Introduction

> It must be remembered, too, that the belief in spirits and ghosts, and the return of the dead is far from having disappeared among educated people, and that many who are sensible in other respects find it possible to combine spiritualism with reason. A man who has grown rational and sceptical, even, may be ashamed to discover how easily he may for a moment return to a belief in spirits under the combined impact of strong emotion and perplexity.
>
> Sigmund Freud (1907)[1]

I.1 The *Revenants* of International Law

It was telling to see how the individuals coming back to Europe from the Syrian battlefield were called returnees, or *revenants*. The term *revenant* in fact indicates someone who has supposedly come back from the afterlife.[2] Since the outbreak of the Syrian Civil War, a plethora of debates has surrounded this non-state actor, debates that have amplified following the Paris and Brussels attacks.[3] The topic had gained world-wide attention when the United Nations Security Council (UNSC) openly criminalized those joining the Al-Nusra Front and the Islamic

[1] Sigmund Freud, 'Delusion and Dream in Jensen's Gradiva', in J. Strachey, A. Freud, A. Strachey and A. Tyson (eds.), *The Standard Edition of the Complete Psychological Works of Sigmund Freud. Vol. IX* (London: Hogarth Press 1959) 7–93, p. 71.

[2] The *Oxford English Dictionary* defines *revenant* as 'a person who has returned, especially one who is thought to have come back from the dead'. The *Larousse Dictionary* defines the term as the following: 'Âme d'un mort qui se manifesterait à un vivant sous une forme physique (apparition, esprit, fantôme).'

[3] On the security threat posed by returning foreign terrorist fighters in their home states see Phil Gurski, *Western Foreign Fighters: The Threat to Homeland and International Security* (Lanham, MD: Rowman & Littlefield 2017) and Elena Pokalova, *Returning Islamist Foreign Fighters: Threats and Challenges to the West* (London: Palgrave Macmillan 2020).

State. Conflating the problem with jihadi-led terrorism, the UNSC also offered a definition for 'foreign terrorist fighters' (FTF).[4]

As many at the time noted, no real status existed for such an actor in international law.[5] And yet foreign fighters have long been around the international scene. Historians have generally referred to the broader phenomenon of foreign volunteering, and scholarship has today recognized the involvement of volunteers in many conflicts over the last two centuries.[6] Some famous examples include the nineteenth-century wars of independence in Latin America, where Britons fought under various guises;[7] or the Greek War of Independence (1821–1832), which saw many volunteers driven by philhellenic sentiments joining the ranks of the Greek insurgents against the Ottoman empire.[8] The list continues with the American Civil War (1861–1865), the Second Boer War (1899–1902) and the Spanish Civil War (1936–1939). Recent examples include the Yugoslav Wars and the conflicts in Iraq, Somalia and Libya, where the presence of third-country nationals on the battlefield has been extensively documented.[9] To be precise, the very term 'foreign fighter' is

[4] Specifically resolution 2178 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 preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict'. Addressing the Growing Issue of Foreign Terrorist Fighters, S/RES/2178, 24 September 2014, preamble.

[5] *See* generally Andrea de Guttry, Francesca Capone and Christopher Paulussen (eds.), *Foreign Fighters under International Law and Beyond* (The Hague: Asser Press 2016).

[6] *See* Steven O'Connor and Guillaume Piketty (eds.), *Foreign Fighters and Multinational Armies: From Civil Conflicts to Coalition Wars, 1848–2015* (Abingdon: Routledge 2022); Christine G. Kruger and Sonja Levesen (eds.), *War Volunteering in Modern Times: From the French Revolution to the Second World War* (London: Palgrave Macmillan 2013); and Nir Arielli and Bruce Collins (eds.), *Transnational Soldiers: Foreign Military Enlistment in the Modern Era* (London: Palgrave Macmillan 2013).

[7] *See* Moises Enriquez Rodriguez, *Freedom's Mercenaries: British Volunteers in the Wars of Independence of Latin America. Vol. I: Northern South America* and *Vol. II: Southern South America* (Lanham, MD: Hamilton Books 2006).

[8] *See* William St. Clair, *That Greece Might Still Be Free: The Philhellenes in the War of Independence* (Oxford: Oxford University Press 1972); Hervé Mazurel, *Vertiges De La Guerre: Byron, Les Philhellènes et Le Mirage Grec* (Paris: Les Belles Lettres 2013); and Moises Enriquez Rodriguez, *Under the Flags of Freedom: British Mercenaries in the War of the Two Brothers, the First Carlist War, and the Greek War of Independence (1821–1840)* (Lanham, MD: Hamilton Books 2009).

[9] On the Yugoslav case: Jennifer Mustapha, 'The Mujahideen in Bosnia: The Foreign Fighter as Cosmopolitan Citizen and/or Terrorist' (2013) 17 *Citizenship Studies* 742–755. For the Iraq War: Christopher Hewitt and Jessica Kelley-Moore, 'Foreign Fighters in Iraq: A Cross-National Analysis of Jihadism' (2009) 21 *Terrorism and Political Violence* 211–220. For the Somali case: Lorenzo Vidino, Raffaello Pantucci and

rather a recent invention, appearing in the academic literature and in international forums with the involvement of the Arab Mujahideen during the Soviet–Afghan War (1979–1989).[10]

One can thus suggest that the so-called foreign fighter is but a non-state actor coming back in different historical moments to fight in conflicts abroad.[11] As such, they can be added to the longer list of 'irregulars', a category already explored by legal scholars.[12] If the phenomenon of foreign volunteering is usually read in relation to the rise of modern nation-state armies, this remains but one aspect of a more

Evan Kohlmann, 'Bringing Global Jihad to the Horn of Africa: Al Shabaab, Western Fighters, and the Sacralization of the Somali Conflict' (2010) 3 *African Security* 216–238. For Libya: Aaron Y. Zelin, 'The Others: Foreign Fighters in Libya' (2018) 44/45 *Washington Institute for Near East Policy*: *Policy Notes* (2018) 1–27.

