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The Spanish Civil War and the Legacy of Nineteenth-Century Adventurers

1.1 Who Is a Genuine Volunteer?

May 1937. When the Spanish minister of foreign affairs Julio Álvarez del Vayo sent to the League of Nations a White Book containing evidence of regular presence of Italian troops on Spanish soil, the civil war had been going on for about a year.[1] Having started as a revolt against the government of the Popular Front, the rebellion was soon joined by military generals and factions opposed to the Republican government in Madrid.[2] First with the help of Mussolini and then of Hitler, Francisco Franco – at the time commander-in-chief of the Army of Africa – had been able to transport his troops from Morocco to Europe, and was soon recognized as the most experienced general to lead the Nationalist army.[3] What began as a mutiny resulted in a civil war, thanks also to the aid furnished by foreign powers in various forms.

In March 1937, del Vayo had sent a note to the League's Secretary General denouncing the presence of Italian troops as 'constituting an attack upon the territorial integrity of Spain' and requesting the note be communicated to all member states.[4] The Council confronted the issue during its ninety-seventh session held in Geneva on 28–29 May.

[1] League of Nations, Official Journal, Special Supplement 165, White Book (1937) pp. 4–140.

[2] For a detailed account see Hugh Thomas, *The Spanish Civil War: Third Edition. Revised and Enlarged* (London: Penguin 1977). *See* also Michael Alpert, *A New International History of the Spanish Civil War* (London: Macmillan 1994) and Guy Hermet, *La Guerre d'Espagne* (Paris: Éditions du Seuil 1989). For a detailed legal analysis of the war see Ann Van Wynen and A. J. Thomas Jr., 'International Legal Aspects of the Civil War in Spain, 1936–39', in Richard Falk (ed.), *The International Law of Civil War* (Baltimore, MD: Johns Hopkins University Press 1971) 111–175.

[3] *See* John F. Coverdale, *Italian Intervention in the Spanish Civil War* (Princeton, NJ: Princeton University Press 1975) and Robert H. Whealey, *Hitler and Spain: The Nazi Role in the Spanish Civil War, 1936–1939* (Lexington: University of Kentucky Press 1989).

[4] *See* on this point Francis O. Wilcox, 'The League of Nations and the Spanish Civil War' (1938) 198 *Annals of the American Academy of Political and Social Science* 65–72, p. 65.

Although this was not the first attempt made by Spanish representatives to denounce the interventions of Italy and Germany to sustain Franco's army, the League had never previously been confronted with such evidence. The White Book was in fact the result of a series of documents found in the possession of Italian officers during the battle of Guadalajara, one of the fiercest fought during the war (8–23 March 1937). The Book gave a detailed account of the war materiel, military structure and instructions sent by Rome to its volunteer units. It included payrolls, roadmaps, the numbers of weapons assigned to the various brigades, as well as copies of their military badges.

Certainly, the presence of foreign contingents on Spanish soil had been known for some time. The Non-Intervention Committee based in London had already implemented a land and sea borders control plan to stop the influx of volunteers in February 1937.[5] Hence the League was certainly not the only venue to look at the problem of foreign fighters during those years. Yet it was there that the Spanish representatives kept bringing their claims, denouncing the Non-Intervention Agreement as a 'legal monstrosity'.[6]

On 28 May del Vayo started his speech in front of the Council by referring to the last extraordinary session held in December 1936, which had culminated in the adoption of the first resolution on the Spanish situation.[7] He stated that the evidence collected during the previous months proved beyond doubt that an armed intervention was underway.[8] Then he turned to the White Book, which in his view clearly demonstrated the following:

> (1) The existence on Spanish territory of complete units of the Italian army whose personnel, material, liaison and command are Italian; (2) The fact that these Italian military units behave in the sectors assigned to them as a veritable army of occupation; (3) The existence of services organized by the Italian Government for these military units on Spanish territory as if they were in a finally conquered country; (4) The active participation of the most eminent personalities in the Italian Government, who have

[5] *See* Patricia A. M. Van Der Esch, *Prelude to War: The International Repercussions of the Spanish Civil War (1936–1939)* (The Hague: Martinus Nijhoff 1951) p. 77.
[6] *See* the original speech by del Vayo in September 1936. League of Nations, Official Journal, Special Supplement 155, 17th Ordinary Session, sixth plenary meeting (1936) pp. 49–50.
[7] League of Nations, Official Journal 18, 97th Session of the Council, fifth meeting (1937) p. 317.
[8] *Ibid.*

> addressed messages to the invading forces, giving them advice and encouragement in their aggression.[9]

The Spanish representative made some crucial categorizations in his speech, classifying the contingents as 'complete units' forming an 'army of occupation', and having a clear line of command attributable to the Italian government. In other words, the organized and structured character of the volunteers sent by Mussolini constituted for him an armed aggression. Yet, beyond these technicalities:

> it is painful for the Spanish Government to accept the use of the title 'volunteers' for two different categories of men; on the one hand, those who are sent from countries where every free expression of will is crushed by the iron tyranny of the totalitarian regimes and who are not even volunteers in name … On the other hand, those who came of their own free will to fight side by side with us … A clear and noble ideal brought these volunteers into the struggle in Spain because of its universal aspect.[10]

The distinction made between regular and irregular military units is here framed by a clear moral divide. The real volunteers are understood as those men fighting for an ideal: that is, they had come to Spain not following the orders of a government, but rather of their own free will. Moreover, the struggle fought in Spain was to del Vayo universally recognized as a 'just' cause for engaging within the ranks of the Republicans. Here is an indication of how the status of foreign fighters depends primarily on an ideological stance.

This differentiation between 'good' and 'bad' volunteers can be better understood if one looks at the political context of the time. The civil war was generally perceived in Europe as a conflict between two contesting ideologies: communism against fascism.[11] This was evidenced by the arrival of thousands of volunteers ready to fight on one side or the other.[12] In a historical moment that was witnessing the consolidation

[9] *Ibid*., p. 318.
[10] *Ibid*., p. 319.
[11] *See* Koskenniemi, *The Gentle Civilizer*, pp. 338–342. *See* more generally Alun Kenwood (ed.), *The Spanish Civil War: A Cultural and Historical Reader* (Providence, RI: Berg Publishers 1993).
[12] The literature on foreign volunteers during the Spanish Civil War is vast. For some compelling studies see Peter Carroll, *The Odyssey of the Abraham Lincoln Brigade: Americans in the Spanish Civil War* (Stanford, CA: Stanford University Press 1994); Richard Baxell, *British Volunteers in the Spanish Civil War: The British Battalion in the International Brigades, 1936–1939* (London: Routledge 2004); Christopher Othen, *Franco's International Brigades: Adventurers, Fascists and Christian Crusaders in the*

of totalitarianism, the liberal European powers were deeply worried that the Spanish scenario could result in a world war, and did not wish to expose themselves militarily.[13] Hence the Franco-British plan of non-intervention. Conversely, the Soviet Union hoped to intensify the hostilities in order to gain a greater sphere of influence on the world stage.[14]

Politics aside, the Iberian Peninsula also became the battlefield for wider cultural struggles: between fascism and communism, certainly, but also between civilization and barbarism.[15] The war thus had great resonance among European and American intelligentsia, with many renowned personalities expressing their support, or joining the battlefield. George Orwell, Simone Weil, Ernest Hemingway and André Malraux were among those leftist intellectuals who stood with the Republicans. Drieu la Rochelle, Evelyn Waugh and Ezra Pound were sympathizers of Franco.[16] Their open commitment to the Spanish conflict is far from insignificant. It is precisely this cultural heritage that would flood the

Spanish Civil War (London: Hurst 2013); Rémi Skoutelsky, *L'Espoir Guidait Leur Pas: Les Volontaires Français Dans les Brigades Internationales* (Paris: Grasset & Fasquelle 1998); Giles Tremlett, *The International Brigades: Fascism, Freedom and the Spanish Civil War* (London: Bloomsbury 2020); and Judith Keene, *Fighting for Franco: International Volunteers in Nationalist Spain during the Spanish Civil War* (London: Hambledon Continuum 2007).

[13] This point is explained in Nathaniel Berman, 'Between "Alliance" and "Localization": Nationalism and the New Oscillationism' (1994) 26 *New York University Journal of International Law & Politics* 449–492.

[14] *See* Dan Richardson, *Comintern Army: The International Brigades and the Spanish Civil War* (Lexington: University of Kentucky Press 1982) and Stanley G. Payne, *The Spanish Civil War, the Soviet Union, and Communism* (New Haven, CT: Yale University Press 2004).

[15] It is no coincidence that important internationalists of the time took opposing positions on the war. Louis Le Fur, for instance, supported the legitimate resistance of Franco's army and thus the lawful intervention of Germany and Italy: 'On comprend … le jugement d'Unamuno, souvent cité: "Dans l'Espagne actuelle, il y a d'un côté la civilisation et de l'autre la barbarie", ou celui plus récent du cardinal Verdier en réponse à la Lettre collective des Evêques d'Espagne: "La lutte titanesque qui ensanglante le sol de la catholique Espagne est en réalité la lutte entre la civilisation chrétienne et la prétendue civilisation de l'athéisme soviétique".' Louis le Fur, *La Guerre d'Espagne et le Droit* (Paris: Les Editions Internationales 1938) p. 25. On the opposite side, one can find the position of Scelle. *See* George Scelle, 'La Guerre Civile Espagnole et le Droit des Gens' (1939) 13 *Revue Générale de Droit International Public* 197–228.

[16] *See* generally Valentine Cunningham (ed.), *The Spanish Front: Writers on the Civil War* (Oxford: Oxford University Press 1986) and Stanley Weintraub, *The Last Great Cause: The Intellectuals and the Spanish Civil War* (New York: Weybright and Talley 1968). *See* also James D. Wilkinson, 'Truth and Delusion: European Intellectuals in Search of the Spanish Civil War' (1987) 76 *Salmagundi* 3–52. For some notable literary works which include personal accounts of the war, *see* George Orwell, *Homage to Catalonia* (London:

imaginaries of legal actors in the following decades. The images of these personalities would reappear in other contexts and times, influencing how foreign fighters' causes would later be understood. But for the moment, let's return to the Council in May 1937.

After del Vayo completed his speech, the French minister of foreign affairs Yvon Delbos took the floor. First, Delbos reiterated the achievements made by the Non-Intervention Committee, praising especially the frontier control plan.[17] Then, he stressed that there was a clear duty facing the League, to recall 'the foreign combatants, whose presence in Spain . . . serves to feed the flames of civil war and threatens to extend the conflict'.[18] These words were echoed by the British foreign secretary Anthony Eden, who himself praised the Non-Intervention Agreement. On the question of the withdrawal of volunteers, Eden pointed out that 'foreigners engaged in hostilities, whether on one side of the other, have no business on Spanish soil'.[19] He concluded his speech by stressing that the Committee was presently negotiating solutions to implement a viable plan for the withdrawal of non-Spanish combatants.

Of a quite different tone was the intervention by the Soviet representative Litvinoff. As he condemned the 'violent intrusion of foreign armed forces into the territory of a Member of the League of Nations', he also called it an 'aggression in its crudest form'.[20] The Russian diplomat went on to emphasize how Franco's rebellion would not have been possible without the aid coming from abroad, and that the White Book clearly proved that 'tens of thousands of well-armed and trained foreigners poured into Spain to help the rebels . . . foreigners who were on active service in the armed forces of other States'.[21]

This was hardly surprising. Russia had firmly opposed the Italian and German intervention in Spain since the very beginning of the hostilities. Already in December 1936, when del Vayo appealed to the League on the basis of Art. 11 of the Covenant, the Russians had clearly voiced their

Penguin 2013); Georges Bernanos, *Les Grands Cimetières Sous la Lune* (Paris: Plon/Seuil 1995); and Ernest Hemingway, *For Whom the Bell Tolls* (London: Vintage Books 2005).

[17] League of Nations, Official Journal 18, 97th Session of the Council, fifth meeting (1937) p. 321.

[18] *Ibid.*

[19] *Ibid.*, p. 324.

[20] *Ibid.*, p. 321.

[21] *Ibid.*, p. 322.

support for the Spanish government.[22] Back then, the Soviet representative had made clear that 'certain foreign Powers have openly intervened in the interests of the rebels … supplied them with war material, airplanes and *experts* now assisted by whole formations from abroad'.[23]

The term of art utilized by the Russian representative is noteworthy, and returned in the period of decolonization. Then, foreign advisers and experts sent by Cuba and Russia to their allies in Africa would be endorsed as a legitimate form of aid, unlike the groups of white mercenaries pointed to as unlawful combatants. Yet this passage calls for a further parallel. In December 1936, the French representative Viénot had underlined that 'for a long time, the arrivals of volunteers in Spain were individual and intermittent; and many Governments were not able to interfere to restrict such activities … this is no longer the position. Large formations – and even organized units – are now appearing in the war area'.[24]

While Viénot's vision was certainly influenced by the 1907 Hague Conventions – as we shall see – it is interesting to note this contraposition between the single individual leaving their country to fight abroad and the organized nature of foreign aid. The dichotomy between 'organized' and 'non-organized' groups is another of the poles on which the lawfulness of foreign fighters plays out, especially in contemporary counter-terrorism discourse.

At the time, the organized aid sent by Rome and Berlin in the form of war materiel, experts and technicians was a serious matter for the Spanish government. Franco had been able to transport part of his army from Africa to Spain thanks to the aeroplanes delivered by Mussolini. And it is not irrelevant that the two champions of non-intervention – France and the United Kingdom – were the first two nations to prohibit public and private exports of all war materiel to both sides, as early as August 1936.[25] In this regard, it is interesting to see how that Army of

[22] League of Nations, Official Journal 18, 95th Session of the Council, third meeting (1936) pp. 11–14. Article 11 of the League Covenant stated: 'Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.' League of Nations, Covenant of the League of Nations (Paris, 28 April 1919) Art. 11.

[23] *Ibid.*, p. 16. Emphasis added.

[24] *Ibid.*, p. 13.

[25] Portugal, Italy and Germany also joined the Non-Intervention Agreement, although with important reservations, and breached it almost immediately, together with Russia.

Africa was characterized. These were the troops which had been moved on the continent with the help of Italy in July 1936. In September of the same year, in a note sent to the members of the Non-Intervention Agreement, the Spanish government stated the following:

> In their inability to enlist in the rebellion real Spanish contingents, the rebel generals, besides assuring themselves of this foreign aid, had recourse to the recruitment of mercenary Moroccan troops, mobilized against the Spanish people precisely because of their fame for cruelty and their sanguinary renown, a proceeding which by itself should have scandalized the civilized world.[26]

It is fascinating to see how the Moors were singled out as mercenaries, but also as barbarian troops who would render war more savage. This certainly gives an account of the racialized discourse informing the interwar period.[27] At the same time, the categorization of the Moors as barbaric troops offers an idea of the ambivalence permeating the figure of the foreign fighter: during decolonization, there would be a shift in such racialized conceptions, with the anti-colonial fighters being portrayed as battling for self-determination, and the white, right-wing mercenaries pointed to as neocolonial and racist soldiers of fortune. Indeed, the colonial question would resurface again along three historical moments: in the Hague in 1907, in the United Kingdom in 1976 and in contemporary debates on the Syrian Civil War.

Back to the question of foreign aid: del Vayo himself returned to this issue in September 1937. The Spanish representative once again pressed his colleagues: '[Could] anyone deny that the sending of arms, ammunition and whole divisions to the rebels constitutes a scandalous violation of international law?'[28] He then lashed out at the policy of non-intervention, asking the other delegates whether such a policy made

[26] *See* Norman J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (New York: Macmillan Company 1939) pp. 231–232.

[27] On this point see Pierre-Alexandre Cardinal and Frédéric Mégret, 'The Other "Other": Moors, International Law and the Origin of the Colonial Matrix', in Ignacio de la Rasilla del Moral and Ayesha Shahid (eds.), *International Law and Islam: Historical Explorations* (Leiden: Brill/Nijhoff 2018) pp. 165–198. *See* also Elisabeth Bolorinos Allard, 'The Crescent and the Dagger: Representations of the Moorish Other during the Spanish Civil War' (2016) 93 *Bulletin of Spanish Studies* 965–988 and Ali Al Tuma, 'The Participation of Moorish Troops in the Spanish Civil War (1936–39): Military Value, Motivations, and Religious Aspects' (2011) 30 *War & Society* 91–107.

