestations also indicates that the distinction suggested by the counterterrorism framing of foreign fighting — that is, that a clear division between *peaceful* and *violent* violence is possible — is insufficiently nuanced to take into account the richness of the history and the politics involved in the alternative framings of the foreign fighting issue over time and setting.

It is not only that the narrow counterterrorism framing does not allow diverse views (it does what the powerful authorities want; treats as the enemy the people that the powerful authorities cannot countenance), but that it also does not allow for diverse *thinking*. The counterterrorism framing reflects the more general trend of thinking about international problems from a security perspective. Within that securitisation trend, those with certain expertise and functions — especially security experts — have a particular stake in that framing, and the resources and institutional authority it brings to their work. The discourses surrounding examples of *other* foreign fighting demonstrate, though, how red threads of debate, which have arisen also in the two previous moments studied, continue to resonate regarding today's manifestations of foreign fighting. These include questions about state involvement/facilitation, distinguishing between groups and individuals, ideology and financial motivation, fighting on the side of a legitimate government, or parent state intervention in the same conflict. Much more has been going on within international law than only counterterrorism. The tensions remain. The counterterrorism framing within the general securitisation trend risks ignoring these red threads of international legal debate that become visible with a less narrow and “in the moment” view; the multi-coloured histories involved; the lineage of other red threads that have at times made foreign fighting of all persuasions complicated in terms of states' legal inter-relations. So, foreign fighting constantly transforms but legal issues also repeat.

It therefore becomes worthwhile to consider the red threads appearing across the three selected moments of international legal regulation of foreign fighting — the *change* and *stasis* — and I turn to this now in my concluding chapter.

Chapter Six

Concluding Observations

1. International Legal Responses in each Moment

Approached *individually*, each of the three moments of foreign fighter regulation presented in this thesis demonstrates how the international legal response was based upon a perception of a transformed phenomenon. At first glance, those responses can give the impression that amongst the pool of indeterminate law and opinion, there were at least these key decisions concerning manifestations of foreign fighting considered sufficiently significant in terms of number, threat or political interest — which I picture as peaks on a seismograph. Key decisions in which international regulation was considered necessary, but also possible and precise; that additional regulation represented a chipping away of state national interests for the greater good, and a clarification and therefore progress in the law. Instead, this study has shown how, in each instance, the specific response was intimately tied to time and setting within a particular framing, and undertaken in preference to relying on existing general law and principles, and confronting the hard questions those norms might present.

The diplomatic positions taken in concert by the European states during the Spanish Civil War took the most objective position against foreign fighting, and also represent the most obvious side-stepping of an existing institutional and legal set-up, namely, the League of Nations. The agreed definition — notably for withdrawing foreign volunteers from Spain rather than criminal penalisation — was extremely broad, covering those volunteering on the side of the government and in non-combat roles, and leaving much to the determination of the Committee. Partly, this reflected a hope that Italy and Germany would likewise withdraw their troops. Some domestic legislative responses at that time have enjoyed a longer lifespan, but because the Non-Intervention Agreement was limited in time, scope and geographical application, its lasting impact on international law has been minimal.

In contrast, the response to mercenaries has been permanent since it carved off and defined a category of fighter on the international level. Still, the limited state support for the UN Mercenary Convention means that customary law does not require objective criminalisation of mercenarism. This leaves the question a matter of national determination, governed by the reference to mercenaries — although undefined — in the articulations of the principles of friendly state relations and the definition of aggression, when mercenary actions violate those fundamental duties.

While the detailed definitional criteria adopted for the purposes of international humanitarian law (IHL), and repeated in the UN Mercenary Convention, have proven unworkable, the mercenary has lived on as a topic of interest, particularly in scholarship on PMSCs. Moreover, as I will return to below, the dichotomy of financial versus ideological primary motivation remains one of the strongest drivers of how different forms of foreign fighting are envisioned and categorised.

Finally, the Security Council's demands regarding foreign terrorist fighters have worked to augment the underlying rules on foreign fighting by adding more specific duties within the existing obligation to prevent terrorism. This again carves off a category of individual that is to be prohibited always and anywhere. Its future impact remains to be seen: as mentioned in Chapter Five, relevant Security Council resolutions also use the broader phrasing 'terrorists including suspected foreign terrorist fighters', arguably reducing the significance of Resolution 2178's original definition. At the very least, based on its impact to date, the counterterrorism *framing* of the issue will likely retain significant power.⁸²³

Chapters Three, Four and Five illustrated how debates about the necessary response to each of those transformed manifestations involved technical legal questions, requiring specialist knowledge aligned with the predominant framing of the legal issues in each moment. The relevant institutions in each case — a stand-alone diplomatic body, the London Committee, in the 1930s, the UN Special Procedure on Mercenaries, and the UN Counter-Terrorism Committee and its Executive Directorate regarding foreign terrorist fighters — shored up how and by whom those questions were to be answered within the dominant framing. Although, in this regard, the UN Special Procedure on Mercenaries has faced challenges through lack of support and acceptance from several Western states.

2. International Legal Responses Across Time and Setting

The expanded view offered by reading *across* the selected moments makes visible the changes in framing over time, but also reveals that while each response was different and focusing on a transformed phenomenon, similar points of contention — the options for distinguishing cases and possible determinations of the law — have repeated.

This study has shown, therefore, that key tensions surrounding the regulation of foreign fighting do not apply only in the snapshot of each moment, but persist in a way that moves across time and setting. The possible pathways of pinning down those

⁸²³ See, eg, regarding the Security Council negotiating a new Chapter VII resolution on foreign terrorist fighters in August 2020, Fionnuala Ní Aoláin, 'The Challenges of a New UN Security Council Resolution on Foreign Fighters' *Just Security* (Blog Post, 17 August 2020) <<https://www.justsecurity.org/72052/the-challenges-of-a-new-un-security-council-resolution-on-foreign-fighters/>>.

persistent tensions were argued and settled differently in different situations in line with the dominant legal framing of the issue. Those framings have operated over decades of debate, adding weight to their pertinence, pervasiveness and persuasion in international legal argumentation. The framing of the issue has been doing a lot of work.

Ultimately, though, each framing recedes and gives over to another dominant framing, continually morphing in line with general developments in thinking and focus in international law over time. Today, as a legal issue, foreign fighting is no longer chiefly discussed as a matter of neutrality law — although strong traces remain on the domestic level — nor of national liberation — although self-determination arguments remain possible, and as mentioned, the dichotomy of financial and ideological motivation remains key. Rather, the dominant focus today lies firmly within counterterrorism thinking.

The important aspect is that international law does not start with a clean slate in each new framing, or reflect only the most powerful politics of the moment. Something more complex occurs in which previous determinations provide a foundation for ongoing argumentation, even regarding an instance of foreign fighting perceived as transformed. As the studies within this thesis have demonstrated, the ongoing colouring of the law by earlier argument and determination appears particularly strong where a category of foreign fighter has been defined by status on the international level.

There is, in these ways, a significant resonance between the responses to foreign fighters in the three moments studied, even if the legal questions considered most pertinent, and the scope of argumentation considered most persuasive, have shifted in line with the treatment of the topic in its alternative framings.

By considering foreign fighting as a relatively broad conceptual whole, I have not suggested in this study that all foreign fighters necessarily pose similar policy concerns or should be treated identically. Nor am I arguing for the application of laws adopted in earlier moments to be necessarily retained and re-applied today. Rather, what has emerged through this research is the value in reflecting upon how international law operates to encompass, simultaneously, elements of debate that resonate between instances of foreign fighting, and the particular distinctions made in each instance. Rather than narrating linear progress towards a satisfying resolution to questions as the law has developed, this thesis has shown that there is instead *change* and *stasis* in international law's response towards foreign fighting.

3. *Change and Stasis in International Legal Argument*

If the framing changes but the underlying red threads of debate persist, attention to both the change and the stasis is critical to understanding the direction of thinking on this issue in different moments, as well as the operation of the contemporary counterterrorism framing and responses to it, and the prospects for ongoing and future transformations.⁸²⁴

In this section, I make some concluding comments about framing and then provide brief observations about seven selected red threads of debate made visible through the approach taken in this study.

3.1 Framing and Unframing Foreign Fighting

Since the legal framing of an issue will hold some aspects more centrally, and pay less attention to others, every frame will reflect a certain vision of the world; certain limits and prejudices. Categorisations of fighters legally defined within a dominant framing will reflect those central preoccupations, even while being produced with the aim of a universal application. As this work has sought to demonstrate, the counterterrorism framing alone, or any other framing for that matter, cannot, therefore, offer a complete solution to the questions with which we are confronted regarding foreign fighting. The framing can only set the scope of persuasive argument and help to pin down the persisting tensions on this topic in the particular time and setting.

Therefore, paying attention to the law only within one of the framings risks missing the shifts that occur; mistaking the politics of the moment as a seemingly universal, natural or self-evident articulation of the law. It also risks missing or negating the linkages that persist between *other* examples of foreign fighting. As described in Chapter Two, international lawyers risk responding in ‘crisis mode’, rediscovering a priority policy issue without building on past scholarship nor attempting to unpack earlier layers of meaning.⁸²⁵ The wider view helps one to appreciate the operation of the framing and its morphing, as well as the red threads of debate that persist *across* framings. That is, it contributes to making visible the politics and history underlying even seemingly neutral — because *legal* — lines of argument. This can offer a better understanding of how those politics have played out in international legal argument across time within their predominant framings.

The key point is that, at the very least, those working with international law can realise that they are not bound within the narrow counterterrorism framing. Lawyers can be aware of an issue’s framing and also seek to be unshackled from it. This

⁸²⁴ Paraphrasing Rittich. See Chapter Two, n 91.

⁸²⁵ Paraphrasing Charlesworth. See Chapter Two, nn 74–76.

project demonstrates that there is a richer repertoire available in international law for thinking about the hard choices posed by foreign fighting.

Notably, that richer approach requires not excluding certain categories or manifestations of foreign fighting from consideration automatically or uncritically where the distinctions upon which one would rely ignore the multiple elements actually in play in the international legal debates, or otherwise do not hold up as decisive criteria. In particular, I am thinking of the definition of the mercenary and the weaknesses of the financial motivation criterion. It is for these reasons that this thesis argues that the international legal response to mercenaries must be considered as part of the broader story of international law and foreign fighting. Once again, one can appreciate the distinction but also hold on to that distinguished sub-category's place in the broader account or history.