[10] *See* Daniel Byman, *Road Warriors: Foreign Fighters in the Armies of Jihad* (New York: Oxford University Press 2019) and Roger Warren, *Terrorist Movements and the Recruitment of Arab Foreign Fighters. A History from 1980s Afghanistan to ISIS* (Oxford: Bloomsbury 2021). For the term 'Muslim foreign fighter' see Thomas Hegghammer, 'The Rise of the Muslim Foreign Fighters: Islam and the Globalization of Jihad' (2011) 35 *International Security* 53–94. The Italian historian Marcello Flores d'Arcais retraced several instances in which the presence of foreign individuals in war was documented. Recognizing that it is difficult to give an accurate definition, d'Arcais proposes describing this actor by employing the term volunteer rather than fighter. He writes: 'The meaning and definition of "foreign fighter" has constantly evolved in light of the historical events of the past few decades, particularly because of the lack of a clear meaning and definition in the international legal framework … Instead, the term "volunteer" was used both for nationals and foreigners, putting an emphasis on the individual – civilian and/or former (or foreign) soldier – as a participant in war (or conflict, uprising, civil war, revolution); they joined a threatened government, a non-state actor, a minority group seeking to come to power or national or diverse ethnic groups seeking their independence.' Marcello Flores, 'Foreign Fighters' Involvement in National and International Wars: A Historical Survey', in de Guttry et al. (eds.), *Foreign Fighters under International Law* 27–47, p. 28.

[11] For the purpose of this study, the terms foreign fighter/volunteer/combatant will be used interchangeably.

[12] *See* specifically Sibylle Scheipers, *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford: Oxford University Press 2015). Although Scheipers shows that various types of 'irregular fighters' (e.g., guerrillas, terrorists, etc.) have been marginalized throughout the modern codification of humanitarian law, foreign fighters are absent from her study. Emily Crawford and Helen Kinsella both contributed to problematize the division between combatants and civilians, highlighting different biases beneath the principle of distinction. *See* Helen M. Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca, NY: Cornell University Press 2011) and Emily Crawford, 'Regulating the Irregular: International Humanitarian Law and the Question of Civilian Participation in Armed Conflicts' (2011) 18 *UC Davis Journal of International Law and Policy* 163–190.

complex story.[13] Travelling for the love of adventure, for idealism, faith, or for pecuniary reasons, there is usually a mix of causes pushing these individuals to join armed conflicts and groups abroad. One common trait points to their vision of an-other place, together with a moral urge to intervene in the world.[14] 'I dream'd that Greece might still be free', writes Byron in one of his most famous poems, whereas André Malraux in *L'Espoir* describes the different motivations pushing leftist volunteers to join the ranks of the Republicans during the Spanish Civil War.[15] The desire to seek a deeper meaning is often translated into action, but this impetus is always ambivalent, fractured, a harbinger of ideals and contradictions: 'I had had one craving all my life – for the power of self-expression in some imaginative form . . . At last accident, with perverted humour, in casting me as a man of action had given me place in the Arab Revolt', T. E. Lawrence affirms, not without a hint of cynicism.[16]

To be clear, this book is not concerned with the motivations of different foreign fighters across time and space. Other scholars have successfully proposed this type of analysis.[17] Rather, what is interesting

[13] This point is analysed extensively by Janice Thomson, as she explains the decrease in the utilization of mercenaries compared to the rise of the nation-state army. *See* Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton, NJ: Princeton University Press 1994).

[14] Roger Stéphane, *Portrait de l'Aventurier: T. E. Lawrence, Malraux, Von Solomon* (Paris: Points Editeur 2014). Based on the original text published by Éditions Grasset & Fasquelle (1965).

[15] André Malraux, *L'Espoir* (Paris: Gallimard 1937).

[16] T. E. Lawrence, *The Seven Pillars of Wisdom* (London: Penguin Classics 2000) pp. 640–641. In the case of white mercenaries, a mix of heroic ambitions and self-perception as noble condottieri is reflected in the way they understood their political mission on the African continent. The biographies of some well-known European mercenaries bear witness to this. *See* specifically Jean Schramme, *Le Battailon Leopard: Souvenirs d'un African Blanc* (Paris: Laffont 1969); Mike Hoare, *The Road to Kalamata: A Congo Mercenary's Memoir* (Lexington, KY: Lexington Books 1989); and Rolf Steiner, *Carré Rouge: du Biafra au Soudan, le Dernier Condottiere* (Paris: Laffont 1976).

[17] *See* Nir Arielli, *From Byron to Bin Laden. A History of Foreign War Volunteers* (Cambridge, MA: Harvard University Press 2018); David Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford: Oxford University Press 2013); and Darryl Li, *The Universal Enemy: Jihad, Empire, and the Challenge of Solidarity* (Stanford, CA: Stanford University Press 2019). For Malet, there is always a transnational identity reconnecting these individuals to certain groups and struggles abroad. In other words, there seem to be different reasons which, at different times, attract different 'types' of foreign fighters abroad. Or, as he puts it: 'in the first half of the twentieth century, most foreign fighters were members of Communist groups. In the late nineteenth century, the feared perpetrators of transnational violence were anarchists. In both these waves, the militants and insurgents shared a key common trait with mujahidin today: transnational

is the diverse range of characters one can find when looking at the recent history of this phenomenon – for example, romantic adventurers (Byron), mercenaries (Lord Cochrane), political advisers (Lafayette), revolutionaries (Garibaldi), secret agents (T. E. Lawrence) or intellectuals (Hemingway, Orwell and Malraux).

