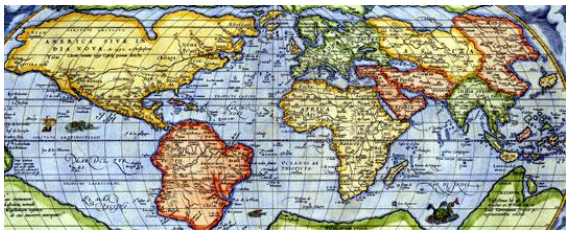

European Society of International Law

Conference Paper Series

Conference Paper No. 8/2017

2017 ESIL Research Forum, Granada, 30-31 March 2017

"The Neutrality of International Law: Myth or Reality?"

Retrieving Neutrality Law to Consider 'Other' Foreign Fighters under International Law

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Abstract:

Since the early twentieth century, scholarship has debated the continued relevance of neutrality law in an international system based on collective security. This paper contributes to continued thinking about the notion of neutrality, by considering what questions may be opened up when neutrality law's rules on private foreign enlistment are examined alongside contemporary practice in response to the phenomenon of foreign fighters. Specifically, this paper retrieves earlier contesting views surrounding the departure of foreign volunteers to armed conflict under traditional neutrality law, and suggests how and why these debates can be of contemporary interest to a consideration of law and policy regulating foreign incursion and various kinds of foreign fighters today. Australia's legislative response to foreign incursion by those within its jurisdiction, and its recently enacted "declared area offence" relating to parts of Syria and Iraq, provide one illustrative example.

Keywords: International law; neutrality; non-intervention; armed conflict; history; foreign fighters; foreign incursion; terrorism; Australia.

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This paper represents part of ongoing doctoral research on foreign volunteer fighters in armed conflict and international law, supervised by Professors Anne Orford and Martti Koskenniemi. The author is grateful for support provided by the University of Melbourne's Human Rights Scholarship. The author thanks Anne Orford and the anonymous reviewers for their comments on an earlier draft, as well as Nele Verlinden and Mario Prost for thoughtful feedback during the European Society of International Law Research Forum at the University of Granada "*The Neutrality of International Law: Myth or Reality?*" (March 2017), where this work was originally presented.

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1. Introduction

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.[1] This paper contributes to attempts to reconsider the notion and relevance of neutrality, by retrieving earlier debates about its rules on foreign volunteering/enlistment by individuals and examining these alongside contemporary dilemmas in law and practice in response to the phenomenon of foreign fighters.

The phenomenon of private individuals choosing to leave their country of origin or residence in order to participate in a foreign armed conflict raises multiple considerations under international law.[2] Of particular significance is the question of whether and to what extent a State is required to

[1] e.g. 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, 1st ed, 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; D Schindler, "Transformations in the Law of Neutrality since 1945" in AJM Delissen and GJ Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead* (Martinus Nijhoff, 1991) 382; Detlev F Vagts, "The Traditional Legal Concept of Neutrality in a Changing Environment" (1998) 14 *American University International Law Review* 83; Laurent Goetschel, "Neutrality, a Really Dead Concept?" (1999) 34(2) *Cooperation and Conflict* 115; Elizabeth Chadwick, "Neutrality Revisited" in Tim McCormack and Rain Liivoja (eds), *Routledge Handbook of the Law of Armed Conflict* (Taylor & Francis, 2016).

[2] See e.g. Manuel R Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (Martinus Nijhoff, 1962); H Lauterpacht, "Revolutionary Activities by Private Persons against Foreign States" (1928) 22 *American Journal of International Law* 105; 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

seek to prevent the departure of fighters volunteering with armed groups overseas as one aspect of its duty "not to allow knowingly its territory to be used for acts contrary to the rights of other States", as notably described in the International Court of Justice's *Corfu Channel* judgment.[3] The 1970 Friendly Relations Declaration adopted by the UN General Assembly likewise provides that States must not *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]

The interest of this paper is in individual volunteers acting in their private capacity and the question of possible State responsibility through omission (lack of diligent prevention of harm) rather than attribution.[5] Scholarship has referred to these "no harm" or "non-toleration" rules as the basis of an argument that international law requires States, to a standard of due diligence, to seek to prevent the movement of all foreign fighters.[6] As Ian Brownlie has argued: "In principle, omission to prevent such departure [of 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."[7] In comparison, Tom Ruys poses the question in the following open way: "The 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."[8]

A due diligence prevention of harm duty in international law has been developed rather significantly as part of international environmental law considerations. The application of such a duty, including a duty to cooperate, is also more readily identified in respect of counter-terrorism

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Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 229.

3 *Corfu Channel* (*UK v. Albania*), Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 9. Similarly, Judge Moore (in dissent) in the *S.S. 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" (*The S.S. Lotus*, PCIJ Ser. A., No. 10, (1926), 88).

4 *Friendly Relations Declaration*, A/RES/25/2625, 24 October 1970, Principle 3.2.

5 While they may technically be "foreign fighters" of some sort, my work is not concerned with organised armed groups based in one state which intervene in armed conflict in another state, such as Hezbollah fighting in the Syrian conflict; nor with proxies allegedly supported or even organised by a state, such as the Chinese intervention into Korea by "volunteers" in 1950. Nor do I consider troops of foreign intervening countries, such as US military personnel in Iraq.

6 As argued, e.g., in scholarship offered by Krähenmann, "The Obligation under International Law of the Foreign Fighter's State of Nationality", *supra n.* 2; Sandra Krähenmann, "Foreign Fighters under International Law" (Academy Briefing No. 7, Geneva Academy of International Humanitarian Law and Human Rights, October 2014) 49–51.

7 Ian Brownlie, "Volunteers and the Law of War and Neutrality" (1956) 5(4) *International and Comparative Law Quarterly* 570, 573–74. See also, discussing the 1869 *Alabama* claims, Joanna Kulesza, *Due Diligence in International Law* (Brill Nijhoff, 2016) 61: "Such [due diligence] activities should also include preventing individuals within state territory from preparing and committing acts of war against the will of state authorities."

8 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. See also Arnold McNair, writing at the time of the Spanish Civil War, who found the rules on volunteers applicable in civil war "ill-defined and still in course of development": "The Law Relating to Civil War in Spain" (1937) 53 *Law Quarterly Review* 471, 496–99.

efforts.[9] It is "so widely recognized that it should not fuel a debate".[10] Moreover, in September 2014, the Security Council explicitly required States to take legislative action to prevent the travel and attempted travel of the specific category of "foreign terrorist fighters",[11] described in Resolution 2178 as:

> "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict […]".[12]

Such a resolution places this obligation squarely within the collective security system of the UN over and above any other legal framework – there is no room for arguments of abstention or neutrality.[13] Yet, as described in Section 3 of this paper, there are various categories of foreign fighters, fighting for different causes and reasons, and questions remain about how such duties of diligent conduct apply, or should apply, in practice in these various settings. This is perhaps particularly so regarding the case of foreign volunteers who may be fighting against another armed group such as the Islamic State group and not necessarily against the government, or where a right of self-determination may be relevant. More generally, questions surrounding the exact scope of the wider principle of non-intervention in international law have placed it constantly under pressure, today increasingly overtly. A pragmatic 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. An alternative approach might condemn all and any such volunteering with armed groups based on a view in favour of abstention, that foreign armed conflict is not of the concern of the State's nationals, or that the uncontrolled taking up of arms by private individuals cannot be tolerated.

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9 See, e.g., Kimberly N Trapp, *State Responsibility for International Terrorism* (Oxford University Press, 2011) 64ff; Robert P Barnidge, Jr, "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; Helen Duffy, *International Responsibility, Terrorism and Counter-Terrorism* (Cambridge University Press, 2nd ed, 2015) 83ff; 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, 659–66; Convention for the Prevention and Punishment of Terrorism (1938), Art. 2, LN doc. C/94/M/47, Annex 4, 196-97.

10 Proulx, *supra n.* 9, 660.

11 S/RES/2178 (2014). See also S/RES/2170 (2014); EU Directive on Combatting Terrorism (16 February 2017), described in European Parliament, "Preventing terrorism: clampdown on foreign fighters and lone wolves", http://www.europarl.europa.eu/news/en/news-room/20170210IPR61803/preventing-terrorism-clampdown-on-foreign-fighters-and-lone-wolves.

12 S/RES/2178 (2014), PP 8 and see also OP 5, 6, 10. For useful commentary on this definition, see, e.g., Krähenmann, "The Obligation under International Law of the Foreign Fighter's State of Nationality", *supra n.* 2, 234ff; Martin Scheinin, "Back to Post-9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters" <https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>.

13 See, e.g., New Zealand Hansard (Debates), Speech by Hon. C. Finlayson, 9 December 2014, Second Reading of Countering Terrorist Fighters Legislation Bill 2014, 702 NZPD 1255: "fulfilling our role as a good international citizen. … There is no room for moral ambiguity". See also Maria Gavouneli, "Neutrality - A Survivor?" (2012) 23(1) *EJIL* 267, 272.

Stepping back from the legally- and geographically-more limited category of foreign terrorist fighters in the Middle East so as to take in a more encompassing view of legal responses to private volunteering allows a consideration of more fundamental, and also more confronting and morally intimate, questions and conceptual matters at the heart of legal debate and practice that arise with the private taking up of arms across borders. A consideration of such *other* foreign fighters therefore provides a challenging and potentially enlightening lens for examining due diligence preventive duties of States. In turn, retrieving earlier debates under neutrality law about regulation of foreign volunteers provides one – and certainly not the only – relevant pathway of re-situating and reconsidering these contemporary dilemmas.

In order to do this, Section 2 of this paper introduces neutrality law's provisions on foreign volunteers. Section 3 provides some background by highlighting how questions related to due diligence prevention duties and the contested categorisations of different types of foreign fighters are being grappled with by States in their domestic legal frameworks. The second half of the paper then explores the possible relevance of four selected historical debates within the traditional neutrality approach to a consideration of contemporary questions and values surrounding legal responses to foreign fighters and due diligence preventive duties: abstention vs. impartiality, and the public-private divide; territorial and extra-territorial jurisdiction; the threats posed by groups and individuals; and the scope of vigilance required.