The question becomes how international lawyers can best avoid any oversimplification of the problem based on a too-exclusive focus on counterterrorism strategies, and achieve some critical distance from mainstream legal argumentation about foreign fighting, while still being able to function, and responsibly so?⁸²⁶ Moreover, how to do this without merely reverting to an all-encompassing but somewhat fudged position of a “competent lawyer” by arguing *lex lata this*, but *de lege ferenda that*?

3.2 Red Threads of International Legal Argument

To further the conversation about possible aspects that can support necessary critical distance, I set out in this section key observations about seven selected red threads of debate. Given that, as mentioned in Chapter One, Martti Koskenniemi has argued that ‘the best histories have demonstrated how lawyers have argued those cases, and what it has been necessary to believe in order to think one or other argument as the more plausible one’,⁸²⁷ I hope to indicate to international lawyers not a proposal of a solution to the hard question of foreign fighting — not what I think is the best or correct argument today — but rather to offer a glimpse of the heritage and power as well as the *baggage* — what needs to be overcome or compromised — in choosing one argument over another on a particular red thread, should one wish to employ it. That exercise starts to offer some substance and argumentative options for the richer repertoire I am suggesting is available for thinking, and which a counterterrorism framing, or any other framing, alone, cannot offer.

⁸²⁶ See, similarly, Isabel Feichtner, ‘Critical Scholarship and Responsible Practice of International Law. How Can the Two Be Reconciled?’ (2016) 29(4) *Leiden Journal of International Law* 979.

⁸²⁷ Martti Koskenniemi, ‘What Should International Legal History Become?’ in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, Order, and International Law* (Oxford University Press, 2017) 381, 386–7.

The selected red threads of debate are often inter-related. Each deserves fuller analysis but is limited, below, to key observations from the three moments of foreign fighter regulation studied.

Foreignness

A first recurring theme of debate surrounds *foreignness*. Foreignness is at once integral to the notion of the foreign fighter and somewhat of a red herring. As illustrated in the preceding chapters, nationalisation has been used by the territorial state as a reward for foreign fighting, or simply to regularise it. Denationalisation has been used by the parent state as a punishment. This makes citizenship both highly relevant *and* instrumentalisable; even disposable.

The description of the fighters to be withdrawn from Spain, as well as the adopted definitions of the mercenary and foreign terrorist fighter, explicitly included foreignness as a criterion. The departure of an individual from one jurisdiction to another makes international law related to state responsibility immediately relevant to the topic. Foreign fighting can also challenge norms of citizenship and allegiance. Still, state-determined citizenship does not reflect the possible connections one might hold with a foreign or transnational community. Questions surrounding the applicability of the relevant law to the stateless, dual nationals, permanent residents, diaspora communities or those with a historical, religious or ethnic link to the fighting remain key, and unsettled. Moreover, states' modern due diligence preventive duties, whatever their scope, would logically include unlawful harm caused by any person departing from the parent state's territory to fight with an armed group against state armed forces, regardless of citizenship.⁸²⁸

Showing similar tensions, on the one hand, IHL cares little about one's nationality on the battlefield. On the other, foreigners have at times been targeted and detained differently than local fighters; their uprootedness contributing to assumptions that they are more dangerous or that their participation not only escalates hostilities but causes conflict to be protracted or even intractable.⁸²⁹

⁸²⁸ Albeit respecting the prohibition of the arbitrary deprivation of the right to return to one's country: *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(4).

⁸²⁹ Challenging such assumptions, Darryl Li, 'A Universal Enemy?: "Foreign Fighters" and Legal Regimes of Exclusion and Exemption under the "Global War on Terror"' (2010) 41 *Columbia Human Rights Law Review* 355, 363–9; Nir Arieli, *From Byron to bin Laden: A History of Foreign War Volunteers* (Harvard University Press, 2018) 151–69. Nationality was debated but not adopted as a possible prohibited basis of discrimination in detention under Article 3 common to the Geneva Conventions 1949: Jean de Preux et al, *Commentary to Geneva Convention (III) Relative to the Treatment of Prisoners of War*, ed Jean Pictet, tr AP de Heney (ICRC, 1960) 41.

Foreignness as a theme of debate links to questions discussed in Chapters Four and Five surrounding who may act transnationally in solidarity with an armed cause, assuming the armed cause itself has a legitimate right to resort to force. The transnational nature of foreign (terrorist) fighting becomes key to justifying states' efforts to prevent or punish it, but the perceived threats can also lead to increased ambivalence about borders and sovereignty for the purposes of state military intervention, especially in a *global* war on terror. Foreignness also links to considerations of national allegiance and rules on treason which appear throughout the legal debates where the volunteer fights against her own or an allied country, or even due to involvement in terrorism.⁸³⁰

Groups and Individuals

Legal debates examined in this thesis show that the logic and practical possibility of making a distinction between *organised groups and recruitment within the parent state* on the one hand, and *individuals acting independently* on the other, have been regularly debated.

The debates and doctrine recognise a difference between joining an armed conflict by volunteering with an existing foreign group, party to that conflict, and becoming a party by launching transnational hostile action directly from the parent state. Yet, the questions surrounding which activity constitutes organised transnational activity, and which only extraterritorial activity, remain unsettled. Under neutrality law, the questions posed included the level of organisation required by the departing group as opposed to a more loose-knit collection of volunteer fighters, and when and where recruitment was effectively taking place. When it came to the significant numbers of volunteer fighters participating in the Spanish Civil War, the European states opted not to rely on the existing neutrality rules — the distinction between organised groups and individual departures in the Fifth Hague Convention 1907 did not firmly hold. Chapter Four mentioned the question of whether mercenaries have operated as individual rogues, small independently-organised bands or volunteers with existing foreign rebel groups. Further, throughout the twentieth century to today, foreign fighters have sometimes supported a foreign armed cause and been able to arrange volunteering through their links with a local organisation such as the Communist Party during the Spanish Civil War, or are recruited through other pre-existing networks. Today, we might also ask when precisely a volunteer can be considered to become a member of the group or to be directly participating in hostilities, or query

⁸³⁰ See, eg, Cecile Fabre, 'Why British Jihadists Can't Be Charged with Treason', *New Statesman* (online, 8 April 2019) <<https://www.newstatesman.com/politics/uk/2019/04/why-british-jihadists-cant-be-charged-treason>>.

how to treat small groups of volunteers travelling together to a warzone and intending to operate as a stand-alone unit for the armed group?

Overall and even acknowledging the historical lineage of the differentiations between groups and individual action, the three moments studied indicate that the doctrine has developed today towards greater duties on states not to tolerate certain conduct of *individuals* with transnational effect or at least certain defined categories of individual.⁸³¹ Some of the tensions inherent in the group/individual question are otherwise relieved — although also made subject to other potential problems for the law⁸³² — by Resolution 2178's demands surrounding the criminalisation of acts preparatory to foreign terrorist fighting.⁸³³

At stake are the perceptions of the respective *harm* fighters may cause and the accompanying contours of *reasonable or constructive knowledge and diligent prevention* demanded of the state. The practical and legal difficulties described here are tempered by the flexible nature of the diligence duty, which, as shown in the debates, makes fluid the parameters affecting the foreseeability of departures and/or unlawful harm, and the positive measures to be taken. I will return to this in section 4.2 below.

States and Individuals

Connected to the question of groups and individuals, a third recurring issue surrounds *state-tolerated or -facilitated versus independent action* of foreign fighters and, relatedly, approaches focusing on *state responsibility versus individual criminal responsibility* of the fighters themselves.

That foreign fighters are regularly imagined as independent or rebellious individuals is not surprising given the traditional distinction in international law between prevention of hostile expeditions and departures of individual volunteers, but also because of the status-based definitions of the mercenary and the foreign terrorist fighter. However, through the course of this research, it has become clear that links with the state appear throughout foreign fighter manifestations in greater and lesser forms; often blurred or at least difficult to prove.⁸³⁴ As mentioned in Chapter One and

⁸³¹ See Chapter Five, section 4.1.2 'Unlawful Harm? Groups and Individuals'.

⁸³² Such as evidentiary, or regarding legality and the protection of rights. See, eg, Lisa Ginsborg, 'One Step Forward, Two Steps Back: The Security Council, "Foreign Terrorist Fighters", and Human Rights' in *Using Human Rights to Counter Terrorism* (Edward Elgar, 2018) 195, 211–15; Tarik Gherbaoui, 'Criminalising Foreign Fighter Travel in Order to Prevent Terrorism in Europe: An Illegitimate Assault on Human Dignity?' in Christophe Paulussen and Martin Scheinin (eds), *Human Dignity and Human Security in Times of Terrorism* (Springer, 2020) 241.

⁸³³ SC Res 2178, UN Doc S/RES/2178 (24 September 2014) para 6.

⁸³⁴ On difficulties in proving government collusion: Ian Brownlie, 'Volunteers and the Law of War and Neutrality' (1956) 5(4) *International & Comparative Law Quarterly* 570, 574; James Upcher, *Neutrality in Contemporary International Law* (Oxford University Press, 2020) 107.

demonstrated throughout the thesis, such links range from directly sending nationals as proxies or auxiliaries — usually discounted as foreign fighting because directly attributable to the state⁸³⁵ — to covertly encouraging or directing irregular participation, facilitating exit or entry, partnering with groups hosting foreign fighters, being informed of plans by aspiring foreign fighters pre-departure and turning a blind eye or allegedly relying on those persons for intelligence, or taking no prosecutorial action upon certain foreign fighter returns. Foreign volunteers may also act independently but in line with government policy. Both historically and in recent decades, there can be confusing lines between states commissioning and supporting (unauthorised) irregular actors but also the need for those actors to be given some leeway by the sovereign authority to ensure effectiveness as well as plausible deniability.⁸³⁶

A related question remains whether concerns related to the lack of democratic oversight of private participation in warfare, and its challenge to the state monopoly on force, could be remedied if the state authorises that private participation; alternatively, whether certain functions, including the offensive use of force, remain inherent to the state and non-delegable.⁸³⁷ We saw this debate regarding whether state reliance on mercenaries to quell an armed opposition should or should not be prohibited. Such arguments also make it difficult to determine whether foreign fighting in support of a government side to a conflict but within a non-state armed group, such as in Ukraine and during the Spanish Civil War, should be considered more akin to foreign enlistment or to foreign fighting?