That the most diverse and renowned personalities appear on this list is not irrelevant, or just an extravagant cultural detail. Quite the contrary. Throughout this book, it will be shown how past figures of the foreign fighter are directly evoked by national and international lawmakers. The images of these and other fighters will then reappear from the past – as *revenants* – when state representatives and politicians cast decisions upon the legal status of this actor. Here is the first reason why it is crucial to go back to history: there is a whole repertoire of figures evoked in the legislative arena. Secondly, this move helps characterizing law as a social artefact, embedded within a web of cultural references. Most importantly, as a human product, moulded by the fears, desires and fantasies that traverse legal actors and their imaginary. This is the aspect that is studied in more depth in this book.

By connecting three significant moments in the recent history of civil war (Spain, Angola and Syria), the book shows how different cultural figures of the foreign fighter have informed and keep informing the legal

ideological affiliation'. Malet acknowledges that since the Soviet invasion of Afghanistan a new transnational identity has formed and has attracted individuals during the Bosnian wars (1992–1995), the civil war in Algeria (1991–2002), the first Chechen war (1994–1996), the Kosovo war (1998–1999) and later in Afghanistan, Iraq and Syria: the one of the Ummah, or the community of Muslim believers. According to his view, most foreign fighters are neither mercenaries nor fanatics, given that: 'rather than for greed, most mobilize in response to perceived threat . . . or the need to protect a certain group or cause' (the quotes from Malet are at pp. 207–213). Similar to Malet, Arielli argues that the decision to fight abroad is linked with forms of ideologies. These determine the volunteers' choice to leave, defining their historical contingencies. Arielli divides those ideological motivations in three grand moments, or 'waves': (1) the liberty vs. tyranny wave (nineteenth century); (2) the left-wing vs. right-wing wave (1917–1980); (3) and the so-called clashes of civilizations wave (1980–present). Arielli defines four typologies of volunteers: self-appointed ambassadors, diaspora volunteers, cross-border volunteers and substitute-conflict volunteers. Like Malet, he also distinguishes volunteers from both mercenaries and state-sponsored troops (e.g., the French foreign legion or the British colonial troops). Finally, Li's monograph focuses on one particular type of foreign fighter – the Arab Mujahedeen in the context of the Bosnian wars. By employing a mix of anthropological, historical and ethnographic methods, Li advances a fascinating argument in favour of an Islamic form of universalism. Once again, my book is not concerned with foreign fighters' motivations or ideological commitments, but rather with the figures populating the imaginary of legal actors.

conversations of state representatives, policymakers, international lawyers and national courts at different times and places. These figures, it is argued, linger at the back of various decisionmakers' positions and arguments, informing the way in which they understand the rightness or the wrongness of the foreign fighters' causes and, most importantly, the legal responses to the problem posed by Western citizens going to fight in wars abroad. Epitomizing different conceptions of freedom, these figures have an impact on the way foreign fighters are understood and judged in each historical period.

On this note, it must be added that such figures are not fixed. On the one side, they mirror the historical-political context in which the lawmakers make use of them. On the other, they move across time and space, reappearing in different settings, contexts, moments. Besides, a distinction is operated each time between the 'good' and the 'bad' foreign fighter: idealists and fascists, mercenaries and military advisers, enemies of humanity and freedom fighters, and so on. The status of foreign fighters is always played out through a lawful/unlawful dichotomy, which links to the passions, the desires and the fantasies that lawmakers project to them.

Nathaniel Berman has showed in his seminal work how rules remain essentially a human product, and likewise how human beings tend to put their 'passions and ambivalences' into the categories of law.[18] Following the same methodological path, foreign fighter status is taken here as an example to show how such status cannot explain the whole story of this non-state actor. Different lawmakers will engage in passionate fights to define who counts as a legitimate foreign combatant, as some wish to prosecute the 'bad' foreign fighters under the law, while others argue that they should not be criminalized for their actions. What is at stake is the most classical of the struggles at the core of the legislative process, which reveals how law is not a neutral tool, nor can it soften the conflicts at the root of society.[19] On the contrary, law understood *as a social and cultural construct* is embedded within the passions, the desires and the fantasies of its creators, fantasies which, every time there are attempts to expel

[18] Nathaniel Berman, *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Leiden: Brill 2011).

[19] Similar to the famous expression 'one man's freedom fighter is another man's terrorist', one side's lawful foreign fighter is always going to be the other side's enemy. This kind of Schmittian formula will nevertheless be problematized throughout the book. *See* Carl Schmitt, *The Concept of the Political. Expanded Edition* (Chicago: University of Chicago Press 2007).

them from the law, keep coming back, as *revenants*, here in the form of figures/images of the 'good' and the 'bad' foreign combatant.