[28] League of Nations, Official Journal, Special Supplement 175, 18th Ordinary Session. Sixth Committee, eighth meeting (1937) p. 57.

sense at all, given that Italy and Germany were blatantly violating the agreement.[29] Finally, he went back to the issue of the withdrawal of non-Spanish combatants by asserting that, for the Spanish government, the International Brigades were 'the only genuine foreign volunteers'.[30] To testify once more to the moral divide between 'good' and 'bad' volunteers, it suffices to go back to a few days earlier at the eighteenth ordinary session of the League's Assembly. There, the Spanish Prime Minister Juan Negrín had taken the floor for a long tirade against the fascist intervention: 'The only volunteers are those fighting in our ranks. [They have been] driven from home by ... the Fascist terror, and [are] convinced that the cause of Spain is that of world freedom.'[31] This statement should be compared with that of Count Ciano, Mussolini's right-hand man, who had previously declared: 'We put no pressure on the volunteers. The national spirit of Italy is such that even without an appeal from the Government all Italian youth desires, as soon as it feels itself engaged in an anti-Communist struggle, to take part in the fight.'[32]

Fascist terror and anti-communist struggle. There could not be two more different conceptions of freedom, and thus of the reasons for going to fight in Spain. This perspective shifted during decolonization, when the Soviet Union became the sworn enemy of American imperialism. White mercenaries then professed an open aversion to Russia and vowed to stop a communist takeover of the African continent. Conversely, the autocratic nature of the Islamic State pushed many Western volunteers to join Kurdish groups during the Syrian Civil War. The point is that the status of foreign fighters is in fact impossible to understand unless opposing conceptions of freedom are considered. As will be shown in the following sections, cultural figures are often associated with these opposing visions.

Back to the plenary meeting of September 1937. The representatives of France and the United Kingdom again defended the policy of non-intervention. This time, however, they also made clear the real purpose of such a policy. While recognizing the rhetorical force of del Vayo's speech, Delbos stated in fact that 'all Europe realized how important it

[29] *Ibid.*, p. 58.
[30] *Ibid.*, p. 56.
[31] League of Nations, Official Journal, Special Supplement 169, 18th Plenary Session, fifth meeting (1937) p. 57.
[32] Malcolm Muggeridge and Stuart Hood (eds.), *Ciano's Diplomatic Papers* (London: Odhams Press 1948) p. 77.

was to prevent Spain from becoming the theatre of … conflicting interventions'.[33] Elliot (United Kingdom) asserted instead that 'the urgent and essential need was to prevent the Spanish conflict from overflowing the borders of Spain and engulfing the whole of Europe'.[34] Much has been written about the policy of non-intervention, and it is not the aim here to return to it. But these words sum up extremely well the political attitude of the two countries that made all possible efforts to establish a parallel system to the League, fearing that the Spanish Civil War could spark a world conflict.

Conversely, the Russian representative Litvinoff reminded his colleagues that 'in accordance with international law, it was to give no help to the rebels against the lawful Government'[35] but that 'immediately after signing the Non-Intervention Agreement it became known to the whole world that supplies were still being sent to the rebels'.[36] Litvinoff concluded his speech by remarking how the non-intervention had bluntly failed. While Norway, Austria and Poland sided with France and the United Kingdom, the speech of the Mexican representative Isidro Fabela was perhaps the most critical about the shortcomings of the League. At the same time, Fabela focused on the issue of volunteers. After denouncing the 'war of aggression'[37] at the hands of a 'foreign army fighting in Spain against the lawful government',[38] Fabela again noted the distinction between legitimate and illegitimate volunteers:

> They are volunteers, we are told … We know that thousands of so-called volunteers who are fighting the Spanish Government have been trained abroad. Is it imaginable that thousands and thousands of 'volunteers' can be 'organized' – I stress the word 'organized' – by their own resources in one country to invade another without the help or protection of their Government. To accept that view would be tantamount to admitting that such a Government exercises no authority or control over what is happening in the territory under its jurisdiction.[39]

Significantly, the differentiation between organized and non-organized groups returns in the Mexican representative's speech. In particular, in

[33] League of Nations, Official Journal, Special Supplement 175, 18th Ordinary Session. Sixth Committee, ninth meeting (1937) p. 59.
[34] *Ibid.*, p. 60.
[35] *Ibid.*, p. 63.
[36] *Ibid.*
[37] *Ibid.*, p. 60.
[38] *Ibid.*, p. 61.
[39] *Ibid.*

his view, the large number of troops trained abroad made their home states directly responsible.[40] To prove this point, Fabela affirmed that the tribute received in the countries of origins clearly made these volunteers organs of the state. Conversely, if they were soldiers leaving their countries to serve in a foreign army, they would have been outlawed:

> Army regulations all over the world contain definite rules making it an offence for soldiers to serve a foreign Government without official authorization and severely punishing such action. Therefore, if it is to be admitted that the foreign soldiers fighting in Spain are volunteers, they would have to be regarded as having left their country illegally – that is to say, as offenders. It is common knowledge, though, that these soldiers are not only not regarded as offenders, but as *heroes* deserving the cordial congratulations of their Government. Consequently, their acts are the acts of the Government and involve the latter's responsibility.[41]

The remark made by Fabela is interesting precisely because it points to the homage received by the fascist volunteers upon their return to Italy.[42] Two visions of the heroic nature of the foreign combatant are made clear: on the one hand the leftist idealists who joined the International Brigades, and on the other the brave legionaries who fought in Spain to defeat the Bolshevik enemy.

Nothing resulted from that September session, however, and no formal act was passed.[43] It took another seven months for the League to hold another session on the Spanish question. Del Vayo first sent a letter from

[40] In his speech, Fabela made reference to the 1933 Treaty of London, which outlawed different acts of aggression. The treaty contained the expression 'armed bands', a term which will become in vogue among international lawyers after World War II. *See* Convention for the Definition of Aggression (London, 3 July 1933) Art. II (5).

[41] League of Nations, Official Journal, Special Supplement 175, 18th Ordinary Session. Sixth Committee, ninth meeting (1937) p. 61. Emphasis added.

[42] This was also highlighted by Negrín during the Assembly meeting: 'in the Popolo d'Italia, Signor Mussolini's organ, we read of "the Italian generals who led the legionary troops to victory in Spain, north of Santander" . . . Every cinema in Geneva gives Italian news reels showing those same troops singing "Giovinezza" as they enter the towns of Northern Spain'. League of Nations, Official Journal, Special Supplement 169, 18th Ordinary Session, fifth plenary meeting (1937) p. 58.

[43] A subsequent controversy arose over a vote on a resolution on the Spanish situation containing a specific paragraph about non-Spanish combatants. The various states' positions were exacerbated precisely when it came to discuss whether to include paragraph 4 of the said resolution, which stated: 'there are veritable foreign army corps on Spanish soil, which represents foreign intervention in Spanish affairs'. *See* League of Nations, Official Journal, Special Supplement 169, 18th Ordinary Session, eleventh plenary meeting (1937) pp. 99–108.

Barcelona on 19 April 1938, and then a formal telegram to the Secretariat on 30 April, requesting the issue be placed on the agenda. Restating all the main issues concerning the situation in Spain, during the 101st session of the Council, held in Geneva on 11–13 May 1938, the Spanish representative also emphasized how the conditions of the war had worsened. There, del Vayo gave his final passionate speeches, stressing once again that characterizing the conflict in Spain as a civil war did not do justice to the actual situation on the ground:

> We reject the characterization of the Spanish war as a civil war, because this term is used to create the impression that the conflict is limited to two Spanish groups and that there is therefore no foreign intervention . . . This is proved by acts such as the bombardment of Guernica, Almeria and Barcelona, and many others of a like nature of which the barbarity has aroused the indignation of the whole world.[44]

The cruelty of the fascist troops was at the heart of the matter. Once again, no resolution was adopted. Lord Halifax (United Kingdom) and Henri Bonnet (France) reassured the League that a plan for the withdrawal of volunteers was in the hands of the Committee of Non-Intervention.[45] But it was only in September 1938 that an agreement was finally reached. This time a resolution was approved, which included the dispatch of an International Commission, with the United Kingdom, France and Iran appointed as the three members to supervise its work.[46] The very last meeting on the Spanish situation held by the countries still standing at the League was held in January–February 1939. It was there that the International Commission presented the Council with a provisional report on the 'Withdrawal of Non-Spanish Combatants from Spain'.[47] Two years had passed since the border closure plan was set up by the Non-Intervention Committee in February 1937. The withdrawal of volunteers was the last act in a dramatic situation that had lasted for

[44] League of Nations, Official Journal 19, 101st Session of the Council, seventh meeting (1938) pp. 354–355. A few days earlier, del Vayo had addressed the floor by stating that: 'Hitler's Germany and Fascist Italy are fulfilling in Spain their sinister destiny' and that 'despite the Non-intervention Agreement, large scale Italo-German intervention is to-day a fact'. Fourth meeting, p. 327.

[45] *Ibid*., p. 331.

[46] League of Nations, Official Journal 19, 103rd Session of the Council, second meeting (1938) p. 883.

[47] League of Nations Official Journal 20, 104th Session of the Council. Provisional Report of the International Military Commission Entrusted with the Verification of the Withdrawal of non-Spanish Combatants from Spain (1939) pp. 125–141.

almost four years. A few months later, in April 1939, Franco proclaimed his victory over the Republicans, putting an end to the civil war. In September of the same year, Hitler invaded Poland, opening a new page in the history of warfare and of armed intervention.

1.2 The End of Freebooters

While the League's discussions provide the ideological background to frame the dichotomy between 'good' and 'bad' volunteers, it is significant to note how the Spanish Civil War ignited debates among famous international lawyers of the time. McNair, Padelford, Lauterpacht and Jessup are among those Anglo-American scholars who published articles and books on the topic.[48] These debates give a first-hand account of the sources, conventions and principles utilized during the interwar era, together with offering a good entry point to the doctrine of neutrality.[49] Yet these discussions are also revealing of important cultural aspects lingering behind the legal characterizations of volunteering abroad. In particular, one can see how the predominant figure at play in the imaginary of these internationalists is that of the adventurer, understood as a free individual not pursuing any state policy. In contrast to this, the image of the freebooter is indicative of a discomfort at the idea of citizens of third states venturing into civil wars for pecuniary reasons or to seize other nations' territories. But let us look into these aspects more closely.

A first, significant article that came out in January of 1937 was one by Philip Jessup.[50] Distancing himself from political quarrels and from any discussion on the 'present political alignments of Europe . . . with fascism

[48] Charles Rousseau, Georges Scelle and Louis le Fur were their most renowned French counterparts.

[49] Significantly, these international lawyers in effect refer to the classical doctrine of neutrality, as codified in the Hague Conventions, overshadowing any early idea of collective security under the League system. On this point see generally Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley: University of California Press 1959).

[50] Philip C. Jessup, 'The Spanish Rebellion and International Law' (1937) 15 *Foreign Affairs* 260–279. In a surgical analysis, Jessup traces the steps that can lead to a civil war. From a situation of mere domestic violence (or riots), to one of open rebellion (equated with insurrection or revolution), to the recognition of the rebel group by foreign states. The American scholar clarifies that recognition of insurgency does not confer special rights on the insurgents, and it does not impose on foreign states any special obligations. Only later on, 'if the insurgents have reached a very considerable degree of organization and stability . . . they may attain the status of belligerency', pp. 270–272.

arrayed against democracy',[51] the well-known American jurist focused instead on the most pressing legal problems arising from the situation on the Spanish peninsula. For lawyers like Jessup, the object of contention was first to assess the legal status of both factions in the war; whether the conflict in Spain was to be considered a civil war (or only an internal rebellion); and what rights and obligations other states held towards the belligerents.[52] In his article, Jessup argues that there existed a difference in international law between 'helping the established government and helping a revolutionary group which has not yet been accorded recognition'.[53] Recognition of belligerency, he explains, put the two factions in the war on an equal footing, conferred them the same rights and duties, and entailed neutrality by other foreign states.[54] Jessup then continues by listing the ways in which the belligerency of a rebel group can be recognized, not ultimately by enforcing a blockade, as he recalls the famous precedent of the American Civil War.[55]

Here one can have a sense of the legal background in which the debates over foreign volunteers were taking place. As seen at the League, these were pressing issues for the Spanish government, given the aid Rome and Berlin had provided to the rebels, together with their recognition of Franco's government. As Jessup notes: 'the extension of recognition by Italy and Germany is that ... for them the Franco government is the government of Spain and the established government is merely a rebellious group ... following the principles outlined above, Italy and Germany would now be legally free to supply aid to the Franco group just as previously any states would have been free to supply aid to the established government'.[56] Naturally, Jessup is aware of the Non-Intervention Agreement which should have precluded any foreign aid reaching either party in the war, yet he also acknowledges the purpose of that policy: prevent the spillover of the conflict in Europe.[57]

[51] *Ibid*., p. 260.
[52] In a similar vein see Charles Fenwich, 'Can Civil Wars Be Brought under the Control of International Law' (1938) 32 *American Journal of International Law* 538–542.
[53] Jessup, 'The Spanish Rebellion', p. 265.
[54] 'If their belligerency is recognized, they thereupon acquire the same rights which are granted to a sovereign state when it is at war. In other words, recognized belligerents may establish blockades, may visit and search the ships of third powers on the high seas, may size and confiscate contraband goods, and the like.' *Ibid*., p. 272.
[55] *Ibid*.
[56] *Ibid*., p. 274.
[57] *Ibid*.

We have already seen how the pact of non-intervention was highly criticized by the Spanish government. What is more interesting for our purpose is looking at how Jessup deals with the problem of volunteers. He does so in few lines, recalling that 'the enlistment of volunteers is within the control of any government' and that 'if the laws of neutrality are applicable, all governments are under a duty to prevent such forms of assistance'.[58] Quite concise, to say the least. At the same time, Jessup does not miss the opportunity to point out how the present situation differed from what has happened in the past: 'it cannot be denied that one of the burdens which must be accepted by totalitarian state or dictatorial government is an enhanced international responsibility for the acts of its individual citizens'.[59]

This is one of the recurring tropes used by lawyers and experts discussing the reappearance of foreign fighters in war scenarios. While recognizing that volunteers have always taken part in conflicts abroad, they tend to distinguish the current situation (be it of mercenaries during decolonization or of terrorists today) from what occurred previously. This break between the past and the present is always done with the purpose of advancing a particular project: emphasizing enhanced state control over its citizens – as in the case of Jessup – or differentiating between old and new actors on the battlefield. Yet this tactic of distancing from the past is accompanied by the persistence of certain figures lingering in their imaginary, as we shall see.

The British legal scholar Arnold McNair discussed the problem of volunteers more extensively than his American counterpart.[60] Adopting a similar attitude to Jessup's, he distances himself from the politics of the Spanish Civil War. McNair starts his discussion by recalling the

[58] *Ibid*., p. 269.

[59] *Ibid*., p. 268. Jessup continues by discussing the recognition of the de facto government. The very issue of recognition of insurgents as the de facto government was analysed by Hersch Lauterpacht in a famous article of June 1939, just at the end of the Spanish Civil War. Yet the two most famous international lawyers of the Anglo-American tradition do not seem very interested in the problem of volunteers, and rather kept their focus on the doctrine of neutrality, and how it applied to the various stages of the civil war. *See* Hersch Lauterpacht, 'Recognition of Insurgents as a de facto Government' (1939) 3 *Modern Law Review* 1–20. On the same issue see also Wyndham Legh Walker, 'Recognition of Belligerency and Grant of Belligerent Rights' (1937) 23 *Transactions of the Grotius Society* 177–210 and H. A. Smith, 'Some Problems of the Spanish Civil War' (1937) 18 *British Yearbook of International Law* 17–31.