2. Retrieving neutrality law

The "non-toleration" and "no harm" rules applying to States' responses to the private taking up of arms across borders have certain roots in neutrality law.[14] As a starting point, neutrality is relevant to a consideration of private volunteering because the codified version of traditional neutrality law included specific rules – in fact an exception – concerning enlistment with the foreign belligerent forces by private individuals in the neutral State. While it was the *State* that held neutrality law's two related duties of abstention and prevention – *abstention* from participation in the conflict in support of either belligerent, and *prevention* of abuses against its neutrality by taking feasible action to defend its territory[15] – these responsibilities required the

[14] Garcia-Mora, *supra n.* 2, 50. 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. Making a similar argument regarding rules on intervention in self-defence, AS Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense" (2012) 52 *Virginia Journal of International Law* 483.

[15] Erik Castrén, *The Present Law of War and Neutrality* (Suomalainen Tiedeakatemia, 1954), 442, 463, 471–72, 474, 477; Lassa Oppenheim, *International Law: A Treatise* (H. Lauterpacht ed, Longmans, 7th ed, 1952) vol II Disputes, War and Neutrality, 684–85, 738–39, 743 [§§320, 349, 351]; Michael Bothe, "The Law of Neutrality" in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 2nd ed, 2008), 583–84 [§1109]. Impartiality is sometimes listed as a third duty. See Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing, 2008), 279–80; Bothe, 571, 581, 584 [§§ 1101, 1107, 1110]; Oppenheim, 654–56, 673ff [§§ 294-95, 313ff].

neutral State to also consider the actions of *private individuals* within its territory which might impact on its neutral status.[16] This was not due to an attribution of the private individual's conduct to the neutral State – although in some cases, this was certainly the relevant question[17] – but rather an acknowledgement that the State could be considered to be no longer neutral through omission, that is, if it failed to take sufficient care to prevent certain actions of persons within its territory who were militarily supporting either of the belligerents.[18]

In neutrality law's codified form, Articles 4 and 5 of the 1907 Fifth Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land [Hague Convention (V)] 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.[19]

Article 6 of Hague Convention (V) provided a significant exception 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 of private actors, as well as between actions of organised bodies ("corps of combatants", recruitment) and those of lone individuals. It specifically excluded any effect on neutral status, and by implication the perception of any threat or harm posed, when individual volunteers chose to leave the neutral parent State in order to enlist with one of the belligerent parties.

As Hague Convention (V) applied only to international armed conflicts[20] such that enlistment was generally with State 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.[21] The thinking behind Article 6 has in any case evolved over time.[22] Yet, neutrality law was also faced with contesting views in its own time and context. An examination of the 1907 negotiations leading to the adoption of Hague Convention (V) shows that certain debates related to foreign enlistment and due diligence regarding foreign volunteers continue to arise in discourse regarding the

16 Castrén, *supra n.* 15, 441, 443, 447: "The duty to refrain from war operations rests also on the subjects of neutral States, in so far as belligerents have the right to take repressive measures against those who intervene."

17 e.g. Garcia-Mora, *supra n.* 2, 67–79: "volunteers are really instruments of international policy and not simply innocent foreigners who for ideological reasons join belligerent forces"; Brownlie, *supra n.* 7, 577-78.

18 Castrén, *supra n.* 15, 447.

19 This paper only considers the rules related to armed conflict on land, although particular rules also exist regarding neutrality in sea and air warfare.

20 And situations in which belligerency had been recognised.

21 Krähenmann, "Foreign Fighters under International Law", *supra n.* 6, 50; Kolb and Hyde, *supra n.* 15, 278–79.

22 The individual liberty represented in Article 6 of Hague Convention (V) has been criticised as representing an approach of impartiality as opposed to abstention, and as being outmoded and no longer representative of the law regarding volunteers: Isidro Fabela, *Neutralité* (Editions A. Pedone, 1949) 65–66; Garcia-Mora, *supra n.* 2, 68; Eric David, *Mercenaires et Volontaires Internationaux en Droit des Gens* (Brussels University, 1978), 170; Brownlie, *supra n.* 7, 577.

phenomenon of foreign fighters today. As I explore in the following section, my argument is that certain concepts and values have been integral to debates over the legality and moral correctness of foreign fighters, and the private use of force more generally, during the late nineteenth and twentieth century. These contesting visions of the law therefore demand some consideration in terms of appraising arguments in scholarship and practice regarding the scope of duties of due diligence prevention of foreign fighters today. This includes debates touching upon the notion and scope of impartiality, abstention, solidarity, recognition, the State monopoly on the legitimate use of force, freedom of movement, protection of citizens, national interests and security, moral reckoning, and the perceived threats or wrongs that international law is seeking to regulate.

The purpose is not to look to traditional neutrality law in order to call for adherence to an original understanding of a text or instrument or "[privileging] a particular time and place as having a special authority" to answer legal questions.[23] Nor does neutrality law necessarily provide satisfactory answers to existing questions surrounding foreign volunteers even within its own framework of application: Article 6 of Hague Convention (V) has been described as "clumsy, uncertain and ineffective", showing "uncertainties and deficiencies."[24] Rather, although history will always be viewed from a particular modern standpoint, as Anne Orford argues:

> "the study of international law requires attention to the movement of meaning. International law is inherently genealogical, depending as it does upon the 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".[25]

This is certainly the case for the topic of foreign fighters, in regard to which scholarship and practice regularly refer to historical settings in which States responded, including legally, to private volunteers and mercenaries as they appeared.[26]

As this paper argues, there is room for examining how neutrality law may have moulded practice and thought regarding the non-intervention principle of "non-toleration" of the movements of civil war volunteers, or served as "inspiration to interpret and refine the general obligation not to 'interfere in civil strife'".[27] Positions on foreign volunteering argued by different actors in different times and contexts may often serve as proxies for deeper underlying political discourses. While the contemporary discussion involves its own complexities, the same or similar influences may remain discernible through time. I therefore suggest, at the very least, that any thinking about

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23 Robert W Gordon, "The Struggle Over the Past" (1996) 44 *Clev. St. L. Rev.* 123, 125.

24 Brownlie, *supra n.* 7, 570, 574.

25 Anne Orford, "On International Legal Method" (2013) 1 *London Review of International Law* 166, 175.

26 E.g. regarding earlier foreign enlistment laws, 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; 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. Contrasting foreign terrorist fighters and international volunteers on the republican side of the Spanish Civil War: New Zealand Hansard (Debates), various speeches, 9 December 2014, Second Reading of Countering Terrorist Fighters Legislation Bill 2014, 702 NZPD 1207, 1212, 1260.

27 Ruys, *supra n.* 8, 50.

the scope of the State duty "not to allow knowingly its territory to be used for acts contrary to the rights of other States" in relation to foreign volunteers in civil war can benefit from a consideration of the earlier practice and contested visions of neutrality. Considering such questions allows a description not only of various arguments within the historical international legal debate about foreign volunteers, but it might also become possible to begin to understand the operation and interplay of any tensions, across time and setting, that continue to resonate in contemporary forms and practices, and in that way offer something more meaningful than either a purely pragmatic or universalist viewpoint on the rules of State relations and duties regarding foreign volunteer fighters.

3. Categorisations of foreign fighters, no harm duties, and dilemmas in domestic law

The term "foreign fighter" is not defined in international law, and there is no specific international instrument dealing with this category of actor.[28] Current discourse on foreign fighters commonly refers to jihadist fighters, specifically those involved with listed terrorist organisations. The attention given to the counter-terrorism perspective is understandable given the acute security threats felt by States.[29] It nevertheless overshadows the fact that throughout history, civil war has also been fought by *other* foreign fighters:[30] individual volunteers who leave their country of origin or residence to join armed groups fighting in an overseas armed conflict, and who may be uninvolved with terrorist activities or listed terrorist groups, or who may even be acting in order to fight *against* terrorism or some other ill. Depending on the definitions used and historical period of interest, examples that may come to mind include international volunteers traveling to the Spanish Civil War in the 1930s, acting as mercenaries in the 1960s-70s, joining the *mujahidin* in Afghanistan in the 1980s, serving with armed forces in the Balkans in the 1990s, or involved today in the conflicts in Syria, Ukraine, South Sudan or the

28 For examples of definitions of "foreign fighter" proposed in legal and political science scholarship, see J. Colgan and T. Hegghammer, "Islamic Foreign Fighters: Concept and Data", Paper presented at the International Studies Association Annual Conference (Montreal, 2011), 6, cited in Krähenmann, "Foreign Fighters under International Law", *supra n.* 6, 6; David Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford University Press, 2013) 9; Andrea De Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016) 2.

29 See, e.g., Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, A/71/384 (13 September 2016) 42; See also S/RES/2178 (2014) PP 8–10.

30 For examples of use of the term "other foreign fighters", see Shashi Jayakumar, "Biker Gang Chic and "Reverse Jihad": The "Other" Foreign Fighters" (No. 215, S. Rajaratnam School of International Studies, 3 November 2014); Nathan Patin, "The Other Foreign Fighters: An Open-Source Investigation into American Volunteers Fighting the Islamic State in Iraq and Syria" (Bellingcat, 26 August 2015). Using the term to refer to foreign Shi'ite fighters, compare Daniel Byman, "The Foreign Policy Essay: Syria's Other Foreign Fighters", *Lawfare*, 12 January 2014 <https://www.lawfareblog.com/foreign-policy-essay-syrias-other-foreign-fighters>.

Central African Republic. Foreign volunteers joining groups such as the Syrian Kurdish YPG (People's Protection Units) to fight against the Islamic State group, or joining opposition groups to fight a human rights-abusing regime – "shooting in the right direction"[31] through the eyes of some – raise particular legal and moral questions, and divide opinion. One part of popular sentiment champions volunteers of a certain persuasion and argues against any conflation of "good" foreign fighters with terrorism or other criminal activity.[32] Some cases also present a rather unique scenario of volunteers fighting against another armed group and not necessarily against State armed forces.

Scholarship makes clear that broader phenomena of foreign fighting, transnational soldiering or international volunteering are not new.[33] Yet, as discussed in this paper, one striking aspect of the debates around wider categories of foreign fighters is the seeming lack of consensus about whether international law requires States to seek to control *all* such private volunteering with armed groups and if regulation is required, how to define the problematic cases and the scope of the duty. Precisely because States have been working to ensure that they have appropriate domestic criminal legislation and administrative measures required of them by the Security Council to control "foreign terrorist fighter" movement, they have also been confronted with questions about possible limits regarding these *other* categories of foreign fighters and how to best ensure coherence of amendments with existing criminal provisions.