The noble adventurer, the racist mercenary and the religious fanatic are part of a *cultural repertoire* informing the lawmaking process and related criminalization or acquittal of foreign fighters. Hence, the argument made in this book should not be misunderstood as an aesthetic or visual claim about law. Nor is the accent put on the actual roles played by Byron, Orwell, Malraux and suchlike on the battlefield. Along with De Saussure, the term 'foreign fighter' is seen as a floating signifier, with a contextual meaning. It does not matter whether they are volunteers, mercenaries or terrorists. Or rather, it matters to the extent to which the lawmakers will legitimize some and delegitimize others: idealists and fascists; soldiers of fortune and foreign advisers; fanatics and freedom fighters.[20] The interest lies in the cultural figures which haunt legal actors when they produce these kinds of binary oppositions. As much as the lawmakers would like to rationalize their passions through the law, they fail to do so. Their conscience is split, and so are the images they resort to. Yet these figures populate their imaginary and will come back to inform subsequent debates, establishing the precedents upon which the foreign fighters' status will be moulded and framed.

I.2 Setting the Frame

The present study ranges from the codification of the 1907 Hague Conventions to the Syrian Civil War, with the criminalization of foreign terrorist fighters (September 2014).[21] By following the developments on the legal status of the foreign combatant, the story highlights those moments where cultural figures enter the debate and influence lawmaking or adjudicating processes. The book should thus be read as an intervention in the legal history of the Western foreign volunteer, with the intent to analyse this non-state actor from a cultural standpoint.[22]

[20] Similarly see Aaron Ettinger, 'The Mercenary Moniker: Condemnations, Contradictions and the Politics of Definition' (2014) 45 *Security Dialogue* 174–191. *See* also Stéphane Baudens, Marc Dupré and Hélène Terrom (eds.), *Les Combattants Étrangers: Approches Culturelles et Juridiques* (Paris: Mare et Martin 2021).

[21] It also includes an excursus on the 1874 Brussels conference, as an important node to understand how the figure of the foreign combatant shifts from the nineteenth to the twentieth century.

[22] *See* specifically Robert W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 56–125. *See* also Hayden White, *Metahistory: The Historical Imagination in*

To this end, the book is built upon three civil conflicts, which mirror three historical moments and their different conceptualizations of law and of warfare.[23] These are:

(1) The Spanish Civil War (interwar period);
(2) The Angolan Civil War (decolonization);
(3) The Syrian Civil War (War on Terror).

The three civil wars are placed within ideological struggles that provide the setting from which the various figures of the foreign fighter emerge. These struggles can be summarized as follows:

(1) The fight of communism versus fascism (Spanish Civil War);
(2) The anti-colonial uprisings (Angolan Civil War);
(3) Religious fundamentalism (Syrian Civil War).

Other periods (and other wars) could have been considered, notably during the long nineteenth century. However, had the book jumped from the Greek War of Independence to the American Civil War, to Spain, the narrative would have become too episodic, losing acuity and historical accuracy. The references to Byron, Garibald or Lafayette that appear in the first chapter do indeed come from the nineteenth century, but when their images enter the debates of the interwar period, the legal and political landscape is naturally very different from that of previous centuries.

The three periods are thus chosen to reflect contemporary developments within international law, and specifically within international

Nineteenth-Century Europe (Baltimore, MD: Johns Hopkins University Press 1973); Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore, MD: Johns Hopkins University Press 1987); Keith Jenkins, *Re-thinking History* (New York: Routledge 2003); and Joan Scott, *Théorie Critique de l'Histoire. Identités, Expériences, Politiques* (Paris: Fayard 2009).

[23] The figures analysed in the chapters emerge from precise contexts. Another way of approaching the material would have been the one used by Eric Hobsbawm in his fascinating monograph on banditry. There, Hobsbawm retraces three figures of the bandit in the longue durée: the noble robbers, the avengers and the haiduks. Hobsbawm's approach has certainly influenced the present work, which however remains solidly anchored in a more traditional historical timeline. Where Hobsbawm starts his analysis from the figures (only later placed within different historical backgrounds), here the opposite process was adopted: different figures of the foreign combatant emerge each time from precise historical, political and legal contexts. *See* Eric Hobsbawm, *Bandits. Revised Edition* (New York: Pantheon Books 1981).

humanitarian law (IHL). The Spanish, Angolan and Syrian Civil Wars in fact represent three vantage points to explore how legal doctrines, the practice of states and the codification of the laws of war concerning foreign fighters have all been advanced in the twentieth century.[24] This is not done to retrace a history of humanitarian law, however.[25] Explaining how these individuals were taken into consideration in the codification of IHL principles, or why they have remained rather marginal figures, is not the primary intent of this book.[26]

[24] For some classic studies on the legal aspects of civil war: John Norton Moore and Joseph Perkovich (eds.), *Law and Civil War in the Modern World* (Baltimore, MD: Johns Hopkins University Press 1974); Stephen C. Neff, *The Rights and Duties of Neutrals: A General History* (Manchester: Manchester University Press 2000); and Eliav Lieblich, *International Law and Civil War* (New York: Routledge 2013). For a compelling historical study on the notion of civil war: David Armitage, *Civil Wars: A History in Ideas* (New York: Alfred A. Knopf 2017). This remains a non-exhaustive list, of course.

[25] The aim of this study is to show how the present foreign fighters' categorizations are linked to previous cultural archetypes. And, consequently, how the figures evoked in earlier epochs still affect and inform the imaginaries of legal actors in the present. For important critical work on the laws of war see David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press 2006); Chris Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 *Harvard International Law Journal* 49–95; Frédéric Mégret, 'The Laws of War and the Structure of Masculine Power' (2008) 19 *Melbourne Journal of International Law* 200–226; and Nathaniel Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 *Columbia Journal of Transnational Law* 1–71. On the colonial origin of the laws of war see Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"', in Anne Orford (ed.), *International Law and Its Others* (Cambridge: Cambridge University Press 2006) 265–317.

