ARTICLE

Regulating the Foreign-Fighter Phenomenon

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The transnational mobilization of foreign fighters is a centuries-old phenomenon that threatens international security. The phenomenon challenges States' sovereign monopoly on the use of force under international law. It augments the capabilities of parties benefiting from such mobilizations, often prolonging or intensifying armed conflict. It creates networks of trained and experienced private fighters who are unmoored from State direction and free to choose whether, when, and for what cause to fight. And it generates sometimes substantial pockets of aliens who are de facto exiled from their States of origin or habitual residence and pushed to participate in additional armed conflicts.

Despite these threats, today, the foreign-fighter phenomenon escapes specific international legal regulation. Consequently, in many circumstances, States of origin are—or behave as if they are—legally free to look the other way as their nationals depart for and participate in foreign armed conflicts. Likewise, in many circumstances, States of origin are—or behave as if they are—legally free to ignore their nationals' onward travel to additional conflicts, where they may intensify ongoing situations of armed violence. Sometimes, States of origin dissuade or impede the repatriation of their nationals following their participation in armed conflicts, exacerbating international insecurity and shifting their security-related burdens onto other actors in the international system.

This Article argues that international peace, security, and stability can and should be improved by extending existing principles of international law to the foreign-fighter phenomenon and by clearly imposing obligations on States of origin to interrupt the typical foreign-fighter lifecycle. Such regulation should oblige States to, first, restrain the departure of their nationals or habitual residents for foreign conflict zones; second, readmit their nationals or habitual residents when they attempt to return; and, third, facilitate the repatriation of their nationals or habitual residents when they are detained in the context of a foreign armed conflict. These obligations would address the structural infirmities currently present in the international system that contribute to the prolongation and recurrence of the foreign-fighter phenomenon—and the non-ideological international insecurity it represents.

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I. INTRODUCTION

Foreign nationals who travel to conflict zones abroad to participate in ongoing armed conflicts have been a recurrent phenomenon in wars for nearly two-and-a-half centuries.[1] Haitian freemen contributed to the American Colonies' failed efforts to capture Savannah in 1779.[2] Lord Byron volunteered to fight in the Greek War of Independence in 1823-1824.[3] Demobilized British veterans of the Napoleonic Wars and other volunteers assisted Latin America's revolutions against the Spanish Empire in the 19th century.[4] Tens of thousands of foreign nationals, many former prisoners of war, augmented the Red Army during the Russian Revolution and subsequent civil war.[5] Thousands of foreign nationals flocked to Spain during the mid-to-late 1930s to participate on both sides of the Spanish Civil War.[6] And since then,[7] foreign nationals have appeared on battlefields as diverse as those of Afghanistan during the anti-Soviet *jihad* in the 1980s,[8] Tajikistan during its civil war between 1992 and 1997,[9] the former Yugoslavia during its dissolution in the 1990s,[10] Chechnya,[11] Iraq following the U.S. and coalition invasion in 2003,[12] Syria since 2011, and Ukraine since 2014.[13]

Whether their participation in armed conflicts abroad ultimately may be regarded as heroic or villainous, foreign fighters—individuals, other than

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1. Malet identified the participation of foreign fighters in 70 of 331 non-international armed conflicts between 1816 and 2005. DAVID MALET, FOREIGN FIGHTERS: TRANSNATIONAL IDENTITY IN CIVIL CONFLICTS 10 (2013).

2. *E.g.*, George P. Clark, *The Role of the Haitian Volunteers at Savannah in 1779: An Attempt at an Objective View*, 41 PHYLON 356, 356–57 (1980).

3. Although Lord Byron is often cited as an example of an ancient foreign fighter, in fact he died of illness before he was able to participate in the hostilities of the Greek War of Independence. NIR ARIELLI, FROM BYRON TO BIN LADEN: A HISTORY OF FOREIGN WAR VOLUNTEERS 6 (2017).

4. *E.g.*, *id.* at 41–42.

5. David Malet, *Workers of the World, Unite! Communist Foreign Fighters 1917-91*, 27 EUR. REV. HIST. 33, 36–38 (2020).

6. *E.g.*, MALET, *supra* note 1, at 92–126.

7. *E.g.*, Thomas Hegghammer, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, 35 INT'L SEC. 53, 53 (2011) ("Since 1980 between 10,000 and 30,000 [foreign fighters] have inserted themselves into conflicts from Bosnia in the west to the Philippines in the east.").

8. *E.g.*, MALET, *supra* note 1, at 158–92.

9. Mohammed M. Hafez, Jihad *after Iraq: Lessons from the Arab Afghans*, 32 STUD. IN CONFLICT & TERRORISM 73, 73–74 (2009).

10. *Id.*

11. *Id.*

12. *Id.*

13. *E.g.*, KACPER REKAWEK, A YEAR OF FOREIGN FIGHTING FOR UKRAINE: CATCHING FISH WITH BARE HANDS 5 (Mar. 2023), https://www.counterextremism.com/sites/default/files/2023-03/CEP%20Report_A%20Year%20of%20Foreign%20Fighting%20for%20Ukraine_March%202023.pdf.

mercenaries, who voluntarily depart their State of origin or habitual residence to participate in a foreign armed conflict—pose normative and material challenges to both States and the international system. Acting on their own initiative, foreign fighters operate in a manner contrary to foundational assumptions that undergird modern international law.[14] They challenge States' sovereign monopoly over recourse to armed force by deciding for themselves whether, when, and for what to fight.[15] They question the juridical relationship between sovereign and citizen by fighting on behalf of a party to whom they do not owe allegiance and that may not even be a State. And, as private actors engaging in warfare at their own initiative, they reject the precept that public authorities alone may sanction violence in the international system.

Moreover, as Thomas Hegghammer has observed, "Foreign fighters matter because they can affect the conflicts they join[.]"[16] At a minimum, foreign fighters affect the conflicts they join by supplying person-power, even if only as cannon fodder. More concerningly, foreign fighters—especially experienced or veteran foreign fighters—affect the conflicts they join by transferring knowledge and experience to, augmenting the capabilities of, or increasing the likelihood of success for the parties to which they adhere. Indeed, as non-international armed conflicts have proliferated

14. ARIELLI, *supra* note 3, at 9 ("[F]oreign volunteers who serve in a foreign conflict, without being sent by their government, defy international norms and expectations."); *see also* MALET, *supra* note 1, at 15–16 ("In international relations theory, the nation-state is considered the primary political unit of the international system, and individuals are typically expected to affiliate with and fight for their own state.").

15. *E.g.*, 2 L. F. L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 54 (Hersch Lauterpacht ed. 1952) ("War is the contention between two or more *States* through their armed forces, for the purpose of overpowering each other, and imposing such conditions of peace as the victor pleases.") (emphasis added); *id.* § 56 ("To be war, the contention must be *between States*. In the Middle Ages wars between private individuals, so-called private wars, were known, and wars between corporations—the Hansa, for instance—and States. But such wars have totally disappeared in modern times."); *see also* ARIELLI, *supra* note 3, at 27.

16. Hegghammer, *supra* note 7; MALET, *supra* note 1, at 52 (finding that NIACs in which foreign fighters participate are "disproportionality successful"); *see also* Malet, *supra* note 5, at 40 (assessing that "[a]lthough the International Brigades . . . failed to save the Spanish Republic, they prolonged the war by nearly two years, forcing a depleted Franco to remain neutral during the Second World War"); Kristin M. Bakke, *Help Wanted? The Mixed Record of Foreign Fighters in Domestic Insurgencies*, 38 INT'L SEC. 150, 167–70 (2014) (noting that the arrival of foreign fighters improved the Chechen insurgents' ability to mobilize resources and is correlated with a change in the conflict's framing from a nationalist to an Islamist struggle).

since the outlawing of war nearly a century ago,[17] foreign fighters have become an increasingly important[18] and frequent presence on battlefields.[19]

Yet more concerning is the seeming propensity of foreign fighters to proliferate. Either as individuals or small groups, experienced foreign fighters who are unable or unwilling to return to their States of origin may follow their consciences or social pressure to subsequent conflict zones. There, they become nodes in recruiting networks, trainers, or even leaders. In so doing, they propagate international insecurity and additional manifestations of the foreign-fighter phenomenon. But, because foreign fighters are self-directed, a mobilization that finds favor among certain States today may spawn a subsequent mobilization that is disfavored by those same States tomorrow. Thus, some of the Arab Afghans who fought with the *mujahideen* against the adversaries of the United States in the anti-Soviet *jihad*, then later in the former Yugoslavia or in Chechnya, became its enemies in Afghanistan, Iraq, and elsewhere.[20] Similarly, reports have

17. *See, e.g.*, EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT 14 (2010) ("Of the 225 armed conflicts that had taken place between 1946 and 2001, 163 were internal armed conflicts. Only forty-two were qualified as inter-state or international armed conflicts. The remaining twenty-one were categorized as 'extra-state', defined as a conflict involving a State and a non-state group, the non-state group acting from the territory of a third State.").

18. The presence of foreign fighters in non-international armed conflicts correlates with an increased likelihood that a non-State actor will succeed in its prosecution of such armed conflicts. MALET, *supra* note 1, at 11; *id.* at 52.

19. *See* Edoardo Corradi, *Joining the Fight: The Italian Foreign Fighters Contingent of the Kurdish People's Protection Units*, 53 ITALIAN POL. SCI. REV. 201, 201–03 (2022); MALET, *supra* note 1, at 11 ("[Foreign fighters] have been increasing both in absolute numbers and relative to the total number of insurgencies [since 1816]."); *id.* at 49–51; Hegghammer, *supra* note 7, at 60 ("Of seventy armed conflicts in the post-1945 Muslim world, eighteen had a . . . global foreign fighter contingent [that received no State support] . . . . Sixteen [of eighteen] contingents mobilized after 1980 (one in the 1980s, ten in the 1990s, and five in the 2000s).").

20. *E.g.*, Hafez, *supra* note 9, at 74 ("A substantial number of Arab Afghans became a menace in regional conflicts and on the international scene. Specifically, the most threatening elements functioned as commanders of training camps in Pakistan and Afghanistan, giving safe haven to violent militants seeking skills in terrorism and guerrilla warfare. Some served as spiritual leaders or military commanders of national Islamist causes, including insurgencies in Algeria, Egypt, Kashmir, Tajikistan, Bosnia, and Chechnya. Others served as leaders, financiers, or facilitators of international terrorist cells embracing Islamist causes."); *id.* at 82 ("[T]he genesis of Al Qaeda lies in key figures like bin Laden, Abu Hafs al-Masri, and Abu Ubayda al-Banshiri. All three acquired combat experience and leadership skills in battles like the ones in Jaji and Jalalabad[, Afghanistan]. All three suffered injuries in combat. Their legitimacy among *jihadists* stemmed in some measure from their credentials earned in the battlefield."); *id.* at 84 ("Sheikh Anwar Shaaban . . . was an Islamist in Egypt until he fled to Afghanistan during the 1980s. In 1991, he obtained political asylum from the Italian government and settled in Milan. There he opened the Islamic Cultural Institute in a converted garage. The Institute attracted Arab Afghans and sent Europeans to Afghanistan with Pakistani visas. The Institute also attracted exiled dissidents from Egypt, Tunisia, and Algeria. In 1992, Shaaban went with several other militants to Bosnia and served there for three years as a spiritual and political leader to the Arab volunteers. He shuttled back and forth from Bosnia to Italy, bringing with him new recruits and veterans of the

emerged recently of *jihadist* fighters from Syria traveling to Ukraine to fight against Russia.[21]

As the diverse history of foreign fighter mobilizations demonstrates, the foreign-fighter phenomenon is not tied to any particular ideological motivation, any particular historical epoch, or any particular tactical approach.[22] Moreover, political science and international relations literature suggests that the motivations of individual foreign fighters are diverse, multifaceted, and sometimes incoherent.[23] Nevertheless, together these facets of the foreign-fighter phenomenon indicate that States of origin are best positioned to promote international security by restraining initial foreign-fighter flows and interrupting subsequent, second-order mobilizations. As a general matter, individual foreign fighters trace a life cycle that includes at least (1) departure from their State of origin; (2) participation in a foreign armed conflict; (3) potential travel to a subsequent conflict zone; and (4) return to their State of origin.[24] This life cycle might be further generalized as including a "departure" phase and a phase of "return"—or failure to return. Both phases indicate that foreign fighters' States of origin play a critical role in either subverting or promoting international peace and security. States of origin may limit the international security challenges posed by foreign-fighter mobilizations by restraining the

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Afghan *jihad*."); Neil Hauer, *Chechen and North Caucasian Militants in Syria*, ATLANTIC COUNCIL (Jan. 18, 2018), https://www.atlanticcouncil.org/blogs/syriasource/chechen-and-north-caucasian-militants-in-syria (describing former Chechen insurgents traveling to Syria to participate in the Syrian Civil War as *jihadists*).

21. *See, e.g.*, Steven Stalinsky, *The Jihadi Conflict Inside the Russia-Ukraine War*, MEMRI (May 22, 2023), https://www.memri.org/reports/jihadi-conflict-inside-russia-ukraine-war (noting that Rustum Azhiev, "former emir of the Syria-based Chechen jihadi group Ajnad Al-Kavkaz," has taken command of the Separate Special Purpose Battalion of the Armed Forces of the Chechen Republic of Ichkeria as it fights Russia in Ukraine).

22. *See* Malet, *supra* note 5, at 33 ("[O]ver the last 100 years many more individuals have volunteered to be foreign fighters for Marx than for Mohammed. And, decades before jihadi supporters emigrated to populate a caliphate, Communists and their families were recruited to build Workers' Paradises that similarly promised opportunities in new societies free from exploitation."); ARIELLI, *supra* note 3. Indeed, as Malet remarks, "there is evidence in the literature that the ideologies are not what principally motivates foreign fighters as much as commitment to fighting on behalf of a social group with which the fighter identifies." Malet, *supra* note 5, at 35.

23. *See* REKAWEK, *supra* note 13, at 5; AARON Y. ZELIN, YOUR SONS ARE AT YOUR SERVICE: TUNISIA'S MISSIONARIES OF JIHAD ch. 9 (2020) (surveying the disparate motivations of Tunisian foreign fighters who participated in the Syrian Civil War); ARIELLI, *supra* note 3; MALET, *supra* note 1, at 158–92; Hegghammer, *supra* note 7, at 53; Hafez, *supra* note 9, at 73–76.

24. *Cf.* Craig Forcese & Ani Mamikon, *Neutrality Law, Anti-Terrorism, and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies*, 48 U.B.C. L. REV. 305, 307 (2015) ("'Foreign fighters' have a 'life cycle' divided into two discrete periods, both of which have galvanized state attention and concern: departure to the conflict zone and return to the country of origin. Distinct policy preoccupations arise at each stage. Departure enhances the supply of recruits to fight or otherwise participate in foreign conflicts, with possibly serious consequences for life, foreign relations, and international stability. Return amounts to the re-entry of a potentially further radicalized individual, equipped with new means and methods, into [their State of origin's society] to which he or she may wish to do harm.").

departure of their nationals for foreign conflict zones. Once their nationals have departed to participate in foreign armed conflicts, States of origin may limit the international security challenges posed by the onward travel of experienced foreign fighters by ensuring their nationals' safe return. In either case, the most appropriate actor in the international system to restrain or curtail manifestations of the foreign-fighter phenomenon is the State of origin of individual foreign fighters.

Today, however, international law does not clearly assign States of origin the responsibility to restrain or recover their nationals who desire to or actually do become foreign fighters. Despite the normative and material challenges posed by the foreign-fighter phenomenon—and notwithstanding the frequency with which foreign fighters appear in armed conflicts of both international and non-international character[25]—the phenomenon is not specifically regulated by international law.[26] In fact, the appellation "foreign fighter"[27] is not even a term of art in international law.[28] In the absence of international legal regulation, States of origin behave, in many cases, as if it is permissible to tolerate the departure of their nationals for foreign conflict zones. Likewise, and more dangerously, in the absence of international legal regulation, States of origin often appear to regard the repatriation of their foreign-fighter nationals as discretionary.

Notably, however, this absence of regulation does not mean that the international system has ignored the phenomenon.[29] Rather, the

25. *See, e.g.*, MALET, *supra* note 1, at 33 ("Although state laws and international norms tend to treat transnational military recruitment by nonstate organization as aberrant, such groups have a very long history in civil conflicts.").