A comparative study of State practice is beyond the scope of this paper. It suffices to say that different countries, based on their legislative histories/precedents and political interests, have taken or discussed different domestic approaches to legislative amendments on foreign fighters since 2014, including through laws on neutrality, foreign enlistment, mercenarism, foreign

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31 Henry Tuck, Tanya Silverman and Candace Smalley, "Shooting in the Right Direction: Anti-ISIS Foreign Fighters in Syria & Iraq" (Institute for Strategic Dialogue, 2016). See also Kevin Maurer, "Is It Legal to Go Overseas to Fight ISIS?" *Men's Journal*, undated <http://www.mensjournal.com/adventure/collection/is-it-legal-to-go-overseas-and-fight-isis-20150324>: " 'The U.S. government only cares what direction you're shooting at and who you are shooting at", said Matthew VanDyke, founder of Sons of Liberty International, a nonprofit group that hires veterans to train Assyrian Christians to fight ISIS in Iraq. "As long as you're shooting in the right direction, at bad guys, they don't really care'".

32 e.g. Australian Associated Press, "Reece Harding's Mother Says Locking up Fighters Battling Isis Is 'Farcical'" *The Guardian*, 6 July 2015 <https://www.theguardian.com/australia-news/2015/jul/06/reece-hardings-mother-says-locking-up-fighters-battling-isis-is-farcical>; David Wroe, "Australia's Laws Should Not Treat Jamie Bright like a Terrorist" *Sydney Morning Herald*, 8 June 2016 <http://www.smh.com.au/federal-politics/political-opinion/australias-laws-should-not-treat-jamie-bright-like-a-terrorist-20160607-gpd8cv.html>. Similarly, regarding the UK, George Monbiot, "Orwell Was Hailed a Hero for Fighting in Spain. Today He'd Be Guilty of Terrorism" *The Guardian*, 11 February 2014 https://www.theguardian.com/commentisfree/2014/feb/10/orwell-hero-terrorism-syria-british-fighters-damned; Megan Specia, "First, a Symbol of Occupy Wall Street. Then he Waded into Syria" *New York Times*, 12 July 2017 <https://www.nytimes.com/2017/07/12/world/middleeast/occupy-protester-robert-grodt-dies-in-syria.html>.

33 See, e.g., Malet, *supra n.* 28; Nir Arielli and Bruce Collins (eds), *Transnational Soldiers – Foreign Military Enlistment in the Modern Era* (Palgrave MacMillan, 2013); 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.

incursion and anti-terrorism. Discussion about proposed Norwegian legislative amendments, for example, included questions of who, and/or which conduct and situations, might be excluded from laws prohibiting participation in armed conflict by individuals in Norway. Could volunteers with certain non-State actors be exempted from liability but not others? More fundamentally, should criteria be objective or subjective?[34] In the UK, the Independent Reviewer of the Terrorism Act cautioned that: "'a legally informed policy debate' was needed to decide 'how the law should treat foreign fighters', including whether there should be a principled prohibition of fighting in non-international armed conflicts abroad; whether such a prohibition should be based on terrorism laws, and if so, on what basis, i.e. whether participation in an armed conflict is inherently 'terrorist' or because of the blowback risk".[35]

Meanwhile, within the UN Human Rights Council special procedures system, the Working Group on the Use of Mercenaries asserted that foreign fighters are a possible contemporary form of mercenarism or mercenary-related activities.[36] Similarly, legislative debates in Belgium questioned whether its national law implementing the 1989 UN Mercenaries Convention[37] should be extended so as to criminalise more generally leaving for Syria to fight there (which was ultimately rejected as an approach); as well as whether any such decision should be specific to Syria or apply to fighting in any foreign State, and whether the law should include a blanket ban on any fighting, or only for siding with listed terrorist groups.[38]

In Australia, like in several other States, late 2014 saw a number of amendments made specifically in relation to foreign fighters as part of compliance with Security Council Resolution 2178.[39] Australian law criminalises entering a foreign country to engage in hostile activity.[40] As a novel aspect, it also specifically declares as off-limits areas Al-Raqqa province in Syria and the Mosul district in Ninewa province of Iraq,[41] "satisfied that a listed terrorist organisation is

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34 Helene Højfeldt, "Prohibiting Participation in Armed Conflict" (2015) 54 *Mil. L. & L. War Rev.* 13.

35 Comments by the UK Independent Reviewer of the Terrorism Act 2000, David Anderson QC, *The Terrorism Acts in 2013: Report of the Independent Reviewer of the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (2014), 97-8 [10.69], cited in Krähenmann, "The Obligation under International Law of the Foreign Fighter's State of Nationality", *supra n.* 2, 244–45.

36 *Report of the 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* (A/71/318, General Assembly, 9 August 2016).

37 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted 4 December 1989 by UN General Assembly Resolution 44/34, entered into force 20 October 2001.

38 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) 394–95.

39 The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth)* was passed "to address the government's response to the increased threat of terrorism posed by Australians engaging in, and returning from, conflicts in foreign States": Cat Barker, "Bills Digest No. 34: Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014" 6.

40 *Criminal Code* (Cth), ss 119.1(1-2), 119.4, 119.6, 119.7.

41 In December 2014 and March 2015 respectively. Australian Government, "Australian National Security: Declared Area Offence", https://www.nationalsecurity.gov.au/Whataustraliaisdoing/pages/DeclaredAreaOffence.aspx. Travel warning pamphlets with maps and straightforward explanations of the new law were made available

engaging in a hostile activity in that area of the foreign country."[42] It is an offence to enter or remain in a declared area, with the exception of certain legitimate purposes such as humanitarian activities, journalism, making a "*bona fide* visit to a family member", or performing official government or UN duties.[43] Despite the specific rationale behind the declared area offence, linked to the actions of the Islamic State group, the purpose of the amendment was introduced in wider terms: on the one hand, as a "response to the increased threat of *terrorism* posed by Australians engaging in, and returning from, conflicts in foreign States", and on the other hand, responding to the "threat posed by Australians fighting with overseas *terrorist and insurgent groups* and returning here ("foreign fighters")",[44] that is, seemingly a concern with *all* foreign fighters joining armed opposition groups.

In practice, however, volunteer fighters "shooting in the right direction"[45] in Syria or Iraq, and returning to Australia, have been released without charge after police interviews, or had foreign incursion charges dropped through prosecutorial or Attorney-General discretion.[46] There is a "moral difference", former Prime Minister Tony Abbott has said, "between fighting for ISIS and battling against the extremist group."[47] Although never condoning or encouraging such volunteering, statements and practice from the United Kingdom, Canada and the United States

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at airports and online: Australian Government, Travel Warning (al-Raqqa, Syria), undated, https://www.nationalsecurity.gov.au/WhatAustraliaisdoing/Documents/Travelwarning-al-Raqqa-province-Syria.PDF; Australian Government, "Conflict in Syria: Australian Government's Position: Important Information for Australian Communities" <www.livingsafetogether.gov.au>.

42 *Criminal Code* (Cth), s 119.3. Such declarations remain effective for three years unless revoked or renewed: *Criminal Code* (Cth), s 119.3(4). There have not yet been similar declarations regarding other countries where groups designated by Australia as listed terrorist organisations may be operating. The list of organisations proscribed as terrorist by Australia is available: <https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx>.

43 *Criminal Code* (Cth), s 119.2(3). Although possibly unique currently, there is at least one older example of a declaration of off-limits "combat areas", namely by the United States during World War II (in relation to Europe), through which, for their own protection, it was unlawful for US citizens and vessels to proceed into or through (dual citizens and humanitarian vessels were excepted). See *Proclamation Defining Combat Areas* (Dept. of State Bulletin, Vol. I, No. 19, 4 November 1939) and its subsequent geographical extension, and *Regulations Concerning Travel into Combat Areas* (Dept. of State, Departmental Order No. 831, 16 December 1939), available in Naval War College, *International Law Situations 1939* (United States Government Printing Office, 1940), 146-48, 153-57.

44 Barker, *supra n.* 39, 6–7 (emphasis added). Similarly, the Australian Attorney-General introduced the Bill in Parliament as providing measures regarding "the threat posed by returning foreign fighters and those individuals within Australia supporting foreign conflicts." The remainder of his speech, however, referred only to the threats posed to Australia by individuals joining or supporting extremist groups and then returning to Australia: George Brandis, "Second Reading Speech: Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014", Senate, Debates (Hansard, 24 September 2014, page 6999).

45 Tuck, Silverman and Smalley, *supra n.* 31.

46 Australian Associated Press, "Ashley Dyball, Australian Who Fought against Isis in Syria, Released after Return" *The Guardian*, 7 December 2015 <https://www.theguardian.com/australia-news/2015/dec/07/ashley-dyball-australian-fought-against-isis-syria-released-after-return>; Adam Cooper, "Prosecutors Drop Case against Jamie Williams Who Was Accused of Trying to Fight Islamic State" *The Age*, 9 December 2015 <http://www.theage.com.au/victoria/prosecutors-drop-case-against-jamie-williams-who-was-accused-of-trying-to-fight-islamic-state-20160208-gmp26b.html>.

47 Australian Associated Press, "Reece Harding's Mother Says Locking up Fighters Battling Isis Is 'Farcical'", *supra n.* 32.

have echoed these sentiments.[48] Yet, Australia's foreign incursion law does not distinguish foreign fighting on moral grounds.

This domestic practice suggests that the exact contours of State duties under international law regarding the movement of foreign fighters between States seem not to have been satisfactorily squared away today, or are perhaps less onerous or universal in practice than an application of a general "no harm" principle might initially suggest, despite a long history of foreign volunteering in armed conflict. Neutrality law had to tackle similar questions in its own time and context.