[26] The examination of how foreign fighters were understood under the modern laws of war certainly points to the state-centric bias at the core of IHL. Foreign fighters as actors in warfare are only conceivable in relation to state armies, or groups resembling fully organized armed contingents. As we will see throughout the chapters, they will mostly be protected under the regime dealing with international armed conflicts. In a situation of civil strife; however, they tend to benefit from less protection. This bias is not exclusively targeting foreign fighters though, as they suffer from the same prejudice as other non-state armed actors. Mégret notes: 'Although the laws of war claim to have nothing to do with the jus ad bellum, they are at least the repositories of a notion of who is more fundamentally allowed to participate in war, with states at the apex, state-mimicking non-state actors a relatively close second, and pure non-state actors that do not inscribe their action within a sovereign register as distant thirds.' Frédéric Mégret, 'Theorizing the Laws of War', in Florian Hoffmann and Anne Orford (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press 2016) 762–778, p. 17. For some relevant literature on non-state actors, please refer to: Andrea Bianchi (ed.), *Non-state Actors and International Law* (Aldershot: Ashgate 2009); Math Noortmann and Cedric Ryngaert (eds.), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (London: Routledge 2016); Jean d'Aspremont (ed.), *Participants*

Here, another clarification is needed. The discussion is on two levels: the national and the international. It is particularly interesting to follow the discourse of legal actors, as it shifts from the domestic to the international plane and back. Lawmakers in the domestic context refer to the international sphere to solve the issue of foreign fighters; conversely, international actors point to the domestic level to pass and enforce legislation against them. This is not only indicative of the interconnections between the two frameworks, but it also reinforces the argument about the difficulty of producing any clear-cut categorization for this non-state actor.[27]

Related to this is the choice of the material. French and British sources have been privileged. Focusing on the case studies of France and United Kingdom was not only due to the possibilities of conducting research, but above all for the richness of the material and for the cultural figures which keep recurring in the debates on foreign volunteers. One of the apparent shortcomings of this work might be that this material remains strictly legal: for example, doctrines, parliamentary debates, preparatory works. While the genealogical method envisages finding the hidden ways in which the legal material is moulded, here the reverse approach was adopted. Within the discourse of legal actors, I deliberately chose to trace those figures that bring a focus *from law elsewhere*. The objective is to bring out an alterity from the legal material itself, by showing how law is embedded within a web of cultural references in the imaginary of its creators. This is also the reason why the text makes extensive use of direct quotes – attempting to offer a sense of the fantasies, fears and related cultural images that actors use when speaking about foreign fighters.[28]

in the International Legal System: Multiple Perspectives on Non-State Actors in International Law (London: Routledge 2011); and Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds.), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (The Hague: Asser Press 2020).

[27] It must also be emphasized that legal actors themselves move from the national to the international context and vice versa. State representatives and policymakers often sit in parliamentary debates and in UN venues. Or they are briefed by international experts, before drafting legislation at the national level. This should be taken as a further confirmation of the strong interrelations between the two stages. I am aware that there are fundamental differences between the domestic and international spheres in how norms are produced and enforced. But this book does not deal with the function and nature of legal systems. The story unfolds through sites where the issue of foreign fighters is dealt with from a legal point of view.

[28] On this point see Marianne Constable, *Our Word Is Our Bond: How Legal Speech Acts* (Stanford, CA: Stanford University Press 2014).

Naturally, in each of the three periods analysed, only certain sources were considered. The problem of Western subjects going to fight in wars abroad has been discussed in many different forums and by different actors over the last century. Yet not all voices could be included.[29] Let me state an important caveat. I am aware that there is a multiplicity of stories on the ground in every historical era. Not all leftist volunteers in Spain merged with the International Brigades. There were other right-wings troops and battalions apart from the ones sent by Germany and Italy to help Franco.[30] One side of the argument is that it is difficult, if not impossible, to reflect all historical complexities. The other, more compelling I believe, is that not all foreign fighters had the same weight in the legal arena. In this sense, the book traces those events which contributed to significant debates and changes in legislation. As I explain in detail in Section I.5, the idea is to detect moments of rupture. To offer another example, the focus on British mercenaries in Angola is useful to the national and international debates triggered by the trial in Luanda (June 1976). That is why the debates at the United Nations (UN) or in Geneva are more persuasive than, say, those of the 1977 African Convention on Mercenarism. Because they are revealing of the conflicting cultural visions underneath the categorization of 'good' and 'bad' foreign combatants during the decolonization period.

At this point, it must be stressed that the purpose of this work is not to write a global history of the foreign fighter, but only a partial one. Partial, because deliberately Eurocentric. The focus is kept on Western countries,

[29] To offer an example, the issue of foreign volunteers is discussed at the Institut de Droit International, specifically at the Session de Florence in 1908. Nonetheless, in Chapter 1 it is preferred to give precedence to the *travaux preparatoires* of the 1907 Hague Conventions: on the one hand because the discussions at the Institut followed those that took place only one year earlier in the Netherlands and, on the other, because The Hague is a more advantageous venue to observe the figures at play behind the conceptual positions of states' delegations. In Chapter 1, the debates at the League are privileged over those at the Committee of Non-Intervention in London. This was done to establish a thread with the discussions at the General Assembly and the Security Council in the subsequent chapters.