26. Historically, the development of international law has been marked by its reactivity to crises and precipitating events. Michal Saliternik & Sivan Shlomo-Agon, *Proactive International Law*, VERFASSUNGSBLOG (Aug. 14, 2022), https://verfassungsblog.de/proactive-international-law/. However, even accounting for this mode of development, the absence of international legal regulation pertaining to foreign fighters is notable in light of the phenomenon's persistent recurrence over the course of more than two centuries in which the international system has attempted to address specific manifestations of the phenomenon on an ad hoc and sui generis basis.

27. Even in popular media or other social science disciplines, "foreign fighter" is a term of relatively recent vintage. Historically, many who would be considered "foreign fighters" today would have been classified as "foreign volunteers." *See, e.g.*, Ian Brownlie, *Volunteers and the Law of War and Neutrality*, 5 INT'L & COMPAR. L. Q. 570 (1956); *see also* ARIELLI, *supra* note 3. Like "foreign fighter," the term "foreign volunteer" lacked a definition at international law.

28. *E.g.*, John Ip, *Reconceptualising the Legal Response to Foreign Fighters*, 69 INT'L & COMPAR. L. Q. 103, 104 (2020) (noting that the term "foreign fighter" "lacks a settled legal definition"); *see also International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, 101 INT'L REV. RED CROSS 869, 932 (2019) ("'Foreign fighter' is not a term of art in IHL. There is no *specific* regime – and there are no rules – under IHL dealing explicitly with foreign fighters . . . .").

29. Nor has the phenomenon been ignored by international law scholars. *See, e.g.*, Sandra Krähenmann, *The Obligations under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination*, *in* FOREIGN FIGHTERS UNDER INTERNATIONAL LAW

international community has repeatedly confronted either the need to restrain the arrival of foreign fighters in a conflict zone or the necessity of ensuring their ultimate repatriation through ad hoc, sui generis efforts focused on specific, extant manifestations of the phenomenon.[30] Unfortunately, these case-specific approaches to the problem have done little to promote international security over the long term by restraining or regulating subsequent manifestations of the phenomenon. Even as the international community has in recent years evidenced greater willingness to treat the foreign-fighter phenomenon prospectively, it has circumscribed the efficacy of its regulatory forays by counterproductively tying them to "terrorism."

This Article argues that international peace, security, and stability can and should be improved by clearly imposing obligations on States of origin to interrupt the typical foreign-fighter life cycle traversed by their nationals. Such regulation should oblige States, first, to restrain the departure of their nationals or habitual residents for foreign conflict zones; second, to readmit their nationals or habitual residents when they attempt to return; and third, to facilitate the repatriation of their nationals or habitual residents when they are detained in the context of a foreign armed conflict. Significantly, such obligations would represent a progressive extension of existing requirements under international law that demand States both refrain from interfering, directly or indirectly, in the internal or external affairs of other States, and exercise due diligence in preventing harm to other States that emanates from their own territory. Additionally, obliging States of origin to repatriate those of their nationals who become foreign fighters when they are detained in the course of an armed conflict would reflect an extension of existing explicit or implicit obligations under both general public international law and international humanitarian law in broadly analogous circumstances. This is a modest argument. But by clearly assigning to States of origin international legal obligations concerning nationals who participate in armed conflicts abroad, extension of the foregoing principles would address the structural infirmities currently present in the international system that contribute to the prolongation and recurrence of the foreign-fighter phenomenon—and the non-ideological international insecurity it represents—across diverse historical periods. This suggested extension of existing international legal principles to the foreign-fighter phenomenon

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AND BEYOND 229 (Andrea de Guttry et al. eds., 2016); Brownlie, *supra* note 27, at 578. However, many scholars approach the foreign-fighter phenomenon by assessing the extent to which foreign fighters are regulated or protected by international humanitarian law. Others assess whether international law addresses the phenomenon or variations on the phenomenon specifically. This Article takes a different path, suggesting that history, international relations, and general principles of international law and their underlying policies indicate that international law is already well-positioned to control the foreign-fighter phenomenon in an objective, value-neutral, and effective manner.

30. *See infra* Part II.B.

could be accomplished most expeditiously by adopting a new United Nations Security Council Resolution that builds on Security Council Resolutions 2170[31] and 2178.[32]

This Article begins, in Part I, by proposing an objective, value-neutral definition of foreign fighters that reflects the phenomenon's recurrence across historical eras, independent of underlying ideological currents, and that would facilitate its general regulation. It then describes the international security challenges the foreign-fighter phenomenon and its manifestations pose, and which justify specific international legal regulation. Part II examines the existing international legal principles that could contribute to restraining the phenomenon, as well as historical and contemporary examples of *sui generis* efforts to regulate it. Finally, Part III suggests the content of international law that could contribute to the phenomenon's effective regulation.

II. FOREIGN FIGHTERS AND THE FOREIGN-FIGHTER PHENOMENON CONSIDERED

Effective international legal regulation of the foreign-fighter phenomenon must account for what the phenomenon is, the normative and material challenges it poses to the international system, and the role States play in its recurrence and prolongation. The latter two considerations, in particular, both justify international legal regulation of the phenomenon and imply such regulation's content. This section proposes and explains the importance of an objective, value-neutral definition of "foreign fighter."[33] It describes how foreign fighters insult the international system from both a normative perspective and from a material one. It then explains how, and in some circumstances why, States tolerate the phenomenon, contributing to its recurrence and prolongation. Finally, it addresses whether the foreign-fighter phenomenon is a problem of sufficient magnitude to warrant international legal regulation.

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31. S.C. Res. 2170 (Aug. 15, 2014).

32. S.C. Res. 2178 (Sept. 24, 2014).

33. *See* Andrea de Guttry et al., *Introduction*, *in* FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND 1, 2 (Andrea de Guttry et al., Francesca Capone, Christophe Paulsen eds., 2016) ("[T]he phenomenon of foreign fighters does not have an ascertained legal meaning under the existing international legal framework . . . ."); Robert Heinsch, *Foreign Fighters and International Criminal Law*, *in* FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND 161, 162 (Andrea de Guttry et al. eds., 2016) ("The term 'foreign fighters' . . . is . . . not a term of art as such in international criminal law . . . ."). International law is not alone in this respect. As of 2011, Hegghammer ascribed the absence of the term "foreign fighter" in political science literature to their falling into "an intermediate actor category lost between local rebels, on the one hand, and international terrorists, on the other." Hegghammer, *supra* note 7, at 55.

A. Proposed Definition of Foreign Fighters

This Article defines "foreign fighters" as (1) individuals who leave their State of origin (2) to join[34] a party other than their State of origin that is engaged in an armed conflict[35] (3) in a State in which the individuals are aliens[36] (4) at their own initiative and (5) who are not mercenaries[37] under international law.[38] This definition endeavors to reflect the diverse conflict typologies[39] in which foreign fighters have participated and the variety of actors—both State and non-State—they might support. Aside from excluding mercenaries, it embraces all foreign fighters irrespective of their underlying motivations.[40] It is also value-neutral, eschewing politically

34. *See, e.g.*, NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 31–35 (2009); General Orders No. 100, The Lieber Code, art. 57 (1863) ("So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies."); *cf.* Ip, *supra* note 28, at 107 ("[T]ravelling to fight and travelling to receive terrorist training are not the same thing.").

35. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

36. An "alien" is "an individual who does not have the nationality of the State in whose territory that individual is present." Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10 (2014).

37. Mercenaries, who may be foreign nationals with respect to the armed conflict in which they participated, are distinguished from foreign and local fighters primarily by their pursuit of private gain. *E.g.*, International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, art. 1(b), Dec. 4, 1989, 2163 U.N.T.S. 75 ("A mercenary is any person who . . . [i]s motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party[.]").

38. This definition is consistent with that adopted by Arielli for "foreign volunteers." ARIELLI, *supra* note 3, at 4–5 ("Foreign volunteers leave their country of nationality or residence and take part in a conflict abroad on the basis of a personal decision, without being sent by their government and not primarily for material gain.").

39. *See generally* Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. RED CROSS 69 (2009) (elaborating on the typology of armed conflicts under international humanitarian law).

40. Individuals who become foreign fighters do so for disparate, interactive, and even inconsistent motivations. *See* ARIELLI, *supra* note 3, at 66–93 (reviewing the various individual motivations of foreign fighters over the last 250 years). Much of the difficulty in analyzing foreign fighters from a political science or international relations perspective arises from disparate, overlapping, and difficult-to-determine motivations of individual foreign fighters. *E.g.*, *id.*; Hegghammer, *supra* note 7, at 65 ("Religious difference probably affects the likelihood and eventual scale of [Muslim] foreign fighter mobilization, but it is neither a necessary nor a sufficient cause of foreign fighter involvement."); *id.* at 90 ("Two key components seem crucial for the occurrence of large-scale global foreign fighter mobilizations: first, an ideology stressing solidarity within an imagined transnational community; second, a strong cadre of transnational activists."); Hafez, *supra* note 9, at 75 ("The motivations of the [Arab Afghan] volunteers can be divided into five categories, mainly those seeking religious fulfillment, employment opportunities, adventure, safe haven, and military training."); *id.* at 76 ("Volunteers [for the anti-Soviet *jihad*] from the [Persian] Gulf included guest workers who

valanced references to the tactics foreign fighters or the forces they join may adopt.[41] Additionally, for both legal and policy reasons, it attempts to principledly distinguish between foreign nationals who travel to a conflict zone of their own volition and those who do not—such as individuals who are sent by their State to participate in an armed conflict or who are trafficked to a conflict zone. Finally, it excludes from its ambit mercenaries, who are primarily motivated by remuneration or private gain and who thus represent a separate phenomenon.[42] Consequently, the definition of foreign fighters employed in this Article builds on and broadens existing, potentially applicable definitions concerning foreign fighters.[43]

The definition of "foreign fighter" adopted by this Article does not consider the justness or goodness of the cause or party to which a foreign fighter adheres. In so doing, it avoids adopting a potentially—even inherently—discriminatory[44] basis for international legal regulation. The

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came from impoverished countries such as Mauritania, Somalia, Sudan, and Yemen. They were seeking jobs and salaries with Gulf-based NGOs in Pakistan, not martyrdom in Afghanistan. Even a substantial number of members of the Egyptian Muslim Brotherhood went to serve as engineers and doctors because they could not find employment in Egypt."); *id.* ("A number of Egyptian radicals were released from prison by the mid-1980s and knew that they would face harassment if they stayed at home. In addition to seeking a safe haven, they wanted to build up their clandestine military capabilities in order to topple their regimes at home in the near future."). While these considerations may be important on at an individual level they are beyond the scope of this Article and they tend to obscure the structural features of manifestations of the foreign-fighter phenomenon that are amenable to international legal regulation. Regardless, at bottom, foreign fighters are individuals who are motivated—at least in part—by a transnational call to action. Whether these transnational calls are ideological, religious, cultural, or civilizational, they necessarily reflect a conception of the world that rejects the State-based international system—at least as it is settled at the moment of their mobilization.

41. *See* Krähenmann, *supra* note 29, at 237.

42. *Cf.* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art 47(2), June 8, 1977, 1125 U.N.T.S. 609 ("A mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.").

43. *E.g.*, Andrea de Guttry et. al., *Introduction*, *in* FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND *supra* note 33, at 2 ("This book defines foreign fighters as 'individuals, driven mainly by ideology, religion and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict.'"); MALET, *supra* note 1, at 9–10 (defining "foreign fighters" or "transnational insurgents" as "noncitizens of conflict states who join insurgencies [armed conflicts within the boundaries of recognized sovereign entities between parties subject to a common authority at the outset of hostilities] during civil conflicts").

44. *Cf.* Darryl Li, *A Universal Enemy?: "Foreign Fighters" and Legal Regimes of Exclusion and Exemption Under the "Global War on Terror,"* 41 COLUM. HUM. RTS. L. REV. 355, 357 (2010) ("The threat allegedly posed by the figure of the foreign fighter, a special category of 'terrorist,' has occasioned a diverse set

discriminatory consequence of value-based regulation of foreign fighters is already apparent in the disparate treatment to which similarly situated returned foreign fighters are and historically have been treated. For example, a State may prosecute one national who becomes a foreign fighter in support of a disfavored cause or organization, while refraining from prosecuting another who joins a favored cause or organization. Such disparate treatment undermines the rule of law and is subject to the temporary political or policy preferences of a State,[45] with adverse consequences for at least some of the individuals involved. Thus, a value-based approached to foreign fighters does not provide a reliable or appropriate basis for international legal regulation.

Significantly, the definition of foreign fighter employed by this Article rejects the emphasis of foreign fighters as terrorists that has prevailed in recent decades.[46] Since at least the anti-Soviet *jihad*, the foreign-fighter phenomenon has been most frequently discussed in the context of terrorism occurring in non-international armed conflicts (NIACs), particularly those involving so-called *jihadists*.[47] Especially since the United States' invasion of Afghanistan in October 2001, this focus has entailed an unfortunate conflation of "foreign fighting" with "terrorism." Thus, the international community's recent efforts to regulate foreign fighters, through UN Security Council Resolutions 2170 and 2178, impose obligations on States of origin to curtail their nationals from becoming "foreign *terrorist* fighters."[48] But foreign fighters do not necessarily engage in terrorism.[49] Indeed, although there is a contemporary "tendency to conflate foreign fighters with terrorists,"[50] in other circumstances "people who traveled abroad to voluntarily fight in foreign conflicts [foreign fighters] have also been hailed

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of laws and policies specifically targeting transnational Muslim populations in various countries. At the same time and in those same countries, measures have been put in place that effectively immunize *other* foreigners, often Americans and their allies, from local accountability."); *id.* at 361 ("The focus on the 'foreign fighter' has resulted in efforts to police other 'out-of-place Muslims' more generally.").

45. Consider, for example, the position of foreign fighters who joined ISIS—a disfavored organization that is viewed with hostility by many State actors due to its abhorrent ideology—who then travel to Ukraine to fight against Russia in its illegal war. By fighting on behalf of Ukraine, should these reviled individuals alter their standing in the eyes of States that rightly support Ukraine in its resistance to Russia's unlawful aggression?

46. *E.g.*, S.C. Res. 2178, pmbl. (Sept. 24, 2014).

47. *E.g.*, Malet, *supra* note 5, at 33 ("In the twenty-first century, global audiences associate the term 'foreign fighter' with the transnational Islamist terror groups that have operated since forming to battle the Soviet Red Army in Afghanistan in the waning days of the Cold War.").

48. S.C. Res. 2178 (Sept. 24, 2014) (emphasis added). U.N. S.C. Res. 2178 defines "foreign terrorist fighters" as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict[.]" *Id.* U.N. S.C. Res. 2170 applies to but does not define "foreign terrorist fighters." S.C. Res. 2170, pmbl. (Aug. 15, 2014); *e.g.*, *id.* ¶ 7.

49. *E.g.*, Ip, *supra* note 28, at 105–07.

50. ARIELLI, *supra* note 3, at 3.

as heroes."[51] Neither do foreign fighters exclusively join non-State organized armed groups (OAGs);[52] nor do they exclusively participate in NIACs. Historically speaking, foreign fighters have participated on the side of governmental forces in armed conflicts as diverse as the Spanish and Syrian civil wars.[53] Today, foreign fighters participate on both sides of the international armed conflict (IAC) between Russia and Ukraine.[54] As of March 2023, between 2,000 and more than 20,000 foreign fighters from at least fifty-two States of origin have reportedly joined Ukraine in its fight against Russia.[55] Similarly, throughout the complex of armed conflicts taking place in Syria since 2011, as many as 80,000 foreign nationals have traveled or been sent to Syria to fight in support of the Assad regime in its efforts to retain control.[56]

A definition of foreign fighters like that proposed in this Article better reflects the international security challenges posed by foreign fighters and the foreign-fighter phenomenon described in the next section. As a result,

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51. *Id.*

52. Elizabeth M.F. Grasmeder, *Leaning on Legionnaires: Why Modern States Recruit Foreign Soldiers*, 46 INT'L SEC. 147, 147 (2021) ("My research shows that from 1815 to 2020, ninety-one states have implemented more than two hundred . . . policies to enlist [foreign fighters]."); ARIELLI, *supra* note 3, at 4; Edwin Bakker & Mark Singleton, *Foreign Fighters in the Syria and Iraq Conflict: Statistics and Characteristics of a Rapidly Growing Phenomenon*, *in* FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND 9, 10 (Andrea de Guttry, et al. eds., 2016) ("In both [Iraq and Syria], citizens from all continents have joined various groups and fractions on all sides of the conflict, such as the self-proclaimed Islamic State, Jabhat al Nusra, the Free Syrian Army, Kurdish groups, and groups and militias fighting on the side of the Assad regime have also attracted foreign fighters, primarily Shias from Lebanon, Iraq, Iran, and Afghanistan."); *id.* at 16–18 (describing the fact and significance of as many as 10,000 foreign fighters joining or fighting alongside the Assad regime in Syria through 2015); Marcello Flores, *Foreign Fighters Involvement in National and International Wars: A Historical Survey*, *in* FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND 27, 36–38 (Andrea de Guttry, et al. eds., 2016) (describing minority groups in multiethnic empires becoming foreign fighters for the States opposing their imperial sovereigns during World War I).