[60] Arnold McNair, 'The Law Relating to the Civil War in Spain' (1937) 53 *Law Quarterly Review* 471–500.

principles laid out by the Institut de Droit International concerning the duties of foreign powers during an insurrection. McNair asserts that in the event of a civil war third states have an obligation not to interfere, for instance by sending weapons, ammunition, military equipment, or financial aid. Likewise, no duty exists to help the legitimate government suppress an insurrection.[61] He then moves on to discuss the very central legal problem: the recognition of belligerency by a foreign government and its consequences.[62] Again, it is not the purpose here to enter into a technical debate concerning the recognition of belligerency, or how such a doctrine developed during the long nineteenth century. Mention of these principles are intended to offer an idea of the context in which legal debates on foreign volunteers were taking place.

What really preoccupies McNair is how to justify the British attitude towards the Spanish Civil War.[63] He points out that under international law the United Kingdom had a right to recognize the belligerent status of Franco's faction, yet his government opted for a policy of non-intervention. He praises this latter option by recalling that 'recognition of belligerency would have been entirely consistent with a policy of "neutrality" . . . but . . . our Government and the French Government took the view that the grant of any such recognition . . . would in fact bring considerable prestige to General Franco and be tantamount to an intervention in his favour'.[64] McNair is of course aware that the Spanish Civil War was not fought on purely legal grounds, but also in the sphere of international diplomacy.

His analysis of the current law in relation to foreign volunteers is more elaborated than Jessup's. McNair starts from the general acknowledgement that 'a foreigner who enlists in the forces of either belligerent when an international war is in progress . . . commits no crime against the other belligerent, who is not entitled to punish him if captured'.[65] Yet he also recalls that many countries had passed specific legislation to criminalize those who join a foreign war. He mentions the UK Foreign Enlistment Act of 1870, which was re-enacted in January 1937. Such acts

[61] *Ibid*., pp. 472–473. For an opposite view see Scelle, 'La guerre civile espagnole', p. 223. Discussing the policy of non-intervention, Scelle argued that third states had a right to intervene in supporting the legitimate government in a civil strife.

[62] *Ibid*., pp. 474–484.

[63] On McNair's and other British international lawyers' attitudes during the Spanish Civil War see specifically Ignacio de la Rasilla del Moral, 'In the General Interest of Peace? British International Lawyers and the Spanish Civil War' (2016) 18 *Journal of the History of International Law* 197–238.

[64] McNair, 'The Law Relating to the Civil War in Spain', pp. 491–492.

[65] *Ibid*., p. 494.

were common in nineteenth-century British foreign policy and were directed at preventing citizens enlisting in foreign armies, but were also intended as a manifest form of neutrality towards a foreign conflict.[66] Having discussed the meaning of the act, McNair turns to examine the question of volunteers. His words mirror those spoken at the League by various states' representatives. In particular, he asserts that:

> In almost every war will be found fighting foreign volunteers attracted by the desire of employment or love of adventure or sympathy with the cause of one of the belligerents ... the present conflict in Spain is no exception. But it is exceptional in another aspect ... that from certain countries, sometimes called 'totalitarians', in which the Government controls the actions of its citizens ... there have gone to Spain to fight for one side or the other military and air units or formations, definitely organized ... their degrees of organization constitute them at any rate 'hostile expeditions', such as it is illegal for a neutral Power to permit to leave its territory.[67]

McNair makes no distinction here between the volunteers fighting for personal gain and those going to fight abroad following their ideals, as they are a common feature of many civil wars. In this sense, the figure of the volunteer evoked by McNair is a hybrid between an adventurer, a mercenary and a committed idealist. Like Jessup, he is more interested in establishing a separation between the past and the present: volunteers from the so-called totalitarian states possess for him a degree of organization that makes them part of a 'hostile expedition'.[68]

McNair substantiates his arguments by resorting to the 1907 Hague Conventions which made legal the crossing of frontiers by single persons willing to join one of the belligerents. We have already encountered this idea in the proceedings of the League. Specifically, in the intervention by Viénot in December 1936, when the French representative reiterated the idea of small groups of men crossing borders, as opposed to entire and

[66] Foreign Enlistment Acts were used in many civil wars during the nineteenth century to prevent British subjects from going to fight in Latin America or in the Greek War of Independence. *See* Nir Arielli, Gabriela A. Frei and Inge Van Hulle, 'The Foreign Enlistment Act, International Law, and British Politics, 1819–2014' (2016) 38 *International History Review* 636–656. With reference to the Spanish Civil War, *see* S. P. Mackenzie, 'The Foreign Enlistment Act and the Spanish Civil War, 1936–1939' (1999) 10 *Twentieth Century British History* 52–66.

[67] McNair, 'The Law Relating to the Civil War in Spain', p. 497.

[68] McNair then returns to the problem of recognition of belligerency, explaining that if a foreign power had recognized both parties to the conflict, then neutrality would apply and any such expeditions would be illegal. On the contrary, if a foreign power had not recognized belligerent status, those expeditions would be legal if directed to help the legitimate government, but not the insurgents *Ibid*., pp. 498–499.

organized military units. McNair is careful to remind his readers that a hostile military expedition prepared in the territory of a neutral state is to be considered illegal. The expeditions evoked by McNair represent a cornerstone against which the problem of volunteers was being read and understood by the Anglo-American internationalists of the 1930s.[69] It is thus essential to elucidate this point further.

The topic is addressed by Hersch Lauterpacht in an article published in the *American Journal of International Law* in 1928.[70] His study is noteworthy because it discusses the meaning of 'hostile acts' of private persons directed towards a foreign state. Lauterpacht outlines a difference existing between the Russo-German attitude on the one side and the Anglo-Saxon one on the other. For the former countries, hostile acts included a large pool of activities (such as revolutionary propaganda and conspiracies), whereas for the latter, these were 'organized acts of force directed against a foreign territory' (which included military expeditions).[71] Lauterpacht then regroups states' responses to such acts into two main categories, underlining that the United Kingdom and United States adopted a 'rigid distinction between the duties of the state and those of its subjects'.[72] On the contrary, countries like Russia, Germany, or Austria are described by Lauterpacht as reactionary, given that they treated 'revolutionary acts of a treasonable character against a foreign government . . . as criminal offences'.[73] Reference is made to the German,

[69] For the sake of clarity, it must be pointed out that even when American jurists acknowledge a duty for governments not to allow hostile military expeditions to be formed within their borders, this remains a marginal problem in the overall discussion of non-intervention and recognition of belligerency.

[70] Hersch Lauterpacht, 'Revolutionary Activities by Private Persons Against Foreign States' (1928) 22 *American Journal of International Law* 105–130.

[71] 'This means that whereas the state itself is prohibited by international law from committing acts amounting to assisting revolutionary movements abroad, its subjects are not, with one exception, so prohibited. The second is that, in consequence of that exception, private persons are forbidden by municipal law, enacted in performance of a clear international duty, from committing such acts as amount to making the national territory a base for military or naval operations against a friendly state.' *Ibid.*, p. 113.

[72] *Ibid.*, p. 113. Lauterpacht mentions a third group of states represented by France, Italy and Spain: 'The criminal codes of the countries belonging to this group do not state *expressis verbis* what are the acts which are deemed likely to disturb the external peace of the state and which are accordingly prohibited by law. They content themselves with stigmatizing as crimes such acts as are described as being against international law, or as exposing the country to the danger of war or reprisals, or, in general, as compromising its foreign relations.' *Ibid.*, p. 118.

[73] The acts of private individuals, Lauterpacht explains, could be subsequently criminalized under municipal law, e.g., the British Foreign Enlistment Acts and the US neutrality laws. *Ibid.*, p. 116.

Austrian and Russian penal codes, which all contained extremely strict provisions regarding the actions of their citizens at home and abroad. Thus, Lauterpacht notes a strict centralization by this group of states regarding their own citizens, including the duties owned to foreign governments.

Seeking to define what principles states should generally follow when it comes to preventing hostile military expeditions, Lauterpacht opts for the Anglo-Saxon tradition of neutrality laws. However, he does recognize a limit to the freedom given to the subjects of neutral countries, in such a way that 'it must prevent them from committing such as acts as would result in the neutral territory becoming directly a base for the military operations of either party. They must not build or fit out ships to the order of belligerents ... they must not leave the neutral territory in organized military units'.[74] In other words, a neutral state must not host or become the base for military operations in foreign countries, and – most importantly for our purpose – individuals who wish to fight abroad should not cross borders in organized military units. But where did this idea come from, and on what cultural background is it based?

The answer is offered by Emerson Curtis in a fascinating article dated 1914.[75] There, Curtis discusses the American legal responses to such expeditions in the nineteenth century. By resorting to some famous examples, Curtis aims to demonstrate the crystallization of a duty preventing these activities in international law.[76] What is most significant, though, is how these expeditions are characterized. By equating them with the actions of privateers, Curtis draws a distinction between these actors and the volunteers going to fight in wars abroad. The American William Walker is used to make the point:

> Perhaps the most notorious expeditions were those of William Walker. In his first attempt, he planned to gain possession of the Mexican territory of Lower California. He set sail in October 1853 with an expedition from San Francisco, invaded the territory, killed a few people, and wounded others ... On May 4, 1855, Walker again set sail from San Francisco, this time for Nicaragua ... Walker made three more attempts at invasion of Central America ... He was shot at Truxillo in September 1860.[77]

[74] *Ibid.*, p. 127.

[75] Roy Emerson Curtis, 'The Law of Hostile Military Expeditions as Applied by the United States' (1914) 8 *American Journal of International Law* 1–37.

[76] Curtis cites the Texas Revolution, the Canadian Rebellion of 1837 and the Nicaraguan Revolution of 1855 (among others), where American citizens had taken active part in military expeditions abroad.

[77] *Ibid.*, pp. 243–244.

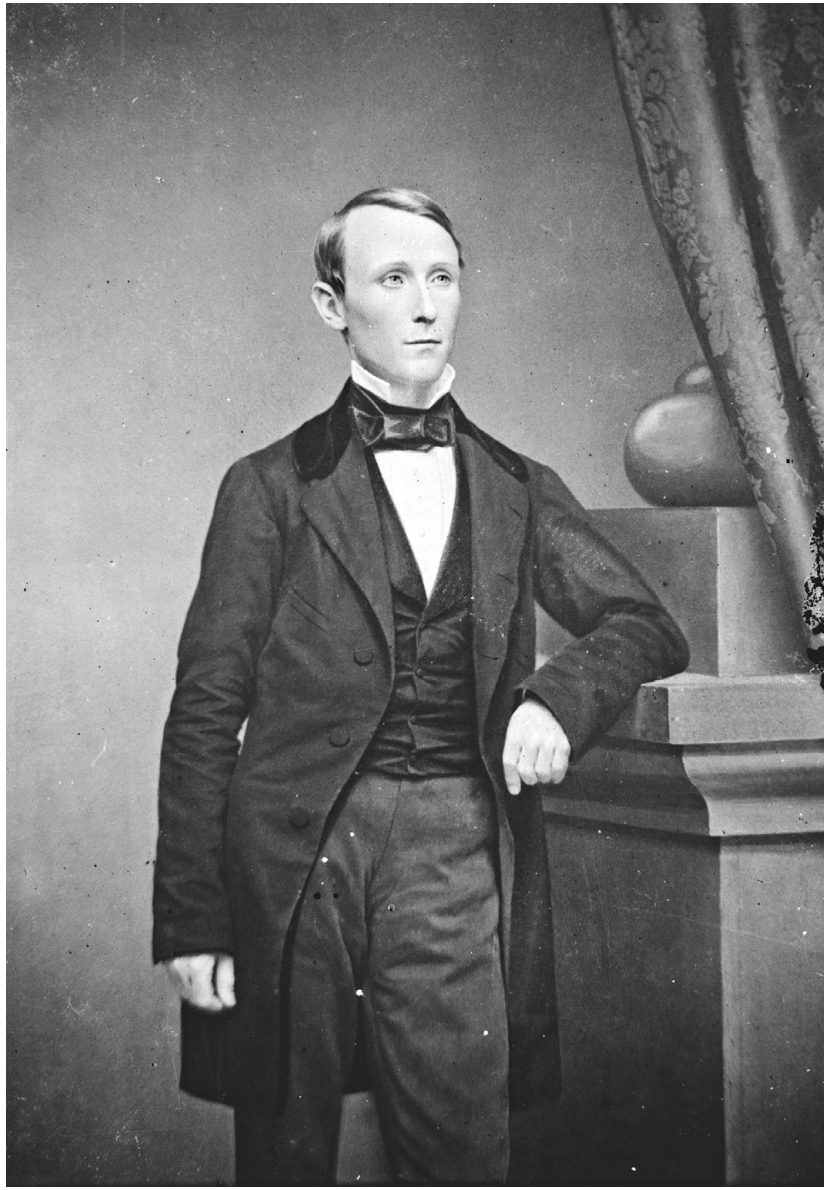

Figure 1.1 Portrait of William Walker (1824–1860) by Mathew Benjamin Brady
Source: Library of Congress Prints and Photographs Division, Brady–Handy Photograph Collection, DC 20540 USA.

The figure of Walker is used to show how expeditions aimed at conquering the territory of other states were extremely dangerous to peaceful relations among sovereign states. It is not the point of this study to retrace the history of piracy and privateering in the long nineteenth century. Suffice to say that these actors – which were more or less tolerated by states in previous times – contributed to structuring diplomatic and foreign relations among countries.[78] But the figure of the pirate does not remain confined to that era and reappears in other periods. However, for scholars like Curtis, freebooters were seen as a dangerous legacy of the past. His position thus attests to a discomfort with their activities, as opposed to the image of the adventurer engaging in wars abroad following higher ideals. The dichotomy between 'good' and 'bad' foreign fighters is drawn based on moral judgements concerning the cause pushing people to take up weapons abroad, and is supported by precise cultural figures, in this case Walker.

Going back to the Spanish Civil War, if during the first months of hostilities the focus was on the recognition of belligerency, as the numbers of foreigners increased, references to the problem of volunteers became more frequent. In an article by Francis O. Wilcox in the *American Political Science Review* in April 1938, one can see how the topic is given increasingly more space.[79] Referring back to the Hague Conventions, and the principles of the Institut of Droit International, Wilcox reasserts the idea that there is no responsibility on a neutral state in a civil war when separate individuals are crossing borders. States are however free to pass legislation to prevent that from happening, or to criminalize such conduct.[80] Oppenheim in particular is a central source for international lawyers of the time, since he devoted the whole second book of his famous *Treatise* to war and neutrality. Interestingly,

[78] This is not to equate filibusters/freebooters/privateers with pirates. There are legal as well as conceptual differences between the two actors. *See* J. D. Ford, *The Emergence of Privateering* (Leiden: Brill/Nijhoff 2023), Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (New York: Zone Books 2009) and Sonja Schillings, *Enemies of All Humankind* (Hanover, NH: Dartmouth College Press 2016).

[79] Francis O. Wilcox, 'The Localization of the Spanish War' (1938) 32 *American Political Science Review* 237–260.

[80] 'Neutrality is thus an attitude of impartiality on the part of states, and not on the part of individuals. ... On the other hand, each government may, within its own discretion, impose upon its citizens those restrictions which seem advisable in order to ensure neutrality.' *Ibid*., p. 240.

Oppenheim confirms the doctrine in relation to foreign volunteers in these terms:

> Although several States, as, for instance Great Britain and the United States of America, by their Municipal Law prohibit their subjects from enlisting in the military or naval service of belligerents, the duty of impartiality incumbent upon neutrals does not at present include any necessity for such prohibition, provided that the individuals concerned cross the frontier singly and not in a body; moreover, as has already been mentioned, the subjects of neutral States who thus enlist do not thereby commit any offence against the rules of International Law.[81]

This point will be elucidated when looking at the *travaux* of the 1907 Hague Conventions, which reveal a certain laissez-faire attitude on the part of states towards their citizens taking up arms abroad.[82] As seen in Lauterpacht, this way of looking at the problem is mainly drawn from the Anglo-Saxon tradition on neutrality, a tradition which prevailed over those of the German-speaking countries and of Russia. This points to a division in the former countries between the private and public spheres, with the legal scenario changing the moment organized groups move across borders. That has perhaps radically changed today, if one considers the security concerns informing current legislation on foreign fighters in the global war on terror. This aspect will be analysed in more detail later, but it is important to start drawing some parallels to see what of the original neutrality doctrine has endured and what has drastically changed. It is interesting to note how the private/public distinction – a pillar of the interwar period – starts to shift during the

[81] Lassa Oppenheim, *International Law: A Treatise, Fifth Edition Vol. II. Edited by Hersch Lauterpacht* (New York: Longmans, Green 1935) p. 555 § 322.