Linking to “stateness” in a different way, rebel groups have sometimes formed indirectly through state structures by way of military defections, or the side supported by the foreign fighter was itself seeking statehood, either through revolution or secession.⁸³⁸ Questions of legitimate authority and recognition, as well as self-determination, are also at play. For example, as we saw in Chapter Five regarding Kurdish forces, states may consider a group differently where it has some level of just authority and exerts *de facto* governing control over an area.

⁸³⁵ See Chapter One, section 2.4.

⁸³⁶ Janice E Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press, 1994) 21, 42–4, 67, 149; Klaas Voß, ‘Plausibly Deniable: Mercenaries in US Covert Interventions During the Cold War, 1964–1987’ (2016) 16(1) *Cold War History* 37; Nicole Sunday Grove, ‘Weapons of Mass Participation: Social Media, Violence Entrepreneurs, and the Politics of Crowdfunding for War’ [2017] *European Journal of International Relations* 1, 9–10.

⁸³⁷ Regarding the prohibition on states relying on such actors for belligerent actions if not incorporated into their armed forces, see Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013) 64.

⁸³⁸ Sibylle Scheipers, *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford University Press, 2015) 3.

In relation to the second point regarding *state responsibility* and *individual criminal responsibility*, over the twentieth century, the doctrine has shifted in focus from state responsibility regarding diligent prevention of unlawful harm caused by foreign fighters, to greater emphasis on criminalising the fighters themselves. Neutrality law was chiefly concerned with duties on the third state and the belligerents to maintain the third state's neutral status. Although some veterans of the Spanish Civil War faced penal or administrative action upon their return home, the international legal response was chiefly concerned with the diplomatic agreement between *states* not to tolerate participation by their nationals, even if this prevention was then carried out through legislation prohibiting departures to Spain. In line with general developments in international criminal law, the subsequent response to mercenaries and foreign terrorist fighters gave greater attention to individual criminal responsibility over and above a deep concern for state duties of prevention.

It is not that state prevention duties were ignored in the legal response — even regarding the reviled foreign terrorist fighter, or, rather, *precisely* because she is so reviled, states are obliged to adopt a range of preventive and punitive mechanisms. They have assigned significant resources to doing so and their compliance is monitored by the assigned UN body. Yet, what becomes clear is that the intense policy focus on a transformed phenomenon of foreign fighting, at least since the second half of the twentieth century, has led to an approach in which a category of foreign fighters is identified and legally defined as policy priorities appear. Although the alternative framings relied upon in different political moments drive a certain view and institutional treatment of a policy issue, and the institutional lives of mercenaries and foreign terrorist fighters have been different, this technique of individualisation and definition by status, supported by monitoring and ownership within separate expert institutions, represents a continuity in approach.

As mentioned, the distinguishing and defining could be seen to contribute to the progressive clarification of rules on foreign fighting. The institutional jurisdiction governing the category of fighter works hard to keep the defined collectivity alive — the UN Working Group on Mercenaries, and the UN Counter-Terrorism Committee and its Executive Directorate. That jurisdictional ownership reinforces the framing in which the definition was adopted and, therefore, the relevant legal questions and technical skills required for the category. Yet, as the accounts of the three moments reveal, the rules and definitions have been the subject of criticism once adopted; accused of being over- or under-inclusive — even unworkable — and unhelpfully tied to narrow time and place.

Such definitions have therefore proven difficult to craft, but perhaps less difficult in the moment than being perceived as not taking any necessary action, to agree on the definition of international terrorism, or to resolve foundational dilemmas about fundamental rules over which these definitions have been constructed, such as friendly relations principles or state-citizen relations.

Over and above questions of technical operability about the adopted definitions, it could be considered whether the focus on the fighters' individual status as terrorists (or as any other category in a given moment) presents a more systemic problem for international law. Important aspects might be left out of the framing, and therefore the thinking, when the focus turns predominantly to the individual and to individual criminal justice. The depth of field shallows, bringing the individual's actions into sharp focus, while allowing other relevant questions to blur, with the effect of lessening regard on state action. This approach pushes more fundamental rules governing state relations and the individual decision to participate in conflict abroad to the blurred background — the relationship between authority and solidarity⁸³⁹ — and seems to be something that risks occurring within a framing that arises due to an intense focus on a transformed phenomenon; in crisis mode. The recurring approach risks being limited to pointing out certain 'bad guys' of the moment and relying on a particular institutional framework to monitor them. Karen Engle points out that the 'criminal law lens often reveals a simple picture of a world infused with a few bad actors, even monsters'.⁸⁴⁰ The focus and assumptions made can have associated 'disabling effects' on legal thinking.⁸⁴¹ An approach pointing out unacceptable characters also feeds back into the predominant framing.

Motivations and Justness of Cause

The intense focus on mercenaries in the 1960s–1970s saw a defined category of foreign fighter *primarily motivated by financial gain*. Looking across the selected moments, one could ask how it could be that certain states in the UN General Assembly and Human Rights Council have been so concerned with the harm posed by foreign fighters primarily motivated by financial benefit (mercenaries), but that neither those bodies nor the Security Council have taken specific action on fighters

⁸³⁹ See Chapter One, n 142.

⁸⁴⁰ Discussing human rights-related criminalisation, not foreign fighting, Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Review* 1069, 1071, 1120. See also Karen Engle, Zinaida Miller and Dennis Davis, 'Introduction' in Karen Engle, Zinaida Miller and Dennis Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press, 2016) 1, 2; Vasuki Nesiah, 'Doing History with Impunity' in Karen Engle, Zinaida Miller and Dennis Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press, 2016) 95, 96, 100, 111–12.

⁸⁴¹ Engle (n 18) 1071.

motivated by other reasons (assuming they were not involved in terrorism or other international crimes)? In contrast, for states, the International Court of Justice in its *Nicaragua* decision had made clear that there was no basis in international law for interventions based on a state's ideological views.⁸⁴²

Despite criticism of its workability in practice, the financial motivation factor of the mercenary definition holds significant and long-lasting sway. The mercenary is, today, continually distinguished from foreign fighters who are often defined in the literature as being primarily motivated by 'ideology, religion and/or kinship', and, expressly, *not* primarily by financial gain.⁸⁴³ The very different institutional mandates related to mercenaries and to foreign terrorist fighters support these distinctions. As discussed in Chapter Four, attempts by the UN Working Group on Mercenaries to demonstrate the potential usefulness of considering mercenaries and foreign fighters as having common features has proven weak in the face of the security community's jurisdictional ownership of the foreign fighter issue within its present framing, and the objection of certain Western states.

What I want to re-emphasise from Chapter Five is how the notion of ideology — amorphous in the first place (as one colleague commented, 'as if financial motivation is not also an ideology!') — has shifted in international legal discussions as attention turned from national liberation freedom fighters to persons involved in terrorist groups. In the counterterrorism framing of the foreign fighter issue, ideology has morphed from being the good intentions of 'noble international combatants for peace',⁸⁴⁴ to unlawful intentions to participate in terrorist activity.

Moral distinctions surrounding motivations are difficult to unravel from the perceived *justice of the cause*. Perceptions of the armed struggle — by states as well as in popular understanding, and able to shift over time — have had significant impact on assessments of foreign fighting and its regulation. As Chapter Five discussed, assessments of just cause and the common good — with the notion of just war that lurks behind them — can involve important considerations of values and rights deserving of protection. Ultimately, however, one 'must imagine that claims to make war in the name of right will rarely sound sincere or seem persuasive to those who believe the truth lies elsewhere — who oppose the war, are disgusted by the tactic, or simply expect themselves to be maimed or killed'.⁸⁴⁵ The hard choices for states that wars pose, and the more general tension surrounding the reciprocity of rules

⁸⁴² Chapter Five, n 160.

⁸⁴³ See Chapter Four, nn 122–123.

⁸⁴⁴ Chapter Four, n 113.

⁸⁴⁵ David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 158, 177.

underlying international law — how a state can restrict others’ conduct to protect itself, without limiting its own freedoms⁸⁴⁶ — suggests that the perception of cause and values will certainly form part of the legal debate, but that this is less useful or reliable in isolation. That is, the justness of the cause needs to be reflected upon alongside the other red threads of debate that repeat from one situation to another, embracing, as possible, the wider tensions. It becomes one red thread among many, with its accompanying baggage.

Human Rights

Related to the justness of the cause, the impact of *human rights protections* on the regulation of foreign fighting arise firstly regarding the populations affected by armed conflict or atrocity crimes — that is, the question of the protection of those rights through violent intervention in solidarity with a cause of self-determination or R2P response discussed in Chapters Four and Five.

The human rights of the foreign fighters also arise as an issue. Diligent prevention duties, impacting as they do on individuals’ rights, in particular the right to leave and return to one’s country, but also potentially of expression, association, family life or even employment, must be carried out in compliance with these rights.⁸⁴⁷ Throughout the three selected moments, the rights of citizens to move and act have been debated. Negotiation of the Fifth Hague Convention included debates on the reasonable limits of state duties to monitor nationals and control their departures. The due diligence obligations were also considered strictly territorial in nature.⁸⁴⁸ In the 1976 Diplock inquiry into the United Kingdom (UK) Foreign Enlistment Act 1870, it was explained that the UK was not in a position to prevent all mercenarism due to the importance of the right to freedom of movement which would require a ‘compelling public interest’ to be overridden. That was, notably, a *domestic* public interest, which was not felt to be the case regarding subjects fighting overseas.⁸⁴⁹ Today, the fact of fighters wishing to participate in a situation involving ‘gross and extensive violations of human rights and [IHL]’ has been found by New Zealand to make proposed movement restrictions on suspected foreign *terrorist* fighters proportional to the

⁸⁴⁶ See, eg, Michael N Schmitt, ‘In Defense of Due Diligence in Cyberspace’ (2015) *Yale Law Journal Forum* 68, 69.

⁸⁴⁷ Alex Conte, ‘States’ Prevention and Responses to the Phenomenon of Foreign Fighters Against the Backdrop of International Human Rights Obligations’ in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 283, 286.

⁸⁴⁸ Chapter Three, text accompanying nn 54–57.