[30] *See* Sylvain Roussillon, *Les 'Brigades internationales' de Franco. Les Volontaires Étrangers du Côté National* (Versailles: Via Romana 2012); Michael Alpert, *The Republican Army in the Spanish Civil War, 1936–1939* (Cambridge: Cambridge University Press 2013); and Lisa A. Kirschenbaum, *International Communism and the Spanish Civil War: Solidarity and Suspicion* (Cambridge: Cambridge University Press 2015). For two recent studies on the Spanish Civil War and its socio-political background see specifically Stanley G. Payne, *The Spanish Civil War* (Cambridge: Cambridge University Press 2012) and Gerald Brenan, *The Spanish Labyrinth* (Cambridge: Cambridge University Press 2014).

doctrines and actors.[31] In this sense, the figures of *other* foreign fighters – that is, those populating the imaginaries of non-Western actors – are left out of this book. Nonetheless, the three chapters reveal that the colonial question is an integral part of the modern history of the Western foreign combatant, both before and after decolonization. Such a question is, however, filtered through figures pertaining to a Eurocentric imaginary. Let us now explore how.

I.3 The Cultural Approach: Ambivalence

Revenants, they have been called. The idea of the return of images of the foreign fighter is of crucial importance to rewrite the history of this non-state actor from a cultural standpoint. As much as lawmakers would like to confine foreign fighters within a certain legal category, they do not manage to do so, because of their deep ambivalences towards this figure.[32] I take the psychoanalytic notion of ambivalence from Nathaniel Berman, who, in his reading of the passions that cross the modern construction of internationalism, is informed by Kleinian thought.[33] Melanie Klein retraced the fundamental idea of the individual as split between 'good' and 'bad' objects of desire, or aspects of the self:

> The concept of splitting is central to Klein's theory in which the individual begins life with the developmentally essential task of achieving a binary split between the 'good' and 'bad' aspects of himself . . . Klein's view is that the first act of the ego is to split off and project out into the object its

[31] On the notion of Eurocentrism see Arnulf Becker-Lorca, 'Eurocentrism in the History of International Law', in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press 2012) 1034–1057. On the choice of prioritizing certain events see specifically Fleur Johns, Richard Joyce and Sundhya Pahuja (eds.), *Events: The Force of International Law* (London: Routledge 2010).

[32] I use the term 'figure' interchangeably with 'image' and 'characters' in order not to overload the text.

[33] I refer to the term 'splitting' as used by Melanie Klein. Melanie Klein, *Contributions to Psychoanalysis 1921–1945* (London: Hogarth Press 1948) pp. 288 and 346. 'In dividing its mother into a "good" mother and a "bad" one and its father into a "good" father and a "bad" one, it attaches the hatred it feels for its object to the "bad" one or turns away from it while it directs its restorative trends to its "good" mother and "good" father and, in phantasy, makes good towards the damage it has done its parent-imagos in its sadistic phantasies.' Melanie Klein, *The Psychoanalysis of Children* (New York: Grove Press 1932) p. 222.

> destructive impulses and its loving libidinal impulses; the object is correspondingly split into a 'bad' and a 'good' part.[34]

Berman utilizes the idea of the ego's identity construction and applies it via analogy to the self-constructed identity of internationalism, as: '[international lawyers] attempt to construct an image of the self . . . by splitting between good and bad images of that self – for example, in Basch's distinction between the good colonialism of the French and the bad colonialism of other Europeans, or in Brown's distinction between bad "imperialism" and good "trusteeship colonialism"'.[35] Even if Berman's analysis focuses on the construction of internationalism as an ambivalent passion played out on binary oppositions, this model can be used for other types of legal constructs and discourses. It is the same kind of ambivalent discourse that is found when legal actors try to give an identity to our foreign fighters: these become split into good and bad 'volunteers', good and bad 'mercenaries', good and bad 'jihadists', and so on.

Yet Berman goes further in his analysis by claiming that '[international lawyers] attempt to create an *image* by splitting between good and bad images of [the] other – for example, between "undisciplined" and "disciplined" nationalism . . . between not yet men and men'.[36] In other words, there are figures at play in projecting good and bad versions of the same object, figures which are attached to the desire to see war waged in a certain way, or to the nobility of the cause fought in a conflict abroad.

[34] Elizabeth Bott Spillius, Jane Milton, Penelope Garvey, Cyril Couve and Deborah Steine (eds.), *The New Dictionary of Kleinian Thought* (New York: Routledge 2011) p. 491.

[35] Berman, *Passion and Ambivalence*, p. 425. Jouannet explains the process in a very helpful way: 'Put more simply, it refers to the fact that an individual can experience contradictory feelings of love and hate for the same object . . . Klein referred to the phenomenon of ambivalence in order to characterize one of the fundamental psychological mechanisms operative from the very first months of a human being's life, from this moment the individual – as a being of desire – is caught between the drives of life and death. In Klein's view, if the drive – as the energy that animates each individual – is fundamentally ambivalent, it will construct the objects to which it is addressed in its own image (that is, as ambivalent). Yet, the ambivalence of this constructed object (in particular the mother for the young child), is unbearable for the subject; the individual, therefore, "splits" the object into a "good" and "bad" version. In doing so, the relation to the "good" object involves an element of idealization, and the relation to the "bad" object entails, for its part, anguish and fear. The dynamics of ambivalence are inseparable from the self-construction of the subject. The two versions of the object, the "good" and the "bad", inevitably emerge together, giving rise to mechanisms of repression and conflicting fantasies.' Emmanuelle Jouannet, 'A Critical Introduction', in Berman (ed.), *Passion and Ambivalence*, pp. 9–10.

[36] Berman, *Passion and Ambivalence*, pp. 425–426. Emphasis added.

As such, the foreign fighter gets split every time into 'good' and 'bad' versions of the same: brave highlanders and scary adventurers, noble volunteers and racist white men, perverted romantics and war heroes.