[82] Garcia-Mora, in a study devoted to hostile acts of private persons against foreign states, discusses the issue of volunteers in these terms: 'The only prohibition imposed is the formation of combatant corps to assist any of the belligerents as found in Article IV of the Convention [Hague Convention N. V, Art. VI]. It has been seen quite clearly that this Article really prohibits the organization of military expeditions in neutral territory, and that the obligation contained in it does not go beyond the prevention of such expeditions in the manner indicated. As previously submitted, the cardinal distinction embodied in these two articles reflected the nineteenth century *laissez-faire* philosophy whereby a line of demarcation was drawn between the sphere of the government and that of the individual, thus implicitly assuming that purely private actions of the individual could not be imputed to the state.' Manuel R. Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (The Hague: Martinus Nijhoff 1962) p. 68.

Spanish Civil War, as a direct effect of the fascist/totalitarian volunteers present on the Iberian Peninsula.[83] Let us delve into this aspect further.

We have seen how foreign volunteers were generally read by the international lawyers of the time through the prism of neutrality. For most of those lawyers, volunteers should have been dealt with using ad hoc legislation, such as the British Foreign Enlistment Acts, or the US neutrality laws.[84] If one takes a look at the latter, it can be seen how the delivery of war materiel was much more central than the volunteers themselves. Under such laws, American citizens were forbidden to travel on belligerent ships during war, but were not strictly forbidden to enlist in foreign armies.[85] An article by James W. Garner published in January 1937 asserts that:

> If it be said that the duty of non-intervention has reference only to the conduct of governments in directly assisting the rebels and has no application to the conduct of private individuals . . . this distinction, if it was ever applicable in civil wars, is now antiquated, and is today repudiated by the best writers on international law, and has been rejected by the most recent legislation, such as the American neutrality legislation of 1935 and 1936.[86]

Garner thus aligns himself with those international lawyers who wanted to break with the past. He points nonetheless to a division existing between the private and public spheres, given that the duty of non-

[83] On this point see 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* 118–150.

[84] Neutrality laws generally prohibited the export of arms, ammunition and instruments of war from the United States to foreign nations at war, and also private loans from American citizens to belligerent nations. They functioned therefore as a sort of embargo. Specifically, the act of May 1937 forbade US citizens from travelling on belligerent ships, and American merchant ships were prevented from transporting arms to belligerents. However, they did not criminalize the enlisting of private citizens per se. *See* Francis Deák and Philip C. Jessup (eds.), *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries (2 vols.)* (New York: Columbia University Press 1939). *See* also Charles G. Fenwich, *The Neutrality Laws of the United States* (Washington, DC: Carnegie Endowment for International Peace 1913).

[85] Although the participation of American citizens in the Spanish War was generally regarded as unpatriotic. *See* on this point Edwin Borchard, 'The Power to Punish Neutral Volunteers in Enemy Armies' (1938) 32 *American Journal of International Law* 535–538. *See* also George A. Finch, 'The United States and the Spanish Civil War' (1937) 31 *American Journal of International Law* 74–81. The point is analysed historically by Thomson, *Mercenaries, Pirates, and Sovereign*, pp. 79–84.

[86] James W. Garner, 'Questions of International Law in the Spanish Civil War' (1937) 31 *American Journal of International Law* 66–73, p. 68.

interference in a foreign conflict was traditionally put solely on the state, and not on private individuals trading with the factions at war.[87] Another American internationalist, Vernon O'Rourke, discusses the private nature of the aid to be furnished to insurgents in these terms:

> A position of neutrality in a civil war interdicts only official governmental aid to the insurgents; help of a private nature is usually not considered violative of neutrality . . . But non-intervention, as announced at London, involves the control of activities of private individuals to a much greater extent than is necessitated by a declaration of neutrality. In pursuance of this policy all governments in Europe have passed laws forbidding the direct or indirect exportation of arms, munitions and materials of war destined for Spain.[88]

O'Rourke also shares the opinion that private trade with the belligerents is now to be forbidden and welcomes the Non-Intervention Agreement. Then he turns to discuss the acts passed in the United Kingdom and France to prevent citizens from going to fight abroad. This comes as a confirmation that the two issues – trade and fighting – were seen as distinct spheres. Hence, for many international lawyers of the time, single, private citizens were free to enlist abroad, unless national legislation prevented them from doing so. But there is a curious ambivalence in the figure of the private citizen evoked by these American jurists. On the one side, they acknowledge that modern law requires a shift from a duty of non-intervention put solely on states to one addressing single, private individuals; on the other hand, the private character they refer to seems to involve only the material transactions of subjects with the belligerents, remaining silent on physical engagement in war. In this sense, the figure that underpins their vision is still the one of the nineteenth-century adventurer, devoid of any financial motivation. An ideal kind of fighter

[87] *See* the Final Act of the Hague Peace Conference 1907 (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.' James Brown Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907: Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations. Second Edition* (New York: Oxford University Press/ Humphrey Milford 1915) p. 29.

[88] Vernon O'Rourke, 'Recognition of Belligerency and the Spanish War' (1937) 31 *American Journal of International Law* 398–413, p. 409.

who has nothing to do with privateering activities, as we have seen with reference to the image of Walker.

To conclude with the Spanish Civil War, perhaps the most complete work produced by a legal scholar at the time is that by Norman Padelford. The American academic addresses all the main legal problems of the war, while examining extensive material taken from the archives of the Non-Intervention Committee.[89] His take on volunteers is objective and neutral. By confining himself to the actual practice of states, he concludes that:

> [before the war] the majority of the states of Europe did not regard volunteering for or engaging in military service in a foreign civil strife as contrary to or forbidden by existing international law . . . Subsequent to the 14th of February, 1937, restrictive measures were adopted by twenty-five of the twenty-eight states adhering to the non-intervention policy . . . Judging from the ad hoc form of the measures which were taken by the other twenty-four states above noted, it would appear that the states had no thought of establishing a new principle of international law generally binding in all future cases of civil strife.[90]

Padelford regards volunteers as a problem to be addressed using ad hoc legislation, affirming that there was no urgent need for a norm in international law to regulate the question – perhaps a further confirmation that foreign fighters at the time were not making the headlines in international legal scholarship. The fact that most of these internationalists referred to the domestic context is not to be overlooked, however. On the contrary, it proves how the legal dynamics connected to foreign fighters inevitably passed from the national level as well. In fact, it was in January 1937 that countries started to discuss legislation to prevent their citizens' recruitment and departure for Spain. The British Houses and the French Parliament are privileged venues to understand how states were dealing internally with these individuals, particularly because they reveal

[89] *See* Padelford, *International Law and Diplomacy*, Appendices, pp. 203–674. Charles Rousseau also devotes a long and comprehensive study to the Non-Intervention Agreement, its origins and nature, its application and practical content as well as its functioning. His characterization of the agreement as a '*no man's land* juridique' remains well-known. Similarly to Padelford, Rousseau deals with the main legal questions related to the Spanish Civil War in a neutral and analytical tone. Different from his American counterpart, however, when it comes to discussing the issue of volunteers, Rousseau is much more attentive to national debates. Charles Rousseau, 'La Non-Intervention en Espagne' (1939) 19 *Revue de Droit International et de Législation Comparée* 217–280, p. 237.

[90] Padelford, *International Law and Diplomacy*, pp. 74–75.

significant cultural aspects informing the discourse of policymakers, aside from the doctrine of neutrality as seen in the work of the Anglo-American internationalists.

1.3 Evoking Past Heroes

Following a new influx of Italian troops into Spain in autumn 1936, many European states began to debate internally the problem of volunteers.[91] Belgium, Switzerland and Poland were among those countries where strict legislation to prevent the recruitment and departure of volunteers was enforced. Our focus will be on the United Kingdom and France, not only because these were the two main promoters of the Committee of Non-Intervention, but also because the numbers of their citizens going to fight in Spain were the highest during those years.[92] Additionally, many of the volunteers were reaching Spain through France, making the country an important place of transit. As already pointed out, some important personalities who were active on the Iberian Peninsula were British and French. The focus on these two countries is thus useful on the one hand to show a continuation with the League's debates and, on the other hand, because French and British parliamentary debates reveal fascinating cultural aspects framing the figure of the foreign fighter in the interwar period.

In France, a law for the interdiction of volunteers is discussed at the Chamber of Deputies on 15 January 1937. A proposal to criminalize French nationals going to fight in Spain had already been filed in December by Council President Louis Rollin.[93] By the end of the month, Jean Desbons, a deputy from the Haute-Pyrénées had deposited formal draft legislation to outlaw French nationals fighting in Spain with either side. The draft included the stripping of their nationality, six months' imprisonment with a fine of 10,000 francs for those who helped the

[91] *See* le Fur, *La Guerre d'Espagne et le Droit*, p. 48.

[92] Technically France comes first for numbers of volunteers joining the International Brigades, followed by Italy, Germany, Poland, the United States, the Soviet Union and only then the United Kingdom. *See* specifically Thomas, *The Spanish Civil War*, Appendix 7, pp. 974–985.

[93] A previous debate was held on 5 December, when the problem of French citizens going to fight in Spain was addressed in terms of the dangers posed to France's foreign policy. *See* Journal officiel de la République française. Débats parlementaires. Chambre des députés. Séance du samedi 5 Décembre 1936.

recruitment process, and the banning of all propaganda activities in France.[94]

The proposal by Desbons was examined on 12 January 1937, but it was later abandoned. The government of Leon Blum wished to remain in line with the United Kingdom, and more generally with the decisions taken by the Non-Intervention Committee. Blum himself, on 13 January, filed a draft bill on volunteers, which was approved a few days later. It is interesting to look at the parliamentary debate following this proposal, as it gives a first-hand account of the arguments deployed by the various blocs of the Parliament, and as they contextualize the cultural references flooding the imaginary of the French legislator.

The session of 15 January was opened by Raymond Vidal, the special rapporteur of the civil and criminal commission. Vidal reminded the audience that although at the beginning foreign volunteers were just 'des isolés qui, mus par leur seul idéal, allaient combattre sous le drapeau de leur choix, pour une cause qu'ils croyaient juste et bonne',[95] after some time their character had changed: 'nous avons assisté à l'arrivée en Espagne de techniciens, d'ingénieurs; de pilotes; récemment, les départs sont devenus collectifs, ils ont même paru inspirés, suscités, organisés'.[96]

Here one can see the idea already contained in the League's debates and highlighted by the Anglo-American internationalists: the actions of individual foreign volunteers could not be deemed illegal. Conversely, the moment they organized in military units, the legal scenario changed. What is crucial to highlight in this debate, however, is how a distinction was drawn between the volunteers and those who recruited them. Having briefly commented on the retroactivity of the law for those already on Spanish soil, Vidal takes a clear stance by pointing out that:

> nous avions pensé pouvoir instaurer une échelle de peines . . . nous avions pensé qu'il fallait faire une différence entre le volontaire qui part combattre pour son idéal, avec sa foi, son ardeur, sa générosité – car l'idéal, quel qu'il soit, est toujours éminemment respectable – et, au contraire, celui qui faisait profession d'enrôler, celui qui, systématiquement, recrutait

[94] For a recent overview on the stripping of nationality see Laura Van Waas, 'Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications', in Andrea de Guttry, Francesca Capone and Christopher Paulussen (eds.), *Foreign Fighters under International Law and Beyond* (The Hague: Asser Press 2016) 469–487.

[95] Journal officiel de la République française. Débats parlementaires. Chambre des députés. Séance du vendredi 15 Janvier 1937, p. 42.

[96] *Ibid.*

> dans un but plus ou moins avoué, plus ou moins vénal, et qu'il importait de punir davantage.[97]

Vidal is suggesting introducing different punishments for the volunteers who travelled to Spain and those who recruited them, judged as individuals who sought to profit from the actions of the volunteers. This could be an early suggestion of the main division which would later on distinguish volunteers from mercenaries. But it is interesting to note that the same figure which underlaid the discourse of the Anglo-American international lawyers remerges here: the free, committed adventurer who is engaging in a war abroad not for material reasons. It is by following this line of thinking that Vidal wished to punish the recruiters more severely than the actual volunteers.

Next, Grumbach, the rapporteur for the Commission of Foreign Affairs, reminded his colleagues that the Spanish situation was endangering the peace of Europe, and the hostilities were exacerbated by the presence of foreigners on both sides. Taking a seemingly pacifist stance, he sided with Blum's proposal, stating that: 'd'accord avec le Gouvernement, la commission des affaires étrangères, à l'unanimité, estime que l'état de choses actuel constitue un immense danger pour la paix'.[98] To that end, Grumbach contrasted the proposal made by Vidal for establishing a different degree of criminal offences for the volunteers and the recruiters. Although realizing that 'si cruellement injuste qu'il soit d'être oblige . . . de mettre sur le même plan les volontaires – les vrais volontaires – quelle que soit leur nationalité, quelles que soient leurs opinions, qu'ils se battent par conviction et enthousiasme républicains, dans les rangs des gouvernementaux, ou mus par un idéal opposé au nôtre, dans le camp des rebelles'[99], Grumbach saw no other way to end the conflict but to ban all forms of volunteering, perhaps one of the clearest statements of *realpolitik* of those years.

It was then the turn of Marcel Héraud, representative of the Républicains indépendants et d'action sociale, who took a strong stance against the proposal by Blum, praising instead the original draft prepared by Desbons. In particular, Héraud saw the stripping of nationality as the right penalty to deter volunteers from volunteering in Spain: 'ne vous rendez-vous pas compte combien ces sanctions sont dérisoires? . . .

[97] *Ibid.*, p. 43.
[98] Séance du vendredi 15 Janvier 1937, p. 44.
[99] *Ibid.*

Pensez-vous qu'un homme qui va risquer sa vie pour son idée puisse être empêché de le faire par la menace d'une amende? Pouvez-vous imaginer que recule devant la prison celui qui ne recule pas devant la mort?'[100]

These interventions make clear what criminal sanctions the French legislator was envisaging for foreign volunteers. It is also here that some famous cultural references start to appear. Another deputy, Brun, responded vehemently to Héraud's intervention with the following question: 'Qu'attendez-vous alors pour dire que Garibaldi a eu tort et pour condamner La Fayette?'[101] The famous communist deputy Gabriel Péri was even more direct than his colleague:

> Je suppose que la majorité de la Chambre trouvera aussi choquante que nous-mêmes l'assimilation que, sous ce terme générique de 'volontaires' on établit entre des forces et d'origine et de qualité différente . . . Il n'y a, à côté de l'armée républicaine espagnole, des volontaires qui, après tout, peuvent se réclamer des plus généreuses traditions, celle de La Fayette, celle de Garibaldi, celle de Byron. Il y a des hommes qui se sentent menacés chaque fois qu'ils savent que la liberté est en péril . . . des hommes qui, lorsqu'ils sont Français et qu'ils se battent aux côtés de la république espagnole, témoignent qu'ils ont de la sécurité française une notion beaucoup plus juste et beaucoup plus correcte que celle des pèlerins de Burgos.[102]

The images of former foreign fighters are evoked to characterize the French nationals fighting for freedom, and to distinguish them from those totalitarian volunteers sent by Italy and Germany. Garibaldi, Byron and Lafayette are regarded as honourable volunteers, and are used to draw a moral divide with the military expeditions sent to Spain by totalitarian states.[103]

Leon Blum was not averse to such references either. In recalling to the Chamber how both the British and French governments wanted to push for a common policy to prevent their citizens from going to Spain, he stated:

> [la loi] assimile . . . deux formes d'engagement ou d'enrôlement qui sont cependant bien différentes: le libre don de la personne à un idéal, à une

[100] *Ibid.*, p. 46.
[101] *Ibid.*
[102] *Ibid.*, p. 49.
[103] As Péri continues his speech: 'Le danger provient de l'afflux, sur le territoire espagnol, d'effectifs paramilitaires ou militaires envoyés en service commandé, en corps expéditionnaire par des gouvernements étrangers . . . Ce sont des "volontaires totalitaires" ou, plus exactement, suivant une définition originale, en régime hitlérien un volontaire est un homme qui reçoit l'ordre de demander l'autorisation de s'engager volontairement.' *Ibid.*, p. 49.