⁸⁴⁹ United Kingdom, *Report of the Committee of Privy Councillors Appointed to Inquire into the Recruitment of Mercenaries* (Cmnd 6569, 1976) [10], [15], [52(3)] <http://psm.du.edu/media/document/s/national_regulations/countries/europe/united_kingdom/united_kingdom_diplock_report_1976.pdf> (‘Diplock Report’).

protection of national security, public order and the rights and freedoms of others.⁸⁵⁰ In contrast, broader geographical bans on travel, such as Australia's declared area offence, have been subject to submissions regarding their compliance with human rights obligations.⁸⁵¹

Human rights issues in the form of state duties to protect those in their territorial jurisdiction from abuses of rights are also relevant. This involves the duties of the destination state to protect inhabitants from harm, for example, by ensuring appropriate border controls. This has also been used to discourage departures. For example, Australia issued pamphlets warning people of the risk to *themselves* if they travelled to Syria to join the fight.⁸⁵²

Seen more broadly, the protection of human rights becomes relevant through the idea that in earlier periods of the twentieth century, non-state violence was considered necessary, at least by a majority within the General Assembly, as a last resort to defend certain rights and protections, such as to fight against colonialism. In theory, the strengthening of human rights protections from the 1970s might have eventually eliminated the need and associated justness of such struggles (and, therefore, of foreign fighting). As these protections have not been able to achieve their aspirations, the fraught issue underlying laws related to armed conflict, namely that violence may be required in order to protect populations, and more broadly, the question of the justice of certain armed causes, remain.

Nationalism and Friendly Relations

Fifth, the international legal debates and practice witness a shift from greater, albeit never exclusive, concern about harm occurring in the destination state or to foreign relations, to greater concern about home state security in the present counterterrorism setting.

Although, ultimately, a parent state's respect for neutrality law aimed to protect it from reprisal from an aggrieved belligerent, and to prevent hostilities spreading to its own territory and protect its economic interests, a basic premise underlying abstention was the prevention of further escalation of the war. The position taken in the Fifth Hague Convention was that individual enlistees did not harm neutrality. Yet, the London Committee's regulation of the foreign fighting in the Spanish Civil War

⁸⁵⁰ Jeff Orr, 'Consistency with the New Zealand Bill of Rights Act 1990: Countering Terrorist Fighters Legislation Bill' (Legal Advice to Government, 12 November 2014) [20] <<https://www.justice.govt.nz/assets/Documents/Publications/bora-Countering-Terrorist-Fighters-Legislation-Bill.pdf>>.

⁸⁵¹ See, eg, Australian Human Rights Commission, 'Review of the 'Declared Areas' Provisions' (Submission, 3 November 2017) <https://humanrights.gov.au/sites/default/files/2017-1103_ahrc-supplementary-submission_declared-areas_final.pdf>.

⁸⁵² But see also *Diplock Report* (n 27) [11], placing responsibility on the individual.

occurred within a predominant framing of that notion of abstention; of not wanting one's nationals to become involved in a foreign conflict in order to avoid inter-state friction and further escalation of the conflict. In the particular circumstances in Spain, it was also to disincentivise the deployment of troops by Germany and Italy. Some International Brigade veterans faced penal and administrative responses from their parent states upon return, including citizenship-stripping, but, as mentioned in Chapter Three, the perception of threat was seemingly often attached to the individuals' links with the Communist Party rather than their fighting in Spain.

Similarly, the attempt through the UN Mercenary Convention to objectively criminalise mercenarism was based on the notion of the harm mercenarism caused in the destination state rather than threats to the parent state upon return. This included the risk of unlawful conduct of hostilities, inhibiting self-determination, and weakening of the democratic oversight of the use of force.

The difference with the analysis of possible threats posed to parent states by foreign terrorist fighters is marked. As mentioned in Chapter Two, diplomatic positioning and domestic debate shows that the predominant concern of states is security *at home*, i.e. from actions of would-be, and especially returning, foreign fighters. Although there was a focus in Resolution 2178 on preventing the movement of aspiring fighters in the first place, backed up by the Security Council recognising the need to stem recruitment, disrupt financial support and counter radicalism more generally, the risk of violence in the parent state or third states upon return/relocation has been a constant preoccupation.⁸⁵³ International (P5) concern about the transformed manifestation of foreign fighting peaked in line with violent terrorist attacks being carried out *outside* of the warzones most affected by terrorism — Iraq, Afghanistan, Syria and Nigeria⁸⁵⁴ — especially in Europe, or in theatre against Western hostages.

As operations against the Islamic State group shrunk its control of territory, the detailed follow-up Resolution 2396 (2017) showed significantly greater concern with the risks associated with *return* and *relocation*, and stressed the need for international cooperation for criminal prosecutions of foreign terrorist fighters.⁸⁵⁵ Further evolution of the situation saw international legal debate shift in late 2018 to the problems surrounding the fighters and families associated with the Islamic State group detained by Kurdish forces. Rather than cooperating to ensure criminal prosecution as necessary, many parent states opted not to facilitate repatriation, or even to prevent

⁸⁵³ SC Res 2178, UN Doc S/RES/2178 (24 September 2014) preamble, paras 2, 6.

⁸⁵⁴ 'Global Terrorism Index 2017: Measuring and Understanding the Impact of Terrorism' (Report, Institute for Economics & Peace, 2017) 21 <<http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf>>.

⁸⁵⁵ SC Res 2396, UN Doc S/RES/2396 (21 December 2017).

the return of their nationals by cancelling passports, or revoking citizenship where the individual held dual nationality or was thought to be able to obtain another nationality.⁸⁵⁶

Those decisions have forced other states to deal with a problem originating from the parent state. Scholarship and other commentary have justifiably criticised such responses as risking statelessness, potentially breaching international legal duties such as the prevention (in this case, prosecution) of terrorism, or ensuring respect for IHL, as well as effectively avoiding consular assistance duties.⁸⁵⁷ These responses link to the red thread of foreignness in foreign fighter debates, and questions of allegiance and treason.

This aspect of the counterterrorism framing has also seen threats posed at home being debated regarding *other* foreign fighters, such as returnees from the YPG or the conflict in Ukraine, based on the argument that *any* direct participation in warfare, but particularly participation outside of state armed forces, might normalise and train, or even radicalise, a person for a resort to force or violent vigilantism; alternatively, that certain *other* foreign fighters do not pose the same security risks upon return as foreign terrorist fighters.⁸⁵⁸ Only those considered foreign terrorist fighters have been made subject to citizenship-stripping or other blocks to their return home.

I am not suggesting that states should not be concerned with home security, nor that states are not making efforts to combat foreign terrorist fighting. To the contrary, there is an intense preoccupation with counterterrorism efforts and a related assignment of resources — administratively, legislatively and militarily. The criminalisation of unlawful activities forms one part of a state's prevention duties, and I do not discount the evidentiary and international judicial cooperation challenges regarding extraterritorial conduct. Still, what is revealed is how domestic responses within the counterterrorism framing translate into nationalistic approaches, and how

⁸⁵⁶ Liz Sly, 'The Jihadis That No One Wants', *Washington Post* (online, 21 December 2018) <<https://www.washingtonpost.com/graphics/2018/world/syria/isis-prisoners/>>; Natalie Muller, 'Germany Is Failing to Prosecute IS Foreign Fighters, Yazidis Accuse', *Deutsche Welle* (online, 29 May 2019) <<https://p.dw.com/p/3JMhx>>; HJ Mai, 'Why European Countries Are Reluctant To Repatriate Citizens Who Are ISIS Fighters', *NPR* (online, 10 December 2019) <<https://www.npr.org/2019/12/10/783369673/europe-remains-reluctant-to-repatriate-its-isis-fighters-here-s-why>>.

⁸⁵⁷ 'Principles on Deprivation of Nationality as a National Security Measure' (Institute on Statelessness and Inclusion, 19 March 2020) <<https://www.institutesi.org/resources/principles-on-deprivation-of-nationality/>>; Council of Europe, Parliamentary Assembly, *Withdrawing Nationality as a Measure to Combat Terrorism: A Human-rights Compatible Approach?* Resolution 2263, 9th sitting, 25 January 2019; Christophe Paulussen, 'Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive' (Perspective, International Centre for Counter-Terrorism, 17 October 2018) <<https://icct.nl/publication/countering-terrorism-through-the-stripping-of-citizenship-ineffective-and-counterproductive/>>.

⁸⁵⁸ See, eg, Bret Walker, Independent National Security Legislation Monitor, 'Annual Report' (Report, Commonwealth of Australia, 28 March 2014) 27 <<https://apo.org.au/node/40152>>.

in turn this has affected international law. For example, Helene Højfeldt explains that '[d]omestic criminal law is increasingly being applied to conduct [of foreign fighters] committed in times of armed conflict. The policy aim is no longer to repress war crimes, but to safeguard national security'.⁸⁵⁹

Responses to the transnational actions of foreign fighters within the counterterrorism framing therefore risk becoming concerned primarily with the relationship of allegiance between the state and its nationals, and home security, over and above any deep concern about external relationships between states or about the effects of violence occurring elsewhere, which were seemingly more present in earlier framings of the issue. Once again, this reflects a narrowing view of what is at stake in these legal debates; a shift from greater doctrinal concerns about friendly state relations and third state relations with parties to armed conflict, that is, with state responsibility, to greater attention paid to individual criminal responsibility of the fighters.

Abstention and Intervention

A final and related theme surrounds the possibility and value of *abstention from conflict versus intervention*. Although there is now little place for neutrality law's military abstention in an international system based on collective security, and non-intervention is relied upon as a governing principle instead, political notions of neutrality, abstention from conflict and arguments about the contours of non-intervention persist, if only one looks beyond the dominant counterterrorism framing.⁸⁶⁰ Indeed, the non-intervention rules are placed under some pressure because the counterterrorism framing demands not only a non-neutral approach but one that commits to active cooperation in military intervention.

The resulting multinational coalitions, often US-led, impact on international legal argumentation surrounding foreign fighting in two ways. First, as discussed within Chapter Five, arguments (and prosecution attempts) against *other* foreign fighters confronting the same enemy as the parent state have either not materialised or proven difficult, particularly if the parent state attempts to do so through anti-terrorism laws. Second, an intervening state's partnered operations with armed groups in the destination state with which foreign fighters are volunteering puts under pressure any straightforward argument relying on democratic accountability and a state authority's monopoly on the legitimate use of force where the state is supporting the armed group in question.