4. Contested visions of the regulation of foreign volunteer fighters under neutrality law and in contemporary settings

As discussed above in Section 2 of this paper, the legal framework of military neutrality, as codified, required a neutral State to seek to ensure that individuals in its territory did not undertake conduct endangering its neutrality. Yet, it left significant room for the actions of private individuals wishing to enlist, and at least initially, to continue commerce with the belligerents.[49] While the provision relevant to individual volunteering in Hague Convention (V) appears straightforward, views remained diverse and unsettled at the time the discussions began at the 1907 Hague Conference.[50] Various elements seemed to be at play in the negotiation of Hague Convention (V), and as I argue, albeit transformed for the modern setting, certain of these dilemmas have not been settled and continue to be of relevance today.

I discuss the following four selected elements that appear from an analysis of the debates about volunteers: first, the extent to which the law might require an abstention approach from States, that is, diligent prevention of all foreign fighters; second, the transnational and extra-territorial

48 "Iraq Crisis: PM Urges UK Kurds Not to Travel to Fight IS" *BBC News*, 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. [...] said there was a difference between joining the forces of the 'recognised Kurdish authority' and Sunni extremist group IS"; "The [Canadian] government has discouraged this development, but its response to this issue has been more muted than has been its reaction to other foreign fighting in the region. This uncertain response may reflect the fact that this latest form of foreign fighting amounts to serving with the "enemy of our foe" […]": Forcese and Mamikon, *supra n.* 26, 11; "While the U.S. has worked to cut down on the flow of foreign fighters to IS and other terror groups, travel to Iraq and Syria itself is not necessarily illegal, though the State Department advises against it": Jeff Seldin, "Many Americans Fighting in Iraq, Syria Are Foes of IS" *Voice of America (US)*, 10 April 2016 <http://www.voanews.com/a/americans-fighting-iraq-syria-foes-islamic-state-report/3459384.html>; Compare regarding Singapore: Lim Yan Liang, "Singaporeans arrested under ISA for links to conflicts abroad", *Straits Times* (Singapore), 17 March 2016 <http://www.straitstimes.com/singapore/singaporeans-arrested-under-isa-for-links-to-conflicts-abroad>.

49 Castrén, *supra n.* 15, 443, 447.

50 Brownlie, *supra n.* 7, 577.

nature of the harm; third, the distinction between organised groups and private individuals for the perception of the threat posed; and, finally, the level of vigilance demanded.

4.1 Impartiality or abstention, and the public-private divide

There is an important conceptual difference between neutrality in its earlier form of impartiality – treating both belligerents equally – and its development in practice and doctrine towards abstention – remaining aloof from both belligerents.[51] The codification of neutrality law in 1907 showed elements of both, largely assigned through a public-private distinction.[52] 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. If State policy placed any restrictions on private actions, however, the domestic law and policy were required to maintain formal impartiality.[53]

During the 1907 Peace Conference in The Hague, 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 belligerent forces should not allow foreigners to serve.[54] Despite support from certain States during the debates,[55] as is clear from Article 6 above, this position did not ultimately find acceptance, not even by Great Britain which included such rules in its domestic law and whose law had inspired the proposal.[56] 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 the former, since the neutral State could not prevent foreigners within its territory from departing, the question arose of the wishes, or duties, of foreign nationals residing in the neutral State to return to their own country in order to enlist or complete national military obligations.[57] That Hague Convention (V) as adopted permitted neutral States to be indifferent to the departure

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51 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, 17: "The most advanced theories of neutrality at the time [of the enactment of the US Foreign Enlistment Act 1794] required at best strict impartiality and not complete abstention."

52 Örvik, *supra n.* 1, 34.

53 Castrén, *supra n.* 15, 482; Geog Cohn, *Neo-Neutrality* (trans. A. S. Keller and E. Jensen, Columbia University Press, 1939), 36-7.

54 Statement of German Delegation, Second Commission, Second Subcommission, Fourth Meeting (19 July 1907), Fifth Meeting (26 July 1907) and discussion in Plenary (7 September 1907) in James Brown Scott, *Proceedings of the Hague Peace Conferences: Translation of the Official Texts* (William S. Hein & Co., 2000) III, 177, 186-87, 191; Antonio S de Bustamente, "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, 112–13.

55 Scott, *supra n.* 54, III 199.

56 "Although the interdiction demanded by the German proposition results from the British law, [Great Britain] nevertheless considers that there is no need to formulate a conventional obligation in this respect. Such an interdiction can result from an act of sovereignty but not from stipulations within the domain of international law." Statement of the representative of Great Britain, Fifth meeting (26 July 1907), *Ibid* III 197-98.

57 *Ibid* I 141, III 176; de Bustamente, *supra n.* 54, 113–14.

of individuals allowed this national military enlistment to take place, assuming the domestic law of the home State and the receiving State so allowed.[58] Ultimately, the codification reflected a position in which no distinction was made as to whether the departing individuals were citizens or not of the neutral State,[59] even though the departure of citizens might logically impact to a greater extent perceptions of a State's neutrality.

This liberty of private action also fitted the described logic of the period concerning the divide between the State's public affairs, and the activities of private persons and entities.[60] While the State had to protect its neutral status by not supporting either warring side with war material or funds,[61] private individuals were not prevented from continuing their usual activities, even if the same acts would have breached neutrality law if carried out by the State.[62] 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. Rather, it also worked to protect economic interests, particularly the everyday business relations between the populations of the neutral and belligerent States, as well as to help maintain friendly relations and contain the spread of violence.[63] At the time of codification, in addition to foreign enlistment, private trade, including even the supply of arms to the belligerents, was expected to continue,[64] although this regularly led to allegations of

58 Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011), 27; Castrén, *supra n.* 15, 446. States' domestic laws reflect varying policies regarding the enlistment of foreigners within their own armed forces, and the enlistment of their own citizens in foreign armed forces.

59 Scott, *supra n.* 54, I 141.

60 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.

61 Although not specified in Hague Convention (V), this was a rule of customary law. Ordinary commerce in non-military commodities could continue. Castrén, *supra n.* 15, 474, 477; Oppenheim, *supra n.* 15, 738–39, 743 [§349, §351]; Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge, 2013) 67 n. 61.

62 Lauterpacht, *supra n.* 2, 106; Kolb and Hyde, *supra n.* 15, 280; Stephen C Neff, *The Rights and Duties of Neutrals: A General History* (Juris Publishing/Manchester University Press, 2000) 106, 130; Friedmann, *supra n.* 60, 134; Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press, 1959) 533.

63 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, *supra n.* 62, 106ff, 130. See also the second *vœu* in the Final Act of the Second Peace Conference (The Hague, 18 October 1907): "The Conference expresses the opinion that, in case of war, the responsible authorities, civil as well as military, should make it their special duty to ensure and safeguard the maintenance of pacific relations, more especially of the commercial and industrial relations between the inhabitants of the belligerent States and neutral countries."

64 Hague Convention (V), Art. 7: "A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet". See also Art. 6 Hague Convention (XIII); Oppenheim, *supra n.* 15, 655; Norton, *supra n.* 1, 297–98; Neff, *supra n.* 62, 130; Örvik, *supra n.* 1, 20. See also Syngman Rhee, *Neutrality as Influenced by the United States* (Princeton University Press, 1912) 35, quoting correspondence of United States Secretary Jefferson to Hammond in response to British complaints, 15 May 1793, in Randolph, Correspondence of Jefferson, Vol. III, 291: "our citizens had been free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means of their subsistence perhaps, because of a war existing in foreign and distant countries in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting those that are at peace, does not require from them such an international derangement of their occupation".

unneutral State conduct.[65] The belligerents were left to police this private commerce for contraband.[66] 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.[67] Increasing State control of the weapons industry meant that transfers of arms to the belligerents by private entities could eventually no longer be argued as neutral. The "neat separation" between State and civil society became "intertwined".[68] Did this have a similar effect on private enlistment?

In domestic neutrality or foreign enlistment laws, some States chose an abstention policy over impartiality, restricting citizens' actions towards parties to any type of armed conflict, and thus going further than what was at the time required under international law.[69] 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.[70] Even conflicts perceived to be "peripheral" could become important for the parent State, if its citizens involved themselves in it.[71] Enforced to varying – often lesser – degrees,[72] a State's domestic law might, therefore, not only criminalize the carrying out of hostile acts against another State, but might prohibit citizens from joining the armed forces of a State involved in armed conflict,[73] or might restrict commercial dealings with both sides of the conflict.[74] Prevention agreements sometimes appeared in the form of treaty provisions – *bon voisinage* or mutual protection agreements – guaranteeing the non-toleration on national territory of groups likely to make armed incursions into, or

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65 Elizabeth Chadwick, "Neutrality Revised?" (2013) 22 *Nottingham Law Journal* 41, 44. See also the legal opinion of Jenner of 19 July 1832 regarding a complaint about the interference of British subjects during civil war in Portugal, in Arnold D McNair, *International Law Opinions, Vol. III War and Neutrality* (Cambridge University Press, 1956) 136–37.

66 Chadwick, "Neutrality Revised?", *supra n.* 65, 44; Örvik, *supra n.* 1, 20–22; McNair, *supra n.* 65, 136–37; Neff, *supra n.* 62, 106, 130: "commercial-adventure doctrine".

67 Norton, *supra n.* 1; Friedmann, *supra n.* 60, 119–20, 130ff; Greenspan, *supra n.* 62, 533; Brownlie, *supra n.* 7, 577; See also discussion in LtCol WL Williams, Jr, "Neutrality in Modern Armed Conflicts: A Survey of the Developing Law" (1980) 90 *Military Law Review* 9; Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War Law* (Rinehard, 1954) Discourse 24, 408ff; Naval War College, *supra n.* 43, 2-4, 7-8.

68 Kolb and Hyde, *supra n.* 15, 280.

69 Oppenheim, *supra n.* 15, 636, 668, 670 [§292A, §310, §311A]; Greenspan, *supra n.* 62, 533–34, 547, 552; Castrén, *supra n.* 15, 114; Chadwick, "Neutrality Revised?", *supra n.* 65, 48, 52; Richard A Falk (ed), *The International Law of Civil War* (The Johns Hopkins Press, 1971): "The main steps along the trail of intervention in a civil-war situation are prudential and political, not legal".