> foi, selon ces exemples légendaires que l'on a cités aujourd'hui à maintes reprises à la tribune, l'exemple de La Fayette, celui de Byron, celui de Garibaldi, celui de Villebois-Mareuil, ou bien un départ en service commandé; d'une part, le libre exercice de la volonté ou de la conviction individuelle, qui jusqu'à ce jour, au regard des engagements internationaux, était pleinement licite, ou bien, de l'autre part, l'intervention indirecte d'un Etat … Nous sentons cette difficulté et nous comprenons les appréhensions qu'elle peut provoquer; mais, avant tout, il s'agit de préserver l'Europe de la guerre.[104]

Two opposed notions of freedom – and thus of reasons for fighting abroad – are at play here: embracing an ideal or following the commands of a government. Two versions had already been discussed at the League, and that will return, reversed, in the period of decolonization.

Nonetheless, it is important to note that not everyone in the room shared Péri's view. A few moments earlier some right-wing representatives had reacted to the comparisons drawn by the communist deputy, shouting from their benches: '[M. François de Saint-Just] c'est votre avis, ce n'est pas le notre [M. Charles des Isnards] Et les pèlerins de Moscou?'[105] In other words, the figure of the good foreign fighter evoked by some politicians is split: on the one side, there might well be the Garibaldis, the Lafayettes, the Byrons, taken as examples of an honourable form of volunteering; while on the other, the figure of the Soviet soldier is thrown into the discussion to show that their vaunted heroism may contain a dark, twisted side. These two versions of the foreign combatant (the idealist volunteer and the cynical/opportunist soldier) reappear decades later, both at the UN General Assembly, and in contemporary debates over foreign terrorist fighters.

The point is that political actors stand on different moral grounds, and as Blum was trying to convince the Chamber of Deputies to vote in favour of the proposed bill on volunteers, the representatives of the right felt compelled to react to the unlawful invasion of Spain at the hands of the Bolshevik enemy. As already seen at the League, civilization and barbarism were the two poles around which the legitimacy of foreign fighters was debated: be it the savagery of the Moorish troops, the cruelty of fascist soldiers, or conversely the fear of an end to Christian civilization at the hands of the Russians.[106]

[104] Séance du vendredi 15 Janvier 1937, p. 52.
[105] *Ibid*., p. 42.
[106] On the differentiation between the 'bad' Comintern soldiers and 'good' foreign volunteers see specifically George Esenwein, 'Freedom Fighters or Comintern Soldiers?

The draft law proposed by Blum was finally passed on 21 January. It ended up being more far-reaching than the one proposed by Desbons. It authorized the French government to take 'all the necessary measures' to hamper (a) the engagement and acts tending to the engagement of persons in either of the fighting forces of Spain; (b) the departure and transit of all persons going to Spain in order to fight; (c) the engagement in the above forces of French nationals who were outside of the national territory. It did not, however, include the removal of nationality.

Reference to past volunteers is also present on the other side of the Channel. The problem of British citizens going to fight abroad was addressed by Westminster in winter 1936. On 1 December, while the House of Commons was discussing the implementation of a specific bill outlawing the carriage of munitions to Spain on merchant shipping, Philip Noel-Baker – representative of the Labour Party – raised the issue of volunteers. Fiercely criticizing the pact of non-intervention and suggesting that the League was instead the right venue to deal with the Spanish situation, he pointed the finger at the troops fighting on the side of Franco.[107] In particular, Noel-Baker feared that when the Non-Intervention Committee extended the embargo on volunteers, Italy and Germany would maintain their battalions on Spanish soil. As noted by the communist representative William Gallacher: 'if you stop the volunteers from this country [Russia] the Germans will still be there. If Germany signed a Non-intervention Pact which included no volunteers, the Germans would still be there, and so would the Italians'.[108]

A few days before, on 25 November, the Secretary of Foreign Affairs Anthony Eden had made clear that 'the question of the enlistment of

Writing about the "Good Fight" during the Spanish Civil War' (2010) 12 *Civil Wars* 156–166.

[107] HC Deb, 1 December 1936, Vol. 318, c1068. Philip Noel-Baker continued: 'I believe that if our Government had then invoked the League and had endeavoured to establish a really effective system for preventing such infractions by Signor Mussolini and others, a really effective system of non-intervention, that they would have rendered a great service to Europe. But, unfortunately, they did not . . . If the embargo had been applied all round it would have deprived the Spanish Government of their legal rights, but it might have solved the general problem. But, unfortunately, we applied it at once, and we allowed the Fascists five weeks in which to pour in arms in quantities which they thought were sufficient to win the war.' For a compelling analysis of British diplomatic efforts during the Spanish Civil War *see* Tom Buchanan, 'Edge of Darkness: British "Front-line" Diplomacy in the Spanish Civil War, 1936–1937' (2003) 12 *Contemporary European History* 279–303.

[108] HC Deb, 1 December 1936, Vol. 318, cc1148–1149.

volunteers is not covered by the Agreement regarding Non-Intervention in Spain, which relates only to the prohibition of the export of war material',[109] while advancing the idea that the Committee in London was taking into consideration a general prohibition on all volunteers. A certain distrust of such provisions was evident – especially from the Labour Party's side – as made clear by the words of the Welsh representative Morgan Jones: 'I should be glad to see volunteers and all instruments of warfare stopped, so long as they are stopped all round ... If there is to be a ban on volunteers therefore, let it not he unilateral, but multilateral, all nations taking part in it.'[110]

Nevertheless, the Foreign Enlistment Act came into force on 11 January 1937. It proscribed British subjects from going to Spain. Anthony Eden returned to the question of volunteers on 19 January, the same day that the French National Assembly was discussing Blum's draft law. Eden made reference to the discussions held at the Committee of Non-Intervention, highlighting how the issue of volunteers had become a more serious matter. As well as introducing the idea of a frontier control system, Eden focused on an aspect that we have already seen debated in the French context – the differentiation between volunteering and recruiting. In the words of the British prime minister:

> within the last few weeks, the attention of the Government has been called to the development of recruiting activities in this country. I deliberately say 'recruiting', and not 'volunteering', because it is the activities of recruiting agents to which our attention has been directed, rather than the purely voluntary enlistment of individual supporters of one side or the other wishing to go to fight in Spain.[111]

Eden replied to a remark that those being paid were the volunteers fighting for Franco: 'it is not a question here of someone going to fight in Spain for their political principles; it is a question of recruiting going on, of offering individuals money to go and take part'.[112] In other words, Eden stressed that the legality of British citizens going to fight abroad was initially raised because of the issue of recruitment.[113] This position attests

[109] HC Deb, 25 November 1936, Vol. 318, c394.
[110] HC Deb, 18 December 1936, Vol. 318, c2826.
[111] HC Deb, 19 January 1937, Vol. 319, c98.
[112] *Ibid.*
[113] 'The point was that, once recruiting had begun in this country, the Government were bound to be asked whether it was legal or not; and, the legal position having been ascertained, it was no less clear that it was the duty of the Government to make it plain. Admittedly we are in this respect in a different position from other countries which have

to a significant cultural detail. On the one side, it shows how the UK authorities were more worried about the organized enrolment of individuals on British soil, an aspect that might be linked to the prohibition of hostile military expeditions. On the other hand, the net distinction made by Eden between recruiters and volunteers points once again to the images found in the writings of the internationalists: the idealist adventurer fighting abroad following his political faith, as opposed to the freebooter seeking personal profit from wars and revolutions.

In the session of 19 January, the discussion was diverted to the question of volunteers already present on Spanish soil. Clement Attlee, president of the Labour Party, challenged Eden: 'now we have the question of volunteers. You cannot call the German and Italian troops in Spain and Morocco volunteers. You cannot volunteer, if you belong to a Fascist State, unless you manage to escape from it. They are in no sense volunteers; they are instruments of dictatorship'.[114] The differentiation between totalitarian and genuine volunteers is once again drawn and it reflects the tense political climate of those years. The session of 19 January essentially continued with the discussions concerning the most suitable rule to stop all volunteers, whether the Foreign Enlistment Act was passed in time, and if Italy and Germany would have respected the Non-Intervention Agreement.

Noel-Baker – one of the strongest adversary of non-intervention – again questioned Anthony Eden in a subsequent session: 'can [Mr. Eden] give the House any information concerning the last meeting of the Non-Intervention Committee, and the proposals made in the notes from Germany and Italy concerning the despatch of volunteers from Spain?'[115] To the answer provided by Eden, that both Germany and Italy had declared themselves favourable to the prohibition on sending their volunteers, the Labour representative replied: 'shall we not have the same situation as there was previously, with one-sided observance at the expense of the Madrid Government?'[116] And in a heated debate at the House of Lords in March 1937, Baker evoked those noble figures who had already been mentioned in the French Chamber of Deputies:

no Foreign Enlistment Act. We are in a different position from the French, who have had to pass this Bill in order to enable them to act at all.' *Ibid.*, c100.

[114] *Ibid.*, c110.

[115] HC Deb, 1 February 1937, Vol. 319, c1272.

[116] *Ibid.*, c1273.

> They are not volunteers. You cannot put on the same footing as those troops the other volunteers, the 20,000 or so of the international column on the Government side who are engaged in what Lord Palmerston encouraged 10,000 Britishers to do for the Government of Spain in 1837. They are doing only what was done by people like Lafayette, Byron and Garibaldi, whose names Englishmen, not less than others, now honour. You cannot put these men on the same footing as the hired levies from Italy and Germany.[117]

Many other discussions about foreign volunteers were held during those years. From proposing specific legislation to hamper their recruitment and departure, to the stripping of their citizenship, to the question of repatriation at the end of the hostilities, a complete review of state practice would be impossible. France and the United Kingdom were chosen as the main promoters of the policy of non-intervention, but also for the important cultural references evoked in their Parliamentary debates. The images of past, noble adventurers stand as proof of how the foreign fighter is a category which cannot be reduced to technicalities alone. The figure of the foreign volunteer is constantly evoked in law-making processes, to help characterize the legitimacy and the illegitimacy of their cause. If the debates at the League were played mainly on ideological grounds, the writings of the internationalists revealed a set of cultural ideas behind the outlawing of certain practices related to volunteering abroad. Here, the images of former adventurers reappeared from the past, flooding the imaginary of British and French policy-makers, and epitomizing different conception of freedom. However, an analysis of how the foreign fighter as a cultural category entered the scene of modern international law cannot ignore the Hague Conventions of 1907. It is there that a first codification of its status is found, and the two opposing figures of the adventurer come into play. The Hague Peace Conferences represent a logical step to show how the volunteers of the interwar era moved on to the codification in the Geneva Conventions, before the next historical period, and the appearance of other foreigners fighting in wars abroad.

1.4 Brave Highlanders or Scary Adventurers?

The Hague Peace Conferences provide a privileged venue to explore the codification of early norms on volunteering abroad, but also to capture

[117] HC Deb, 17 March 1937, Vol. 321, c2143.

different cultural references relating to foreign fighters, as a mirror of specific fears, desires and fantasies at play in the delegates' discourses. The Conferences of 1907 are also the only humanitarian conventions in which the question of foreign volunteers was openly debated, given that in the subsequent Geneva talks, volunteers would be assimilated into the armed forces of one of the contracting parties.

An aspect worth mentioning is how these early codifications were strongly influenced by the doctrine of neutrality. Therefore, one can advance the argument that they have been formally replaced by the Geneva texts and especially by Additional Protocol I (AP I). Their present relevance also remains doubtful because the doctrine of neutrality has been gradually overshadowed by the collective security system under the UN Charter.[118]

Conversely, it is interesting to note how neutrality has reappeared today: some academics and policymakers have in fact advanced the argument that a return to neutrality laws would represent a practical way to counteract the phenomenon of foreign fighters in our time.[119] That the doctrine of neutrality did not completely disappear – even with the advent of the UN – is a topic extensively discussed in the literature, and which goes beyond the scope of this book.[120] But neutrality was a

[118] For a debate *see* T. Komarnicki, 'The Problem of Neutrality under the United Nations Charter' (1952) 38 *Transactions of the Grotius Society* 77–91, Laurent Goetschel, 'Neutrality, A Really Dead Concept?' (1999) 34 *Cooperation and Conflict* 115–139, Detlev F. Vagts, 'The Traditional Legal Concept of Neutrality in a Changing Environment' (1998) 14 *American University International Law Review* 83–102, Alfred P. Rubin, 'The Concept of Neutrality in International Law' (1988) 16 *Denver Journal of International Law & Policy* 353–375 and Patrick M. Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 17 *Harvard International Law Journal* 249–312.

[119] *See* specifically Marnie Lloydd, 'Retrieving Neutrality Law to Consider "Other" Foreign Fighters under International Law' (2017) 9 *ESIL Conference Paper Series* 1–28, John Ip, 'Reconceptualising the Legal Response to Foreign Fighters' (2020) 69 *International and Comparative Law Quarterly* 103–134, Elizabeth Chadwick, 'Neutrality Revised' (2013) 22 *Nottingham Law Journal* 41–52 and 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* 305–360.

[120] It is with the advent of the League that a new way of framing the relations of sovereign states had been put in place. Nonetheless, the writings of the international lawyers during the Spanish Civil War contain no reference to the principles laid down in Arts. 10 and 11 of the Covenant, which are taken as the foundation of the modern collective security system. A few years after the creation of the UN, Erik Castrén will devote one of his most important works to the question of neutrality in warfare. *See* Erik

pivotal concept in the early modern period for assessing the relations of states at war, as evidenced by the works of important internationalists like Oppenheim.[121] Again, the aim is not to retrace the debates around this doctrine, but rather to understand how it formed the legal lens through which volunteering abroad was understood in The Hague.[122]

In particular, Convention V relating to the Rights and Duties of Neutral Powers and Persons in War on Land contains six articles on foreign volunteers. Interestingly, an important distinction was made at the time between the rights and duties of a neutral *power* (a state) and of neutral *persons* (individuals). Although this differentiation has been criticized by many international lawyers, it remains central to the debates and to the subsequent codification in 1907.[123] Chapter I of Convention V – headed 'Rights and Duties of Neutral Powers' – contains at least two important articles in relation to volunteers:

> **Article 4**
> Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.

Castrén, *The Present Law of War and Neutrality* (Helsinki: Suomalainev Tiedeakemia 1954).

[121] 'It was not until the eighteenth century that theory and practice agreed that it was the duty of neutrals to remain impartial, and of belligerents to respect the territories of neutrals. Bynkershoek and Vattel formulated adequate conceptions of neutrality. Bynkershoek does not use the term "neutrality", but calls neutrals *non hostes*, and he describes them as those who are of neither party – *qui neutrarum partium sunt* – in a war, and who do not, in accordance with a treaty, give assistance to either party. Vattel, on the other hand, uses the term "neutrality", and gives the following definition: "Neutral nations, during a war, are those who take no one's part, remaining friends common to both parties, and not favouring the armies of one of them to the prejudice of the other". But although Vattel's book appeared in 1758 . . . his doctrines are in some ways less advanced than those of Bynkershoek. Bynkershoek, in contradiction to Grotius, maintained that in the absence of a previous treaty promising help, neutrals had nothing to do with the question as to which party in a war had a just cause; that neutrals, being friends to both parties, have not to sit as judges between them, and consequently, must not give or deny to one party or the other more or less accordance with their conviction as to the justice or injustice of the cause of each.' Oppenheim, *International Law*, pp. 494–495 § 288.

[122] 'Such States as do not take part in a war between other States are neutrals. The term "neutrality" is derived from the Latin *neuter*. Neutrality may be defined as *the attitude of impartiality adopted by third States towards belligerents and recognised by belligerents, such attitude creating rights and duties between the impartial States and the belligerents*.' *Ibid*., p. 519 § 293.

[123] 'Neutrality is an attitude of impartiality on the part of States, and not on the part of individuals. Individuals derive neither rights nor duties according to International Law from the neutrality of those States whose subjects they are.' *Ibid.*, p. 522 § 296.