⁸⁵⁹ 'Prohibiting Participation in Armed Conflict' (2015) 54 *Military Law and the Law of War Review* 13, 30.

⁸⁶⁰ See, eg, Heike Krieger, 'Rights and Obligations of Third Parties in Armed Conflicts' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press, 2018) 448.

Such activities are not only seemingly increasingly overt within the counterterrorism framing,⁸⁶¹ but also persistently complicated, reflecting the cyclical shifts in states' insistence on their monopoly on collective violence, described in Chapter One. In Chapter Five, I discussed the issue of intervening states and foreign fighters working together on the battlefield, for example, sharing intelligence or calling in close air support, despite a parent state not publicly condoning foreign fighting. Take also, for example, the alleged threats in early 2020 that Turkey would rely on non-state fighters with which it has been partnering in Syria in order to intervene in Libya. These forces have been described as foreign fighters and also mercenaries — and Turkey's actions denounced.⁸⁶² It is unclear in this case, though, whether existing foreign fighters would be being moved transnationally by a state, or whether through their transnational deployment, non-state fighters would *become* foreign fighters; alternatively, as discussed above regarding state oversight, whether Turkey's recruitment and management of such manpower, and/or the consent of the UN-recognised Libyan Government of National Accord, would exclude imposition of the foreign fighter label.

The tensions between abstention and intervention also appear within domestic legal responses to foreign fighting. In Chapter Five, I outlined possible lines of argument featuring, on the one hand, an insistence on the state monopoly on the use of force, and on the other, paying attention to the protection of norms and values. The former could be described as abstentionist or objective regarding foreign fighting; the latter allowing subjective analysis of the local situation. Given the somewhat permissive environment in international law surrounding foreign fighting, the persisting tensions underlying the relevant doctrine are illustrated by the lack of uniformity in domestic implementation but, importantly, also in states' retained nimbleness. I will return to this point in my concluding observations next.

4. Concluding Observations

4.1 Persisting Tensions: Humanity and the State

After her brief experience as a volunteer fighter during the Spanish Civil War, the French philosopher Simone Weil was disheartened by the violence committed even by the side she had chosen to support. She wrote that 'almost no one had been able to

⁸⁶¹ Christina Nowak, 'The Changing Law of Non-Intervention in Civil Wars: Assessing the Production of Legality in State Practice after 2011' (2018) 5(1) *Journal on the Use of Force and International Law* 40, 75: 'States are increasingly creating exceptions'.

⁸⁶² Edith M Lederer, 'UN Envoy: Countries Backing Libya Peace Fuel Conflict', *Associated Press* (online, 30 January 2020) <<https://apnews.com/5e9e79a5e4b6f0cae6a80f3e87463665>>; 'Turkey's Erdogan Confirms Sending Syrian Fighters to Libya', *Al Jazeera* (online, 22 February 2020) <<https://www.aljazeera.com/news/2020/02/turkey-erdogan-confirms-sending-syrian-fighters-libya-200221082443159.html>>. See also SC Res 2510, UN Doc S/RES/2510 (12 February 2020) para 10.

resist the impetuous rush of this civil war and preserve the principles of humanity'.⁸⁶³ 'The necessities, the atmosphere of civil war prevail over the aspirations which one tries to defend by means of civil war.'⁸⁶⁴

While I have been undertaking this study, as far as I am aware, Kimberley Taylor has remained in Syria with the Kurdish forces. She has not been featured in the press recently but regular tweets in her name still appear regarding the conflict in northern Syria.⁸⁶⁵ Previously expressing fear of arrest if she returned home to the UK, the dropping of charges against other British YPG fighters might provide some comfort, while in future, the UK's designated area offence adopted in 2019 might become relevant should parts of Syria be declared off-limits.⁸⁶⁶ What remains near certain is that the UK will not face state responsibility complaints regarding its lack of prevention of instances of foreign fighting like Taylor's.

Weil's sage warning corresponds with sentiments I hold stemming from my experiences in the humanitarian sector in civil war contexts. As mentioned in opening, I remain wary of a lowering of the bar to entry into armed conflict. At the same time, Taylor's story and the suffering of populations in Syria and Yemen in particular have accompanied me throughout this project. I recognise that my feelings about Taylor's decisions are somewhat coloured by her gender. Still, there is something striking about her commitment. Without knowing her, I find myself regularly hoping that she is safe and well.

The fact of being able to hold conflicting opinions reinforces for me how the individual stories of foreign volunteer fighters embody the persisting tensions inherent to international law on foreign fighting.

Approaching these tensions in terms of state responsibility and the state-claimed monopoly of force appears straightforward, objective, predictable and stable. *Precisely because* of the subjective politics and beliefs associated with each side of a conflict, and the nature of violence committed even by sides considered to have a just cause, one could insist on relying on certain existing structures of the international legal order, universalising the question, and avoiding, or perhaps even actively negating, the 'nagging feeling' described by Jan Klabbers that resistance fighters,

⁸⁶³ Enzo Traverso, *Fire and Blood. The European Civil War 1914–1945*, tr David Fernbach (Verso, 2017) 246–247, quoting Weil's 1938 letter to Georges Bernanos.

⁸⁶⁴ Simone Pétrement, *Simone Weil: A Life*, tr Raymond Rosenthal (Pantheon, 1976) 282, quoting Weil's 'Réflexions pour déplaire' [Displeasing Reflections].

⁸⁶⁵ See, eg, @KimmieTaylor_ (Twitter, 15 June 2020, 3:44 am AEST) <https://twitter.com/KimmieTaylor_/status/127222339482931203>.

⁸⁶⁶ *Counter-terrorism and Border Security Act 2019* (UK), s 4. See also Lucia Zedner, 'The Hostile Border: Crimmigration, Counter-Terrorism, or Crossing the Line on Rights?' (2019) 22(3) *New Criminal Law Review* 318, 343–4.

even terrorists, may not be simply common criminals.⁸⁶⁷ Foreign fighting could be understood as an ill or an escalation that states wish to restrain because of — and through the means of — international law. Taken to an extreme, leaving one's country to fight elsewhere, outside of state military and security structures, could be perceived as radicalism in itself.⁸⁶⁸

An alternative way of thinking is that *precisely because* of the subjective politics and beliefs associated with each side of a conflict, one must insist on considering the nature of the different claims and causes, and deciding on a response accordingly. Relying on existing state-based structures and universal rules might be perceived as too generic and unrealistic politically, leading to bureaucratic negotiations and governmentality on the “crude” level of the state; not able to react quickly enough, bogged down by national interests, including veto powers in the Security Council, and insufficient to appropriately protect populations in need. This might suggest the value of thinking more creatively outside of the state framework, to allow for exceptions or give greater agency to non-state actors. There may be people who deserve protection; values worth defending.

In turn, any increased authorisation of the use of violence, even for protection purposes, might be perceived as dangerous in that it chooses sides and favours solidarity over abstention. Allowing contestation of existing structures of violence could simply perpetuate violence, and ultimately, make cause and judgement irrelevant. For example, the fighting of foreign volunteers in Ukraine today has been described as ‘a kind of “ideological traverse”, on which everyone can fight for what they wish, and against whom they choose’.⁸⁶⁹ Reliance on a more objective and universal rule, on existing norms and state-based structures, such as the Security Council, might be preferable even if they are less than ideal in some circumstances.⁸⁷⁰

And so the arguments and counter-arguments go on. Once one is aware of the existing tensions, one or the other arguments cannot be embraced exclusively; argumentation remains torn, vascillating.⁸⁷¹

⁸⁶⁷ Jan Klabbers, ‘Rebels with a Cause? Terrorists and Humanitarian Law’ (2003) 14(2) *European Journal of International Law* 292, 301.

⁸⁶⁸ See Darryl Li, “‘Afghan Arabs,’ Real and Imagined’ [2011] (260) *Middle East Report* 2, 6.

⁸⁶⁹ Arkadiusz Legieć, ‘Profiling Foreign Fighters in Eastern Ukraine: A Theoretical Introduction’ in Kacper Rękawek (ed), *Not Only Syria? The Phenomenon of Foreign Fighters in a Comparative Perspective* (IOS, 2017) 22, 22. See also Tony Honoré, ‘The Right to Rebel’ (1988) 8(1) *Oxford Journal of Legal Studies* 34, 34; Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (Oxford University Press, 2017) 299.

⁸⁷⁰ Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, reissue with a new epilogue, 2005) 17–19.

⁸⁷¹ Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) 115: ‘States have often vacillated between the desirability of absolute moral prohibitions on certain types of violence and the necessity of exceptions’.

The complicating factor — but also the redeeming feature of international law that renders it constantly potentially valuable — is that the tensions in the debates on foreign fighting are not between *state interests* on the one hand and *fundamental human values* on the other, as it may at first appear. Rather, humanity is already intimately present in an approach to foreign fighting based on the state monopoly of force, and the state and its political processes, projects and power imbalances remain intensely present in any approach sympathetic to solidarity with causes of resistance, self-determination or protection.⁸⁷² Arguing exclusively for a more objective or a more subjective approach to foreign fighting cannot ever bring satisfaction because it will either not sufficiently take into account that notions of resistance persist in international law, or give violent resistance too much space. Reflecting this, international law and practice regarding foreign fighters in the twentieth century to today has not clearly taken a path of pragmatic reason or of principled universal rules exclusively. The possible arguments are in this way interlaced rather than inherently opposite.

The overall argument this thesis has offered is that the counterterrorism framing of the issue of foreign fighting obscures this moral, political and legal interlacing and complexity; the particular and universal aspects of the international legal responses; its histories and possible futures, as I turn to now to conclude.

4.2 What this Study Reveals about the Counterterrorism Framing of Foreign Fighter Issues

4.2.1 A Counterterrorism Framing

In answer to the research question motivating this thesis, studying the alternative framings and international legal responses surrounding foreign fighting appearing throughout the twentieth century to today reveals that the present counterterrorism framing of foreign fighter issues involves significant technical legal questions of its own, but can also have a naturalising, and therefore universalising, effect on thinking. The study has demonstrated how reducing the vision of *foreign fighters* to *foreign terrorist fighters*, and therefore to a category of individual to be prevented and penalised, denationalised, even neutralised, always and anywhere, within the single dominant framing of the moment, offers an insufficiently nuanced gaze on international law and foreign fighting. This narrower frame cannot, on its own terms, satisfactorily resolve all our questions. It obscures a richer and broader story of persisting tensions interwoven into the international legal arguments responding to the issue of foreign fighting within its alternative framings.