53. *E.g.*, MALET, *supra* note 1, at 92–126 (describing foreign fighters participating in the Spanish Civil War on behalf of the Spanish government); Tom Perry, Laila Bassam, Suleiman al-Khalidi & Tom Miles, *Hezbollah, Other Shi'ite Allies Helped Assad Win in Aleppo*, REUTERS (Dec. 14, 2016), https://www.reuters.com/article/us-mideast-crisis-syria-aleppo-fall-insi/hezbollah-other-shiite-allies-helped-assad-win-in-aleppo-idUSKBN1431PV.

54. Tanya Mehra & Abigail Thorley, *Foreign Fighters, Foreign Volunteers and Mercenaries in the Ukrainian Armed Conflict*, INT'L COUNTER-TERRORISM CTR. (July 11, 2022), https://www.icct.nl/publication/foreign-fighters-foreign-volunteers-and-mercenaries-ukrainian-armed-conflict.

55. REKAWEK, *supra* note 13, at 8 ("Due to the fluidity of the situation [in Ukraine], precise statistics are impossible to establish at this point. On the one hand, the number of 20,000 applicants for the [International Legion of Defence of Ukraine] is often brought up in discussions of the issue. This is, however, contested by some of the recruiters[, who] estimate[] that the number would more likely to be in 'low thousands.'"); Mark Guarino, *Foreign Fighters in Ukraine Speak Out on Their Willingness to Serve: 'I Had to Go*,' ABC NEWS (Nov. 6, 2022), https://abcnews.go.com/International/foreign-fighters-ukraine-speak-willingness-serve/story?id=91671528.

56. *See* ROBERT S. FORD, THE SYRIAN CIVIL WAR: A NEW STAGE, BUT IS IT THE FINAL ONE?, MIDDLE EAST INSTITUTE 5 (Apr. 2019).

it provides a more effective basis for general international legal regulation of the phenomenon that is tailored to address those threats.

B. Normative and Security Challenges Posed by the Foreign Fighter Phenomenon

Regardless of the character of the armed conflicts in which they participate, the nature of the parties to which they adhere, or the tactics which they employ, foreign fighters challenge the existing international order from both normative and security perspectives. This section describes these disparate but related challenges because they call out for international legal regulation.

1. Foreign Fighter Normative Challenges to the International System

From a normative perspective, foreign fighters undermine the State-based international order by challenging States' sovereign monopoly on the resort to armed force under international law.[57] Rather than fighting on behalf of States or at the command of their national governments,[58] foreign fighters elect to participate in armed conflict at their own initiative.

Moreover, when foreign fighters support OAGs rather than States, they inherently undermine the State-based system by enlarging the capacity of such OAGs. As the armed forces of non-State actors, OAGs intrinsically challenge the international system by contesting States' sovereign monopoly on force internally. In some cases, they may also challenge the international system by attempting to revise settled territorial boundaries, as ISIS did in attempting to establish a territorial caliphate that would erase the recognized international border between Syria and Iraq.[59]

Additionally, the transnational nature of foreign-fighter recruitment itself necessarily challenges the State-based international order. Such recruitment interferes with and mediates the relationship between the State and its nationals or habitual residents by relying on the activation of a perceived threat to "a transnational community" linking local recruits to

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57. II OPPENHEIM'S INTERNATIONAL LAW, *supra* note 15, § 54 ("War is the contention between two or more *States* through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.") (emphasis added); *id.* § 56 ("To be war, the contention must be *between States*. In the Middle Ages wars between private individuals, so-called private wars, were known, and wars between corporations—the Hansa, for instance—and States. But such wars have totally disappeared in modern times.").

58. MALET, *supra* note 1, at 15–16 ("In international relations theory [and international law], the [State] is considered the primary political unit of the international system, and individuals are typically expected to affiliate with and fight for their own [S]tate.").

59. *E.g.*, Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/.
("Similarly, accepting any border is anathema, as stated by the Prophet and echoed in the Islamic State's propaganda videos. If the caliph consents to a longer-term peace or permanent border, he will be in error.").

foreign conflicts.[60] Consequently, the fact of foreign-fighter involvement in armed conflicts challenges the State as the primary (and sovereign) political community in the international system. Undermining the primacy of States normatively challenges the existing international legal system by eroding the State's claim to exclusive authority for using force in international relations.

2. Foreign Fighter Security Challenges to the International System

In addition to posing normative challenges to the international system, foreign fighters also pose practical, security, and diplomatic challenges to that system.[61] Foreign fighters undermine or potentially undermine international security through at least five effects or mechanisms that may operate independently or in combination. First, foreign fighters undermine international security by augmenting parties to an armed conflict, contributing person-power that may exacerbate, intensify, prolong, or even decide an armed conflict.[62] In some cases, foreign fighters may contribute skills or capabilities otherwise unavailable to a party to an armed conflict, enhancing the party's ability to wage war and increasing its likelihood of success.[63] Second, foreign fighters may exhibit a "veteran effect," acting as

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60. *See also* REKAWEK, *supra* note 13, at 5 ("[T]he foreigners fighting for or assisting the fight in Ukraine are beginning to constitute a transnational social movement."); *cf.* MALET, *supra* note 1, at 4 (describing the transnational activation of foreign fighters generally).

61. Indeed, at least in the context of "foreign terrorist fighters," the UN Security Council has acknowledged that such foreign fighters "increase the intensity, duration and intractability of conflicts"; "may pose a serious threat to their States of origin, the States they transit and the States to which they travel, as well as States neighbouring zones of armed conflict in which foreign terrorist fighters are active"; and "that the threat of foreign terrorist fighters may affect all regions and Member States, even those far from conflict zones." S.C. Res. 2178, *supra* note 32, at 2. *See* Bakke, *supra* note 16, at 150 ("[O]ne of the major policy concerns about conflicts in Afghanistan, Iraq, Libya, Mali, Pakistan, Russia's North Caucus region, Somalia, and Syria has been that these states may both attract and breed [foreign fighters] threatening domestic, regional, and international security. In the United States, the Barack Obama administration has predicated its focus on the Afghanistan-Pakistan border precisely on this concern, as did France in its January 2013 intervention in Mali.").

62. *Cf.* S.C. Res. 2170, *supra* note 31, ¶ 7 (finding that foreign terrorist fighters in Syria and Iraq were "exacerbating" the armed conflict there); MALET, *supra* note 1, at 52 (finding that foreign fighters make insurgencies in which they participate "disproportionally successful").

63. *E.g.*, MALET, *supra* note 1, at 156–57 (describing the recruitment and importance of foreign pilots in the Israeli war of independence); Fabrizio Coticchia, *The Military Impact of Foreign Fighters on the Battlefield: The Case of ISIL*, *in* FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND 121, 121–37 (Andrea de Guttry et al. eds., 2016) ("In sum . . . bringing new skills that locals don't have and the experience acquired in previous military operations tends to enhance the impact of transnational combatants in a civil war."); ARIELLI, *supra* note 3, at 125–72 ("A second major contribution of foreign personnel [to the Israeli side of the 1948 Arab-Israeli War], especially those who were veterans of the Second World War, was in helping to train new recruits to become pilots and to fill all the other positions that a modern air force required."); Zam Yusa, *Philippines: 100 Foreign Fighters Joined ISIS in Mindanao Since the Marawi Battle*, THE DEFENSE POST (Nov. 5, 2018), https://www.thedefensepost.com/2018/11/05/100-foreign-fighters-join-isis-mindanao-philippines-marawi/ (quoting Ahmad el-Muhammady as remarking that "'[v]eterans especially from conflict areas like in

force multipliers by enhancing the capabilities of parties to an armed conflict through training, knowledge transfer, or leadership.[64] Significantly, veteran foreign fighters who return to their States of origin or habitual residence may increase the likelihood of successful domestic terrorist attacks.[65] Third, veteran foreign fighters may also demonstrate a network effect by which they enhance recruitment and transnational mobilization, as well as access to finances and materiel, by drawing on the relationships they have developed through their earlier experience as foreign fighters.[66] Fourth, and closely related to the network effect, the experience of being a foreign fighter may increase the likelihood of further radicalization. "[F]oreign fighter mobilizations empower transnational terrorist groups . . . because volunteering for war is the principal stepping-stone for individual involvement in more extreme forms of militancy."[67] Likewise, veteran foreign fighters may also contribute to the emergence of new, transnational organizations that are willing to use violence within a domestic political context.[68] Of course, not all nor even the majority of foreign fighters emerge further committed to the cause they joined by participating in an armed

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Syria are capable of sharing their hard-learned skills such as making improvised bombs . . . . It only takes one such an expert to bolster a terror group.'").

64. *E.g.*, Coticchia, *supra* note 63, at 130 (ascribing battlefield success of ISIS, in certain operations, to the presence of veteran foreign fighters who, through their previous experience, developed skills as logisticians, snipers, and in the use of IEDs and RPGs); REKAWEK, *supra* note 13, at 7–8 (noting that, in addition to fighting for Ukraine, some combat-experienced foreign fighters in Ukraine are engaged in training the Ukrainian armed forces).

65. Ip, *supra* note 28, at 109 (citing Thomas Hegghammer, *Should I Stay or Should I Go? Explaining Variations in Western Jihadists' Choice between Domestic and Foreign Fighting*, 107 AM. POL. SCI. REV. 1, 11 (2013)) ("As for the veteran effect . . . the presence of a returned foreign fighter increased the chance of successful attack and doubled the chance of fatalities.").

66. ARIELLI, *supra* note 3, at 125–69 ("Experienced foreign volunteers could act not only as conveyors of knowledge through training but also as recruiters."); Hafez, *supra* note 9, at 74 ("Other [Arab Afghans] served as leaders, financiers, or facilitators of international terrorist cells embracing Islamist causes."); *see also* REKAWEK, *supra* note 13, at 7–8 (noting that experienced foreign fighters, including some who previously participated in the Russia-Ukraine armed conflict, act as recruiting hubs for additional foreign fighters to join that armed conflict); *Foreign Fighters*, SECURITY SERVICE MI5, https://www.mi5.gov.uk/home/the-threats/terrorism/international-terrorism/international-terrorism-and-the-uk/foreign-fighters.html ("The skills, contacts and status acquired overseas can make [foreign fighters] a much greater threat when they return to the UK, even if they have not been tasked directly to carry out an attack on their return.").

67. Hegghammer, *supra* note 7; *see, e.g.*, ARIELLI, *supra* note 3, at 125–69 ("Gaston Besson, a French volunteer who took part in the fighting in Croatia and Bosnia during the 1990s, was reportedly overseeing the enlistment of foreigners to the Azov Battalion in Ukraine in 2014."); *see also* REKAWEK, *supra* note 13, at 17 (describing the intermixing of foreign fighters with disparate ideological motivations in the Russia-Ukraine armed conflict).

68. *E.g.*, Bakker & Singleton, *supra* note 52, at 21 ("[M]ost transnational jihadi groups today are by-products of [earlier] foreign fighter mobilizations."); Hafez, *supra* note 9, at 74 ("Some [Arab Afghans] served as . . . military commanders of national Islamist causes, including insurgencies in Algeria, Egypt, Kashmir, Tajikistan, Bosnia, and Chechnya.").

conflict abroad, and at least some are disillusioned by the experience.[69] Fifth, foreign fighters may have an inspirational effect, encouraging future manifestations of the foreign-fighter phenomenon.[70] For example, U.S. Congressman Charlie Wilson of Texas "reported that when he learned of Afghan mujahidin fighting the Soviets he instantly equated them with Travis defending the Alamo."[71] Likewise, "Abdullah Azzam . . . named the intervention by the [Arab Liberation Army] and the Muslim Brothers [in the Israeli War of Independence] as his source of inspiration for organizing transnational recruitment to drive the Soviet Army from Afghanistan."[72]

Importantly, there is an iterative, recursive quality to these effects that further impacts international security. During their initial mobilization, foreign fighters acquire training, skills, relationships, and (potentially) combat experience that increases their relative effectiveness and their relative threat subsequently. Even when—as in the anti-Soviet *jihad*—foreign fighters play a de minimis role in the armed conflict itself,[73] the training they undergo, the skills they acquire, the experience they earn, and the networks they develop through their participation reverberate in future conflict zones.[74] Hafez, for example, argues that the "actual import of [the Arab Afghans' experience with the anti-Soviet *jihad*] lies in the training, socialization, and networking conducted by the Arab Afghans."[75] Famously, "[t]he 'Arab Afghan' mobilization [during the anti-Soviet *jihad*], in turn,

69. *See, e.g.*, ARIELLI, *supra* note 3, at 8 ("Very rarely has foreign volunteering been a decades-long commitment, wherein individuals fought voluntarily in one conflict after another. The phenomenon is better understood as a phase in the lives of certain people."); *id.* at 189–97.

70. *See* MALET, *supra* note 1, at 29; *id.* at 49–51.

71. *Id.* at 163.

72. *Id.* at 157.

73. *E.g.*, Hafez, *supra* note 9, at 75 ("The Arab Afghans were a tiny contingent in the anti-Soviet struggle, or 'a drop in the ocean' according to one former prominent Arab volunteer.").

74. *E.g.*, ZELIN, *supra* note 23, at 183–84 (explaining the significance of facilitation networks to enable foreign fighters to successfully travel to and embed with non-State organized armed groups, in particular); ARIELLI, *supra* note 3, at 125–72 ("A second major contribution of foreign personnel [to the Israeli side of the 1948 Arab-Israeli War], especially those who were veterans of the Second World War, was in helping to train new recruits to become pilots and to fill all the other positions that a modern air force required."); *see generally* ZELIN, *supra* note 23, chs. 2–3, 9 (describing the generational linkages between earlier and present-day foreign fighters and their recruitment).

75. Hafez, *supra* note 9, at 77; *see also* MALET, *supra* note 1, at 189 ("[The anti-Soviet *jihad*'s] greatest success lay not in the exploitation of community institutions preexisting Afghanistan, but in the social network created between Arab Afghans during the crucible of the war. Affiliates who returned to their home countries to train others or who moved on together between torn conflict states used their solidarity and contacts to share knowledge . . . ."). According to Malet, "Most of these connections [to recruiters] . . . are veteran foreign fighters who have returned home as respected figures in their communities and who have direct knowledge of the channels necessary for getting recruits to the front lines." *Id.* at 204. Thus, a direct line can be drawn between the mobilization of Arab Afghans and the presence of foreign fighters, originating in the same locales, in conflicts like Bosnia, Chechnya, Somalia, Iraq, Libya, and Syria.

produced a foreign fighter movement that still exists today, as a phenomenon partly distinct from al-Qaida."[76]

Trained in one conflict zone, veteran foreign fighters may go on to train future fighters—whether local or foreign—in future conflicts.[77] Combat-experienced foreign fighters may command fighters in later conflicts.[78] Indeed, the influence of veteran foreign fighters' previous experiences are evident in the adoption of similar tactics across conflicts.[79] Further, with respect to so-called *jihadist* foreign fighters, their experience-based adoption of conventional tactics, in addition to terrorist tactics, has contributed to greater "influence on the ground," improving those fighters' ability to take and control territory.[80]

ISIS, for example, relied on experienced foreign fighters to establish a training regime for its new recruits in Syria and Iraq. By the beginning of 2012, ISIS had established 46 training camps across Syria and Iraq.[81] New recruits attended a six-week basic training course.[82] Coticchia argues that "the presence of 'veterans' from previous conflicts [at ISIS training camps] . . . proved to be crucial in information-sharing among fighters. Terrorist tactics represent a relevant part of their skills, developed across conflicts."[83] Moreover, these training camps built on the model of earlier al Qaeda training camps operated in Afghanistan in the 1990s and early 2000s,[84] which themselves built on the Arab Afghans' experience in the anti-Soviet *jihad*. And the lessons learned by foreign fighters in the insurgency against U.S. forces in Iraq after the 2003 invasion "became vital for the insurgents that fought Assad's conventional forces" during the Syrian civil war.[85]

Significantly, the iterative and recursive effects of foreign fighter experience are not novel, modern innovations. "Often the volunteers [in the Italian revolutions of 1848] . . . constituted autonomous battalions led by

76. Hegghammer, *supra* note 7, at 57; *id.* at 72 ("[T]here are numerous links among post-1980s foreign fighter contingents . . . . There was considerable overlap of personnel, with Arab veterans of 1980s Afghanistan acting as first movers in at least eight of the subsequent mobilizations. . . . [A] number of people participated in more than one conflict, and some were involved in as many as five or six different wars. Finally, many of the same logistics chains and funding sources . . . were involved in different mobilizations.").