Article 6
The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

Article 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.[124]

Here we can finally see the rules mentioned in the previous sections of the chapter, and that were alluded to in the writings of the internationalists and in the debates at the League: the idea that corps of combatants (such as hostile military expeditions) should not be organized in the territory of a neutral state; or conversely, that a state's neutrality in a foreign war was preserved when there were few single individuals crossing the frontier to join one of the belligerents.[125] Additionally, as we read Art. 7, it is clear that the neutrality of a state is not called into question for commercial transactions with one of the belligerents.[126] Here lies that

[124] Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Law (The Hague, 18 October 1907). Full text in Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907*, pp. 133–134. The first articles of the Convention recite as follows: 'Article 1. The territory of neutral Powers is inviolable; Article 2. Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power; Article 3. Belligerents are likewise forbidden to: (a) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea; (b) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages . . . Article 5. A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory. It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.'

[125] As explained by Castrén: 'Hague Convention V forbids the formation of armed forces and the setting up of enlistment bureaux in the territory of a neutral state for the benefit of belligerents . . . a neutral State is not, however, bound to prevent private individuals intending to join the services of a belligerent from crossing its frontier separately. This provision has . . . been interpreted to mean that individuals may leave neutral territory even in small groups as long as no organization is connected with their move . . . if volunteer movements arise in neutral territory, the neutral State may not support them by organizing or assisting the departure of the volunteers.' Castrén, *The Present Law of War and Neutrality*, pp. 481–482.

[126] Concerning the export or transport of war and other materiel, Castrén makes clear that a neutral state cannot deliberately furnish such materiel to one of the belligerents. However, its private citizens are free to engage in commerce with the parties to a war:

distinction between the public and the private spheres evoked earlier, as private individuals could enlist in the army of one of the belligerents but could also continue their normal business transactions with them.[127] Let us turn then to the first two articles – those relating to the formation of corps of combatants and to the individuals crossing borders – to see their genesis and codification.

It was on the suggestion of the French delegation that the subject was brought to the fore during the conferences' meetings. In particular, the French were dissatisfied with the 1899 Hague Regulations, which in

'a neutral State may not itself deliver weapons and other war material to belligerents . . . The Hague Convention (V) does not, to be sure, contain any direct prohibition to this effect. In only provides that a neutral power need not prevent the export or transport from or through its territory, on behalf of either of the belligerents, of anything which can be use to an army or a navy . . . the neutral State may only allow ordinary business activities by private individuals'. *Ibid*., pp. 474–475.

127 On this last point, it suffices to take the second *voeu* of the Final Acts of the Hague Conferences (18 October 1907), which recites: 'The Conference utters the *voeu* 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.' Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907*, p. 689. This is the position criticized in the 1930s by many Anglo-American international lawyers. In two of the most important studies on law and neutrality published in the 1950s, such those of Castrén and Greenspan, there was still much disagreement on this very point. For Castrén, in fact, private persons should be prevented from sending war materiel to one of the belligerents, whereas for Greenspan a doubt arose in considering a difference between a state-owned company and purely private business owners. 'If . . . private persons begin to send war material from neutral territory direct to the armed forces of a belligerent Power, these deliveries must be stopped in order to prevent the neutral territory concerned from becoming a base for the belligerents.' Castrén, *The Present Law of War and Neutrality*, p. 475. Greenspan writes instead: 'A question of some difficulty . . . arises with regard to commercial enterprises owned by the state . . . If commercial enterprises owned by the neutral state are prohibited from supplying war material to a belligerent, then the power with a state-owned economy is placed at a disadvantage compared with a neutral state where private enterprise still flourishes. The law of neutrality in this respect requires clarification . . . the reason for the rule permitting private neutral trade in war material with belligerent states lies in the right of neutrals to maintain commercial relations with belligerents in spite of war. There would, therefore, appear to be no logical reason for any distinction in this regard between purely commercial enterprises in neutral countries whether owned by private individuals or by the state . . . whether a neutral state will permit its nationals to supply war material to belligerents is a matter which lies within the discretion of the government of the neutral state.' Greenspan, *The Modern Law of Land Warfare*, pp. 550–552. Finally, for Castrén, the issue was to be deferred to domestic law since the Hague Conventions were not clear on this point. *See* Castrén, *The Present Law of War and Neutrality*, p. 447.

their opinion dealt with the question too vaguely. Their delegation took inspiration from various municipal laws on neutrality, with the aim of codifying them in international law.[128] The original French proposal read as follow:

> **Article 1**
> A neutral State cannot be responsible for acts of its subjects of which a belligerent complains unless the acts have been committed on its own territory.
>
> **Article 2**
> A neutral State must not allow in its territory the formation of corps of combatants nor the opening of recruiting agencies to assist a belligerent. But its responsibility is not engaged by the fact of certain of its citizens crossing the frontier to offer their services to one or other of the belligerents.
>
> **Article 3**
> A neutral State is not called upon to prevent its subjects from exporting arms, munitions of war, or, in general, from furnishing anything which can be of use to an army, for the account of one or other of the belligerents.[129]

Supporting the French text, the Belgians stressed that neutral Powers not only had duties but also rights: 'being themselves strangers to the hostilities they have the primordial right to demand that they be not implicated in them directly or indirectly'.[130]

The Belgian delegation wanted to emphasize that the territory of a neutral state should remain free from any involvement in the hostilities and, as they put it, '[be] inviolable'.[131] Colonel Borel from the Swiss delegation expressed his agreement with the Belgian view, but reminded the other delegates that 'a neutral State has no other obligation than to repress acts in violation of neutrality which might be committed on its

[128] James Brown Scott, *The Proceedings of the Hague Conferences. Volume 3* (Oxford: Oxford University Press 1921), Meetings of the Second, Third and Fourth Commissions. Second Commission, Second Subcommission, fourth meeting (19 July 1907) pp. 173–174.
[129] *Ibid*., p. 255.
[130] *Ibid*., p. 174.
[131] *Ibid.* This would then become Art. 1 of the Convention: 'The territory of Neutral Powers in inviolable.'

territory, and this obligation is limited by its frontiers'.[132] The view of the Swiss delegate is interesting – given the traditional attitude of his country – as Borel put forward the distinction between 'the recruiting or organizing of groups of combatants on the territory of the neutral State' (as acts that would entail responsibility) and 'the crossing of the frontier separately by individuals' (towards which the neutral state had no obligation).[133] In support of his latter point, Borel added that: 'the control of individual passages can, moreover, never be carried into practice 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'.[134]

This passage is fascinating if compared with the security concerns of the post-9/11 landscape. As states increasingly possess extensive information on their citizens, this can be used at border controls and airports to detect potential foreign fighters. The idea of scrutinizing the intentions of individuals is today much debated in counter-terrorism discourse, especially when used to identify radicalized individuals operating in Western states. Certainly, the expansion of the technological apparatus has changed the rules of the game since 1907. But it is fascinating to see how these very problems were already present back then when dealing with citizens crossing borders to join a belligerent abroad.[135]

It was the Germans that raised one of the most important issues in relation to volunteers. Baron Mareschall von Bieberstein made clear that there had to be a distinction between neutral powers and neutral persons. In particular, the reservation made by Germany aimed at forbidding 'neutral persons from rendering war services to belligerents … the second part of the French text does not make this point sufficiently clear'.[136] This was indeed a very strong counterclaim. It contradicted the whole idea of freeing states from their responsibility when numbers

[132] The French proposal contained also a fourth article. Article 4: 'Prisoners who, having escaped from the territory of the belligerent which held them, arrive in a neutral country shall be left free.' *Ibid*., p. 255.

[133] *Ibid*., p. 176.

[134] *Ibid*., p. 177.

[135] Japan was among those states willing to extend the responsibilities of neutral powers also to their protectorates. However, its proposition was dismissed, as a majority of delegates agreed that the responsibility of a neutral ended at the limits of its jurisdiction (e.g., only its national territory). *See* on this point Antonio S. de Bustamante, 'The Hague Convention Concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare' (1908) 2 *American Journal of International Law* 95–120, p. 100.

[136] Brown Scott, *The Proceedings of the Hague Conferences. Volume 3*, p. 177.

of individual citizens were crossing borders to join a belligerent abroad. The issue was not pushed forward by the German representative, and it was dropped during the fourth meeting on 19 July, but it became central during the subsequent one on 26 July. There, the German delegation proposed to include in the Convention a chapter relating to the rights and duties of neutral persons, by filing the following proposition:

> **CHAPTER I. – Definition of a neutral person**
> **Article 61**
> All the *ressortissants* of a State which is not taking part in the war are considered as neutral persons.
>
> **Article 62**
> A violation of neutrality involves loss of character as a neutral person with respect to both belligerents. There is a violation of neutrality:
>
> (a) If the neutral person commits hostile acts against one of the belligerent parties;
> (b) If he commits acts in favor of one of the belligerent parties, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties (Article 64, paragraph 2).
>
> **Article 63**
> The following acts shall not be considered as committed in favor of one of the belligerent parties in the sense of Article 62, letter b:
>
> (a) Supplies furnished or loans made to one of the belligerent parties, so far as these supplies or loans do not come from enemy territory or territory occupied by the enemy.
> (b) Services rendered in matters of police or civil administration.
>
> **CHAPTER II. – Services rendered by neutral persons**
> **Article 64**
> Belligerent parties shall not ask neutral persons to render them war services, even though voluntary. The following shall be considered as war services: Any assistance by a neutral person in the armed forces of one of the belligerent parties, in the character of combatant or adviser, and, so far as he is placed under the laws, regulations or orders in effect by the said armed force, of other classes also, for example, secretary, workman, cook. Services of an ecclesiastical and sanitary character are excepted.
>
> **Article 65**
> Neutral Powers are bound to prohibit their *ressortissants* from engaging to perform military service in the armed force of either of the belligerent parties.

> **Article 66**
> Neutral persons moreover shall not be required, against their will, to lend services, not considered war services, to the armed force of either of the belligerent parties. It will be permitted, nevertheless, to require of them sanitary services or sanitary police services, not connected with actual hostilities. Such services shall be paid for in cash, so far as it is possible to do so. If cash is not paid, requisition receipts shall be given.[137]

The German proposal is probably one of the most comprehensive in terms of banning foreign volunteers in the armies of one of the belligerents. This time von Bieberstein took the floor for a long introduction, stressing that there was a need to regulate the status of neutral persons in the territory of the belligerents: 'in the majority of States there are hundreds of thousands of inhabitants belonging to another nationality . . . what is then their position with respect to belligerents? What treatment shall they receive? Can they be enrolled in the ranks of the belligerents' armies and render to them other person services in promoting the war?'[138] For the Germans, such individuals were to lose their neutral status if they enlisted in the ranks of either side conducting hostilities. Conversely, furnishing the belligerents with loans or other material/supplies was not regarded as an action endangering the status of being neutral. Thus, if Art. 63 remained in line with the idea shared by many other states (leaving their citizens free to conduct commerce with the belligerents in time of war), Art. 62 was in direct contradiction with the original French proposal. It is here that a particular cultural image emerges. This is summarized by the words of von Bieberstein:

> First of all, the subjects of neutral States should not be admitted into the armies of belligerents . . . If their participation in the war were recognized as lawful one should expect to see *adventurers from all parts of the world* flock to the colors of the belligerents. The presence of such elements in national armies would constitute a danger to discipline and would make it impossible for belligerents to guarantee conscientious application of the humanitarian rules prescribed by the Convention of 1899.[139]

The German delegation was worried not only that allowing the possibility of enlisting would open the door for any sort of adventurers, but that the presence of foreign individuals in another nation's army would endanger the proper conduct of hostilities. The figure of the adventurer evoked by the German delegation is very different from the idealized

[137] *Ibid*., pp. 266–267.
[138] *Ibid*., Second Commission, Second Subcommission, fifth meeting (26 July 1907) p. 187.
[139] *Ibid*. Emphasis added.

image of the noble volunteer we have encountered in the Anglo-American doctrine or in domestic debates. The figure of individuals flooding into a civil war 'from all parts of the world' reappeared many decades later, when the Security Council passed resolutions to stop the influx of 'faceless, nameless terrorists' joining jihadist groups in the Syrian Civil War. At the same time, such a characterization points to a tangible fear among the Germans that the inflow of foreigners to wars abroad posed a potential threat to good relations among states.[140] Certainly, this position confirms the analysis by Lauterpacht about those reactionary countries which saw no separation between their citizens and the rights and duties of the state on the international arena. As already pointed out, countries like the United Kingdom and France were instead adopting a more liberal view, and so did their delegations in The Hague.

It was in fact the British representative Lord Reay who first opposed the German proposition: '[it] forbids a Government to compel a neutral resident within its territory to take up arms; but [it permits it] to treat a neutral, as far as concerns his property or lands, or the payment of taxes, in time of war, in the same manner and to the same extent as it does its own citizens'.[141] The British delegate was thus glossing over the issue of foreigners travelling to join another state's army abroad, and rather focused on the status of those foreigners already present in the territory of one of the belligerents. This is not surprising, given the large colonies with many non-British citizens who could have enlisted in the army, if they wanted to.[142] As Lord Reay continued his intervention, the British delegation wished to clarify 'whether it is desirable that the neutrals established on the territory of a belligerent be put ... on a footing of complete equality with the *ressortissants* of the State in which they reside or whether they should be accorded a distinct position'.[143] The British were mainly interested in understanding how to treat neutral citizens in their colonies, rather than worrying about the question of foreigners going to fight abroad.

[140] 'Moreover, the fact that subjects of a neutral State bear arms against one of the belligerents would not be without influence on the relations between the Governments and might lead to serious complications.' *Ibid.*

[141] *Ibid.*, Second Commission, Second Subcommission, fifth meeting (26 July 1907) p. 188.

[142] The point is explained in A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usage of War. Texts of Conventions with Commentaries* (Cambridge: Cambridge University Press 1909) p. 293.

[143] Brown Scott, *The Proceedings of the Hague Conferences. Volume 3*, Second Commission, Second Subcommission, fifth meeting (26 July 1907) p. 188.

However, the German proposal found a strong ally in the US delegation. Although praising the original French draft, General Davis thought that the German proposal was more advanced in establishing a clear status for neutral inhabitants in a belligerent territory: 'the rules which have been submitted by the German delegation ... define the rights, the duties, and the immunities of a neutral inhabitant of a belligerent State in time of war ... immunity from burdens of a specifically military nature ... in all other respects his situation is not changed. His property is taxed to support the civil administration'.[144] The Americans were also overlooking the issue of foreigners going to fight abroad, and rather focused their attention on those citizens of neutral states already residing in belligerents' territory. The reason given to support the German proposal is interesting though, as the American delegate stressed that the status of foreigners was to 'conform to the conditions of modern commerce'[145] and that 'commercial operations are no longer confined to a single State, but extend to several States'.[146] The Americans were thus particularly concerned with maintaining normal commercial relations during warfare, as they agreed with the idea of authorizing 'supplies furnished or loans made to one of the belligerent parties' by their own nationals. This position was very much in line with the US Neutrality Acts, which prevented the state from supplying and trading war materiel, but not commercial transactions by private individuals, as previously seen.

So much for the general discussion, the various delegates started to debate the specific articles of the German proposal and suggested possible amendments to it. In particular, various delegations wanted to clarify the meaning of *ressortissants*, so as to elucidate whether the term concerned 'persons ... domiciled in the territory of a belligerent State but who [were] not its nationals'.[147] The doubt was soon resolved thanks to the intervention of Colonel Borel, and the delegates agreed to change the word *ressortissants* to *nationals*.[148] The Swiss delegate then proposed an interesting amendment to the text. He advanced the idea that, when

[144] *Ibid.*, p. 189.
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.*, p. 190. As further explained by Pearce Higgins: 'the word ressortissants appears to have a wider meaning than subject, and to include all over whom a state claims to exercise jurisdiction either by virtue of allegiance or domicile'. Pearce Higgins, *The Hague Peace Conferences*, p. 266.
[148] Brown Scott, *The Proceedings of the Hague Conferences. Volume 3*, Second Commission, Second Subcommission, fifth meeting (26 July 1907) p. 190.

deciding no longer to observe neutrality, a neutral person should not be treated differently, or deemed 'guilty of a special infraction'.[149] As he praised the efforts of the German delegation to ameliorate the negative effects of the hostilities, Borel emphasized that 'his failure to observe neutrality implies in itself alone no other consequence for the neutral than the loss of his neutrality in itself'.[150] This proposition is important, as it put the person who enlisted in a foreign army on an equal footing with the nationals of the belligerent party. Here one can see crystallizing a particular attitude towards foreign fighters of the time, something that has perhaps radically changed under today's counter-terrorism discourse.