⁸⁷² See, eg, Isabel Feichtner, 'Realizing Utopia through the Practice of International Law' (2012) 23(4) *European Journal of International Law* 1143, 1146, discussing Weiler.

All framings risk being limiting in their own way, tied as they are to time and setting. Still, of the three framings described in this study, an approach based chiefly within counterterrorism thinking appears at once prone to over-extension *and* particularly narrow; often rushed, and focusing solely on the predominant policy concern of the moment without trying to understand broader or longer-standing aspects of the international legal debates. Over and above the documented risks of abuse undertaken in the name of counterterrorism described in Chapter Two — the leeway in international law that certain counterterrorism-based arguments demand — the counterterrorism framing claims to be able to work within a simplified scheme in which acceptable and unacceptable violence can be determined. It risks presenting a dichromatic image of good and evil, involving also racial and religious stereotyping, rather than dealing with the complex questions underlying foreign fighting. Earlier thinking appeared to leave greater space to consider the moral and legal complexities of determinations surrounding foreign fighting, even within the limits and sometimes problematic politics of the alternative framings of those moments.⁸⁷³

To be clear, my critique of the present counterterrorism framing is not to suggest that action should not be taken to prevent and penalise acts of terrorism. As well as providing at present the dominant framing, counterterrorism is one of the persisting red threads in the legal debates surrounding foreign fighting; an important one to which attention must be paid, but one of many. In that sense, while neither terrorism nor the linking of terrorism and foreign fighting is new, the counterterrorism framing has worked to ensure that the persisting tensions in international law surrounding foreign fighting are now also inextricably linked to the persisting tensions surrounding the definition of terrorism. Whatever the counterterrorism framing can achieve, and whatever its limits, it is not neutral, universal or a natural development of the law as it has progressed. Rather, as mentioned in Chapter Five, it risks echoing what powerful authorities want; treating as enemies the people that the powerful authorities cannot countenance. Like all framings, it does a lot of work and carries a lot of weight, setting the scope for pertinent questions and persuasive argument within that framing's system and logic.

4.2.2 *Responses to the Persisting Tensions*

In addition to this main argument, this study has demonstrated the elusiveness of seeking to respond to the counterterrorism framing, or to remedy the tensions more

⁸⁷³ See similarly Andrew Zammit, 'Citizenship Revocation and Australia's Counter-Terrorism History', *AVERT Research Network* (Blog Post, 31 October 2019) <<https://www.avert.net.au/blog/citizenship-revocation-and-australias-counter-terrorism-history>>: 'The 1975 ... deliberations show an awareness of the moral dilemmas, diplomatic difficulties and practical shortcomings posed by attempting to shift a terrorist threat offshore ... often lacking in contemporary political rhetoric around citizenship revocation.'

generally, through greater definitional clarity on this topic. In practice, it has not been possible to generate international legal definitions that have operated as desired. While the choices, priorities and developments in the different moments can be explained, as stated above, they are not natural, neutral or discoverable but contingent. They have context and historical background. They also prove pliable. The *transformation* of foreign fighting in new settings proves a useful tool for legal argumentation. The adopted definitions have been able to determine a path, a chance for a breath, only for an instant until the political setting morphs again and there is a transformed manifestation of foreign fighting in a new setting.

Similarly, a due diligence standard is sometimes relied upon as a pragmatic solution where reaching settled agreement on a substantive rule is difficult. The moments of regulation studied highlight recurring debates about what is pragmatic and possible for states, but also what is desirable in restrictions on foreign fighting, and to questions surrounding whether regulation/definition should be enacted on the international level or be left for domestic determination. Seen another way, states may not wish to have to enact laws the implementation of which they cannot practically guarantee, such as limiting all travel or controlling the extraterritorial activities of their nationals, especially where human rights arguments can be made.

There is a broad literature on due diligence that is doctrinal in nature, and renewed interest at present in due diligence across many parts of international law.⁸⁷⁴ I do not want to make a doctrinal point here, but only to point out this tendency of resorting to a due diligence standard to cope with underlying tensions. Indeed, scholarship has noted the increasing reliance on due diligence obligations, particularly regarding the control of private actors.⁸⁷⁵

What seems important is that, together with the elusiveness of definitional clarity, this tendency helps to reveal the stakes underlying the debates on foreign fighting. This project demonstrates not only how states have ensured that useful fluidity has been retained in international law on this topic, but suggests how the flexibility and silences advantage some states over others. This has, in turn, an impact on today's armed conflicts and how international law is applied to them.

⁸⁷⁴ See, eg, Timothy Stephens and Duncan French, ILA Study Group on Due Diligence in International Law First Report (International Law Association, 7 March 2014); Joanna Kulesza, *Due Diligence in International Law* (Brill, 2016); Société Française pour le Droit International [French Society for International Law], *Le Standard de Due Diligence et la Responsabilité Internationale* [The Due Diligence Standard and International Responsibility] (Pedone, 2015); Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence and Structural Change in the International Legal Order* (Oxford University Press, 2020 forthcoming); Samantha Besson, *La 'due diligence' en droit international* [Due Diligence in International Law] (Brill, 2021 forthcoming).

⁸⁷⁵ Sarah Heathcote, 'State Omissions and Due Diligence' in Theodore Christakis, Karine Bannelier and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law* (Taylor & Francis, 2012) 305–6.

Since reasonable prevention depends on each situation, due diligence as a standard of conduct remains non-absolute. How many foreign fighter departures must there be, to which types of groups or contexts, over what time period, in order for the parent state to be acting undiligently if it fails to take preventive action? Greater attention by the state could presumably be expected where there is an armed conflict related in some way to the parent state (geographically close, in which the parent state is intervening, or linked through minority population, dual citizens, shared language or culture, or media interest), where the armed conflict is otherwise significant in terms of intensity or existing foreign fighter participation, or where the state is already aware that persons from its territory have left to become foreign fighters, including through complaints or information from the destination state. Ultimately, though, the non-absolute standard of due diligence works to restrict unreasonable burdens being placed on states. Due diligence can also result in a more bureaucratic and procedural approach developing in order to “prove” diligent compliance, as has been the experience under anti-terrorism and environmental protection laws.⁸⁷⁶ While much may be demanded, these factors allow states certain flexibility for circumstances they may perceive differently in future.⁸⁷⁷ Moreover, the pliability of the standards means that, in practice, only situations of significant omission or alleged complicity would be formally discussed between states. As such, the non-toleration of harm/due diligence rule ultimately favours states’ freedoms to act over protections for affected states.⁸⁷⁸

That state determinations can remain nimble in the face of particular contexts could be considered normatively desirable in that issues of justice or protection could be taken into account, allowing the most appropriate, tailored decision to be made in specific contexts. Yet, the implication is also that non-absolute standards prove useful, nimble and realistic for states, and therefore that states have interests in maintaining debate on the law’s exact contours.⁸⁷⁹ The earlier chapters show how states wish to retain as much discretion as possible around issues of transborder harm and foreign fighters. It is perhaps an unfair choice for comparison, but state responses to the Covid-19 outbreak in 2020 indicate the abilities of states to monitor and restrict

⁸⁷⁶ Robert P Barnidge, ‘States’ Due Diligence Obligations with Regard to International Non-State Terrorist Organisations Post-11 September 2001: The Heavy Burden That States Must Bear’ (2005) 16 *Irish Studies in International Affairs* 103, 103; Sandra Krähenmann, *Foreign Fighters under International Law* (No 7, Geneva Academy of International Humanitarian Law and Human Rights, October 2014) 51; Kulesza (n 51) 91ff, 224ff.

⁸⁷⁷ Koskeniemi, *From Apology to Utopia* (n 48) 590.

⁸⁷⁸ An Hertogen, ‘Safeguarding a Liberal System of States: Reinterpreting States’ Freedoms in Increasing Interdependence’ (PhD Thesis, University of Auckland, 2011) 88–94.

⁸⁷⁹ Manuel R Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (Martinus Nijhoff, 1962) 53, commenting that the law on hostile military expeditions was particularly vulnerable to the ‘vicissitudes of political demands’. See also at 61ff.

overseas travel when required. A historical example is the 20,000 soldiers deployed by the US to the Mexican border in 1911 to enforce US domestic neutrality laws and prevent American fighters crossing to support either side in the revolution.⁸⁸⁰ In the three moments studied, despite action being taken to respond to a policy concern raised on the international level, international law proved able to be compromised or circumvented in line with the interests of more powerful states, or simply ignored such as regarding the prohibition of mercenarism, and anyway providing a great amount of discretion such as regarding terrorism. At its most extreme, states might find reasons for alternate processes if the otherwise applicable law seems undesirable, as European states did during the Spanish civil war to sidestep the League of Nations and neutrality law. Although often clothed in international argument, state duties are, then, regularly interpreted by moral and political judgement rather than legal obligation. Here, as elsewhere, the due diligence standard offers a response that provides some comfort to states in the form of restraint on burdensome duties but precisely at the expense of greater responsibility. Such flexibility is relied upon, then, not only when agreement on substantive rules is *difficult*, but when it is *not desired*.

Relatedly, on the domestic level, whether a state has opted for a broad or a more limited prohibition of foreign fighting as set out in Chapter Five, states seek to cope with the simultaneous desire for determinacy and nimbleness by incorporating elements of flexibility. When required, national legislation with a narrower prohibition might seek to rely on standard crimes applying extraterritorially such as murder or weapons offences; alternatively to rely on general offences related to internal or external security and/or label unwanted foreign fighting as terrorism. Conversely, subjectivity is retained in national legislation with a broader prohibition through prosecutorial discretion regarding various persuasions of foreign fighters,⁸⁸¹ or simply through inconsistent application by state security agencies.⁸⁸² Norway's foreign fighting legislation, for example, uses the descriptor 'illegitimate participation' in its offence, which might be relied upon to temper its breadth as considered necessary.⁸⁸³ More explicitly, although service with non-state forces is generally prohibited in Australia's Criminal Code, the prerogative of the authorities to

⁸⁸⁰ Dino Kritsiotis, 'Intervention: Some Early Sketches from the Frontlines of Revolution', *Laureate Program in International Law* (Keynote Address, August 2017) <<http://www.lpil.org/media-2>> 0:16:35–0:17:30.