77. *E.g.*, Coticchia, *supra* note 63, at 129–31; Hafez, *supra* note 9, at 77 ("Those [Arab Afghans] who trained became the trainers of future *jihadists* in Afghanistan, Bosnia, Tajikistan, and Chechnya.").

78. *E.g.*, Hafez, *supra* note 9, at 80–82.

79. Coticchia, *supra* note 63, at 130.

80. *Id.* at 133; Hafez, *supra* note 9, at 82 ("As leaders moved from one conflict zone to the next, their prestige and leadership *bona fides* were further consolidated, enabling them to assume the mantle of 'Emirs' (commanders of the faithful).").

81. Coticchia, *supra* note 63, at 129.

82. *Id.* at 129–30.

83. *Id.* at 130.

84. *Id.* at 130–31.

85. *Id.* at 130.

commanders with battle experience in Spain or Latin America."[86] Likewise, Garibaldi, who gained substantial combat experience in Latin American revolutions between 1836 and 1848, led the "freedom volunteers" during their fight in Rome in 1849.[87] Following the *Risorgimento*, veterans of the *i Mille*, a volunteer company in the war for Italian unification that was led by Garibaldi between 1859 and 1861 and which included foreign fighters, subsequently "participated all over Europe in struggles where people were fighting for their freedom. A few hundred Italians joined the January Uprising in Poland in 1863 . . . ."[88] Likewise, in the wake of the Spanish Civil War, "Jewish Mandate survivors [returned to Mandate Palestine] to face the British with the experience not just of fighting in an insurgency, but of a transnational recruitment effort that changed the balance of forces in an otherwise hopeless conflict."[89]

The recursive and iterative quality of the foreign-fighter phenomenon may be especially relevant when the foreign fighters have originated in what they perceive to be (or actually are) repressive political *milieus*. Such "politically repressed or frustrated [foreign fighters] move to new arenas to fight their battles and gather strength to return home."[90] Indeed, as a historically recurrent matter, at least some foreign fighters are mobilized in the first instance by their motivation to gain training and combat experience in order to return home and upset the social or political order of their States of origin or habitual residence.[91] These foreign fighters pose an especial threat to their States of origin or habitual residence. But when their States of origin or habitual residence refuse or impede their return, they are encouraged to move on to new conflict zones, gaining additional training and experience while simultaneously threatening *international* security. For example, having acquiesced or encouraged their nationals to participate in the anti-Soviet *jihad*, certain Arab countries subsequently viewed returning veterans of that conflict as domestic security threats, jailing and

86. Flores, *supra* note 52, at 34.

87. *Id.* at 35.

88. *Id.* at 35–36.

89. MALET, *supra* note 1, at 126.

90. *Id.* at 24.

91. For example, "Ayman al-Zawahiri . . . first went to Afghanistan to work with refugees in 1980. He determined that the mountainous terrain of Afghanistan was conducive to guerrilla warfare and presented the opportunity to train an army that he could bring home to fulfill his objective of taking power in [Egypt]." *Id.* at 174. More recently, at least some of the foreign fighters participating in the Russia-Ukraine armed conflict appear to be doing so in order to gain experience valuable to speculative, future armed conflicts to upset the domestic order at home. REKAWEK, *supra* note 13, at 20 (describing Belarussian and Russian monoethnic foreign-fighter units operating in the ongoing Russia-Ukraine armed conflict); *id.* at 17 ("[C]ertain elements of the foreign fighter community, in particular some Belarussian and Russian fighters are clearly gearing up to bring the war home after the conflict in Ukraine.").

interrogating them upon their return.[92] The effect of these policies was to discourage the return of these foreign fighters to their States of origin, creating a population of de facto exiles who were pushed by their States of nationality into permanent transnationalism, encouraging them to continue to find so-called open fronts in which to participate.

At bottom, the history of foreign fighters demonstrates that the phenomenon poses international security threats that are divorced from either individual fighters' ideological motivations or the tactics employed in a given conflict zone by the parties to which they adhere. Instead, the phenomenon itself challenges international security by generating cadres of fighters that are trained, combat-experienced, connected, and transnationally-mobilized. The willingness of these cadres to operate outside of the State system and to employ armed violence without public sanction makes them a self-directed and free-floating potential threat to any State and the international system generally. Depending on their underlying ideological motivations—and depending on the historical epoch in which they appear—they have moved across the world to challenge monarchies and imperial powers, capitalist societies, and Western Christendom.[93] As right-wing extremism proliferates internationally, ongoing manifestations of the foreign-fighter phenomenon may well come to challenge pluralism and multicultural democracies.

C. The Role of States of Origin and Bystander States in the Persistence of the Foreign-Fighter Phenomenon

Both States of origin and bystander States play a significant role in the transnational mobilizations that lead to specific manifestations of the foreign-fighter phenomenon, as well as the prolongation of the phenomenon. Most obviously, foreign-fighter mobilization often takes advantage of State-of-origin approval of or tacit acquiescence to local recruitment of foreign fighters.[94] States of origin may also contribute to the prolongation of the foreign-fighter phenomenon by refusing or impeding the return of their nationals or habitual residents when they seek to return home, when the armed conflict in which they have sought to participate ends, or when they have been captured in the context of such an armed conflict. For their part, bystander States may contribute to the scale or

92. *E.g.*, Hafez, *supra* note 9, at 81; *id.* at 83; *id.* at 88–89.

93. *See* ARIELLI, *supra* note 3, at 39–40.

94. State-of-origin approval of or tacit acquiescence to the recruitment and departure of nationals to become foreign fighters should not be confused with the lack of State capacity to impede such travel. *Cf.* ZELIN, *supra* note 23, at 181 (quoting Tunisian Prime Minister Ali Larayedh as, perhaps incredulously, complaining of legal impediments to preventing Tunisian nationals from becoming foreign fighters abroad).

prolongation of foreign-fighter flows by allowing foreign volunteers to transit through their territory to reach a conflict zone or by affording them safe haven during or after the armed conflict in which they participate.

Historically speaking, State-of-origin approval of or acquiescence to local recruitment of foreign fighters has been a significant contributor to the scale of foreign-fighter mobilizations. For example, "[I]t seems likely that passive state support for the Arab Afghans was a necessary cause of the post-1980 proliferation of foreign fighters, but it was not sufficient."[95] The same appears to be true for many States of origin whose nationals participated as foreign fighters in the armed conflicts in Syria[96] or the armed conflict in Ukraine.[97]

State-of-origin motivations for allowing their nationals to depart for foreign conflict zones are diverse and interacting. Sometimes State-of-origin approval of or acquiescence to foreign fighter recruitment results from governmental sympathy with the objectives of the belligerent party that the fighters intend to support.[98] In other circumstances, States of origin may hope to reap near-term domestic political or security benefits from allowing would-be domestic dissidents to depart their territory and join a faraway fight.[99] Alternately, States of origin may encourage or tolerate foreign-fighter

95. Hegghammer, *supra* note 7, at 68.

96. *E.g.*, Maria Tsvetkova, *How Russia Allowed Homegrown Radicals to Go and Fight in Syria*, REUTERS (May 13, 2016, 1:15PM), https://www.reuters.com/investigates/special-report/russia-militants; Mohammed Masbah, *Moroccan Foreign Fighters: Evolution of the Phenomenon, Promotive Factors, and the Limits of Hardline Policies*, 46 SWP COMMENTS 1 (Oct. 2015) ("With a contingent of around 1,500 fighters, Morocco is considered one of the main exporters of foreign fighters to Syria. Until 2014, Moroccan authorities, who were content to see their own jihadis leave and add to the pressure on Bashar al-Assad, mostly turned a blind eye to networks of recruitment.").

97. *See, e.g.*, Ben Makuch, *Foreign Fighters are Becoming Battle-Hardened, and Dying, in Ukraine*, VICE NEWS (Aug. 11, 2022, 12:30PM), https://www.vice.com/en/article/jgp5pb/ukraine-foreign-fighters-us-volunteers (reporting that nationals of fifty-five countries, including Canada, Finland, Georgia, Sweden, Poland, South Korea, Norway, Spain, and Israel have participated on the Ukrainian side of the Russo-Ukraine war); Thomas Gibbons-Neff, Valerie Hopkins & Jane Arraf, *For Foreign Fighters in Ukraine, a War Unlike Any They've Seen*, N.Y. TIMES (July 7, 2022) (noting the contribution of foreign fighters from the United States and the United Kingdom to the Ukrainian effort to resist Russian aggression).

98. *E.g.*, ARIELLI, *supra* note 3, at 150 ("[I]n some cases governments were very sympathetic toward citizens who wished to serve causes that were perceived as justified, as the Swedish policy regarding volunteering for Finland in 1939–1940 illustrates."); Hegghammer, *supra* note 7, at 62 ("Arab Gulf states and Western governments acquiesced to foreign fighter recruitment [during the anti-Soviet *jihad*]."); *see also* ZELIN, *supra* note 23, at 180 (noting the possibility that Tunisia's al-Nahdah government's sympathy with the objective of overthrowing the Assad regime contributed to Tunisian foreign-fighter flows to the Syrian Civil War).

99. *E.g.*, ARIELLI, *supra* note 3, at 150 ("There is also some evidence to suggest that, on a few rare occasions, some governments saw the outbreak of an ideologically charged conflict abroad as an opportunity to get rid of troublesome extremists. . . . According to Milton Bearden, who served as the CIA's station chief in Pakistan between 1986 and 1989, 'a number of Arab states discreetly emptied their prisons of homegrown troublemakers and sent them off to the jihad [in Afghanistan] with the

recruitment and transit to achieve or support their own foreign policy objectives.[100] These disparate motivations are not mutually exclusive and, in combination, may explain the most significant foreign-fighter flows. For example, "Stalin sent [to Spain] a seed force of 500 to 600 foreign Communists who had arrived in the Soviet Union as political refugees, whom he had wanted to unload for some time [before their travel to Spain] . . . ."[101] At different times, States have simply looked the other way as their nationals departed for foreign conflict zones, refused or failed to enforce domestic laws prohibiting foreign enlistment, or discriminately applied such laws based on the political identity or ideological motivations of their nationals and the parties their departing nationals intended to support.[102]

States of origin also play a role in prolonging the foreign-fighter phenomenon by adopting ultimately counterproductive policies that prevent or dissuade the return of their nationals. For example, such States may refuse to repatriate their nationals who have participated as foreign fighters in conflicts abroad.[103] They may also effectively exile[104] their

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fervent hope that they might not return.'"); MALET, *supra* note 1, at 125 ("One American recruit [to the International Brigades in Spain] claimed to have served with three Palestinian Jews that the British Mandate government had been so eager to get rid of that it had paid their transportation costs to Spain."); *id.* at 172–73 ("The governments of various Muslim countries also permitted or actively facilitated recruitment for Afghanistan, hoping to simultaneously gain favor with the United States and domestic legitimacy by supporting Islam, as well as taking the opportunity to unload militants and troublemakers."); *see also* ZELIN, *supra* note 23, at 180 (recounting that leader of the Tunisian al-Nahdah party advised a father of one foreign fighter that "[i]t is better for your son to die in Syria than here").

100. *See* Krähenmann, *supra* note 29, at 231 ("States of origin and transit States may encourage, tolerate or ignore foreign fighter mobilization for policy reasons. Indeed, during the Iraqi insurgency, Syria was repeatedly accused of willingly ignoring or even abetting the foreign fighter mobilization in order to destabilize its neighbour."); *see also* Brownlie, *supra* note 27, at 578 (suggesting that States may tolerate the departure of their nationals to become foreign fighters as a means to achieve foreign policy objectives); *cf.* ARIELLI, *supra* note 3, at 124–25 (arguing that "foreign policy considerations and international obligations do not, on their own, account for the policies of home states" tolerating their nationals becoming foreign fighters, and that, instead, "in several cases [their tolerance is explained] primarily [by] domestic politics and considerations of political expediency").

101. Malet, *supra* note 5, at 38–40 (describing Stalin's use of foreign Communists residing in the Soviet Union to organize apparently non-Communist, nationality-based brigades in Spain); MALET, *supra* note 1, at 97.

102. *E.g.*, ARIELLI, *supra* note 3, at 125–38 (describing examples of disparate enforcement of domestic legislation prohibiting nationals from voluntarily participating in foreign armed conflicts across the United States, the United Kingdom, Canada, Ireland, Sweden, Switzerland, and the Soviet Union).

103. For example, many States of origin that contributed foreign fighters to the Islamic State in Iraq and Syria have persistently refused or failed to repatriate their nationals from the custody of Syrian Democratic Forces. *See, e.g.*, Benjamin R. Farley, *The Syrian Democratic Forces, Detained Foreign Fighters, and International Security Vulnerabilities*, ARTICLES OF WAR (Oct. 24, 2022), https://lieber.westpoint.edu/syrian-defense-forces-detained-foreign-fighters-international-security-vulnerabilities.

104. Significantly, international law prohibits States from exiling their nationals in most circumstances. International Covenant on Civil and Political Rights art. 12(4), Dec. 19, 1966, 999 U.N.T.S. 171 ("No one shall be arbitrarily deprived of the right to enter his own country."); *see* G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 13(2) (Dec. 10, 1948) ("Everyone has the

nationals who become foreign fighters by expatriating or denaturalizing them.[105] Or States of origin may dissuade their nationals from returning home by imposing harsh security or criminal measures upon their return.[106] Malet, for example, argues that

> after the conclusion of the 1980s round of civil war in Afghanistan, mujahidin were refused entry or persecuted by home governments that feared they would continue their jihadist activities rather than settle down to normal daily lives. The fact that virtually all foreign fighters in Texas [during the 1830s], Spain [during the 1930s], and Israel-Palestine [during the 1940s], even those who had previously been involved in contentious politics, reintegrated into civilian life in their home countries is an indication that this policy actually perpetuated the jihad and contributed to its global diffusion. Both Muslim Brothers and Communist revolutionaries in prior decades were perceived as legitimate revolutionary threats by their home governments, and yet they were reclaimed rather than left to further organize transnationally. A similar comparison may be drawn with the nineteenth-century anarchists who were also exiled by their governments and traveled between different underground groups, becoming "connectors" who passed along best practices to violent activists in other countries.[107]

Thus, the failure of States of origin to repatriate and reintegrate those of their nationals who have become foreign fighters appears to be a

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right to leave any country, including his own, and to return to his country."). The U.N. Human Rights Committee has held that "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable." U.N. Human Rights Comm., General Comment 27, Freedom of Movement (Article 17), ¶ 21, U.N. Doc CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999).

105. Christophe Paulussen, *Stripping Foreign Fighters of their Citizenship: International Human Rights and Humanitarian Law Considerations*, 103 INT'L REV. RED CROSS 605, 607–08 (2021) ("[C]itizenship stripping or deprivation of nationality [is] a measure more and more used by states in the counterterrorism and national security context, including against alleged foreign (terrorist) fighters.").

106. *E.g.*, Hafez, *supra* note 9, at 81 ("Many [Arab Afghans], especially Egyptians, Algerians, Syrians, Iraqis, and Libyans, could not go home after serving in Afghanistan because they knew what awaited them there."); *id.* ("Talat Fuad Qasim, one of the leaders of the Egyptian Islamic Group, explained in 1994 why his militants were in Pakistan and Afghanistan: 'The Egyptian Government has closed in on the brothers in Al-Minya and Asyut [in Upper Egypt] and forced them to leave for Cairo, Alexandria, and other governorates . . . . They were also harassed in other governorates and were forced to leave the country. They traveled to Afghanistan and Pakistan, where they found support from God on all levels.'") (alterations and omissions in the original); *id.* at 85 ("Some of the Arab Afghans were unwillingly absorbed into global *jihadism* because they could not go back home and many governments were unwilling to take them in. According to a Saudi speaking for the Arab Afghans in Jeddah during the early 1990s, 'the Algerians cannot go to Algeria, the Syrians cannot go to Syria or the Iraqis to Iraq. Some opt to go to Bosnia, the others have to go into Afghanistan permanently.'").