70 E.g. Greenspan, *supra n.* 62, 533–34.

71 Geraint Hughes, "Soldiers of Misfortune: The Angolan Civil War, the British Mercenary Intervention, and UK Policy towards Southern Africa, 1975-6" (2014) 36(3) *The International History Review* 493, 506-07, discussing how UK became interested in the Angolan war because of the involvement and then trial of British mercenaries, i.e. because of national interests.

72 See text associated with notes 127-129 below.

73 "Between 1794 and 1938, forty-nine states enacted some form of permanent legal control over their citizens' or subjects' foreign military service. Many others passed controls of a temporary nature": Janice E Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press, 1994) 79–82, text relating to Table 4.2.

74 E.g. Lauterpacht, *supra n.* 2, 115ff; Brownlie, *supra n.* 7, 575; Neff, *supra n.* 62, 106.

otherwise interfere in the internal affairs of, other States.[75] Such laws "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, "bolstering both the domestic and international legal order, especially in the fields of recognition, non-intervention, and neutrality".[76] These laws were therefore at times adopted or revised in specific political situations, such as the enactment of new legislation seeking to restrict foreign enlistment during the Spanish Civil War,[77] or withdrawing or enforcing application of existing legislation as specific conflicts arose.[78] Indeed, the European governments' non-intervention agreement in the Spanish Civil War did not originally prevent individual volunteers, in keeping with the traditional rules appearing in neutrality law described above which prevented only organised hostile expeditions. The agreement was then broadened in February 1937 by the Non-Intervention Committee to also explicitly prohibit volunteering.[79]

Looking back to the future, contemporary scholarship responding to the modern phenomenon of foreign terrorist fighters and *other* foreign fighters has itself called for, or described a call for, a reinvigoration of earlier domestic neutrality laws.[80] Craig Forcese, for example, perceiving a gap due to the current focus on counter-terrorism for those *other* foreign fighters who do not have links with terrorist activity, has argued for a renewed application of Canada's "antiquated" domestic foreign enlistment law in order to "signal the illegitimacy of foreign fighting" and to close a "blind-spot" by bringing all Canadian fighters with foreign insurgent groups within the law's ambit and not only those suspected of terrorism offences.[81] Similarly, in relation to the

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75 Ian Brownlie, "International Law and the Activities of Armed Bands" (1958) 7 *International and Comparative Law Quarterly* 717, 713–14, 719; Steven Corliss, "Asylum State Responsibility for the Hostile Acts of Foreign Exiles" (1990) 2(2) *International Journal of Refugee Law* 181, 194–95, 199–200; Neff, *supra n.* 62, 169. The Convention Concerning the Duties and Rights of States in the Event of Civil Strife (Havana, 20 February 1928) between American and Latin-American states, for example, provided for the use of means at the states' disposal to prevent persons within their territory from participating in civil strife, or crossing the border in order to do so.

76 Arielli, Frei and Van Hulle, *supra n.* 26, 2.

77 In line with the European governments' 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. See also discussing Sweden and Belgium, LC Green, "The Status of Mercenaries in International Law" (1979) 9 *Manitoba Law Journal* 201, 219–20; and regarding US law being amended after a significant number of Americans fought as volunteers in the Spanish Civil War, Robert E Cesner, Jr and John W Brant, "Law of the Mercenary: An International Dilemma" (1976) 6 *Cap. U. L. Rev.* 339, 356.

78 e.g. UK Foreign Enlistment legislation regarding the Greek independence war 1820s, First Carlist War in Spain 1835, American Civil War 1860s, Franco-Prussian War 1970 etc., Arielli, Frei and Van Hulle, *supra n.* 26, 5, 7, 8–10. Specifically on the 1835 British Order in Council relaxing application of the UK Foreign Enlistment Act regarding Spain, see Great Britain, "Report of the Neutrality Laws Commissioners" (1868) 38 <https://hdl.handle.net/2027/mdp.35112102557263>.

79 Reflecting strict non-intervention rules over neutrality as the chosen framework: Lieblich, *supra n.* 61, 118; Vernon A O"Rourke, "Recognition of Belligerency and the Spanish War" (1937) 31(3) *The American Journal of International Law* 398, 409–11. See also "Recruits Rush to Evade Ban on Aid to Spain", *Chicago Daily Tribune*, 17 February 1937 <http://archives.chicagotribune.com/1937/02/17/page/4/article/recruits-rush-to-evade-ban-on-aid-to-spain>.

80 Regarding the UK, Arielli, Frei and Van Hulle, *supra n.* 26, 1. Regarding Canada, Tyler Wentzell, "Canada's Foreign Fighters: The Foreign Enlistment Act and Related Provisions in the Criminal Code" 2016 *Criminal Law Quarterly (Canada)*.

81 Forcese and Mamikon, *supra n.* 26, 309.

reappearance of mercenaries in the 1960s and 1970s, certain scholars had called on domestic neutrality laws to be amended and relied upon so as to make it more straightforward to prevent mercenaries from departing.[82]

To some extent, this is the approach Australia's law already takes. Originally enacted to counter mercenarism with armed groups, earlier versions of the Australian Foreign Incursion Act 1978[83] were modified over time as new political situations arose.[84] The law's current iteration mirrors contemporary majority-view interpretations of non-intervention, albeit continually under pressure in international practice: joining the armed forces of a recognised foreign government is acceptable, while joining armed opposition groups is not.[85] Regarding, though, the current conflicts in Syria and Iraq, due to the "declared area offence", as the Government has stated, "[i]t is illegal under Australian law for *any* person in Australia, or *any* Australian citizen or dual citizen *anywhere* in the world, to provide support to *any* armed group in Syria. This includes: engaging in fighting for *either* side […]".[86] The reasoning is certainly not couched in the language of neutrality – as an active member of the US-led coalition fighting against the Islamic State group, Australia is clearly a party to the conflict.[87] Yet the *effect* of the Australian legislative approach to preventing and penalising foreign fighting, in Syria and Iraq at least, can appear neutral; a call for total abstention from fighting by its citizens, matching the German delegation's call for abstention during the 1907 negotiations.[88] Outside of the declared areas, this is not the

82 Cesner, Jr and Brant, *supra n.* 77, 359.

83 Foreign incursion provisions used to be found in the *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)* (repealed), adopted at a time of concern about Australians operating in foreign armed conflicts, including as mercenaries, but were subsumed into the Criminal Code Act 1995, with increased penalties, on 1 December 2014 as part of foreign fighter amendments. For useful discussion of Australia's counter-terrorism and foreign incursion laws, see George Williams, "A Decade of Australian Anti-Terror Laws" (2011) 35 *Melbourne University Law Review* 1136; Kieran Hardy and George Williams, "Australian Legal Responses to Foreign Fighters" (2016) 40 *Criminal Law Journal* 196; Andrew Zammit, "Australia's Counter-Terrorism Tranches" <https://andrewzammit.org/2016/09/02/australias-counter-terrorism-tranches/>; Lexie Henderson-Lancett, "The Foreign Fighter Legislation of 2014" (2016) 41(1) *Alternative Law Journal* 48.

84 Henderson-Lancett, *supra n.* 83; Australian Associated Press, "Government Plans Changes to Anti-Mercenary Laws on Terror Groups" *Australian National News Wire*, 17 March 2004. Regarding the original Bill, and in particular the definition of "government", see Standing Committee on Constitutional and Legal Affairs, "Report on the Clauses of the Crimes (Foreign Incursions and Recruitment) Bill 1977" (Australian Senate, April 1977).

85 Gregor Nolte, *Eingreifen Auf Einladung* (Springer, 1999); Erik Castrén, *Civil War* (Suomalainen Tiedeakatemia, 1966) 111–12, 120 n2; Dinstein, *supra n.* 58, 119; Dapo Akande, "Would It Be Lawful for European (or Other) States to Provide Arms to the Syrian Opposition?" However, see also Louise Doswald-Beck, "The Legal Validity of Military Intervention by Invitation of the Government" (1985) 56 *British Yearbook of International law* 197; Bothe, *supra n.* 15, 579–80 [§1106(6)].

86 Australian Government, "Conflict in Syria: Australian Government's Position: Important Information for Australian Communities" <www.livingsafetogether.gov.au> (emphasis added).

87 Australian Government, Department of Defence, Global Operations - Iraq, http://www.defence.gov.au/operations/okra/.

88 In relation to the conflict in Syria, this abstention is also due to Australia's sanctions against Syria, imposed because of "Australia's grave concern at the deeply disturbing and unacceptable use by the Syrian regime of violence against its people." The same does not apply to Iraq with whom Australia cooperates militarily. See Australian Government, Department of Foreign Affairs and Trade, Sanctions Regimes, Syria http://dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/pages/syria.aspx#Travel.

case. Under the foreign incursion provisions in the Criminal Code, even service with non-State forces can be authorised by the Government "in the interests of the defence or international relations of Australia"[89] – something that has so far not been resorted to under either the re-enacted laws or the previous Act.[90] Thus, in fact, the prerogative of the Australian authorities to approve or disapprove of any armed group or force in specific contexts is retained.

Rather than referring to the *laissez-faire* nature of the public-private divide of previous centuries and to neutrality, language used by governments today is often related to human rights, both to explain restrictions on people's movement or a call for abstention, and to justify exceptions. So, for example, the UK's "Diplock Report" which examined the UK's Foreign Enlistment Act 1870 following the trial of British mercenaries in Angola in 1976, was of the opinion 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 is domestically, which was not felt to be the case regarding subjects fighting overseas.[91] It is a position the UK retained.[92]

In contrast, in relation to its revised foreign fighter laws, the language used in Australia's official statements of rationale relies on notions of protection and human rights in the positive sense, both of the foreign population and the would-be fighters themselves. The "declared area offences" can also be seen in this light. The language used also hints *indirectly* to notions of the State's monopoly on the legitimate use of force and arguably even of duties to ensure respect of international humanitarian law (IHL),[93] as well as advocating non-violence more generally. Enlisting with legitimate State armed forces is allowed, a spokesperson of the Attorney-General's Department has noted, but Australians should not become involved in overseas conflicts, as the choice to do so "only adds to the suffering in Syria and Iraq and it's putting those Australians and others in mortal danger."[94] Specifically regarding *other* foreign fighters, the Australian National Counter-terrorism Strategy explains that traveling 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

89 *Criminal Code (Cth)*, s 119.8.