⁸⁸¹ Chapter Five, n 184.

⁸⁸² See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 19 April 2016, vol 608, col 889 ('UK citizens Returning from Fighting Daesh') (Jim Shannon; Robert Jenrick).

⁸⁸³ Højfeldt (n 37) 30.

approve of an armed group is explicitly retained where it is ‘in the interests of the defence or international relations of Australia’.⁸⁸⁴

More recent scholarship calling for states to return to using ‘antiquated’ domestic neutrality laws in order to cover a wider range of foreign fighting than only foreign terrorist fighting⁸⁸⁵ likewise acknowledge that, in practice, states would retain some executive discretion in the application of such laws in order to temper a blanket prohibition.⁸⁸⁶ Similar calls for domestic neutrality laws to be amended and relied upon were made in relation to the reappearance of mercenaries in the 1960s–1970s, and due to concerns about covert state support for private participation in warfare in the 1980s.⁸⁸⁷

While paying attention to the limits of the counterterrorism framing and considering broader potential duties regarding foreign fighting is in alignment with my approach here, the point is that such domestic neutrality laws, despite their name, are not *neutral* in the sense of abstention, nor *blanket* and therefore needing some discretionary exemption. Rather, they are already partial in their design. Re-applying these alternative approaches may, as their proponents suggest, provide a framework preferable to that of counterterrorism, but will not be able to provide entirely the comfort being sought. Older foreign enlistment laws generally prohibit only service against a state at peace with the parent state. In 1988, for example, charges under the US Neutrality Act against citizens involved in militarily supporting the Nicaraguan Contras were dismissed when counsel successfully argued that the US was effectively at war with Nicaragua even if its operations had been covert.⁸⁸⁸ More recently, American Matthew Van Dyke, who fought with the Libyan opposition in 2011 and faced no legal issues upon his return, said brazenly but seemingly correctly in a media interview regarding US domestic neutrality law: ‘The U.S. government only cares

⁸⁸⁴ *Criminal Code Act 1995 (Cth)*, s 119. See also *Diplock Report* (n 27) 13 [49], in which the Commissioners were in favour of a law prohibiting mercenary recruitment being made applicable only in relation to specified forces by affirmative determination of the authorities in each case.

⁸⁸⁵ See Chapter One, section 4.

⁸⁸⁶ Craig Forcese and Ani Mamikon, ‘Neutrality Law, Anti-Terrorism, and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies’ (2015) 48 *University of British Columbia Law Review* 305, 359; John Ip, ‘Reconceptualising the Legal Response to Foreign Fighters’ [2019] *International & Comparative Law Quarterly* 1, 30.

⁸⁸⁷ Robert E Cesner and John W Brant, ‘Law of the Mercenary: An International Dilemma’ (1976) 6 *Capital University Law Review* 339, 359; Jules Lobel, ‘The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy’ (1983) 24 *Harvard International Law Journal* 1, 56–61.

⁸⁸⁸ Kathleen Belew, *Bring the War Home: The White Power Movement and Paramilitary America* (Harvard University Press, 2018) 99.

what direction you're shooting at and who you are shooting at ... As long as you're shooting in the right direction, at bad guys, they don't really care.'⁸⁸⁹

Reflecting the above, what appears missing in particular in the present framing of debates is concern by parent states about the effect of the foreign fighting not just on another state but on that other state's population suffering armed conflict. The prevention of terrorism inherently seeks to prevent violence and international crimes. Still, although this is not entirely unique to the contemporary framing, as discussed above, approaches within a counterterrorism logic have contributed to a nationalistic approach that relies on arguments based chiefly on the relationship between the foreign fighter and the parent state, such as those commonly made today regarding home security, allegiance, treason and citizenship-stripping rather than thinking about its nationals' battlefield conduct "out there", i.e. potentially impacting on friendly state relations protected by international law, on the wellbeing of foreign populations or the general escalation of the conflict.

Thought of in another way, contrary to the notion of sovereign equality that the international legal system proclaims, the countries suffering armed conflict appear to be understood as already *lawless* in some way; unable to be harmed by the additional presence of certain foreign fighters.⁸⁹⁰ While attempting with this project intentionally to look beyond an IHL analysis, this brings me somehow full circle, to a preoccupation with humanitarian concerns for societies impacted by war.

Ultimately, the malleability of the rules and standards — that states in effect determine what is 'state' and 'non-state',⁸⁹¹ who is citizen and foreign, whether human rights arguments allow greater restrictions or limit preventive burdens on the state, whether constructive knowledge of the activities of individuals or only groups is demanded by due diligence, and so forth — become ways in which states claim not only a monopoly on the legitimate use of violence by insisting on abstention by their nationals, but also impose power through their prerogative to choose whether or not to assert that monopoly by tolerating private involvement in conflict.⁸⁹²

⁸⁸⁹ Jeff Seldin, 'Many Americans Fighting in Iraq, Syria Are Foes of IS', *Voice of America* (online, 10 April 2016) <<http://www.voanews.com/a/americans-fighting-iraq-syria-foes-islamic-state-report/3459384.html>>.

⁸⁹⁰ See, eg, exemplifying this by arguing against the 'overreach' of parent states trying to prevent foreign fighting (since it does not harm them) and, therefore, for greater liberty for (IHL-compliant) foreign fighting, allowing problems to be 'crush[ed]' on the battlefield, Adam K. Webb, "'Swanning Back in'?: Foreign Fighters and the Long Arm of the State' (2017) 21(3) *Citizenship Studies* 291.

⁸⁹¹ Chapter One, n 47.

⁸⁹² Elizabeth Roberts-Pedersen, 'Foreign Fighters Test the State's Monopoly on Violence', *The Conversation* (online, 24 November 2014) <<https://theconversation.com/foreign-fighters-test-the-states-monopoly-on-violence-34305>>; Grove (n 13) 9.

This may not seem a significant problem since it theoretically applies to all states and may be the best that the international legal system can currently offer. Indeed, while scholarship notes that due diligence might dilute substantive obligations, the proceduralisation involved in due diligence standards has also been praised as protecting weaker states from power imbalances.⁸⁹³ Similarly, it may appear that allowing greater permissiveness to non-state resort to force and foreign fighting might counterbalance some of the problems caused by state power and violence. This may be true in individual cases. However, if international lawyers are to take seriously the important critiques of international law as Eurocentric and hegemonic,⁸⁹⁴ then foreign fighting and the legal argumentation which surrounds it need to be reflected upon not only as a manifestation of individual determinations to act, discernible as either *bad* such as foreign terrorist fighting or *good* such as freedom fighters, but something with a far more complex relationship to the state and to the general securitisation of international issues; part of the complex relationship between authority and solidarity through violence.

The counterterrorism framing projects an image of all states being in the fight together. But because of the physical movement of the foreign fighters to the destination states, parent states will inevitably have greater leeway to protect themselves from foreign fighting without needing to insist on the enforcement of a due diligence standard. Moreover, in the absence of complicity, it is likely that parent states with minimal legislative provisions seeking to prevent transnational terrorist activity and hostile expeditions could satisfactorily confront a formal complaint about non-diligent non-toleration made by a destination state.⁸⁹⁵ In this light, the ways those complex relationships between authority and solidarity are argued in international law affect different states differently. Legal argumentation regarding foreign fighting, by retaining flexibility — understandable on one level given the tensions inherent to this topic, and perhaps even necessary — can reinforce international law's weaknesses in the face of national security priorities, as well as existing power imbalances in an international legal system supposedly based on sovereign equality. As David Kennedy has described, '[m]odern expertise knows and it forgets — or refuses to know — its power and its limits. When they forget — and we forget — it becomes all the more

⁸⁹³ See, eg, Lecture by Anne Peters, Cambridge Law Faculty, 'The Rise of Due Diligence as a Structural Change of the International Legal Order' (YouTube, 6 May 2020) <<https://www.youtube.com/watch?v=hjWg1-2VYd4>>.

⁸⁹⁴ From the vast literature, see, eg, Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2004); Kim Lane Scheppele, 'The Empire of Security and the Security of Empire' (2013) 27(2) *Temple International and Comparative Law Journal* 38; Martti Koskeniemi, 'Histories of International Law: Dealing with Eurocentricity' (2011) 19 *Rechtsgeschichte* 152 ('Eurocentricity').

⁸⁹⁵ See also Richard B Lillich and John M Paxman, 'State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities' (1976) 26(2) *American University Law Review* 217, 266.

difficult to understand how this world, with all its injustice and suffering, has been made and reproduced.’⁸⁹⁶

4.2.3 *Seeing the World Whole*⁸⁹⁷

By considering these debates over time, this thesis has suggested how, on the one hand, international law on this topic is concerned with a richer range of possible harms that these actors as a broader category might pose than only terrorism (or only financial motivation or only foreignness and so forth); how international law grapples with more nuanced, complex histories, traditions and political interests at play, and that change and morph.

Such questions will return and endure, particularly in relation to state-supported or facilitated foreign fighting, if recent examples blurring foreign fighting, mercenarism, PMSC operations and foreign enlistment continue. I am thinking not only of the “humanitarian” not-for-profit PMSCs described in Chapter Five, but reports in mid-2020 of an American PMSC being involved in thwarted offensive operations in Venezuela,⁸⁹⁸ of personnel of PMSCs being involved in combat operations in Libya, Syria and Ukraine,⁸⁹⁹ as well as in Yemen⁹⁰⁰ and Nigeria,⁹⁰¹ and, as mentioned above, denouncements of Turkey for violating a UN arms embargo on Libya by deploying forces of ‘foreign fighters’ created from non-state partner forces in Syria.⁹⁰² There are, then, many reasons why the value of thinking more generously about international law regarding foreign fighting will endure as the phenomena and their political settings continue to transform.

Lawyers will not be able to achieve a perfect resolution: there are multiple policy reasons for wishing greater prevention of private participation in armed conflict — that is, that ‘even fighting with today’s “good guys” creates serious foreign policy

⁸⁹⁶ David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016) 5.