107. MALET, *supra* note 1, at 209; *see, e.g.*, *id.* at 185 (quoting YORAM SCHWEITZER & SHAUL SHAY, THE GLOBALIZATION OF TERROR 56–58 (2003)).

significant driver of the prolongation of the foreign-fighter phenomenon. Indeed, denaturalization in particular tends to merely displace the risk posed by foreign fighters to other jurisdictions,[108] potentially imposing it on the international system generally.

At the same time, bystander States may contribute to the persistence of the foreign-fighter phenomenon by providing foreign fighters with safe haven or by tolerating the transit of foreign fighters through their territory.[109] Like States of origin that tolerate foreign-fighter recruitment, these third States may allow foreign fighters to use their territory in pursuit of their own domestic political objectives,[110] or foreign policy goals,[111] or out of ideological sympathy. Pakistan, for example, provided Arab Afghans with safe haven following the anti-Soviet *jihad* in part to leverage those foreign fighters in Afghanistan and Kashmir.[112] Irrespective of their motivation, by affording safe haven to veteran foreign fighters, these third States contribute to the persistence of the foreign-fighter phenomenon.

Finally, the combination of the foregoing motivations may also contribute to the prolongation of the foreign-fighter phenomenon. For example, following the involvement of Arab Afghans in terrorist attacks in Egypt, Algeria, and the United States, international pressure finally caused Pakistan to crack down on their presence in Peshawar.[113] "[S]ubsequently, a few dozen veterans of the struggle in Afghanistan went on to fight in Bosnia,"[114] where they led and enhanced the capabilities of a new manifestation of the foreign-fighter phenomenon.[115] A similar process may

108. *See, e.g.*, Forcese & Mamikon, *supra* note 24, at 334–35.

109. *E.g.*, Krähenmann, *supra* note 29, at 231.

110. *E.g.*, Hafez, *supra* note 9, at 84 ("[In] the case of Yemen . . . returning Arab Afghans were given a haven and deployed against the socialist establishment of the former South Yemen. In 1994 a civil war broke out between the North and South, and the Arab Afghans served as foot soldiers for the Northern establishment.").

111. *E.g.*, *id.* at 83 ("Hassan al-Turabi [the Islamist leader of Sudan who came to power in a military coup in 1989] welcomed [Osama] bin Laden and his Arab Afghans in order to benefit from bin Laden's largesse.").

112. *Id.* at 81; *id.* at 83–84.

113. ARIELLI, *supra* note 3, at 61.

114. *Id.*

115. *Id.*

be occurring with respect to Chechen[116] and Uzbek foreign fighters who joined ISIS and who may now be traveling to Ukraine to fight Russia.[117]

D. Scale of the Foreign-Fighter Challenge to International Security

Although the phenomenon of individuals departing their States of origin or habitual residence to voluntarily participate in a foreign armed conflict has persistently recurred for more than 250 years, it is worth considering whether the phenomenon itself poses such a threat to international security that it warrants international legal regulation. Importantly, it is almost a truism in political science and international relations literature that even the most significant foreign-fighter flows have contributed less than ten percent of the combat person-power to the armed conflicts inspiring their mobilization. For example, writing before the foreign-fighter mobilization to Syria, Hegghammer found that

> [r]eliable numbers of participants do not exist, but the distribution of estimates is bimodal, with five cases of more than 1,000 fighters and thirteen of fewer than 300. Two cases ([Afghanistan during the anti-Soviet *jihad* and Iraq following the United States' 2003 invasion]) included more than 4,000 fighters. In every case, foreign fighters constituted a very small proportion of the total number of combatants . . . .[118]

At the same time, however, the phenomenon itself has persistently recurred over the last 250 years, suggesting that some consideration of international legal regulation is warranted. Moreover, the presence or absence of foreign fighters has demonstrably affected the armed conflicts in which they do or do not participate. Quantitatively, Malet found that OAGs that employed foreign fighters were more likely to succeed in NIACs than those that did not.[119] Qualitatively, foreign fighters have, in a variety of

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116. *E.g.*, Michael Starr, *Why is an Ex-Syria War Jihadist Fighting for Ukraine Against Russia?*, JERUSALEM POST (Jan. 10, 2023, 3:11PM), https://www.jpost.com/international/article-728127 (identifying Rustam Azhiev (aka Abdul Hakim al-Shishani) as the leader of "the Special Purpose Battalion of the Ministry of Defense of the Chechen Republic of Ichkeria," an all-Chechen unit of the International Legion for the Defence of Ukraine). Al-Shishani presents a particularly interesting case study because he reportedly fought against Russia during the Second Chechen War, left Chechnya for Turkey to receive medical care, and subsequently found himself exiled in Turkey along with other similarly situated Chechens. Al-Shishani, a self-described *jihadist*, later served as emir of Ajnad al-Kavkaz during the Syrian Civil War.

117. @azelin, TWITTER (Jan. 7, 2023, 5:05PM), https://twitter.com/azelin/status/1611846531186925570?s=20&t=HgjF5DpWNg8h_In-AWFmAQ (commenting on report that Chechen and Uzbek foreign fighters have departed Syria for Ukraine to fight against Russia).

118. Hegghammer, *supra* note 7, at 60.

119. MALET, *supra* note 1, at 50–51.

armed conflicts, improved the combat effectiveness of the parties to which they adhere by providing skills those parties lacked indigenously, by training parties' fighters, or, most gruesomely, by serving as suicide bombers when local fighters would not.[120]

Additionally, even if relatively few foreign fighters participate in domestic violence upon their return to their States of origin,[121] voluntary participation in an armed conflict abroad is the best predictor that a national or habitual resident will engage in domestic terrorism.[122] Worryingly, the participation of one experienced foreign fighter in domestic terrorism correlates with an increased likelihood of both the success of and the significance of a domestic terrorist act.[123] But the State-of-origin fixation on the near-term domestic security challenges posed by returning foreign fighters in recent decades has tended to blind them to the longer-term and system-wide security threat posed by their failure (or refusal) to securely recover their nationals who have become foreign fighters. This fixation, along with worries over the domestic political consequences of a violent attack perpetrated by a returned foreign fighter, has encouraged States of origin to embrace policies that create permanently dislocated and combat-experienced cadres of foreign fighters that are more likely, for lack of alternatives, to participate in subsequent armed conflicts and, thereby, further threaten international peace, security, and stability.

Taken together, the potential effects of foreign fighters on specific armed conflicts, the threat they may pose to their State of origin or habitual residence upon return, the threat they may pose to additional States should they fail to return and instead move on to subsequent conflict zones, and the persistence and recurrence of the phenomenon suggest that the

120. *E.g.*, *id.* at 127, 130–36 (describing Hagenah and Irgun efforts to recruit foreign fighters with combat or specialized experience, like pilots or merchant mariners, to support the Israeli war for independence); *id.* at 196–97 (noting the propensity of suicide bombers in the insurgency following the U.S. invasion of Iraq in 2003 to be foreign—not local—fighters).

121. *See, e.g.*, Thomas Hegghammer, *Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting*, 107 AM. POL. SCI. REV. 1, 6–7 (2013) (estimating that, between 1990 and 2010, one in nine *jihadists* from the West—defined to include North America, Western Europe, and Australia—returned to the West, so defined, and participated in an act of local terrorism).

122. *Id.* at 10 ("My data . . . indicate that no more than one in nine foreign fighters returned to perpetrate attacks in the West (107 returnees against 945 foreign fighters). . . . [A] one-in-nine radicalization rate would make foreign fighter experience one of the strongest predictors of individual involvement in domestic operations that we know. The predictive power of other biographic variables—whether nationality, economic status, or any other biographical trait studied so far—does not come close.").

123. *Id.* at 11 (finding that 58 percent of all executed *jihadist* attacks in North America, Western Europe, and Australia between 1990 and 2010 involved at least one veteran foreign fighter); *id.* (finding that 16 percent of terrorist plots by *jihadists* in North America, Western Europe, and Australia between 1990 and 2010, which involved veteran foreign fighters, resulted in fatalities, whereas only 7 percent of similar plots that did not involve veteran foreign fighters resulted in fatalities).

phenomenon itself is an international security challenge worthy of international legal regulation.

And international law is well positioned to mitigate the international security challenges posed by the foreign-fighter phenomenon. Critically, the recurrence, scale, and prolongation of foreign-fighter mobilizations appear to be linked, at least in part, to State-of-origin policy choices—choices like whether to tolerate the departure of their nationals for foreign conflict zones, and whether to resist or impede the repatriation of those nationals once they have participated in a foreign armed conflict. Essentially, opportunistic behavior on the parts of States of origin gifts to the international community sprawling, long-term collective-action problems. International law that imposes neutral obligations on all States is especially well-suited to cabin the short-term self-interest of States and to solve international collective-action problems.

III. FOREIGN FIGHTERS IN THE CONTEXT OF INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM

Although it does not *specifically* regulate the foreign-fighter phenomenon, international law already contains several tools that could help mitigate the challenges posed by the phenomenon. For example, the principle of non-intervention and the duty to prevent harm both impose obligations on States designed to prevent them from fomenting or knowingly tolerating transnational harms not dissimilar to those manifested by their nationals who become foreign fighters. Extending these principles to embrace activity that, arguably, presently falls below their ambit would subject a discretionary realm of State behavior to legal regulation in a manner likely to dampen initial foreign-fighter flows. International law could address the other end of the foreign-fighter life cycle by extrapolating and generalizing State-of-origin repatriation obligations that attach, subject to the principle of *non-refoulement*, in certain conflict and non-conflict situations, such as after the conclusion of an IAC or when a national is deported. These modest extensions—extensions that would accord with the policies underlying the principles mentioned, as well as other domains of international law like neutrality law—would tend to restrict the number of States of origin contributing nationals to foreign-fighter flows, restrain the number of nationals who depart even the remaining States of origin, and encourage swifter repatriation of foreign fighters to their States of origin during or after armed conflicts of whatever character, which would limit subsequent or onward foreign-fighter mobilizations.

Additionally, extending existing principles of international law to embrace the foreign-fighter phenomenon is likely to find greater support in

the international community than is often assumed. Insufficient political will is often cited to explain the failure of States to adopt new modes of international regulation in general. It is also often cited, in particular, to explain the unwillingness on the part of States of origin to repatriate their nationals from northeast Syria.[124] Nevertheless, the international community *has* repeatedly attempted to address specific manifestations of the foreign-fighter phenomenon by establishing ad hoc and sui generis regulatory regimes. Irrespective of the success of such efforts, they indicate both a recognition of the importance of an international system-level response to foreign fighters and at least a periodic willingness to formulate such a response. The most recent such effort, UN Security Council Resolution 2178, novelly embraces a prospective approach to the problem, hopefully providing a precedent for more general and effective international regulation of the phenomenon.

This part describes the existing tools of international law that, if extended, could effectively restrain the foreign-fighter phenomenon by addressing the departure and return phases of the foreign-fighter life cycle. It then analyzes three international efforts to address specific manifestations of the phenomenon in the last century in order to illuminate both the political willingness to restrain it and the means by which to do so.

A. Existing International Law Could Be Extended to Regulate the Foreign-Fighter Phenomenon

Existing principles of international law could be extended to restrain the recurrence of the foreign-fighter phenomenon by acting on two stages of the foreign-fighter life cycle—departure and return—and clarifying the legal and international security responsibilities of States of origin. First, the principles of non-intervention and prevention of harm impose duties on States not to tolerate or acquiesce to the departure of their nationals to foreign conflict zones for the purpose of overthrowing the existing political order in States embroiled in armed conflict.[125] These principles also demand that bystander States not tolerate or acquiesce to the transit or presence of foreign nationals who intend to contest the existing political order in conflict States. Neutrality law tends to corroborate the obligation of States of origin

124. *E.g.*, Beatrice Eriksson, *As Women and Children Return to the West from Syrian Camps, Lessons from Sweden*, JUST SECURITY (Dec. 6, 2022), https://www.justsecurity.org/84311/as-women-and-children-return-to-the-west-from-syrian-camps-lessons-from-sweden/ ("The Kurdish administration has appealed repeatedly to the international community to repatriate the approximately 10,000 third-country nationals who are not from Iraq, but the leaders of many of those countries have lacked the political will to live up to their legal and humanitarian responsibilities.").

125. *See, e.g.*, Krähenmann, *supra* note 29, at 231–33.

and bystander States to prevent such foreign-fighter flows.[126] Second, both general public international law and international humanitarian law (IHL) either explicitly require or imply an obligation on the part of States of origin to accept the repatriation of their nationals in circumstances that are often relevant to efforts to restrain the foreign-fighter phenomenon. This part discusses these principles of international law in the context of foreign fighters, as well as human-rights-based limitations on both restraining the departure of nationals or habitual residents, and on State-of-origin authority to recover them.

1. Existing International Law and the Departure of Foreign Fighters

Customary international law prohibits States from intervening directly or indirectly in the internal or external affairs of other States.[127] The principle of non-intervention "involves the right of every sovereign State to conduct its affairs without outside interference."[128] As a corollary to the formal, sovereign equality of all States,[129] the principle prohibits States from interfering with the sovereign prerogatives of other States, including their choices of political system or foreign policy.[130] It likewise prohibits States

126. *Cf.* Ashley Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 497–503 (2012) (noting that neutrality law "establishes rules to guarantee to belligerent states that neutral states will not permit their territory to be used by another belligerent as a safe harbor or a place from which to launch attacks" and that this rule extended to the activities of non-State actors).

127. *E.g.*, G.A. Res. 2625 (XXV) (Oct. 24, 1970); The Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act), 14 ILM 1292, art. VI (Aug. 1, 1975) ("The participating States will refrain from any intervention, direct or indirect . . . in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations. . . . Accordingly, they will . . . refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State."); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 162 (Dec. 19) (finding that "the duty to refrain from organizing, instigating, assisting . . . in acts of civil strife . . . in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force[]" and the prohibition on States "organiz[ing] assist[ing], foment[ing], finance[ing], incit[ing] or tolerat[ing] subversive . . . or armed activities directed towards the violent overthrow of the regime of another State, or interfer[ing] in civil strife in another State" are "declaratory of customary international law"); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 205 (June 27) ("[I]n view of the generally accepted formulations, the principle [of non-intervention] forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States.").

128. Nicar. v. U.S., 1986 I.C.J. at ¶ 202; *id.* ("'Between independent States, respect for territorial sovereignty is an essential foundation of international relations' . . . and international law requires political integrity also to be respected.") (citing and quoting from 1949 I.C.J. at 35). Of course, "examples of trespass against this principle are not infrequent[.]" *Id.*

129. *Id.*

130. *Id.* ¶ 205.

from, *inter alia*, even *tolerating* subversive or armed activities "directed towards the violent overthrow of the régime of another State."[131]

At the same time, the range of State behavior prohibited by the principle of non-intervention has not been definitively resolved in international law. It is clear that direct military intervention, as in the case of Uganda's intervention in the Democratic Republic of the Congo (DRC), violates the principle.[132] Even merely providing financial, logistical, training, intelligence, or materiel support to armed militants contesting a foreign State's government violates the principle of non-intervention, as was the case concerning U.S. assistance to the *contras* in Nicaragua.[133] Moreover, such activities may violate not only the principle of non-intervention, but also the principle prohibiting the use of force.[134]

There is, of course, a qualitative difference between merely allowing nationals to travel to a conflict zone and a State affirmatively organizing, arming, training, or supplying them with intelligence to facilitate their participation in a foreign armed conflict. Nevertheless, the principle of non-intervention prohibits mere tolerance of subversive activities that have the purpose of overthrowing the regime of another State or participating in the civil strife within another State.[135] For example, the United States explained its efforts to prevent American "adventurers"—foreign fighters—from participating in the Upper Canadian Rebellion in 1837 in terms of the principle of non-intervention.[136] More recently, during the 1990s, the United States repeatedly complained about the presence of Osama bin Laden and al Qaeda in Afghanistan to Taliban representatives. Between 1998 and 2001, the United States repeatedly warned the Taliban that it would hold the de facto government of Afghanistan responsible for future terrorist attacks targeting the United States authored by al Qaeda.[137] Similarly, the Soviet Union complained about foreign fighters and foreign support to the anti-Soviet *jihad* in Afghanistan. The issue was so important to the Soviet Union that the Geneva Accords, the agreement ending the Soviet presence in Afghanistan, even included a symmetrical guarantee to end foreign

131. G.A. Res. 2625, *supra* note 127.

132. Dem. Rep. Congo v. Uganda, 2005 I.C.J. at ¶ 164.

133. Nicar v. U.S., 1986 I.C.J. at ¶ 242; *see also* Dem. Rep. Congo v. Uganda, 2005 I.C.J. (entertaining—but ultimately finding unproved—the proposition that the DRC's supposed tolerance of anti-Ugandan militants in the two States' border region violated the principle of non-intervention.)