The discussion soon returned to the problem of the enlistment in a foreign army. In particular, the French delegate Louis Renault opposed the propositions contained in both Art. 64 and Art. 65, as they prevented belligerents enlisting foreigners in their army. In the words of the French delegate:

> neutrals can freely enlist and that the belligerents can accept their services without the neutral State [being consulted]. The consequence of this right will naturally be their complete assimilation to the soldiers of the belligerent . . . The only thing that can be required of a neutral State is that it shall not make it easy for them in this respect by allowing on its territory the formation of corps of combatants or the opening of recruiting agencies. . . . But outside of these limits the neutral State cannot be held to control the actions of its subjects, though it is able to claim from their enrolment whatever consequences it will by reason of its internal legislation, which in certain countries provides loss of nationality in such a case.[151]

As much as for the British, the French delegation saw no issue in enlisting foreigners in their army, the only real obligation being to prevent the formation of organized groups within their territory. In the event that a country wanted to stop the departure of its own citizens, it could resort to the provisions of domestic law. The Belgian delegate found himself in line with his French colleague, as he deplored the German proposal by stating that '[it was] going too far; such a general and absolute prohibition arbitrarily limits the authority of the belligerent while at the same time infringing the right of individual liberty of the neutrals'.[152] The Japanese delegate aligned himself with Germany, stating that it was not desirable to have foreign elements in a regular army. For

[149] *Ibid.*
[150] *Ibid.*, p. 191.
[151] *Ibid.*, p. 195.
[152] *Ibid.*, p. 196.

their part, the delegates of the United States and the United Kingdom limited their intervention by restating the examples of their Neutrality Laws and Foreign Enlistment Acts.

Faced with mounting opposition, the German delegate tried to soften his position by admitting that 'it would not be possible for the neutral State to prevent its subjects, by Draconian methods, from enlisting in the service of such or such belligerent ... but one might imagine the case where thousands of neutral *ressortissants* come to enlist voluntarily in the ranks of one of the belligerent armies'.[153] The French delegation immediately replied by saying that what was worrying the Germans was 'the fact that the subjects of a neutral State might cross its frontier *en masse* to go into the service of one or the other of the belligerents', but that scenario was already been envisioned by Art. 2 of the original proposal. It placed an obligation on the state not to allow the formation of organized groups of combatants to leave its territory to fight abroad.[154]

The fifth meeting ended with France and the United Kingdom reaffirming their disagreement with the Germans, specifically on the proposed Art. 65, which envisaged a strict prohibition on the part of neutral powers towards their citizens in performing military services in the armed forces of either belligerent. In the last words before the meeting was adjourned Lord Reay stated: 'we believe we should maintain with respect to the neutrals only this negative obligation not to favor any of the belligerents and not to depart from a strict impartiality with regard to them'.[155]

But the tone of the conversation was not reconciled in the next discussion, held on 2 August. There, the Dutch delegation returned to the original problem of citizens of a neutral state already in the territory of one of the belligerents. The Dutch were as worried as the British that if the German proposal was accepted, their colonial troops would be hampered from enlisting volunteers. General Jonkheer den Beer Poortugael made his country's position clear:

> Our army is one composed of militia ... but we have in addition a small corps, a reserve of our colonial army. This reserve, like our whole colonial army, is composed of volunteer enlisted soldiers, of which some are natives ... *These are intrepid men loving dangers like the mountain climbers*; furthermore they seek to make a career, as many have done. Well! Why force a State to do without services for which it has such need

[153] *Ibid*., Second Commission, Second Subcommission, fifth meeting (26 July 1907) p. 197.
[154] *Ibid*., p. 199.
[155] *Ibid*., p. 200.

> and restrain these persons from accomplishing a service which they love and have contracted for?[156]

Quite an interesting statement, especially if compared with how Alvaro del Vayo would some years later characterize the Army of Africa, as a group of barbaric mercenaries 'shocking the conscience of the civilized world'. Here one can see emerging a very different image from the adventurer evoked some days earlier by the German delegation. The figure of the *bon sauvage*, depicted as an intrepid man who loves danger and mountain climbing, is clearly imbued with patronizing tones. This image reveals the visceral attachment of the Dutch to their colonies, a sentiment that will re-emerge strongly during decolonization in the discourse of certain European states. There, it will be significant to see how the same image imbued the discourse of British policymakers when they will take pride in the services rendered by their colonial troops.

Going back to The Hague, the Dutch delegation suggested an amendment to Art. 64, excluding the citizens of a neutral State who at the beginning of the hostilities were already in the ranks of the army of a belligerent.[157] The point was backed by the Norwegian delegation, as his representative Hagerup underlined that: 'when war breaks out, a country cannot deprive itself of the services of all those who are not its nationals'.[158] If the situation was not complicated enough, the Italian representative brought to the fore the problem of double nationals. In particular, he found it problematic to reconcile their status in light of Art. 65. How could the obligations of the state where they resided at the beginning of hostilities be solved if they had to be forced to fight against their country of nationality? Faced with mounting difficulties, most states at The Hague finally voted to reject the German proposal, although not in its entirety.[159] The status of neutral persons in the Hague Convention V would finally be codified in three articles, forming Chapter III and regulating the Neutral Powers and Persons in Land Warfare:

[156] *Ibid*., sixth meeting (2 August 1907) p. 202. Emphasis added.
[157] *Ibid*., Second Commission, Second Subcommission, sixth meeting (2 August 1907) p. 275.
[158] *Ibid*., p. 203.
[159] James Brown Scott, *The Proceedings of the Hague Conferences. Volume 1* (Oxford: Oxford University Press 1920), fifth plenary meeting (7 September 1907) and sixth plenary meeting (21 September 1907) pp. 123–129 and 162–172.

Article 16
The nationals of a State which is not taking part in the war are considered as neutrals.

Article 17
A neutral cannot avail himself of his neutrality (a) If he commits hostile acts against a belligerent; (b) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed forces of one of the parties. In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.

Article 18
The following acts shall not be considered as committed in favour of one belligerent in the sense of Article 17, letter (b): (a) Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories; (b) Services rendered in matters of police or civil administration.[160]

As can be seen, the most difficult questions were removed from the final text. The articles did not contain much detail in defining the meaning of hostile acts, or what to do with double nationals. Contrary to the German proposal, a neutral person was free to enlist voluntarily in an army, at the cost of 'availing himself of his neutrality'. However, following the Swiss amendment, such a person would not risk a worse treatment than was reserved to the nationals of the countries at war. Finally, the supplies and loans furnished by single individuals to both parties in the conflict were not seen as endangering their neutrality.

If paired with final Arts. 4 and 6 of the same Convention, these three additional articles give a comprehensive view of how the foreign volunteer was codified in the early laws of war. As a general laissez-faire attitude prevailed among states at The Hague, under international law citizens of neutral countries were free to enlist in a foreign army. However, no groups or expeditions with the intent to join a belligerent were to be formed within a neutral state's territory. All in all, most European delegations understood the problem of volunteers as something to be dealt with via domestic legislation, when and if it was deemed necessary. This points to a distinction existing at the time between the private and public spheres, an aspect further exemplified by the

[160] Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907*, p. 136.

separation between the state and its citizens with regard to the furnishing of supplies and loans to one of the belligerents. As already pointed out, this vision was already being questioned in the 1930s and then radically changed in the 1950s, when internationalists like Brownlie would lament the vagueness and ineffectiveness of the Hague Conventions, calling for their revision.

Nevertheless, one important aspect emerging from the Hague was the contrasting and ambivalent images of the foreign fighter, as expressed by the German, Dutch and British delegations. On the one side, one can find the figure of the adventurer who can endanger the normal conduct of warfare; on the other, the image of the *bon sauvage* was evoked by those representatives whose states included colonial troops in their armies. But the figure of the foreign fighter in the early modern period would not be complete without looking at the codification of this actor as part of the personnel a state can resort to in warfare. After all, this was the point raised by both the British and Dutch delegations in the Hague. For them, the problem was not so much about foreigners travelling to fight abroad, but rather not to exclude the volunteers already residing in their colonies or enlisted in their armies. The qualification of 'militia or volunteer corps' as a lawful actor within the rules of humanitarian law came from the Lieber Code of 1863, and reached Art. 4 of the 1949 Geneva Conventions. To be clear, the following digression will not enter into the specific historical details.

The early modern norms on belligerent qualification are found in the Lieber Code of 1863, including the first distinction between civilians and combatants.[161] In particular, the Code recognized 'partisans' as regular troops that could be used in warfare, and it distinguished them from irregular fighters not belonging to an organized army, such as scouts or single soldiers (to be treated as spies), armed prowlers (to be treated as robbers) and war-rebels.[162] Although the intention of the Lieber Code

[161] *See* for instance Art. 22: 'Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.' Instructions for the Government of Armies of the United States in the Field (Lieber Code) 24 April 1863, originally Issued as General Orders No. 100 (Washington 1898: Government Printing Office). On this point see also Scheipers, *Unlawful Combatants*, pp. 69–104.

[162] Respectively Art. 83 (scouts), Art. 84 (armed prowlers) and Art. 85 (war rebels). Art. 81 recites: 'Partisans are soldiers armed and wearing the uniform of their army but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the

was to differentiate between partisans and other (irregular) combatants, one can imagine how the former could have included the many volunteers who enrolled with both sides during the four years of the conflict.[163] Naturally, the Code remains a first incomplete draft of the modern laws of war, and it was affected by the context of the American Civil War.[164] In fact, it was with the Brussels Peace Conference of 1874 that European powers started to take into consideration a wider and more encompassing project for the codification of international norms to be respected in warfare. And it was in this venue that an article recognizing 'militia and volunteer corps' as lawful belligerent was codified:

> **Article 9**
> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. That they be commanded by a person responsible for his subordinates;
> 2. That they have a fixed distinctive emblem recognizable at a distance;
> 3. That they carry arms openly; and
> 4. That they conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia constitute the army, or form part of it, they are included under the denomination 'army'.[165]

This article contains the four criteria that need to be fulfilled by 'volunteers and militia corps', and which survived more or less intact until the

prisoner of war.' Interestingly, Lieber further explains his position with reference to partisans: 'The terms partisan and free corps are vaguely used. Sometimes, as we shall see farther on, partisan is used for a self-constituted guerrillero; more frequently it has a different meaning. Both partisan-corps and free-corps designate bodies detached from the main army; but the former term refers to the action of the troop, the latter to the composition ... Free-corps, on the other hand, are troops not belonging to the regular army, consisting of volunteers, generally raised by individuals authorized to do so by the government, used for petty war.' Francis Lieber, 'On Guerrilla Parties', in Francis Lieber (ed.), *The Miscellaneous Writings of Francis Lieber: Contributions to Political Science, Volume II* (Philadelphia: J. B. Lippincott 1881) 275–292, pp. 282–283.

[163] On this point see Tracey Leigh Dowdeswell, 'The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification' (2017) 54 *Osgoode Hall Law Journal* 805–850, pp. 816–824.

[164] Additionally, the Code at Art. 52 recognized that: 'so soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent'. In this sense, volunteers who enlisted in one of the armies could be recognized as legitimate solider – thus benefiting from prisoner of war status – as long as they wore uniforms and were recognized to be part of one of the two armies.

[165] Project of an International Declaration Concerning the Laws and Customs of War (Brussels, 27 August 1874) Art. 9.

Geneva Conventions of 1949.[166] At the time of the Brussels Conference, two of the most pressing problems were represented by the *levée en masse* and the role of *franc-tireurs*.[167] It was with the Franco-Prussian war of 1870–1871 that these issues had risen to the fore, and as such they informed the discussions of states representatives.[168] What worried the German delegation was to regulate the spontaneous taking up of arms of a local population (*levée en masse*).[169] In other words, the Germans, in their desire to see anyone who could take arms against them in uniform, in order to be able to identify them, wished to regulate the *levée en masse* as much as possible through the criteria set out by Art. 9. The issue became animated, especially because states such as Belgium, Spain and the Netherlands did not want to relinquish the possibility, in case of an invasion, of making use of other kinds of troops outside of their standard army. The discussions in Brussels thus saw two contrasting sentiments at play. On the one side, the patriotism asserted by smaller states to support their population and the right to defend their motherland. On the other, the German fear of brigands and looters flooding the battlefield.[170] This

[166] As explained by Dowdeswell: 'An early formulation of these rules was delivered in a paper read by Henry Richmond Droop, a barrister of Lincoln's Inn Fields, to the Juridical Society of London on 30 November 1870. Droop's paper addressed the most pressing topic in international law of the day – the status of the francs-tireurs – and he articulated many of the key concepts of modern international humanitarian law … Droop recognized that sovereign authorization remained, at that time, the generally accepted rule for belligerent qualification. However, he argued that this rule was no longer desirable for regulating present-day conflicts, and he proposed instead a rule for belligerent qualification based upon objective and readily observable criteria. Droop rejected the sovereign authorization rule on the grounds that sovereign authorization alone would make it impossible to distinguish between troops and civilians, or to enforce respect for the laws of war on the part of belligerents. Civilians should not be attacked in war, and protecting them is the responsibility of the armed forces who would wage that war … The modern definition of a "lawful combatant" first appeared in its essential form in Article 9 of the Draft Declaration presented at Brussels, and was based upon Droop's organizational criteria, including wearing a distinctive insignia, carrying arms openly, and being subsumed under a nation state's military chain of command so that the laws and customs of war can be enforced by a qualified public authority.' Dowdeswell, 'The Brussels Peace Conference of 1874', pp. 828–830.

[167] On this point see Crawford, 'Regulating the Irregular', pp. 170–171.

[168] Dowdeswell, 'The Brussels Peace Conference of 1874', p. 807.

[169] Actes de la Conférence de Bruxelles de 1874 sur le Projet d'Une Convention Internationale Concernant la Guerre. Protocoles des Séances Plenieres. Protocoles de la Commission Déléguée par la Conférence. Annexes (Paris: Librairie Des Publications Législatives 1874) pp. 28–34.

[170] The German delegation wished that such spontaneous upheaval should nonetheless be organized through a line of command, by making people wear recognizable uniforms:

was the same kind of feeling that was manifest in The Hague through the figure of the adventurer endangering the good conduct of hostilities.[171]

The Germans would eventually relinquish their dream, understanding that it was impossible to demand that an entire population could be provided with uniforms during an occupation in times of war.[172] Nevertheless, what needs to be emphasized here is: when state representatives in Brussels included volunteers and militia corps under Art. 9, no mention was made of foreign fighters. Evidently, they were not the problem that the delegates had in mind, and the fact that volunteers could have been foreign did not make the headlines in 1874. In fact, the same article was transposed in an almost identical form in both the 1899 and 1907 Hague Regulations on the Laws and Customs of Land Warfare. Again, no mention was made of foreign volunteers or foreign militia troops. The article on belligerent qualification as codified in the Hague Convention IV of 1907 read as follows:

> **Article 1**
> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;

'mais il faudra que ces hommes portent un signe certain qui les distingue des brigands et des pillards'. *Ibid*., 28–29.

171 Although the Germans came to their senses, they were still worried that leaving the levée en masse completely unregulated would have been problematic for the problem of brigandage: 'En terminant, M. le délégué d'Allemagne dit que la levée en masse est une chose légitime, parfois nécessaire, et qu'il ne peut venir à la pensée de personne de l'empêcher ou du l'entraver; ce que l'on demande, c'est qu'elle soit organisée d'une manière quelconque, afin de ne pas dégénérer en brigandage. La question doit être examinée sérieusement et consciencieusement: il est de l'intérêt de la patrie de chacun et de la défense commune à tous les Etats qu'elle soit résolue affirmativement.' *Ibid.*

172 Finally, an article codifying the levée en masse was included (Art. 10). This article was transposed in an almost identical form into both the 1899 and 1907 Hague Conventions (Art. 2) and also found its way into the 1949 Geneva Conventions under Art 4 (A) (6). The case of the *franc-tireurs* remained pending. To the questions posed by the Belgian delegation on the status of those individuals not belonging to collective groups, the answer was that the overall project of the Convention was not meant to deal with the special case of single individuals. 'M. le délégué de Belgique avait demandé quel serait le sort d'un citoyen qui, agissant isolément et dans la partie non occupée du pays, ferait des actes do guerre destinés, par exemple, à entraver la marche de l'ennemi. Il lui a été répondu que le projet ne prévoyait pas de tels cas spéciaux. En conséquence, il est resté entendu que la question de savoir si l'individu, agissant dans les conditions ci-dessus indiquées, doit ou non être considéré comme belligérant, n'est pas tranchée par le projet et reste dès lors da dans le domaine du droit des gens non écrit.' *Ibid*., p. 45.