90 Attorney-General's Department, "Foreign incursions and recruitment offences", https://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/ForeignIncursionsAndRecruitmentOffences.aspx.

91 "Report of the Committee of Privy Councillors Appointed to Inquire into the Recruitment of Mercenaries ("Diplock Report")" (Cmnd. 6569, 1976) <http://psm.du.edu/media/documents/national_regulations/countries/europe/united_kingdom/united_kingdom_diplock_report_1976.pdf>, §10ff.

92 Letter from Mr. Nigel C.R. Williams, Ambassador and Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Office at Geneva, (31 January 1996), cited in *Report of the Special Rapporteur on the Question of the Use of Mercenaries*, E/CN.4/1997/24 (20 February 1997), para. 15: the UK has explained that "[t]he recruitment of mercenaries … is only illegal in certain very limited cases (namely, when British citizens would serve in the forces of a foreign State at war with another foreign State which is at peace with the United Kingdom). Legislation to give effect to the United Nations Convention on Mercenaries has been considered, but, from a legal point of view, would be very difficult to implement."

93 As per Article 1 common to the four Geneva Conventions, 12 August 1949.

94 Eryk Bagshaw, "Former Labor Party President Matthew Gardiner Arrested at Darwin Airport" *Sydney Morning Herald*, 6 April 2015 <http://www.smh.com.au/federal-politics/political-news/former-labor-party-president-matthew-gardiner-arrested-at-darwin-airport-20150404-1meqhx.html>.

Iraq either".[95] The position and acknowledgement that private intervention "only adds to the suffering" is an important one. Admittedly, in some circumstances, the fact of an individual's parent State not only intervening militarily in the same armed conflict, but actually training, supporting or conducting partnered operations with the armed group in question, as is occurring regarding US operations in Syria for example, places pressure on any straightforward argument relying on the increased violence or suffering caused by foreign involvement, or a State authority's monopoly on the legitimate use of force.[96]

Finally, questions surrounding nationality and allegiance still arise today, as well as the right to return to one's country, even to fight, regarding dual nationals or individuals with an ethnic link to communities in another State. For example, New Zealand parliamentary debate on proposed foreign fighter legislative amendments in late 2014 indicated a clear desire of certain parliamentarians to ensure that the law 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".[97] Similarly, some dual Australian-South Sudanese citizens have reportedly returned to South Sudan to participate in hostilities on both sides of the conflict.[98] Dual-citizen volunteers are not foreigners in relation to the State that is suffering the armed conflict. Yet, States' modern due diligence preventive duties, whatever their scope, would logically include the risk of harm from any person departing from the parent or transit State's territory to fight with an armed group against State armed forces, regardless of citizenship. Despite contesting personal moral assessments, one might sense even more strongly in the case of persons with nationality or kinship ties, an underlying "nagging feeling" described by Jan Klabbers, that resistance fighters, even terrorists, are not simply common criminals.[99]

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95 Council of Australian Governments, "Australia's Counter-Terrorism Strategy: Strengthening Our Resilience", 3.

96 See, for example, discussion in Max Opray, "Criminalising Those Who Fight against IS" *The Saturday Paper*, 7 March 2015 <https://www.thesaturdaypaper.com.au/news/law-crime/2015/03/07/criminalising-those-who-fight-against/14256468001578>. Terrorism charges against a suspect in the UK were dropped after legal counsel argued that the accused was fighting with a group in Syria actively supported by the UK government, making it "unconscionable" to prosecute him, and security services refused to acknowledge in court whether they had supported the same Syrian opposition groups he had been fighting with: Richard Norton-Taylor, "Terror Trial Collapses After Fears of Deep Embarrassment to Security Services" *The Guardian (UK)*, 1 June 2015 <https://www.theguardian.com/uk-news/2015/jun/01/trial-swedish-man-accused-terrorism-offences-collapse-bherlin-gildo>.

97 New Zealand Hansard (Debates), various speeches, 9 December 2014, Second Reading of Countering Terrorist Fighters Legislation Bill 2014, 702 NZPD 1207, 1212, 1260.

98 Colin Cosier, "Aussies in South Sudan Conflict Put Australian Law to the Test" *The Age*, 17 July 2016 < http://www.smh.com.au/world/do-these-six-australians-have-a-case-to-answer-20160622-gpozja.html>.

99 Jan Klabbers, "Rebels with a Cause? Terrorists and Humanitarian Law" (2003) 14(2) *European Journal of International Law* 292, 301.

4.2 Territorial duties and extra-territorial actions

Traditional neutrality law was concerned with territorial jurisdiction.[100] This meant that once individuals intending to become involved in the hostilities were outside of the neutral State's territory, the neutral State was free from any question of responsibility.[101] The Japanese delegation at the 1907 Peace Conference had advocated for a neutral's responsibility for acts occurring "under its jurisdiction", that is, including in its "protectorates". However, this approach was rejected, limiting responsibility.[102] 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.[103] The Turkish delegation advocated making States responsible for individuals who form a military force just beyond the neutral frontier, but this was also rejected during the negotiations.[104] Ian Brownlie has described the "subtle and illogical distinction [that] must be made between those enlisting before leaving national territory and those leaving with intent to enlist".[105] In line with the position adopted in Hague Convention (V), on the domestic level, certain existing foreign enlistment laws prohibited recruitment and enlistment within their territory, but did not clearly prevent individuals from leaving their country individually to join a foreign force, even as a mercenary provided they did not commit treason.[106] Other or subsequent domestic laws prevented in addition *leaving* the country to enlist in order to close this gap.[107]

These questions remain relevant but are transformed in the modern context. While a State's due diligence duties remain territorial – using the means reasonably available to it in the areas under its jurisdiction – duties of good faith and cooperation, growing in relevance in the increasingly interdependent international community, would also suggest ongoing shared duties of some nature, perhaps minimal, regarding citizens resident elsewhere. These questions also appear in the form of practical and legal challenges surrounding the extra-territorial nature of the acts of violence, or other crimes such as illegal entry or weapons offences, being committed overseas. This gives rise to legislative complexities relating to the recent instruction of the Security Council

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100 Hague Convention (V), particularly Art. 5.

101 Scott, *supra n.* 54, III 33.

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

103 Third Meeting of the Second Commission (30 August 1907) in Scott, *supra n.* 54, III 33.

104 Hull, *supra n.* 102, 203-4.

105 Brownlie, *supra n.* 7, 571–72.

106 Cesner, Jr and Brant, *supra n.* 78, 358; Green, *supra n.* 77, 211–12. See also the legal opinion of Harding of 12 September 1855 regarding a dispute about Great Britain's actions towards US citizens, arguing that no violation was committed by Great Britain persuading or assisting US citizens to leave the US for recruitment in Canada (British territory) during the Crimean War, in McNair, *supra n.* 65, 188–90. The 1896 US Supreme Court decision, *Wiborg v. United States* (163 U.S. 632 1896) likewise held that a person could leave the US in order to enlist in a foreign armed force without violating the neutrality laws then in force. See discussion in Cesner, Jr and Brant, *supra n.* 77, 356–58. Regarding earlier Australian foreign incursion legislation, see Montgomery Sapone, "Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence" (1999) 30(1) *California Western International Law Journal* 1, 29 n170.

107 Green, *supra n.* 77, 211.

for States to ensure that preparatory acts to foreign terrorist fighting be criminalised,[108] or foreign incursion more generally; that is, based on intentions or preparations prior to travel and any commission of violence, as well as evidentiary and international judicial cooperation challenges of extra-territorial conduct of concern. Further, States may face dilemmas regarding extradition of citizens and the proposed revocation of nationality of certain foreign fighters overseas.[109]

4.2 Groups and individuals – the nature of the threat posed

Much of the 1907 negotiations stressed the importance of making a distinction between organised groups and organised recruitment efforts, and the actions of individuals.[110] 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."[111] The description of individuals in the negative sense is noteworthy, that is, as people who could not be recognised as an organised corps or armed band. The volunteers wishing to enlist overseas could not be armed or in uniform, and could not leave in "close formation."[112] Otherwise, as Ian Brownlie explains, "[p]roviding there is no 'organization', whatever this may mean; substantial numbers with individual arms may depart as volunteers."[113] Elements that could help the State prove the existence of organisation included "their number, their attitude, their continuous marching past, or other circumstances".[114]

The discussion around the time of codification implied that individuals not yet in military formation were unable to offer real military support to one of the belligerents or cause real harm to its opponent; that they did not pose a substantial threat.[115] As the Belgian delegation argued:

> "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 consider the situation and will take freely, but in a uniform manner, all the measures which the circumstances seem to it to make necessary."[116]

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108 S/RES/2178 (2014), OP 6(a).

109 Roger Shanahan and Lydia Khalil, "Panel Discussion: Foreign Fighters in Syria and Iraq – The Day After" <https://www.lowyinstitute.org/news-and-media/multimedia/audio/panel-discussion-foreign-fighters-syria-and-iraq-%E2%80%93-day-after> on whether it is in Australia's interests to request extradition of Australian foreign terrorist fighters detained elsewhere; Linda 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* 469.

110 Scott, *supra n.* 54, I 140-41, III 33, 176-77.

111 Fifth Meeting of the Plenary (7 September 1907) in *Ibid* I 141. See also discussion of the Report of the Second Commission in Brownlie, *supra n.* 7, 572.

112 Castrén, *supra n.* 15, 482.

113 Brownlie, *supra n.* 7, 572.

114 Scott, *supra n.* 54, III 33.

115 See, e.g. Garcia-Mora, *supra n.* 2, 69.

116 Statement of the representative of Belgium, Fifth meeting (26 July 1907) Scott, *supra n.* 54, 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.

The collective nature of a hostile initiative or expedition therefore appeared important, just as the international law of armed conflict relies heavily on a minimal level of organisation of a group to apply *jus in bello* rights and duties. In the contemporary scenarios we are contemplating, however, a group "marching past" is hardly relevant. Individuals, sometimes very small groups of individuals, are travelling separately, in order to join a pre-existing organised armed group overseas. Recruitment occurs through complex chains of communication, particularly online through social media or personal connections through transnational networks.[117] One no longer always has to be physically present alongside others to be able to operate with some kind of concerted effort. Therefore, this represents one aspect of the discussions pursuant to the traditional approach of neutrality law which is difficult to apply to modern scenarios.