134. Dem. Rep. Congo v. Uganda, 2005 I.C.J. at ¶ 164.

135. Brownlie, *supra* note 27, at 578 ("The toleration of departure of large numbers of volunteers accompanied by bad faith . . . might fall within other offences [under international law, like] the harbouring of armed bands, fomenting civil strife, or other forms of international interference in internal affairs.").

136. Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, U.K. Foreign Secretary (July 27, 1842), enclosure 1, https://avalon.law.yale.edu/19th_century/br-1842d.asp.

137. *E.g.*, FINAL REP. OF THE NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S. (9/11 Comm'n Rep.) at 176.

intervention in that armed conflict.[138] More than twenty years later, Syria repeatedly "denounced the participation of foreign fighters as an unlawful interference,"[139] as did Ukraine in relation to Russian volunteers in the armed conflict in Eastern Ukraine in 2014.[140]

At the same time, international law does not require a State to act beyond its capabilities.[141] Rather, States are often required to exercise due diligence with respect to risks or threats emanating from their territory. In such contexts, due diligence refers to an obligation of conduct rather than an obligation of effect.[142] States are required to "deploy adequate means . . .

138. Geneva Accords of 1988 (Afghanistan): Agreements on the Interrelationships for the Settlement of the Situation Relating to Afghanistan, Afg.-Pak., Apr. 14, 1988, ¶ 5 ("In accordance with the time-frame agreed upon between the Union of Soviet Socialist Republics and the Republic of Afghanistan there will be a phased withdrawal of the foreign troops which will start on the date of entry into force mentioned above.").

139. Krähenmann, *supra* note 29, at 232 n.13 (citing U.N. Doc. S/2014/426 (June 20, 2014)).

140. *Id.* (citing U.N. Doc. S/2014/426 (June 20, 2014)).

141. Dem. Rep. Congo v. Uganda, 2005 I.C.J. at ¶ 301 ("The Court has noted that, according to Uganda, the rebel groups were able to operate 'unimpeded' in the border region between the DRC and Uganda 'because of its mountainous terrain, its remoteness from Kinshasa (more than 1,500 km), and the almost complete absence of central government presence or authority in the region during President Mobutu's 32-year term in office'. During the period under consideration both anti-Ugandan and anti-Zairean rebel groups operated in this area. Neither Zaire nor Uganda were in a position to put an end to their activities. However, in the light of the evidence before it, the Court cannot conclude that the absence of action by Zaire's Government against the rebel groups in the border area is tantamount to 'tolerating' or 'acquiescing' in their activities."); Nicar. v. U.S., 1986 I.C.J. at ¶ 157 ("[I]f the flow of arms [from Nicaragua] is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States. In particular, when Nicaragua is blamed for allowing consignments of arms to cross its territory, this is tantamount, where El Salvador is concerned, to an admission of its inability to stem the flow. . . . More especially, to the extent that some of this aid is said to be successfully routed through Honduras, this accusation against Nicaragua would also signify that Honduras, which is not suspected of seeking to assist the armed opposition in El Salvador, is providing involuntary proof that it is by no means certain that Nicaragua can combat this clandestine traffic any better than Honduras. As the means at the disposal of the governments in the region are roughly comparable, the geographical obstacles, and the intrinsic character of any clandestine arms traffic, simply show that this traffic may be carried on successfully without any complicity from governmental authorities, and even when they seek to put a stop to it. Finally, if it is true that the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadorian armed opposition supplied, this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal for subduing this traffic if it takes place on its territory and the authorities endeavour to put a stop to it."); *cf.* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. at 18 ("But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors.").

142. *See, e.g.*, Federica Violi, *The Function of the Triad 'Territory,' 'Jurisdiction,' and 'Control' in Due Diligence Obligations*, *in* DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER 75, 76 (Heike Krieger, Anne Peters, Leonhard Kreuzer eds., 2020) (arguing that "the presence of risk justifies the construction of due diligence obligations as obligations of conduct, when obtaining a certain result would be excessively burdensome for states").

to do the utmost, to obtain [a specific] result";[143] they are not held responsible should they fail to obtain that result. Thus, whether a State violates the principle of non-intervention in allowing its nationals to depart its territory to participate in a foreign conflict zone will depend on the State's knowledge of its nationals' intent and its capacity to interdict such travel.

Relatedly, the principle of harm prevention requires States to exercise due diligence to prevent their territory from being knowingly used in a way that is harmful to another State.[144] It thus demands that States not acquiesce to private activity within their territory that is directed at participation in foreign civil strife.[145] States' due-diligence obligations with respect to prevention of harm turn on their knowledge of the activity giving rise to the harm. The obligations apply when the State "should or ought to have known about the risk and have the effective power and tools to intervene" to prevent or address the risk.[146] But, like the principle of non-intervention, the principle of harm prevention does not require States to do that of which they are incapable, given prevailing circumstances. For example, the International Court of Justice (ICJ) found that the DRC had not violated this principle by failing to quell the activities of anti-Uganda militants operating on its border, because the DRC possessed limited governmental capacity and because the militants operated in—and were protected by—especially rugged terrain.[147] Thus, "the degree of effective control [a State enjoys over its territory is] a factor when measuring the standard of diligence requested in a specific circumstance,"[148] even as a State is generally presumed to control its territory at international law.[149] At the same time,

143. *E.g.*, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 10 ITLOS Reports at ¶ 110 (2011).

144. Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 300 (Dec. 19) (explaining that the content of the principle of vigilance is, at least in part, reflected in the Declaration on Friendly Relations' admonition, 'declaratory of customary international law,' that "'every State has the duty to refrain from . . . acquiescing in organized activities within its territory directed towards the commission of such Acts' (e.g., terrorist acts, acts of internal strife) and also 'no State shall . . . tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State . . . .'"); U.K. v. Alb. 1949 I.C.J. at 22; *see also* Dem. Rep. Congo v. Uganda, 2005 I.C.J. at ¶¶ 300–03 (determining that DRC had not violated its duty of vigilance with respect to the operation of anti-Uganda militants operating in the DRC-Uganda border region on the basis of the DRC's limited governmental capabilities and the difficulty of the terrain in which those militants operated); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. at ¶ 430 (Feb. 26) (limiting a State's due-diligence obligation to prevent genocide to its capacity to do so).

145. Dem. Rep. Congo v. Uganda, 2005 I.C.J. at ¶ 300.

146. *E.g.*, Violi, *supra* note 142, at 76–77.

147. Dem. Rep. Congo v. Uganda, 2005 I.C.J. at ¶ 303.

148. Violi, *supra* note 142, at 77; Sambiaggio Case (It. v. Venez.), 10 R.I.A.A 499, 512 (Mixed Claims Comm'n 1903).

149. Violi, *supra* note 142, at 77–78.

States' failure to control their territory in fact may not always provide an excuse for their failure to exercise due diligence.[150]

Together, these principles suggest that States of origin that knowingly tolerate the departure of their nationals or habitual residents from their territory in order to participate in a foreign a conflict zone without destination-State consent commit an international wrong, so long as they possess the capacity to prevent or impede those departures. Similarly, the principle of harm prevention indicates that States that knowingly allow their territory to become a transit vector or safe haven for foreign fighters targeting another State perpetrate an internationally wrongful act.

Even if the principles of non-intervention and harm prevention oblige States not to knowingly allow their nationals to depart their territory to participate in armed conflicts abroad, subject to their capacity, the principles say nothing about a State's obligation to recover or repatriate those of its nationals who become foreign fighters. That means that while it may be internationally wrongful for a State to allow its nationals to become foreign fighters, international law must look elsewhere for an obligation on the part of States to repatriate them.

One source of such an obligation might be found in the secondary rules of State Responsibility and the duty to make reparations for an international wrong.[151] Reparations may take a variety of forms at international law,[152] including restitution, which is designed to "re-establish the situation which existed before the wrongful act was committed,"[153] so long as doing so is neither "materially impossible," nor "involve[s] a burden out of all proportion to the benefit deriving from [the] restitution instead of compensation."[154] In situations where States have knowingly tolerated or acquiesced to the travel of their nationals to foreign conflict zones in a manner that offends the duties of non-interference or prevention of harm, restitution might consist, in part, of the wrongful State recovering its nationals.

Notwithstanding the potential application of these principles to the foreign-fighter phenomenon, actual State practice suggests that States regard the departure of their nationals to participate in foreign armed conflicts as

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150. *See, e.g.*, Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A 829, 831 (Perm. Ct. Arb. 1928) (identifying due-diligence obligations as a corollary duty of sovereignty).

151. Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at art. 31 (2001) ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.").

152. *Id.* art. 34 ("Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.").

153. *Id.* art. 35.

154. *Id.*

falling below the threshold of international legal regulation of interference or due diligence. Clarifying that these principles reach scenarios in which States of origin knowingly tolerate the departure of their nationals for participation in foreign armed conflicts could help restrain foreign-fighter mobilizations. In such circumstances, it would no longer be permissible for a State to simply look the other way as its nationals leave for a battlefield abroad. Instead, States that knowingly allow their nationals to become foreign fighters would perpetrate an international wrong, engaging their responsibility vis-à-vis victim States. Thus, the departure of a State of origin's nationals would cause the State of origin to incur legal costs in the form of being a wrongdoer and in the form of responsibility to repair the wrong—possibly by repatriating those of their nationals who become foreign fighters.

2. Existing International Law and the Repatriation of Foreign Fighters

Although no specific international legal obligation requires States to recover those of their nationals who have become foreign fighters, international law does not accept that mere departure of a national from the territory of her State of origin or habitual residence severs the relationship between the national and their sovereign. Indeed, it is quite the opposite: international law imposes explicit or implicit obligations on States of origin to repatriate their nationals in a number of circumstances.[155]

i. Deportation and Repatriation

Repatriation in consequence of deportation from a foreign State provides a particularly salient example of the continuing obligation of States of origin vis-à-vis their nationals when they travel abroad. Customary international law appears to require States of origin to repatriate their nationals when they are deported from the territory of another State.[156]

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155. For example, international law prohibits States from "arbitrarily" depriving their nationals abroad of their right to return to their States of origin. International Covenant on Civil and Political Rights art. 12(4), Dec. 16, 1966, 999 U.N.T.S. 171; *see also* G.A. Res. 217(III)A, Universal Declaration of Human Rights, art. 13 (Dec. 10, 1948). The Human Rights Committee, the ICCPR's treaty monitoring body, has authoritatively commented that "there are few, if any, circumstances in which deprivation of the right to enter one's own country would be reasonable." Human Rights Committee, General Comment 27 art. 12 ¶ 21 U.N. Doc CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999). The right of return not only guarantees the ability of nationals to re-enter their State of origin, it prohibits, by negative implication, States from actually or constructively exiling their nationals in almost all circumstances.

156. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 56–57 (2014) (expressing, as part of its draft articles on the expulsion of aliens, that "it is undisputed that [an expelled alien's] State [of origin] has an obligation to receive the alien under international law"); *see* Convention on the Status of Aliens, art. 6, Feb. 20, 1928, 46 Stat. 2753, *reprinted in* 22 AM. J. INT'L L. 136 (Supp. 1928) ("For reasons of public order or safety, states may expel foreigners domiciled,

According to the International Law Commission, this rule is "undisputed" in State practice.[157] Moreover, the right of States to expel aliens from their territory is an incident of their sovereignty that has been affirmed by several arbitral decisions dating back more than a century.[158] That right cannot be vindicated without the existence of a corresponding obligation on such aliens' States "of nationality or any other State that has the obligation to receive the alien under international law[.]"[159]

ii. International Humanitarian Law and Repatriation

As with international law's general obligation that States accept the repatriation of their nationals upon deportation, IHL imposes or implies an obligation on the part of States of origin to accept the repatriation of their nationals—at least in certain circumstances. Perhaps more importantly, the presence of these obligations in IHL in *some* circumstances—and the silence of IHL in all other circumstances—indicates that unauthorized participation in foreign armed conflicts does not sever the juridical relationship between a State and its nationals. Moreover, IHL does not appear to provide an excuse or justification for States to refuse to accept the repatriation of their nationals.

With respect to IACs, States may have an affirmative obligation to repatriate certain of their nationals who have been deprived of their liberty in the course of those hostilities. At the end of such armed conflicts, IHL implies a requirement for States of origin to accept the repatriation of their nationals who have become prisoners of war (POWs) by imposing an obligation on detaining powers to repatriate POWs without delay upon the cessation of hostilities.[160] Likewise, IHL implies a requirement for States of origin to accept the repatriation, during the pendency of an IAC, of their nationals who, while POWs, are seriously sick or seriously wounded.[161]

While the Third Geneva Convention (GC III) does not explicitly require a State of origin to re-admit its nationals, such a State's refusal to do so would frustrate a detaining power's efforts to satisfy its obligations under the Convention. Indeed, Article 118 anticipates detaining powers and POWs' States of origin agreeing to a plan to effect the POWs' return.

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resident, or merely in transit through their territory. States are required to receive their nationals expelled from foreign soil who seek to enter their territory.").

157. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, *Draft Articles on the Expulsion of Aliens, with Commentaries*, U.N. Doc. A/69/10, at 32, art. 22, commentary ¶ 1 (2014).

158. *Id.* art. 3, commentary ¶ 1.

159. *Id.* at 32, art. 22(1), commentary ¶ 1.

160. Geneva Convention Relative to the Treatment of Prisoners of War (GC III), art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

161. *Id.* art. 109.

Likewise, Article 118 requires detaining powers and the States of origin to share the burden of repatriation.[162] Additionally, the International Committee of the Red Cross's updated Commentary to the Third Geneva Convention pronounces that "one [State] must allow another to comply with its obligations under the Convention, and the [State] on which the prisoners depend must thus facilitate the repatriation of seriously wounded or sick prisoners of war and receive them."[163]

Moreover, Common Article 1 requires States "to respect and to ensure respect for the [GC III] in all circumstances."[164] This provision applies to all States, whether they are parties to an armed conflict or not.[165] "The interests protected by the Conventions are of such fundamental importance to the human person that every High Contracting Party has a legal interest in their observance, wherever a conflict may take place and whoever its victims may be."[166] Thus, even States that are not party to an IAC must "do everything reasonably in their power to ensure that the provisions are respected universally."[167] Consequently, States of origin that impede or frustrate detaining powers in fulfilling their obligations under the Third Geneva Convention themselves violate Common Article 1 and the Third Convention.

In combination, Common Article 1 and GC III, Article 118 require States of origin to readmit, at the end of hostilities, their nationals who have been detained as POWs in the course of an IAC. Likewise, Common Article 1 and GC III, Article 109 require States of origin to readmit their nationals who are seriously sick or seriously wounded POWs during the pendency of an IAC.

The Fourth Geneva Convention (GC IV) similarly obligates interning powers to repatriate foreign nationals interned consequent to an armed conflict. During IACs, States may intern civilians, including foreign nationals, if doing so is absolutely necessary.[168] Internment is permissible in such circumstances subject to regular procedures for deciding upon internment, rights of appeal, and periodic review.[169] Nevertheless, internees

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162. *Id.*

163. International Committee of the Red Cross (ICRC), *Commentary to the Third Geneva Convention*, at ¶ 4270 (2020).

164. GC III, *supra* note 160, art. 1.

165. ICRC, *supra* note 163, ¶ 152 ("[T]he High Contracting Parties undertake, whether or not they are themselves party to an armed conflict, to ensure respect for the Conventions by other High Contracting Parties and non-State Parties to an armed conflict.").