⁸⁹⁷ Chapter Two, n 93.

⁸⁹⁸ Tom Phillips and Julian Borger, ‘Venezuela: Captured US Mercenary Claims He Planned to Abduct Maduro’, *Guardian* (online, 7 May 2020) <<https://www.theguardian.com/world/2020/may/06/venezuela-maduro-abduction-plot-luke-denman-americans-captured>>.

⁸⁹⁹ Neil Hauer, ‘The Rise and Fall of a Russian Mercenary Army’, *Foreign Policy* (online, 6 October 2019) <<https://foreignpolicy.com/2019/10/06/rise-fall-russian-private-army-wagner-syrian-civil-war/>>; ‘Russian Group Wagner “Fighting in Libya”’, *BBC* (online, 7 May 2020) <<https://www.bbc.com/news/world-africa-52571777>>.

⁹⁰⁰ Aram Roston, ‘A Middle East Monarchy Hired American Ex-Soldiers to Kill its Political Enemies. This Could be the Future of War’, *BuzzFeed* (online, 16 October 2018) <<https://www.buzzfeednews.com/article/aramroston/mercenaries-assassination-us-yemen-uae-spear-golan-dahlan>>.

⁹⁰¹ ‘Eeben Barlow: Inside the World of Private Military Contractor’ *Al Jazeera* (online, 5 January 2020) <<https://www.aljazeera.com/programmes/talktojazeera/2019/12/eeben-barlow-world-private-military-contractors-191229164548897.html>>.

⁹⁰² See n 40 above.

challenges'⁹⁰³ — or for wishing greater permissiveness. In that regard, for those engaging with international law on this topic, including those tasked with decision-making, the approach suggested here is not to seek to resolve satisfactorily the dilemma, but to acknowledge the tensions.

This thesis has therefore sought to demonstrate the value in paying attention to the persisting tensions and how they are framed in different moments and settings, and by different actors. This can contribute to more generous thinking about international law on the topic of foreign fighting, and about the current counterterrorism framing and its operation and effects; what it allows and what it obscures. I am suggesting, then, the potential disabling effects to relevant thinking when it remains limited within that framing.⁹⁰⁴ If the framing of issues changes over time and setting, international legal thinking does not need to remain bound within the present narrow counterterrorism framing. Seeking critical distance from it — unframing the issue — allows reflection on the debates and practices that have arisen within international law regarding the perceived threats or wrongs, as well as values, *beyond terrorism* that other types of foreign fighters might pose and that international law may (or may not) be seeking to regulate.

This desire for critical distance echoes the rather personal and testing demand made by critical legal scholars for international lawyers to practise greater self-reflectivity,⁹⁰⁵ showing awareness of the inherent political nature of the advocacy one is involved in; work that often feels important and urgent, and to which one may feel committed.⁹⁰⁶ Awareness of the politics of decisions is not to render international law pointless, but potentially progressive. It seeks 'to induce a sense that there are more alternatives than practitioners usually realize, that impeccable arguments may be made to support preferences that are not normally heard'.⁹⁰⁷ And in this sense, *not* getting out of the rushed and intense focus on terrorism to consider law and policy's

⁹⁰³ Forcese and Mamikon (n 64) 318.

⁹⁰⁴ Stef Wittendorp, 'Displacing the National Security-Narrative: On the (De-)Securitization of the Governmental and Legal Response to "Foreign Fighters"' [2017] *Security and Global Affairs* 18, 25–6: 'The question here is how can our thinking space be extended beyond the national security-narrative? ... and invite in a broader space of possibilities'.

⁹⁰⁵ Koskeniemi, *From Apology to Utopia* (n 48) 615: 'The decision is made, and its consequences are thus attributable not to some impersonal logic or structure but *to ourselves* ... International law is what international lawyers make of it' (emphasis in original); Kennedy, *A World of Struggle* (n 74) 278–9: 'How did *you* come to feel that things weren't quite right, that the solutions on offer were inadequate, and that taking the time to think hard about it might help? ... But if you have this impulse, you are not alone ... Together, you can change the world' (emphasis in original).

⁹⁰⁶ David Kennedy, 'Theses about International Law Discourse' (1980) 23 *German Yearbook of International Law* 353, 354, 366; David Kennedy, 'A New Stream of International Law Scholarship' [1988] (1) *Wisconsin International Law Journal* 1, 4; Koskeniemi, *From Apology to Utopia* (n 48) 568–9, 605–10.

⁹⁰⁷ Koskeniemi, *From Apology to Utopia* (n 48) 602. See also 591, 605, 615.

histories and categorisations in other times and contexts may have ‘an important side-effect on public decision-making, reducing the quality of the thinking of those whose job it is to take decisions of policy and law in the public interest’.⁹⁰⁸ Stepping back and thinking via wider historical frames can ‘[add] perspectives to provide a more complex and more credible assessment’,⁹⁰⁹ a redescription of an issue, a path for analysis and comparison.

To do this, one needs to be able to step away from usual legal habitats and habits, and try to see institutions like an outsider — particularly counterterrorism- and security-based institutions currently holding jurisdiction over the topic of foreign fighting.⁹¹⁰ That suggestion requires of international lawyers some personal reflection of whether one has mastered the ‘coolness’ and the ‘passion’ demanded;⁹¹¹ the technical skill and the sensitivity, which might embolden one to demand the same of other lawyers working on issues related to foreign fighting.⁹¹²

To conclude, the work presented in this thesis has sought to demonstrate that on the topic of foreign fighting, international lawyers cannot be expected to see or grasp the *whole world* — the persisting tensions make this impossible — but suggests the value in making better attempts at *seeing the world whole*.

⁹⁰⁸ Referring generally to the use of knowledge and specialised regimes, not foreign fighting: Philip Allott, *Eutopia: New Philosophy and New Law for a Troubled World* (Edward Elgar, 2016) 293 [12.18].

⁹⁰⁹ Koskenniemi, ‘Eurocentricity’ (n 72) 176.

⁹¹⁰ Koskenniemi, *From Apology to Utopia* (n 48) 606–8, 610; Martti Koskenniemi, ‘The Politics of International Law: 20 Years Later’ (2009) 20(1) *European Journal of International Law* 7, 14.

⁹¹¹ Koskenniemi, *From Apology to Utopia* (n 48) 617.

⁹¹² See also on the role of the legal advisor in international organisations, especially in relation to the ‘war on terror’, and their ‘greater potential’, Treasa Dunworth, ‘The Legal Adviser in International Organizations: Technician or Guardian?’ (2009) 46(4) *International Legal Adviser* 869.

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Appendix

Selected Legal Provisions

1. Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, opened for signature 18 October 1907, USTS 540, 2 AJIL Supp. 117 (entered into force 26 January 1910)

Article 6

The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

2. Report of the Non-Intervention Committee's Technical Advisory Sub-Committee on Withdrawal of Foreign Volunteers 1937⁹¹³

Persons recommended to be evacuated

All persons in Spain, the Spanish Possessions, or the Spanish Zone of Morocco are liable to be evacuated who, on July 18, 1936, either were nationals of, or—being stateless persons—were domiciled in, any Country the Government of which is a party to the Non-Intervention Agreement, and who are unable to prove that they entered the service of either party in Spain before that date, if they fall within any of the following categories:

- (1) Combatant personnel of whatever rank attached to, serving in, or serving with the naval, military, or air forces of either party in Spain.
- (2) Personnel engaged in the maintenance of essential services in connection with the armed forces of either party, *e.g.*, lines of communication, ground services in aërodromes, supply, ordnance, etc. (N.B. – Exempted are personnel serving in recognized non-Spanish medical, sanitary, or similar units.)
- (3) Personnel engaged as instructors or advisers with the armed forces of either party.
- (4) Personnel engaged in civilian capacity with the armed forces of either party, *e.g.*, lines of communication, naval shore establishments, etc.
- (5) Personnel engaged with either party in, or as advisers to, government departments or other administrative offices, *e.g.*, railways, ports, docks, etc.

⁹¹³ Unpublished report. Authorised summary of relevant part issued in memorandum about the British Plan, adopted 16 July 1937 by the Non-Intervention Committee as the basis for discussion. See Arnold J Toynbee, *Survey of International Affairs 1937*, vol II 'The International Repercussions of the War in Spain (1936–7)' (Oxford University Press, 1938) 301–2, 332–3; Norman J Padelford, 'The International Non-Intervention Agreement and the Spanish Civil War' (1937) 31(4) *American Journal of International Law* 578, 602 n 61 (citation omitted).

- (6) Personnel engaged in any capacity in the work of manufacture, assembly, or repair of war material (including aircraft) covered by the Non-Intervention Agreement.
- (7) Personnel engaged in the arms trade with either party.
- (8) Persons whose activities are in any way susceptible of prolonging or embittering the present conflict. (As to be defined by the special sub-committee.)
- (9) Prisoners of war held by either party.

3. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, GA Res 2625, UN Doc A/RES/2625(XXV) (24 October 1970) annex

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations

...

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

... Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

4. *Definition of Aggression*, GA Res 3314, UN Doc A/9631(XXIX) (14 December 1974) annex

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

...

- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

5. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978)

Article 47 Mercenaries

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

6. *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, opened for signature 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001)

Article 1

For the purposes of the present Convention,

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

2. A mercenary is also any person who, in any other situation:
- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
 - (ii) Undermining the territorial integrity of a State;
 - (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
 - (c) Is neither a national nor a resident of the State against which such an act is directed;
 - (d) Has not been sent by a State on official duty; and
 - (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

7. Security Council Resolution 2178, UN Doc S/RES/2178 (24 September 2014)

Preamble

...

Expressing grave concern over the acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, and resolving to address this threat,

...

Having regard to and highlighting the situation of individuals of more than one nationality who travel to their states of nationality for the purpose of the perpetration, planning, preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and *urging* States to take action, as appropriate, in compliance with their obligations under their domestic law and international law, including international human rights law,

Operative Part

4. *Calls upon* all Member States, in accordance with their obligations under international law, to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by preventing the radicalization to terrorism and recruitment of foreign terrorist fighters, including children, preventing foreign terrorist fighters from crossing their borders, disrupting and preventing financial support to foreign terrorist fighters, and developing and implementing prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters;

5. *Decides* that Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities;

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

(a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;

(b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training; and,

(c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training;

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