Underlying the transformation of recruitment processes are questions related to the harm various foreign volunteers are considered to cause and the extent to which the destination State's ability to prevent entry through its own border control needs to be taken into account. As Jamnejad and Wood explain regarding non-intervention, "[t]he core of what is prohibited is 'coercive interference' in matters which international law leaves to the discretion of States. […] The requirement of coercion therefore removes minor international friction from the scope of the principle, but also means that it will only apply to those acts that to some degree do "subordinate the sovereign will" of another State."[118] Foreign fighting will therefore not necessarily equate to "intervention" but could still represent "harm" of some kind. Such questions might allow one to make a distinction between fighters joining various armed groups, at least when one thinks about the "interference" or "harm" that may be occurring. For example, it could be argued that a foreign fighter joining the fight *against* the Islamic State group, as opposed to insurgents fighting against government forces, is not taking hostile action against the State or harming its territorial integrity. As Dara Conduit and Ben Rich argue, in practice, some foreign fighters might actually support a right to self-determination or help to protect human rights of the population, or at least be aiming to do so.[119] On the other hand, the unauthorized entry and private use of force, even if perceived by some as being for a justified cause, could be considered, in principle, an ill in itself. In some cases *other* foreign fighters have been permitted by local authorities, such as the Kurdish authorities in Northern Iraq, to remain and to fight.[120] While on a pragmatic level the actions of certain foreign fighters might not be considered to be "subordinating the sovereign will", fundamental underlying questions about the nature of harm, as well as who gets to use force and who gets to decide who gets to use force, are nevertheless at stake.

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117 See, e.g., 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.

118 Maziar Jamnejad and Michael Wood, "The Principle of Non-Intervention" (2009) 22(2) *Leiden Journal of International Law* 345, 380–81. Likewise, a neutral state was not expected to take precautions against the "commission of microscopic injuries", W. E. Hall, *A Treatise on International Law* (Clarendon Press, 1890), 601.

119 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.

120 See, e.g. the personal account in Tim Locks, *Fighting ISIS* (Sidgwick & Jackson, 2016).

All of this suggests that the nature of security threats, and responses to them, have changed so as to explain a wider inclusion of, i.e. control over, the "individual" in the approach to these situations. Turning, then, not to the threat posed, but to the object at risk of harm, neutrality law and the principle of non-intervention refer primarily to harm or risk posed to a foreign State, and only secondarily to the risk to the parent State, for example, of belligerents enforcing their rights against the neutral State.[121] As mentioned above, these rules served a greater purpose than merely preventing citizens from fighting overseas; they were relevant in terms of foreign policy and friendly relations, as well as questions related to allegiance. Regarding foreign fighters, however, or at least foreign terrorist fighters, State policy generally places primary attention on the country's own national security. Parent States are concerned with the risks posed by returning fighters, and even sometimes would-be foreign fighters who have been prevented from departing in the first place, over and above the harm that might be posed overseas by departing volunteers,[122] as well as to some extent with the general control of private violence. Moreover, in terms of perceived threat, certain individuals have at times been considered to pose such a serious threat to the security of a State, that they have been directly targeted with deadly force in a foreign country even outside of an armed conflict situation. So in late 2015 when the UK decided to use lethal force against a British citizen present in Syria, it did so because of the threat he was considered to pose to the British population.[123] In this sense, contemporary national security concerns related to terrorism are seen to trump other legal frameworks,[124] and any overriding notion of global solidarity or friendly relations. We see this, for example, in proposals to strip

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121 Brownlie, *supra n.* 7, 575: "In the nineteenth century an important feature was the desire of weak States, on grounds of security, and of powerful States, on grounds of national honour, to avoid giving any form of provocation to a belligerent, at a time when provocation was a *casus belli* in contemporary usage and the justification for aggression. Volunteers could be punished under numerous laws for the offence of exposing the nation to a declaration of war or to reprisals […]".

122 Arielli, Frei and Van Hulle, *supra n.* 26, 16; Sandra Krähenmann, "Foreign Fighters and International Law" in Stuart Casey-Malsen (ed), *The War Report: Armed Conflict in 2013* (Oxford University Press, 2014) 317, 319–20; Daniel Byman, "Frustrated Foreign Fighters", *Lawfare*, 12 July 2017 <https://lawfareblog.com/frustrated-foreign-fighters>.

123 Ewen MacAskill, "Drone Killing of British Citizens in Syria Marks Major Departure for UK" *The Guardian (UK)*, 8 September 2015 <https://www.theguardian.com/world/2015/sep/07/drone-british-citizens-syria-uk-david-cameron>; "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" (S/2015/688, 8 September 2015). See also UK House of Commons Debate 7 September 2015, Parl Deb HC (2015), columns 25-27, and discussion in 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; David Turns, "The United Kingdom, Unmanned Aerial Vehicles, and Targeted Killings" <https://www.asil.org/insights/volume/21/issue/3/united-kingdom-unmanned-aerial-vehicles-and-targeted-killings>.

124 For example, debates about criminalisation of membership in a listed terrorist organisation, i.e. without conduct in violation of international humanitarian law having occurred. See, e.g. Krähenmann, "The Obligation under International Law of the Foreign Fighter's State of Nationality", *supra n.* 2, 238.

foreign terrorist fighters of their passports or citizenship or otherwise exclude them from returning home, leaving the risk of violence as another State's problem.[125]

In comparison, the practice described in this paper shows that certain *other* foreign fighters are not considered to be posing a threat to their parent State upon return, despite their exposure to armed conflict outside of the confines and accountability mechanisms of State military hierarchies, and are therefore not prosecuted for their foreign fighting. This conforms with a general pattern of non-enforcement of domestic foreign enlistment/foreign incursion laws for foreign fighting in certain contexts or aligned with certain causes, for example, in relation to Americans volunteering in World War One and Two prior to the US becoming a party to these conflicts,[126] to those joining the Israeli Defence Force in 1956,[127] and those returning to Australia from Syria and Iraq between 2011–mid-2015.[128] In other words, as highlighted by the differences in domestic law and its implementation, the threats or wrongs posed by foreign volunteers to which international law might seek to respond are not necessarily clearly articulated, nor who gets to decide.

4.4 Scope of vigilance required - due diligence in practice

Linked to the distinction between collective entities and individuals, States present at the 1907 Peace Conference were concerned about the practical impossibilities of a State to recognise the intentions of an individual, where there were no outward trappings of organisation into some kind of military-style unit or other evidence of collective action. Arguments have been made that it was impossible for the State to be able to monitor and control the "secret acts of small groups of persons."[129] More than secrecy, the debates at the Peace Conference touched upon the administrative and practical impact of overly strict monitoring of departing citizens; impliedly also the right of individuals to leave the country and to travel. It was pointed out pragmatically that States would be unable in practice to control the border crossings of individuals without facing administrative or legal problems, "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".[130] The response of the meeting's reporter was clear: it was

125 See, e.g. Van Waas, *supra n.* 109; Ben Saul, "Plan to Strip Citizenship Is Simplistic and Dangerous" *ABC News: The Drum*, 27 May 2015 <http://www.abc.net.au/news/2015-05-27/saul-plan-to-strip-citizenship-is-simplistic-and-dangerous/6499710>.

126 Cesner, Jr and Brant, *supra n.* 77, 356, citing Robert A. Rosenstone, Crusade of the Left: The Lincoln Battalion in the Spanish Civil War (Pegasus, 1969), 89-90; Green, *supra n.* 77, 212, 223.

127 Green, *supra n.* 77, 213, 223.

128 Council of Australian Governments, *supra n.* 95, 3: Of 30 Australians who returned to Australia from Syria and Iraq, none were subsequently involved in activities of concern or were convicted of terrorism-related offences.

129 CG Fenwick, *International Law* (Appleton-Century-Crofts, 3rd ed., 1948) 301. Fenwick cites the 1871 decision of the US-Great Britain mixed claim commission, denying Great Britain's responsibility for an 1864 attack in Vermont by a group supporting the Confederate States who had prepared their attack from Canada, due to the secrecy of the plans of which Great Britain could not be aware.

130 Discussion of the draft article by the Second Sub-Commission of the Second Commission (19 July 1907) in Scott, *supra n.* 54, III 176-77.

only the formation or organisation of "corps" or "bands" on its territory that the neutral State needed to seek to prevent.[131]

The representatives were clearly discussing the practical scope of the due diligence obligation to be placed on the neutral State regarding organised corps. "Due diligence" is not a term used in Hague Convention (V) but had been previously discussed within neutrality law in relation to the standard of care required to prevent acts within one State's territory causing harm to another State. The term appeared in the *Treaty of Washington* 1871 between the United States and Great Britain;[132] the treaty famously 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.[133] The level of care to be taken by a neutral State under later codified neutrality law was that "commensurate with [its] power to protect its territory from abuse by a belligerent".[134] It had to "exercise such control of the situation as it can, […] not willingly permit[ting] infringements of its neutrality"[135] i.e. a duty of means and conduct, not result.[136]

"Constant surveillance" over individuals was considered "illusory" at the time of codification.[137] However, as technologies developed, neutral States were also expected to increase their capacity for vigilance "as the price for remaining uninvolved" in the conflict.[138] The scope of a due diligence standard will also depend on the underlying primary norm in question as well as the context.[139] If it is accepted today that due diligence preventive duties also apply to the departures of individuals, and that greater control of the State over private actions logically equates to greater due diligence responsibilities,[140] the exact scope of the obligation nevertheless remains unsettled. In the 1950s, Erik Castrén described an uncertainty about "how effectively a neutral State must ensure that it has the necessary means available for preventing such infringements of

131 See also Fenwick, *supra n.* 129, 303.

132 Great Britain-United States, Washington Treaty for the Amicable Settlement of all Causes of Difference between the Two Countries, 1871, 143 CTS 145, 149.