166. *Id.*

167. *Id.*

168. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 41; *id.* art. 42.

169. *Id.* art. 43 ("Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or

must be released "as soon as the reasons which necessitated [their] internment no longer exist."[170] GC IV also requires the parties to a conflict to endeavor to "conclude agreements for . . . the repatriation . . . of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time."[171] In any event, interning powers must, "upon the close of hostilities or occupation, . . . facilitate [the] repatriation [of foreign internees]."[172]

No such explicit, textual requirements concerning repatriation obtain in NIACs.[173] Nevertheless, to the extent that IHL accepts the conflict-based detention of individuals in NIACs,[174] that detention must cease with the termination of the relevant NIAC lest it become arbitrary and unlawful.[175] Such continued detention beyond the underlying necessity justifying it would violate Common Article 3, which applies to NIACs. When individuals deprived of their liberty in the course of a NIAC are aliens, it is reasonable to infer that detaining authorities incur a post-conflict obligation to repatriate them.[176] Moreover, because Common Article 1 also applies to NIACs, States not party to NIACs in which their nationals have been detained are required to repatriate their nationals to the extent that repatriation is necessary to effect their post-conflict release.

Nevertheless, States themselves appear to believe that they enjoy discretion under international law to effect or not the repatriation of their

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administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.").

170. *Id.* art. 132.

171. *Id.*

172. *Id.* art. 134.

173. Farley, *supra* note 103.

174. *See* Dan E. Stigall, *The Syrian Detention Conundrum: International and Comparative Legal Complexities*, 11 HARV. NAT'L SEC. J. 54, 71–74 (2020) (reviewing legal status of detention by OAGs in NIACs and suggesting that the customary IHL applicable to NIACs is evolving to admit detention by OAGs in NIACs); LAWRENCE HILL-CAWTHORNE, DETENTION IN NON-INTERNATIONAL ARMED CONFLICT 66–76 (2016) (concluding that "whilst IHL recognizes that the parties to a non-international armed conflict will intern [detain], it does not provide a legal basis for such actions; rather, it merely accepts that internment [detention] will occur and regulates it"); CRAWFORD, *supra* note 17, at 78–117.

175. *See*, *e.g.*, ICRC, Survey of Customary International Humanitarian Law, Rule 99 ("Arbitrary deprivation of liberty is prohibited."); *id.* Rule 128 ("Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist."); Dan E. Stigall, *supra* note 174, at 75 ("Once . . . detention is no longer necessary, the obligation to repatriate persons detained during the course of both [IACs] and [NIACs] is widely recognized.").

176. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 451 (2009).

nationals who have become foreign fighters, at least during NIACs.[177] One need look no further than the prolonged and continuing detention of thousands of foreign fighters from as many as fifty States of origin in northeast Syria for evidence of this practice in NIACs.[178] Over more than three-and-a-half years since most were captured, the Syrian Democratic Forces—the OAG responsible for the detention of ISIS-associated fighters deprived of their liberty in the course of that armed conflict—has repeatedly called on States of origin to repatriate their nationals.[179] Although the continuation of that armed conflict may serve as a basis for the failure of States of origin to repatriate their nationals, it is likely that at least some of those detained are seriously sick or wounded. If so, the IHL applicable to IACs would suggest, analogically, that their repatriation is mandatory. Even if that obligation is not applied by analogy to NIACs, serious illness or injury would seem to suggest their continued detention is not necessary on the basis of security. In that case, the failure of foreign fighters' States of origin to accept their repatriation would appear to violate Common Article 1.

It could be that States of origin are broadly[180] ignoring their obligation to accept the repatriation of their nationals who, having become foreign fighters on behalf of ISIS, have been deprived of their liberty. Of course, States' non-compliance with a purported legal obligation does not necessarily indicate the invalidity or non-existence of the supposed legal obligation.[181] However, it may be that States of origin identify a distinction between *acceptance* and *effectuation*. As such, these States may believe their international law obligations are simply not implicated in a situation when an OAG desires to repatriate their nationals but lacks the means to implement that desire. Regardless, the result is the same: the consignment of thousands of aliens to the custody of an OAG in a conflict zone abroad

177. *See, e.g.*, Farley, *supra* note 103.

178. *E.g.*, *id.*; Eriksson, *supra* note 124.

179. *See, e.g.*, *"Bring Me Back to Canada": Plight of Canadians Held in Northeast Syria for Alleged ISIS Links*, HUMAN RIGHTS WATCH (June 29, 2020), https://www.hrw.org/report/2020/06/29/bring-me-back-canada/plight-canadians-held-northeast-syria-alleged-isis-links ("The Kurdish-led Autonomous Administration for Northeast Syria, which is detaining the foreigners, has repeatedly called on all countries to repatriate their nationals . . . .").

180. The States of origin that have failed to repatriate their nationals detained in the course of the armed conflict with ISIS represent the majority of States that contributed foreign fighters to the conflict, amounting to approximately thirty percent of all States, from regions as diverse as Europe, the Middle East and North Africa, and the Pacific. *See* Charlie Savage, *ISIS Fighters' Children are Growing Up in a Desert Camp. What Will They become?*, N.Y. TIMES (July 19, 2022), https://www.nytimes.com/2022/07/19/us/politics/syria-isis-women-children.html ("Of the roughly 10,000 adult male detainees accused of fighting for ISIS, about 5,000 are Syrian; 3,000 are Iraqi; and 2,000 come from some 60 other countries . . . .").

181. *Cf.* Nicar. v. U.S., 1986 ICJ at ¶ 186 ("It is not to be expected that in the practice of States the application of the rules in question should have been perfect . . . . The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.").

that could be resolved if international law more clearly addressed the obligations of States of origin vis-à-vis their nationals when they become foreign fighters.

iii. International Law Limitations on Repatriation of Foreign Fighters

In addition to requiring States to repatriate foreign nationals, or to accept the repatriation of their nationals, in certain circumstances, international law also imposes limits on the compelled return of individuals to their States of origin. Most significantly, the principle of *non-refoulement* prohibits the return or transfer of an individual where there is a real or substantial risk that the individual will be subject to torture, ill-treatment, or other violations of their fundamental rights.[182] The principle of *non-refoulement* applies in peacetime, as well as in situations of armed conflict, irrespective of their character.[183] It arguably applies to non-State actors in NIACs, as well.[184] Thus, even when a State desires or is obliged to repatriate an alien, it may not do so if that alien faces a real or substantial risk of torture, ill-treatment, or other violations of their fundamental rights. As it does in the context of deportations and post-conflict repatriations of aliens deprived of their liberty due to an armed conflict, any international law obligation on the part of States to recover their nationals who become foreign fighters must be limited by the principle of *non-refoulement*.

3. Existing International Law Fails to Clearly Resolve the Foreign-Fighter Phenomenon

The foregoing survey of international law potentially applicable to the foreign-fighter phenomenon suggests a legal architecture for regulating two phases of the foreign-fighter life cycle: departure from their State of origin;

182. *E.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85; Human Rights Committee, General Comment No 20, Prohibition of Torture and Cruel Treatment or Punishment ¶ 12, May 26, 2004, CCPR/C/21/Rev.1/Add 13; General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant ¶ 12, May 2004, CCPR/C/21/Rev.1/Add. 1326; Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

183. The ICRC interprets common Article 3 of the 1949 Geneva Conventions to provide for *non-refoulement* in non-international armed conflict, and defines it as follows: "The principle of *non-refoulement*, in its traditional sense, prohibits the transfer of a person from one State to another in any manner whatsoever if there are substantial grounds for believing that the person would be in danger of suffering the violation of certain fundamental rights in the jurisdiction of that State." ICRC, *supra* note 163, art. 3.

184. *See, e.g.*, Benjamin R. Farley, *Detainee Transfers and the Principle of Non-refoulement in Relation to 'Non-belligerent Supporting States' in Non-international Armed Conflicts*, 2 OXFORD J. CONFL. & SEC. L. 185, 197–204 (2022).

and return to the State of origin.[185] It suggests that non-intervention and the duty of harm prevention could oblige States of origin to restrain, subject to their knowledge and capacity, the travel of their nationals for purposes of becoming foreign fighters. It also suggests an underlying policy that States are obligated to accept the repatriation of their nationals who become foreign fighters.[186] Nevertheless, it demonstrates that existing international law fails to appropriately regulate the foreign-fighter phenomenon, in large part due to its failure to clearly assign duties to States of origin or habitual residence vis-à-vis their nationals who intend to or do in fact become foreign fighters.

These deficiencies in existing international law do not mean that the international community has ignored the foreign-fighter phenomenon. Instead, its efforts to do so to date have been generally tied to specific manifestations of the phenomenon. Even when these efforts have been prospective in nature, they reflect case-specific concerns that limit their potential future efficacy, as in the case of the foreign-fighter contribution to ISIS.

B. The Limitations of Contemporary and Historical Efforts to Regulate Foreign Fighters

Despite the absence of specific international legal regulation, the foreign-fighter phenomenon has not been ignored by the international community. Unfortunately, the international system has tended to focus on particular manifestations of the phenomenon rather than the phenomenon itself. Consequently, efforts to regulate foreign fighters generally have failed to provide the international system with tools to constrain the next manifestation of the phenomenon. Nevertheless, it is worth surveying previous efforts to understand and to avoid their limitations in the future. It is also worth surveying them because they demonstrate recognition that the

185. *Cf.* Forcese & Mamikon, *supra* note 24 ("'Foreign fighters' have a 'life cycle' divided into two discrete periods, both of which have galvanized state attention and concern: departure to the conflict zone and return to the country of origin. Distinct policy preoccupations arise at each stage. Departure enhances the supply of recruits to fight or otherwise participate in foreign conflicts, with possibly serious consequences for life, foreign relations, and international stability. Return amounts to the re-entry of a potentially further radicalized individual, equipped with new means and methods, into [their State of origin's society] to which he or she may wish to do harm.").

186. *See also* Stigall, *supra* note 174, at 87 (arguing that, in light of U.N. S.C. Res. 2178 (2014), "while it is too soon to definitively say the degree to which the principle of *aut dedere aut judicare* applies to [OAGs] or how far international law requires states to go in seeking the return of foreign terrorist fighters, one can discern that the forces of international law are generally pulling in a direction that would favor the repatriation of detained ISIS fighters to their countries of origin for purposes of investigation, prosecution, or other lawful and appropriate measures to mitigate against the threat they pose"); Brownlie, *supra* note 29, at 579 ("One possible solution would be to extend the duty of prevention in relation to recruiting and hostile expeditions to the exit of volunteers.").

phenomenon is an international security challenge and willingness on the part of the international community to address it.

1. The League of Nations and the Spanish Civil War

Tens of thousands of foreign nationals traveled to Spain during its 1936-39 civil war to participate on both sides of the conflict between the loyalist and fascist rebels.[187] In response to the large flows of foreign fighters and war materiel, twenty-seven European States "pledged themselves to prohibit the direct or indirect export or re-export of arms, munitions, materials of war, aircraft, and vessels of war."[188] Seventeen of these "assumed an even stricter duty 'to abstain from all interference, direct or indirect, in the internal affairs of Spain.'"[189] These pledges were conveyed in diplomatic communications rather than in a single instrument.[190] An ad hoc international committee formed in London to protect and give effect to the non-intervention agreement adopted a resolution in February 1937 to restrain the travel of non-Spanish fighters to Spain—an issue not specifically addressed in the earlier non-intervention pledges.[191]

That resolution attempted to restrain the "the recruitment in, and transit through, or the departure from, [States participating in the International Committee for the Application of the Agreement Regarding Non-Intervention in Spain] of persons of non-Spanish nationality proposing to proceed to Spain . . . for the purpose of taking part in the present conflict."[192] The Non-Intervention Committee endeavored to discourage foreign volunteers joining the Spanish Civil War and to encourage the

187. *See* Ann Van Wynen Thomas & A.J. Thomas, Jr., *Non-Intervention and the Spanish Civil War*, 61 PROC. AM. SOC. INT'L L. 2, 2 (1967) ("Some 150,000 foreign troops, primarily German and Italian, served with the Rebel-Nationalist Army throughout the course of the war. . . . Some 50,000 foreigners served with the Republican-Loyalist forces, 40,000 of these were in the international brigades and 10,000 fought directly with the Loyalist armies."). Note that many of the foreign nationals who fought on the side of the fascist rebels were not foreign fighters within the meaning of this article because they were sent to fight in Spain on behalf of their government. *E.g.*, ARIELLI, *supra* note 3, at 4 ("During the Spanish Civil War the Italian dictator Benito Mussolini sent tens of thousands of Fascist Blackshirts and conscripts from the Italian armed forces to fight against the Spanish Republic. Part of this force, known as the Corpo Truppe Volontarie, included individuals who had volunteered for service in Spain. Yet, importantly for our purpose, it was commanded by an active general in the Italian army and was supplied, paid for, and directed by the Italian foreign ministry's Ufficio Spagna in Rome.").

188. Thomas & Thomas, Jr., *supra* note 187, at 2; Norman J. Padelford, *The International Non-Intervention Agreement and the Spanish Civil War*, 31 AM. J. INT'L L. 578, 580 (1937).

189. Thomas & Thomas, Jr., *supra* note 187, at 2; Padelford, *supra* note 188, at 580.

190. Padelford, *supra* note 188, at 580.

191. Thomas & Thomas, Jr., *supra* note 187, at 3.

192. International Committee for the Application of the Agreement Regarding Non-Intervention in Spain, Spain No. 1, Resolution Adopted by the Committee Relating to the Scheme of Observation of the Spanish Frontiers by Land and Sea, London, Mar. 8, 1937 (describing the February 16, 1937 resolution).

withdrawal of existing foreign volunteers.[193] It subsequently adopted a frontier-observation scheme designed to impede the transit of foreign fighters into Spain to participate in the Spanish Civil War.[194]

While the International Committee for the Application of the Agreement Regarding Non-Intervention in Spain was unsuccessful in preventing foreign fighters from traveling to Spain, its efforts to do so suggests that nearly a century ago the international community recognized the international security challenges posed by large-scale foreign-fighter mobilizations. Unfortunately, its efforts to address that phenomenon were limited to the manifestation that then confronted the international community and did nothing to restrain future foreign-fighter flows.

2. The Dayton Peace Accords

Half a century after the Spanish Civil War, perhaps thousands of foreign fighters[195] from tens of countries joined all sides of the fight to establish new States during the dissolution of Yugoslavia,[196] some of whom were veterans of the anti-Soviet *jihad*—and some of whom went on to fight in subsequent armed conflicts elsewhere.[197] These fighters contributed to the intensity of the civil wars in Yugoslavia and attracted significant international attention.[198] Indeed, in resolving that conflict, the Dayton Peace Accords specifically addressed foreign fighters. Recognizing the local challenges posed by these foreign fighters to an enduring peace following the civil war, the Dayton Peace Accords required the withdrawal of "all foreign Forces, including individual advisors, freedom fighters, trainers, volunteers, and personnel from neighboring and other States" within thirty days of the Accords' signing on December 14, 1995.[199]

As an agreement to end the armed conflicts in the former Yugoslavia, the Dayton Peace Accords were inherently ad hoc and sui generis, reacting to the material conditions of those armed conflicts.[200] As such, the

193. *E.g.*, MALET, *supra* note 1, at 95.

194. International Committee for the Application of the Agreement Regarding Non-Intervention in Spain, *supra* note 192.

195. Nir Arielli, *In Search of Meaning: Foreign Volunteers in the Croatian Armed Forces, 1991-95*, 21 CONTEMP. EUR. HIST. 1, 1 n.2 (2012).

196. *Id.* at 1–2.

197. Hafez, *supra* note 9; *see, e.g.*, Zelin, *supra* note 23, ch. 2.

198. *See, e.g.*, Mark Urban, *Bosnia: The Cradle of Modern Jihadism?*, BBC (July 2, 2015), https://www.bbc.com/news/world-europe-33345618 (describing role of foreign fighters in the Yugoslav civil wars perpetrating war crimes).

199. The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1-A Agreement on the Military Aspects of the Peace Settlement, art. 3(2) (Dec. 14, 1995).