3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'.[173]

Volunteers who respected these four criteria – no matter if foreigners or not – were equated with the soldiers of a standard army.[174] Moreover, in those countries where volunteers and other militias formed the national armed forces – like Switzerland – those troops would have been recognized as the lawful regular army.[175]

Despite two world wars and notably the Spanish Civil War, the story of this article did not undergo significant changes, at least from the point of view of foreign fighters. The representatives of the states gathered in post-war Geneva dealt with a wider, more encompassing codification for the status and the treatment of prisoners of war, following the previous text of 1929.[176] This time the *francs-tireurs* would no longer be the central preoccupation of the various delegates, but rather how to include resistance movements and partisans, for their fundamental role played in World War II. As noted by Jean Pictet in the famous commentaries to the Geneva Conventions: 'the problem was finally solved by the assimilation of resistance movements to militias and corps of volunteers'.[177]

[173] Text in Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907*, p. 107.

[174] This point is confirmed also by the Institute de Droit International in 1908: 'La condition juridique internationale des étrangers, civils ou militaires, n'appartenant par leur nationalité à aucun des Etats belligérants et engagés au service de l'un d'eux, sera absolument identique, en ce qui concerne l'application des lois de la guerre, à celle des nationaux de l'Etat au service duquel ils se trouvent.' Institut de Droit International, Resolution. 'De la Condition Juridique Internationale des Étrangers Civils ou Militaires, au Service des Belligérants' (Florence, 28 September 1908).

[175] The question had already been raised in Brussels in 1874 by Colonel Staaff, delegate representative of Norway and Sweden: 'M. le colonel Staaff trouve que cette question est fort délicate et mérite d'être prise en considération. Si l'on admet que les quatre conditions réunies de l'article 9 ont leur raison d'être, il faudra évidemment faire une distinction entre les corps improvisés et les milices existant en vertu de la constitution de certains pays, surtout lorsque, comme en Suisse, elles forment l'armée même.' Actes de la Conférence de Bruxelles de 1874, p. 29.

[176] Convention de Genève du 27 juillet 1929 Relative au Traitement des Prisonniers de Guerre (Geneva, 27 July 1929).

[177] 'During the preparatory work for the Conference, and even during the Conference itself, two schools of thought were observed. Some delegates considered that partisans should have to fulfil conditions even stricter than those laid down by the Hague Regulations in order to benefit by the provisions of the Convention. On the other hand, other experts or

The final Art. 4 section (A) (1) (2), which included the new wording of resistance movements and the four criteria for belligerent qualification, as codified in Geneva Convention III, is as follows:

> **Article 4**
> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.[178]

Naturally, other issues surrounding militia and corps of volunteers occupied a good part of the preparatory works of Art. 4, yet not that of foreign volunteers.[179] It seems that from 1907 the problem had vanished. What

delegates held the view that resistance movements should be given more latitude. The problem was finally solved by the assimilation of resistance movements to militias and corps of volunteers "not forming part of the armed forces" of a Party to the conflict. However, contrary to the interpretation generally given to the corresponding provision in the Hague Regulations, it was recognized that such units might operate in occupied territory. That was an important innovation which grew out of the experience of the Second World War.' Jean Pictet (ed.), *Commentary to the Geneva Convention III Relative to the Treatment of Prisoners of War* (Geneva: ICRC 1960) pp. 49–50. This is of course an oversimplification and the discussions by the Committee in charge of Art. 4 (originally Art. 3) were much longer and denser in content. Again, the point here is not to retrace the history of Art. 4, but rather to look at whether the issue of foreign volunteers had entered the discussions either in Geneva or beforehand. *See* Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II A, Committee II, thirtieth and thirty-sixth meetings, pp. 383–390 and pp. 410–412.

[178] Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949) Art. 4(A)(2).

[179] Notably some countries raised the problem of state armies composed by volunteers and militia corps, while others questioned whether there had to be a distinction between 'militias and volunteer corps' which formed part of the armed forces and 'members of

was the legacy left by those three dramatic years (1936–1939) which had held Europe and the League in suspense? As noted by many commentators, the Spanish Civil War was central in the development of another, no less important norm coming out of the Geneva talks: common Art. 3.[180] Codifying the existence of non-international armed conflicts, this article represented a great incremental step in the protection of the victims of the warfare that had devasted the Spanish peninsula.[181] Perhaps the bloodshed and the sacrifice of the International Brigades – and of the many Italian and German troops sent to Spain by their governments – was not completely in vain.[182]

But what of foreign fighters after the Spanish Civil War? As we move from the League to the United Nations system and towards the decolonization era, a young assistant lecturer at the University of Leeds advances some reflections on volunteering abroad. That young lecturer is Ian Brownlie.[183] As previously explained, the vagueness of Hague Convention V relating to the status of neutral powers and persons in warfare had come under fierce critique already during the interwar years.[184] Back in 1939 Friedmann had commented on Art. 6 of the convention: 'this rule presupposes a community in which an individual

other militia' and 'other volunteer corps'. *See* Pictet, *Commentary to the Geneva Convention III*, pp. 51–56.

[180] David A. Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949' (1979) 11 *Case Western Reserve Journal of International Law* 37–69. *See* also Giovanni Mantilla, *Lawmaking under Pressure. International Humanitarian Law and Internal Armed Conflict* (Ithaca, NY: Cornell University Press 2020) pp. 58–97.

[181] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II B, Summary Records of Meetings, pp. 40–48, 75–79, 82–84, 90–95 and 97–102.

[182] As Antonio Cassese noted: 'States, in deciding to apply some international norms to the Spanish civil war, expressed the legal conviction that these rules should be applied to all internal armed conflicts with the same characteristics of intensity and length as the Spanish war. We can conclude that by the end of the 1930s far-reaching international norms on internal armed conflicts were created and these norms were substantially modelled on the ones applicable to inter-State conflicts. The Spanish civil war thus represented a watershed in the legal conceptions of the international community.' Antonio Cassese, *The Human Dimension of International Law: Selected Papers* (Oxford: Oxford University Press 2008) p. 115.

[183] Ian Brownlie, 'Volunteers and the Law of War and Neutrality' (1956) 5 *International and Comparative Law Quarterly* 570–580.

[184] The laissez-faire attitude endorsed by a majority of states in the Hague seemed unattainable, especially when liberal European powers were confronted with totalitarian/fascist volunteers. Padelford himself had expressed his reservations over the evident state of confusion of the law generally relating to civil war, stating that 'it would be highly desirable … to draw up and accept an international convention defining clearly the rights and duties and obligations of armed forces in time of civil strife'. Norman

may make a decision, such as volunteering for a foreign war on his own responsibility, independently of his government. That this condition no longer exists generally among the members of the family of nations became obvious in the Spanish Civil War'.[185] Shifting from neutrality towards the collective security system, the idea of a volunteer detached from any form of state control also starts to crumble. Far from disappearing, the issue of volunteers re-emerged twice in the years immediately following the creation of the UN: the Israeli War of Independence of 1948 and especially the Korean War of 1950–1953. It was exactly three years after the armistice ending the Korean War that Brownlie devoted a sharp, compelling article on the question of foreign volunteering. He makes clear that the purpose of his study is to criticize the 'ambiguities, gaps and opportunities for abuse' of the present law.[186] One can thus find a clear parallel with those international lawyers who, already in the 1930s, wanted to break with the past. Most importantly, Brownlie asserts that: 'the use of pseudo-volunteers as an instrument of government policy and for purposes of aggression gives increasing significance to the shortcomings of . . . the law'.[187]

What catches the attention is the categorization of our actor as an 'instrument of government policy'. We are very far from the image of the idealist adventurer going to fight abroad following his ideals. Volunteers are now depicted as linked to a governmental plan, ideally closing that public/private gap which existed at the beginning of the century.[188]

J. Padelford and Henry G. Seymour, 'Some International Problems of the Spanish Civil War' (1937) 52 *Political Science Quarterly* 364–380, p.380.

185 Friedmann, 'The Growth of State Control over the Individual', p. 141.

186 Brownlie, 'Volunteers and the Law of War and Neutrality', p. 570.

187 *Ibid*.

188 'The toleration of departure of large numbers of volunteers accompanied by bad faith probably amounts to aggression . . . It might fall within other offences usually discussed in relation to aggression – the harbouring of armed bands, fomenting civil strife, or other forms of intentional interference in internal affairs.' *Ibid*., p. 578. Brownlie would return to this point in his first book devoted to the use of force. By recalling the example of the Korean War, he asserted that: 'the use of volunteers under government control for launching a military campaign or supporting active rebel groups will undoubtedly constitute "use of force". It is the question of government control and not the label "volunteer" . . . which is important'. Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press 1963) pp. 371–372. One more layer is added by Brownlie to the discussion on volunteers. In trying to describe these actors and especially the offences they can be punishable for, he uses the term 'armed bands'. These would become very popular after World War II under the rubric of aggression, as much as hostile military expeditions were in the decades before. In another of his early articles,

To sustain his point, Brownlie further argues that: 'the individualism and *laissez-faire* once prevalent [is] now increasingly replaced by the integration of the individual on the State corpus. With an increase in the definition and comprehensive nature of the citizen's rights and duties *vis-à-vis* the State, there must be a change in the character of the volunteer'.[189] In other words, the volunteer can no longer be understood as detached from the state apparatus. In fact, he is seen as an actor advancing some governmental policy: 'other historical instances of threats to the peace caused by the operations of volunteers include the occupation of Karelia and Olonets by Finnish volunteers in 1919, and D'Annunzio occupation of Fiume'.[190] The figure of D'Annunzio evoked in this passage points to a shift from the image of the noble adventurer as a legacy of the nineteenth century, towards one of an actor under the direct patronage of a state's foreign policy.[191]

To conclude, one can see how in the first years of the Cold War a clear change over the cultural understanding of volunteering abroad was taking place. Brownlie's position attests to the inadequacies of the Hague Conventions and more generally to the perceived gaps in the law. Still in 1962, Manuel Garcia-Mora conducted an in-depth study centred on the international responsibility for hostile acts of individuals against foreign states.[192] In his book, Garcia-Mora dedicates an entire chapter to volunteers. There, he asserts that: 'the years that have elapsed since the adoption of the Hague Conventions have made crystal clear that volunteers are really instruments of international policy and

Brownlie inscribes the history of armed bands within the larger history of hostile military expeditions. Ian Brownlie, 'International Law and the Activities of Armed Bands' (1958) *International and Comparative Law Quarterly* 712–735.

189 Brownlie, 'Volunteers and the Law of War and Neutrality', p. 577.

190 *Ibid.*, p. 578.

191 Few years before Brownlie, the Australian international lawyer Julius Stone, had written: 'any large-scale movement such as that of the army which moved from China into the Korean theatre in the winter of 1950 could scarcely proceed without such organization as would engage the neutral's responsibility'. Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law* (New York: Rinehart 1954) p. 389.

192 'Moreover, the present-day state control over the movement of persons is so pervasive and complete that the departure of a vast number of individuals to participate in a foreign or civil war must necessarily count upon the approval of the state, thus engaging its international responsibility.' *See* Garcia-Mora, *International Responsibility for Hostile Acts*, pp. 76–77.

not simply innocent foreigners who for ideological reasons join belligerent forces'.[193]

This quote seems appropriate to end the first chapter and to move to the next historical period. Between 1960 and 1963, the Katangese province of the Congo started a rebellion to gain its independence. Nigeria, Rhodesia and Angola experienced violent civil wars in the same years. The period commonly known as decolonization began a few years before with Algeria and would now set on fire the rest of the African continent. It is here that other foreign fighters are found in the battlefield. Yet they are portrayed very differently from their predecessors on the Iberian Peninsula. They do not seem to fight for an ideal, but rather for mere personal profit. The mercenaries have made their reappearance on the world's stage.

1.5 Conclusion

The Spanish Civil War was a vantage point to examine how the figure of the foreign fighter entered the legal debates in the early twentieth century. Fought around two opposing ideologies, namely fascism and communism, this war was also described as a battle between Christian civilization and the barbarity of Bolshevism. Overall, these ideological struggles were important to understand foreign policy decisions, and to foreground the cultural figures through which legal actors defined who was a lawful and who an unlawful foreign combatant.

The chapter opened in May 1937 at Council of the League of Nations (Section 1.1). There, the Spanish minister of foreign affairs del Vayo was pleading his case against the Italian aggression. To mark the difference between legitimate and illegitimate volunteers, del Vayo characterized the legitimate ones as those idealists who came to Spain following their political faith, and not the dictates of a government. The differentiation between 'good' and 'bad' volunteers were reiterated during the League's discussions, taking diverse connotations: barbaric and civilized troops, organized and disorganized contingents, heroic fighters and fascist militias. Through these distinctions, a battle was waged between different notions of freedom.

Section 1.2 looked at the debates in the Anglo-American doctrine during the Spanish Civil War years. Although Jessup, Lauterpacht and

[193] *Ibid*., p. 78.

McNair devoted less attention to the issue of volunteers, when compared to the regulation of armed conflict, one can still trace what figure lingered in their imagination. The organized and state-sponsored nature of fascist militias fighting in Spain was in fact perceived by these internationalists as highly problematic. When differentiating the legitimate volunteers from hostile military expeditions, interesting cultural references appeared. The figure of the American freebooter William Walker was evoked to support the argument that expeditions organized within the territory of a state and aimed at conquering or looting other states' territories should now be considered illegal. The activities of freebooters – vestiges of the long nineteenth century – were thus contraposed with the image of the noble adventurer fighting for his political beliefs.

The figure of the adventurer could also be traced in domestic discussions in France and the United Kingdom in the early months of 1937 (Section 1.3). It was here that, along with the usual foreign policy concerns, cultural references entered the lawmaking process. The figures of Byron, Garibaldi and Lafayette were evoked by the French and British legislators: they were taken as a reference to characterize the good side of the Spanish struggle, and thus to legitimize those French and British subjects who were joining the Republicans. Nonetheless, some reacted to this noble lineage by pointing the finger at the cynical and opportunist Russian Comintern soldier. Thus, the figure of the volunteer was split in two: on the one side, there were idealists travelling to the Iberian Peninsula to follow their political faith; on the other hand, opportunist soldiers were also present. This differentiation highlighted a split in the consciousness of the legislator, an aspect that would reappear in subsequent periods.

Finally, the chapter traced a further genealogy at the international level (Section 1.4). As such, it offered a window on the *travaux préparatoires* of the 1907 Hague Peace Conferences, where specific rules on volunteers were codified. At The Hague, opposing images were at play in the discourse of representatives of states. The fear of seeing 'adventurers of all sorts' endangering the good conduct of hostilities underlay the discourse of the German delegation. This version of the 'bad' adventurer was distinguished from that of the *bon sauvage* evoked by the British and the Dutch to portray the foreigners present in their colonial armies.

The end of the chapter placed the figure of the foreign fighter in connection with other important humanitarian debates, specifically the Brussels Peace Conference of 1874 and the 1949 Geneva Conventions. This was done on the one hand to explain the passage from the doctrine

of neutrality towards the codification of the famous combatant status and, on the other hand, to attest to a shift in the cultural perception of the foreign fighter. As we reach the 1950s, the romantic, idealist adventurer which haunted the imagination of a large part of international lawyers and national policymakers had disappeared. The example of the Italian intellectual Gabriele D'Annunzio was used by Ian Brownlie to prove that volunteers could no longer be understood as detached from a state's foreign policy, but rather was a direct manifestation of it. We thus moved into a new era with a new sensibility. And Brownlie was extremely receptive to these changes: by sketching a new figure of the foreign fighter he claimed that 'the volunteer is the relic of the eighteenth-century toleration of the supply of mercenaries'.[194]

[194] Brownlie, 'Volunteers and the Law of War and Neutrality', p. 575.