Once again, these figures are not static; they travel in time, and they undergo modifications. As Berman clarifies: 'so often in "*splitting*", the lines between identities "good" and "bad", "true" and "false" are contingent and indeterminate – an unsurprising feature of constructions that seek "to manage the anxiety" provoked by irreducible ambivalences'.[37] The notion of ambivalence as developed by Berman through Klein is thus crucial to understand how various legal actors are caught up in a web of cultural references, which they cannot get rid of: 'I will use the notion of ambivalence to refer to the inability of an individual, a group, or a culture to rid themselves of ideas, passions, or relationships that they nevertheless claim to condemn or deny.'[38] In our case, the inability of national and international actors of getting rid of cultural images of the foreign combatant which each time symbolize, mirror and epitomize different desires and fantasies projected over them.[39]

The idea that the (legal) identity of foreign fighters passes from certain fantasies which unfold through a historical scenario is supported by the reading of gender historian Joan Scott.[40] Scott reflects upon the formation of the feminist self through a series of 'fantasies [which] were produced to consolidate' such an identity.[41] Utilizing the axes of 'fantasy' and 'echo', she shows how: 'identity as a continuous, coherent, historical phenomenon is revealed to be a fantasy, a fantasy that erases the divisions and the discontinuities, the absences and the differences . . . Echo provides a gloss on fantasy by reminding us that identity is constructed in complex and diffracted relation to others'.[42]

[37] *Ibid.*, p. 429.
[38] *Ibid.*, p. 414.
[39] 'Desire is irreducible. Don't deny your desire, tell me of its quality.' Nathaniel Berman, 'In the Wake of Empire' (1999) 14 *American University International Law Review* 1515–1569, p. 1551.
[40] Joan Scott, 'Fantasy Echo: History and the Construction of Identity' (2001) 27 *Critical Inquiry* 284–304.
[41] For instance, the female orator 'which projects women into masculine public space', or the maternal fantasy 'with its acceptance of rules that define reproduction as women's primary role'. *Ibid.*, p. 293.
[42] *Ibid.*, p. 292. It is interesting that the myth of Echo is linked with the one of Narcissus. Pierre Legendre might help in elucidating this point better: 'the human would be unthinkable without the instance of representation . . . This suggests that the structure of the human subject is a structure of representation'. Pierre Legendre, 'Introduction to

In every era, foreign fighters are furnished with a plot, or a scenario that settles the desires and fantasies of their creators. In other words, certain passions win over others; they operate as a narrative and contribute to form 'individual and collective identity', as Scott explains.[43] But the original tension (the Kleinian splitting) inherent in all processes of identity-formation cannot be contained, precisely because identities are built upon the marginalization of other desires which propagate over time, as an echo. And so the combatants returning today from Syria are *revenants*, as much as are past, heroic volunteers – with their barbaric, cynical, racist counterparts. As put by de Certeau: 'Psychoanalysis recognizes the past *in* the present . . . any autonomous order is founded upon what it eliminates; it produces a "residue" condemned to be forgotten. But what was excluded re-infiltrates the place of its origin.'[44] The term *revenant* reconnects well both with psychoanalytical theory, and with that form of genealogy that Jacques Derrida had referred to as 'hauntology'.[45] Hauntology as a genealogical method is devoted to exploring the characteristic that ghosts seem to possess: the perpetual returning in the form of haunting.[46] If ghosts come back from the past to haunt us, they also re-infiltrate the historical scene. Reading the history of foreign fighters as a history of phantasmatic figures which populate the imaginary of legal actors across times and spaces can be seen properly as an hauntology.[47] In this sense, the history of the various juridical

the Theory of the Image: Narcissus and the Other in the Mirror' (1997) 8 *Law and Critique* 3–35, pp. 10–13.

[43] Scott, 'Fantasy Echo', p. 289.

[44] Michel de Certeau, *Heterologies: Discourse on the Other* (Minneapolis: University of Minnesota Press 1986) p. 4.

[45] *See* Jacques Derrida, *Spectres of Marx: The State of the Debt, the Work of Mourning and the New International* (New York: Routledge 1994). A clarification is needed. Derrida's hauntology, as I understand it, is a stance in favour of the living spectres of Marxism. His aim is to re-engage with and reopen that history, in a time which saw the end of the Cold War and the birth of the Washington Consensus. I make use of hauntology not to sustain a Marxist position, but rather to keep the idea of the living heritage of the past in the present. This point will further be explained in the next section.

[46] As the Oxford Dictionary puts it, haunting is 'a persistent and disturbing presence . . . something unpleasant [that] continue to affect or cause problems'. In the French sense of the word *l'hantise*, 'est un obsession, ou preoccupation constante'.