200. *E.g.*, RICHARD HOLBROOKE, TO END A WAR 320 (1998) ("With NATO forces about to arrive in Bosnia, we could not tolerate the continued presence of [foreign fighters] in Bosnia[.]"); CARL BILDT, PEACE JOURNEY: THE STRUGGLE FOR PEACE IN BOSNIA 191 (1998) ("One of the key U.S. objectives [in securing agreement to the Dayton Peace Accords] was to get [foreign fighters] out of the country as soon as possible.").

obligations the Peace Accords imposed with respect to foreign fighters applied only to foreign fighters present in Bosnia Herzegovina in December 1995, and they bound only Bosnia Herzegovina, Croatia, and the Federal Republic of Yugoslavia.[201] Additionally—and unsurprisingly—they were silent as to the legal propriety of foreign fighters generally or the role of foreign fighters in future armed conflicts, whether inside or outside of the former Yugoslavia.[202] Finally, they imposed no obligation on non-parties to recover or repatriate their nationals who made up the "foreign Forces, individual advisors, freedom fighters, trainers, volunteers and personnel from neighboring and other States[.]"[203]

Thus, although the Dayton Peace Accords inherently recognized the security challenges posed by foreign fighters, they innovated no international legal tools to regulate or restrain future manifestations of the foreign-fighter phenomenon.

3. UN Security Council Resolutions 2170 (2014) and 2178 (2014)

In contrast to the international efforts concerning foreign fighters during the Spanish Civil War and following the dissolution of Yugoslavia, when faced with the unprecedented flow of foreign fighters to Syria and Iraq in the context of the rise of ISIS,[204] the international system has embraced a more general and prospective approach to "foreign *terrorist*

201. The General Framework Agreement for Peace in Bosnia and Herzegovina, pmbl. (Dec. 14, 1995) (identifying the parties to the General Framework Agreement for Peace in Bosnia and Herzegovina, and its annexes, as "Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia"); *see id.* art. 2 ("The Parties shall fully respect and promote fulfillment of the commitments made in Annex 1-A. . . .").

202. *See id.* Annex 1-A (failing to address the legality of foreign fighting or the possibility that foreign fighters may mobilize to participate in subsequent armed conflicts).

203. *Id.* Annex 1-A, art. III.

204. Paulussen, *supra* note 105, at 607.

fighters"[205] through UN Security Council Resolutions 2170[206] and 2178,[207] adopted under Chapter VII of the UN Security Council. The prospective approach reflected in the international system's most recent response to foreign fighters both improves on previous efforts and underscores the enduring security challenge posed by the foreign-fighter phenomenon.[208] At the same time, however, this effort's emphasis on "terrorism" embraces the deficiencies in earlier sui generis approaches to the phenomenon by embedding the international community's then-salient concern over terrorism. Additionally, by emphasizing "terrorism" without defining that term, it creates a discriminatory legal regime that is simultaneously under- and over-inclusive, seemingly prohibiting foreign nationals from adhering to one party to an armed conflict (ISIS) while ignoring those who adhere to other parties like the Syrian government or the non-State Syrian Democratic Forces. Thus, this effort indicates some political willingness to regulate the foreign-fighter phenomenon and suggests a vehicle to do so, even as it fails to generally regulate it.

In UNSCR 2178, the Security Council defined "foreign terrorist fighters" as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or

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205. S.C. Res. 2170 (Aug. 15, 2014) (emphasis added); S.C. Res. 2178 (Sept. 24, 2014) (emphasis added).

206. While it fails to define "foreign terrorist fighters," UNSCR 2170 condemned their recruitment by ISIS and other al Qaeda-associated entities. S.C. Res. 2170, ¶ 7 (Aug. 15, 2014) ("Acting under Chapter VII of the Charter of the United Nations, [the UN Security Council] . . . [*c*]*ondemns* the recruitment by ISIL [sic], ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida of foreign terrorist fighters[.]"). It called upon UN Member States to take municipal action to suppress the flow of foreign terrorist fighters. S.C. Res. 2170, ¶ 8 (Aug. 15, 2014) ("Acting under Chapter VII of the Charter of the United Nations, [the UN Security Council] . . . [*c*]*alls upon* all Member States to take national measures to suppress the flow of foreign terrorist fighters to . . . ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida, reiterates further the obligation of Member States to prevent the movement of terrorists or terrorist groups, in accordance with applicable international law, by, inter alia, effective border controls, and, in this context, to exchange information[.]"). It encouraged UN Member States to dissuade individuals within their territory from travelling to Syria and Iraq for "the purposes of supporting or fighting for" ISIS. S.C. Res. 2170, ¶ 9 (Aug. 15, 2014) ("Acting under Chapter VII of the Charter of the United Nations, [the UN Security Council] . . . [*e*]*ncourages* all Member States to engage with those within their territories at risk of recruitment and violent radicalisation to discourage travel to Syria and Iraq for the purposes of supporting or fighting for ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida.").

207. S.C. Res. 2178 (Sept. 24, 2014).

208. By taking action under Chapter VII, the Security Council recognized that at least "foreign terrorist fighters" traveling to Iraq and Syria posed a threat to international peace and security. *See* UN Charter, art. 24, ¶ 1 ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."); *id.* art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict[.]"[209] The Security Council called, *inter alia*, upon UN Member States "in accordance with their obligations under international law, to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by preventing . . . recruitment of foreign terrorist fighters[,] . . . preventing foreign terrorist fighters from crossing their borders[,] . . . and developing and implementing . . . rehabilitation and reintegration strategies for returning foreign terrorist fighters[.]"[210] It also decided that all UN Member States must "prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of" becoming foreign terrorist fighters.[211] And it requires UN Member States to "ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense" the travel or attempted travel of their nationals or habitual residents to another State to become foreign terrorist fighters,[212] among other offenses.

Unlike previous efforts to regulate or impede foreign fighters from participating in armed conflicts abroad, UNSCR 2178 is not textually tied to a particular conflict. It establishes a framework of general and prospective regulation applicable to "foreign terrorist fighters," and imposes on at least UN Member States obligations to restrain their nationals or habitual residents from becoming "foreign terrorist fighters" in the future. This suggests a recognition, on the part of the Security Council, that "foreign terrorist fighters" threaten the international system irrespective of any specific manifestation of that phenomenon. It also suggests some international political will to regulate, generally, the phenomenon of "foreign terrorist fighters"—a subset of the more general category "foreign fighter."

Although UNSCR 2178 is commendable for its prospective, conflict-independent regulation of "foreign terrorist fighters," as well as its efforts to interrupt the foreign-fighter life cycle, its limitation to foreign *terrorist* fighters is lamentable. For example, although the resolution refers repeatedly to "terrorism," it neither defines the term nor limits its reach to "international" terrorism, leaving compliance with resolution dependent

209. S.C. Res. 2178, *supra* note 32.

210. *Id.* ¶ 4. The Security Council also demanded "that all foreign terrorist fighters disarm and cease all . . . participation in armed conflict," *id.* ¶ 1, and "that all foreign terrorist fighters associated with ISIL and other terrorist groups withdraw immediately," S.C. Res. 2170, *supra* note 31, ¶ 7.

211. S.C. Res. 2178, *supra* note 32, ¶ 5.

212. *Id.* ¶ 6.

upon—and manipulable by—individual States,[213] and susceptible to politically-motivated enforcement. It is simultaneously under- and over-inclusive,[214] while needlessly conflating foreign fighters with terrorism—a distinct phenomenon.[215]

Notwithstanding that criticism, UNSCR 2178 contains some valuable features for future efforts to regulate the foreign-fighter phenomenon. First, it explicitly ties UN Member States' obligation to address the threat posed by their nationals becoming transnational fighters to their existing obligations under international law and their duty to cooperate on issues of peace and security under the UN Charter.[216] In particular, it specifies that these existing obligations entail a duty to "prevent[] foreign terrorist fighters from crossing their borders[.]"[217] Second, it emphasizes that efforts to properly address the threat posed by "foreign terrorist fighters" require States to develop and implement "rehabilitation and reintegration strategies for returning foreign terrorist fighters."[218] Indeed, rehabilitation and reintegration strategies may be more important than reliance on *ex post* criminal prosecution of foreign fighters, given the small rate at which returned foreign fighters engage in domestic terrorism.[219] That is not to suggest, however, that returned foreign fighters and their contacts should not be subject to close scrutiny by domestic security services, consistent with applicable domestic law[220]—particularly given the increased likelihood of successful terrorist acts perpetrated by foreign-fighter veterans as compared to other terrorists.[221]

UNSCR 2178 thereby sought to address both the initiation of foreign terrorist fighter flows and to ensure their recovery, subject to other

213. *See* Krähenmann, *supra* note 29, at 237.

214. *Cf.* Ip, *supra* note 28, at 107 ("[G]rouping together individuals who have travelled to a conflict zone and engaged in a range of activities under the umbrella term of 'fighter' may hinder efforts to formulate a rational and coherent response. Notably, the definition of [foreign terrorist fighter] in UNSCR 2178 does not actually require that an individual engage in terrorist training or terrorist activity—it is sufficient that the individual travels to the conflict State for the purpose of engaging in those activities."); Craig Forcese & Ani Mamikon, *supra* note 24, at 314 ("[A]s a strict legal matter, becoming a foreign fighter should be distinguished from international travel for the purpose of joining a terrorist group or to engage in terrorist training. The two *may* overlap . . . .") (emphasis added).

215. Ip, *supra* note 28 ("The approach taken by UNSCR 2178 is to treat foreign fighting as a form of terrorism, thereby conflating two distinct phenomena.").

216. *See* S.C. Res. 2178, *supra* note 32, ¶ 4 (calling upon UN Member States, "in accordance with their obligations under international law" to prevent foreign fighters "from crossing their borders").

217. *Id.*

218. *Id.* The Security Council also demanded "that all foreign terrorist fighters disarm and cease all . . . participation in armed conflict[,]" *id.* ¶ 1, and "that all foreign terrorist fighters associated with ISIL and other terrorist groups withdraw immediately," S.C. Res. 2170, ¶ 7 (Aug. 15, 2014).

219. Hegghammer, *supra* note 121, at 13 ("Prosecuting all aspiring foreign fighters as prospective domestic terrorists has limited preventive benefits, because so few of them, statistically speaking, will go on to attack the homeland.").

220. *See* Forcese & Mamikon, *supra* note 24, at 315–17; Hegghammer, *supra* note 121, at 13.

221. Hegghammer, *supra* note 7.

international law obligations like *non-refoulement*, by their States of origin or habitual residence. As described above, the failure of States of origin to recover their nationals who have become foreign fighters—including by denaturalizing them or imposing overly harsh penalties that dissuade their return—prolongs both individual manifestations of foreign-fighter phenomena and tends to prolong the phenomenon, aggravating international security concerns. While it is important to note, again, that most returning foreign fighters have not proceeded to participate in subsequent armed conflicts, effective reintegration programs can interrupt the prolongation of foreign-fighter phenomena[222] while also assuaging domestic security concerns on the part of the State of origin.

Thus, although too narrow in subject matter, UNSCR 2178 indicates some political will within the international community to regulate foreign fighters, an understanding that doing so is consistent with and can build on States' existing international law obligations, and a recognition of some tools that may facilitate the successful restraint of the foreign-fighter phenomenon.

IV. TOWARD INTERNATIONAL LEGAL REGULATION OF THE FOREIGN-FIGHTER PHENOMENON

Effective international legal regulation of the foreign-fighter phenomenon should address both components of the foreign-fighter life cycle: departure and return.[223] It should draw from existing principles of international law like the principle of non-intervention and the principle of harm prevention to impose a due-diligence obligation on States to impede the travel of their nationals or habitual residents from their territory to foreign conflict zones to participate in armed conflict. When a State's nationals or habitual residents do successfully travel to a foreign conflict zone, international law should require that State to at least not shirk its international security responsibilities by refusing or failing to recover its nationals. Knowing failure to restrain the travel of nationals or habitual residents to foreign conflict zones, or knowing failure to impede the recruitment of nationals or habitual residents to become foreign fighters,

222. *Cf.* S.C. Res. 2178, *supra* note 32 ("*Recognizing* that addressing the threat posed by foreign terrorist fighters requires . . . facilitating reintegration and rehabilitation[.]").

223. Forcese & Mamikon, *supra* note 24, at 307 ("'Foreign fighters' have a 'life cycle' divided into two discrete periods, both of which have galvanized state attention and concern: departure to the conflict zone and return to the country of origin. Distinct policy preoccupations arise at each stage. Departure enhances the supply of recruits to fight or otherwise participate in foreign conflicts, with possibly serious consequences for life, foreign relations, and international stability. Return amounts to the re-entry of a potentially further radicalized individual, equipped with new means and methods, into [their State of origin's society] to which he or she may wish to do harm.").

should be clearly defined as internationally wrongful conduct, compensable at international law. Likewise, the willful refusal or failure of a State to repatriate its nationals or habitual residents once they have become foreign fighters should be identified as internationally wrongful conduct.

On the other hand, each State's obligation to not willfully refuse or fail to repatriate its nationals and habitual residents should not mean an affirmative obligation to seek out and arrest them. Rather, it should entail an obligation—like States' obligation to accept their deported nationals—to repatriate, upon request, their nationals or habitual residents when they are in the hands of a party to the armed conflict. It should entail a coordinate obligation on the part of a detaining power to surrender a State's nationals or habitual residents upon demand, subject to *non-refoulement*, and a subsequent obligation upon the demanding State to prevent such nationals or habitual residents from returning to the conflict zone. Finally, each State should be prohibited from denaturalizing or otherwise avoiding responsibility with respect to its nationals or habitual residents in consequence of their having become foreign fighters.[224] That is, it should be unlawful for a State to purport to sever its juridical relationship with a national on the basis of their being a foreign fighter.

In practical terms, these obligations would mean that States that knowingly allowed their nationals to travel to Syria in order to participate in an armed conflict against the Syrian government have breached their international obligations vis-à-vis Syria. This result may appear distasteful given the reprehensible character of the Syrian regime. However, the same would be true of States of origin that have knowingly tolerated their nationals to augment Russian or Russian-proxy forces in its war against Ukraine.[225] The ideologically-independent nature of foreign-fighter mobilizations and their persistence suggests that a politically motivated approach to the phenomenon is likely to result in "blowback." The better course, both from an international security perspective and a normative one that privileges the rule of law, is to abjure short-term foreign policy and political considerations for a value-neutral approach that treats acquiescence to the phenomenon as an international wrong. States might still knowingly tolerate the recruitment and mobilization of nationals within their territory to achieve foreign policy objectives but, in the face of an identified prohibition against doing so, they would be forced to justify doing so in

224. *Cf.* PRINCIPLES ON DEPRIVATION OF NAT'Y AS A NAT'L SEC. MEASURE § 4.1 (INST. ON STATELESSNESS AND INCLUSION 2020) ("States shall not deprive persons of nationality for the purpose of safeguarding national security.").

225. *See, e.g.*, Nermina Kuloglija & Enes Hodzic, *Sniper's Video Shows Serb Volunteers Training to Fight Ukraine*, BALKAN INSIGHT (Dec. 16, 2022), https://balkaninsight.com/2022/12/16/serbian-snipers-video-reveals-foriegn-fighters-in-ukraine/.

terms of countermeasures or otherwise suffer international legal consequences for their wrongful conduct.

Prospective international legal regulation of the foreign-fighter phenomenon will better equip States with the legal tools necessary to more appropriately and generally address the normative and security challenges posed by foreign fighters. Doing so will avoid the pitfalls of the political uncertainty and ideologically-based discrimination inherent in focusing on terroristic tactics potentially embraced by non-State beneficiaries of foreign fighters. It will evade the infirmities intrinsic to a retrospective approach to law formulation.[226] Along with existing principles of international law, UNSCR 2178 provides a useful scaffolding on which to build effective international legal regulation of the foreign-fighter phenomenon because it appropriately places responsibility for interrupting the foreign-fighter life cycle on States of origin. Such extension of existing international legal principles to regulate the foreign-fighter phenomenon could be most expeditiously accomplished by building on the precedent established by UNSCR 2178 and adopting a new UN Security Council Resolution prospectively addressing the obligations of States of origin with respect to their nationals who attempt to or actually become foreign fighters. But, at bottom, such regulation should not confuse that phenomenon with terrorism, because they are distinct, and because a regulation that emphasizes tactics or, worse, ideology cannot effectively restrain a phenomenon that recurs irrespective of underlying ideological motivations.

226. Saliternik & Shlomo-Agon, *supra* note 26, at 4 ("[A wide variety of present and likely future international-security] challenges . . . require international legal thinking and rule-making that points to the future, with an eye to preventing the risks and realizing the opportunities embedded in global changes and advancements.").