133 This language was amended to "employ means at its disposal" in the 1907 Hague Convention (XIII), Arts. 8, 23. See discussion in TM Franck and D Niedermeyer, "Accommodating Terrorism: An Offence against the Law of Nations" (1989) 19 *Israel Yearbook of Human Rights* 75, 114; Yoram Dinstein, "The Laws of Neutrality" (1984) 14 *Israel Yearbook of Human Rights* 80, 29; Falk, *supra n.* 69, 115. See also Bothe, *supra n.* 15, 571, 583–84 [§1109]; Oppenheim, *supra n.* 15, 757–58 [§363]; Castrén, *supra n.* 15, 487; Schindler, *supra n.* 1, 382; Deeks, *supra n.* 14, 499; Greenspan, *supra n.* 62, 539–40.

134 Stevenson, United States Military Action in Cambodia: Questions of International law, (1970) 62 Dep't State Bull. 765, cited in Norton, *supra n.* 1, 283.

135 Castrén, *supra n.* 15, 442.

136 Fenwick, *supra n.* 129, 301.

137 Statement of the representative of France, Fifth meeting (26 July 1907), Scott, *supra n.* 54, III 196.

138 Chadwick, "Neutrality Revisited", *supra n.* 1, 21.

139 Kulesza, *supra n.* 7, 32. D. French and T. Stephens, "ILA Study Group on Due Diligence in International Law First Report" (International Law Association, 7 March 2014) 4-5, 10; D. French and T. Stephens, "ILA Study Group on Due Diligence in International Law Second Report" (International Law Association, July 2016) Part 2.

140 Friedmann, *supra n.* 60; LtCol WL Williams, Jr, "The Evolution of the Notion of Neutrality in Modern Armed Conflicts: Additional Report" (1978) 17(1) *Revue de Droit Penal Militaire et de Droit de la Guerre* 159, 173–74; Alfred P Rubin, "The Concept of Neutrality in International Law" (1987) 16 *Denver Journal of International law and Policy* 353, 373.

neutrality, and how vigorously it must act in these cases".[141] His answer was that "too much must not be demanded of a neutral State", since such preventive actions also cost the State. Moreover, a case by case approach was needed, taking into account the State's means and security concerns. While sometimes, in his view, a "mere protest may suffice", a neutral State that showed no intention or power to take necessary action left itself open to the belligerents' self-help to remedy any serious situation.[142]

Many of the concerns expressed during the negotiation and adoption of Hague Convention (V) were echoed during negotiation of the UN's 1989 Convention against the Use of Mercenaries. Amongst several significant differences in national preoccupation and desired approach,[143] some States shared concerns about the level of responsibility that might be expected of them regarding control over their nationals, feeling it unrealistic that they could prevent individuals within their jurisdiction from traveling overseas and participating in fighting. In contrast, some other States believed that only a rule of strict State responsibility would have the deterrent effect desired regarding mercenarism.[144]

If we think about the ongoing complexities of modern conflicts with multiple groups and States involved, and the ongoing moral and political dilemmas they raise, the question surrounding this set of issues becomes whether modern States – with modern technology, surveillance possibilities, data-sharing and also a range of exceptional powers granted to State agencies in the "fight against terrorism" – are better equipped to monitor individuals within their jurisdiction; individuals who today may also have more straightforward access to travel and communication possibilities. These practical factors interplay with a more strongly developed approach to human rights norms such as individual freedom of movement, association and privacy. Additionally, if a due diligence duty of prevention includes prosecution and penalization after return where prevention has failed – an issue seemingly without discussion at the Second Hague Peace Conference – the muted enforcement of domestic foreign incursion provisions regarding *other* foreign fighters who return to their parent State highlights the contesting views of the scope or responsibility under the due diligence duty in this regard.

At least regarding efforts to prevent departure, any State today with minimally organised infrastructure and services controlling entry and exit to the country already takes considerable action. For this reason "toleration" as used in the 1970 Friendly Relations Declaration adopted by the General Assembly will to my mind not be met as a standard regarding a lack of diligence towards individual volunteers, unless the numbers of volunteers are significant or the State had specific prior knowledge. To find responsibility, there may otherwise generally need to be some kind of more active complicity identified or at least argued.[145] One example of a State reaction

141 Castrén, *supra n.* 15, 442.

142 *Ibid*. See also Deeks, *supra n.* 14.

143 Tullio Trêves, "La Convention de 1989 sur les Mercenaires" (1990) 36(1) Annuaire Français de Droit International 520.

144 *Ibid* 530–31; Paul W Mourning, "Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries" (1981) 22 *Virginia Journal of International Law* 589, 609, 621, citing Summary Record of the 21st and 24th meetings, 1980.

145 Compare with Friedmann, *supra n.* 60; Williams, Jr, *supra n.* 140, 173–74. Both go quite far to argue that the trend away from the state-private dichotomy means that neutrals would need to seek to

along these lines is provided by Syria's complaints to the UN Security Council about foreign fighters. Syria submitted information about deceased or detained foreigners accused of fighting with opposition groups, "accusing the States of origin and transit of *unlawfully interfering* in Syria by *actively fostering* civil unrest and terrorism".[146]

5. Conclusion

The notion of neutrality may have evolved almost unrecognizably as a matter of law; some say may have fallen into desuetude. However, certain fundamental questions and moral considerations offered by earlier debates within neutrality law regarding participation in warfare remain relevant to contesting visions of international law and friendly State relations surrounding foreign fighters. Current State practice from Australia and elsewhere shows that questions surrounding the exact scope and application of due diligence prevention of harm rules to foreign fighting/private volunteering still involve dilemmas between abstention and pragmatic foreign policy, considerations under human rights and IHL, and prosecutorial prerogative. Such dilemmas are increased in the case of *other* types of foreign fighters, not necessarily fighting against State armed forces or involved in terrorist activities.

As a principle, or set of principles, non-intervention and good neighbourliness remain vaguer and less settled than neutrality law which is a body of law with agreed international conventions, albeit now showing their advanced age of 110 years. The rules within each framework remain unique. The retrieval of neutrality law in this paper is, therefore, neither intended to signify a call for its reincarnation or application to modern civil wars by analogy; nor to argue that States are free under international law to ignore the departure of individual foreign fighters as per Article 6 of Hague Convention (V). Rather, concepts and practices from traditional neutrality law, including the dilemmas with which it had to grapple, can be seen to have provided a certain backdrop and foundation to non-intervention principles and to the development of the "due diligence" principle regarding prevention of harm. The reflection is that certain fundamental dilemmas and contesting visions and values in the law move through time and remain present in States' thinking about the phenomena existing today, even as we shift our gaze from international to non-international armed conflicts. Some other issues have been shown to have transformed so significantly so as to make the earlier neutrality discussions less relevant.

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prevent anyone under their control from joining the belligerents; moreover that a policy allowing such enlistment would amount to "state action". See also A Van Wynen Thomas and AJ Thomas, Jr, *Non-Intervention: The Law and Its Import in the Americas* (Southern Methodist University Press, 1956) 217, who argue "[w]here there is a duty on the part of a state to act and that state omits to do the act with knowledge of what the consequences of that omission will be, it intends the consequences just as truly as it intended to omit what it should have done."

146 Krähenmann, *supra n.* 6, 49 (emphasis added), citing Letter dated 18 June 2014 from the Permanent Representative of Syria, UN doc. S/2014/426 (20 June 2014) and Statement of the Representative of Syria during the Discussion of the Report of the Secretary-General on the Implementation of Security Council Resolution 2139 (2014).

Given this background, domestic foreign incursion laws can sometimes give the appearance of a neutral stance, and can raise similar questions and contesting views of the law as were debated regarding neutral duties in the past. 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".[147] Nevertheless, a host State's political decision to avoid involvement with a civil war, cannot necessarily be equated to legal rights and duties in international law, and should not be confused with the legal status of neutrality.[148] In this sense, I agree with Maria Gavouneli regarding the "ultimate transformation of the abstention rules into self-restriction principles" in neutrality.[149] It reflects the decline of legal neutrality as a duty, but the continued existence of non-belligerency in practice, and moreover, the possibility of "neutrality in the moral sense",[150] or the choice of principle over force; of rule over reason.

Practice regarding *other* foreign fighters illustrates that States have shown a certain aversion to developing settled, universal rules regarding foreign and private use of force, such as by creating only a very weak proscription of mercenarism[151] or allowing government prerogative for exceptions to foreign incursion laws as in Australia.[152] International law and practice regarding foreign fighters in the 20th century has also not clearly taken a path of pragmatic reason or of universal rules exclusively. Rather, there are blurred lines orientating between abstention, recognition, the prevention of violence and control of the unauthorised use of force, and moral and political reckoning which allow consideration of a party's causes, modes of action and respect for human rights and IHL. The lack of settled practice regarding duties of due diligence prevention of harm can present practical and legal complexities but also allow States to act nimbly in line with policy considerations. Within this, States claim not only a monopoly on the legitimate use of violence, but also impose power through their prerogative in choosing whether to assert or not that monopoly.[153]

147 Elizabeth Chadwick, *Traditional Neutrality Revisited: Law, Theory and Case Studies* (Kluwer Law International, 2002) 181.

148 Oppenheim, *supra n.* 15, 740 [§352]; Kevin John Heller, "The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang" (2011) 47 *Texas International Law Journal* 115, 121; Green, *supra n.* 77, 220; Corliss, *supra n.* 75, 195: "Treaties and laws of this genre seem more a reflection of perceived self-interest or power relationships among states, than a measure of international obligation".

149 Gavouneli, *supra n.* 13, 271–72.

150 Vagts, *supra n.* 1, 102; See also Heike Krieger, "Rights and Obligations of Third Parties in Armed Conflict" in Eyal Benvenisti and Georg Note (eds), *Community Obligations in International Law* (2017, forthcoming).

151 See, e.g., Francoise J Hampson, "Mercenaries: Diagnosis Before Proscription" (1991) 22 *Netherlands Yearbook of International Law* 3.

152 Martti Koskenniemi, "What Is International Law For?" in Malcolm Evans (ed), *International Law* (Oxford University Press, 4th ed, 2014) 35: "[t]o always look for reasons, instead of rules, liberates public authorities to follow their reasoning, and their purposes - hence their frequent aversion against rules in the first place […]".

153 Elizabeth Roberts-Pedersen, "Foreign Fighters Test the State's Monopoly on Violence" *The Conversation*, 24 November 2014 <https://theconversation.com/foreign-fighters-test-the-states-monopoly-on-violence-34305>.