[47] On the etymological convergences of the terms 'ghost', 'imagination' and 'fantasy', Sébastien Rongier writes: 'le mot *image* est hanté par la notion de fantome . . . trois termes essentiels se partagent la plus grande part de la discussion: *eikon*, *eidolon*, *phantasia* . . . le terme le plus courant est *eidolon*. Les premiers sens d'eidolon sont "images" et "fantome" . . . par glissement, le terme définit l'imagination . . . En rapportant la phantasia au regard à partir de la lumiére, le fantome devient une figure

categories utilized to label foreign fighters cannot do without the contribution of psychoanalysis, as '[psychoanalysis] introduces the agency of the unconscious ... psychoanalysis ... look beyond the literal and the rational, to entertain the idea that not all actions express the reasoned self-interest of the actors'.[48] This is of particular relevance to demonstrate how the legal status of the foreign combatant is certainly created via ideologies and state interest, but also via the resort to fantasies, desires and fears. In other words, the cultural archetypes of the foreign fighter might well be used as rationally defensible categories, but that is only one part of the story. To be clear:

> this is not to condemn law as a simple reflection of our passions and our unconscious psychological mechanisms, but rather to show that it can never be the product of our reason alone ... the suggestive force of Berman's work lies in its demonstration of the importance and the inevitability of the play of passions at the very heart of international law ... The same analysis can be applied to states and their governments ... both as national communities and as governments they have their own share of irrationality and passion that guide their actions [which] are not simply a function of their 'interests' alone ... instead, considerations of morality, of culture, of passion are unavoidably intertwined.[49]

Berman understands law as a part of a larger mosaic, formed by a whole set of cultural, moral and social tiles. Furthermore, he suggests an interconnection between the phenomenon of splitting relevant to individual self-formation of identity, and those of players in larger legal arenas. This is a significant indication of how ambivalence is not only confined to the single, private conscience of juridical actors, but crosses the whole liberal system of international law.[50] I will return to this point later when discussing the idea of indeterminacy, in relation to the way one can write the history of the foreign fighter and of international law more generally. For the moment, what needs to be assessed is how the

qui permet de penser l'image'. Sébastien Rongier, *Theories des Fantômes. Pour Une Archéologie des Images* (Paris: Les Belles Lettres 2016) pp. 19–21.

[48] Victoria Hesford and Lisa Diedrich, 'On "The Evidence of Experience" and Its Reverberations: An Interview with Joan W. Scott' (2014) 15 *Feminist Theory* 197–207, p. 204.

[49] Jouannet, in Berman, *Passion and Ambivalence*, pp. 11–13.

[50] 'This kind of ambivalence is associated with doubling ... these two aspects of ambivalence have profoundly marked the discourse and practice of colonialism and other forms of the exercise of power by the strongest countries of the world over those less powerful.' Berman, *Passion and Ambivalence*, pp. 414–415.

cultural figure of the foreign combatant populates the minds of different legal actors, who are part of social groups. That is how to transport the analysis of ambivalence to larger social entities and their imaginary.

I.4 The Cultural Approach: The Imaginary

The concept of the imaginary has a long history in Western thought, beginning with its modern systematizations operated by Hume and Kant, passing from French phenomenology (in the works of Sartre and Merleau-Ponty), and being appropriated by Freud and Lacan and more generally by twentieth-century psychoanalysis.[51] It is within psychoanalytic theory that this concept is of interest for the scope of this study.

If Freud and Lacan have worked extensively with the imaginary, however, they both maintained a negative vision of such a concept: for Freud, in fact, *phantasia* is the place of self-representation, the place of passions and emotions that make up the construction of the ego. These passions and emotions must however be tempered and managed because they can pose problems for human beings in their social relations. Lacan takes the teaching of Freud and develops in more detail the phases of the construction of the identity of the ego, for instance in his famous recounting of the mirror-stage.[52] For Lacan, the formation of identity passes from a whole series of images that are both fascinating and

[51] For an excellent study please refer to Kathleen Lennon, *Imagination and the Imaginary* (New York: Routledge 2015). *See* also Jacques Lacan, *Écrits: The First Complete Edition in English* (New York: Norton 2010) and Sigmund Freud, *Civilization and Its Discontents* (New York: Norton 2010). The concept has also been discussed with reference to law: James Boyd White, *The Legal Imagination* (Chicago: University of Chicago Press 1985), Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley: University of California Press 1995) and Peter Goodrich and David Gray Carlson (eds.), *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence* (Ann Arbor: University of Michigan Press 1998).

[52] The creation of the subject – and thus of its consciousness – is a fluid, ambivalent process that involves other, uncanny elements. The child, Lacan explains, seeks in the mirror for its own image in order to constitute itself as a unitary person. But its self-image is subjected and gets seduced by other images, desires, passions and fears (like its mother's voice, gestures, facial expression, etc.). In other words, the child starts to recognize then that its own ego, its own self-image is in fact fragmented, inherently neurotic and alienated. As the French psychoanalyst explains: '[the mirror stage] is a structural crossroads at which one has to take one's bearings; [the mirror stage] turns out fantasies, produces an alienating identity, an inexhaustible squaring of the ego's audits. The subject ends up recognizing that this being has never been anything more than his construct in the imaginary'. The subject thus perceives his ego as inherently divided, fragmented and incomplete, and at the same time crossed by all sorts of 'other' elements which contribute

seductive, fearful and joyful, and so on.[53] As much as for Freud, the imaginary remains for Lacan a necessary illusion, a misrepresentation that must essentially be subsumed at the level of the 'Symbolic': the Freudian totemic, civilizing role of culture, is then translated for Lacan into the realm of language, of signs.[54]

Yet if we hold to the notion of ambivalence, we should not understand law as a mere weapon of repression, but as a 'multifaceted instrument of regulation, emancipation and illusion – as well as of satisfaction, repression and control of individual and social passions, drives and fantasies'.[55] A position that closely resembles that of social theorist Cornelius Castoriadis.[56]

Castoriadis' approach to psychoanalytic theory offers an understanding of the imaginary that is not necessarily illusory (something that must be corrected), but with the capacity to produce images in a creative sense: 'psychoanalysis obliges us to see that the human being is not [an animal possessing reason] but essentially an imagining being ... in the unconscious, representation, affect, desire are mixed together ... it is

to its own formation. The child, seeking for its self-representation in the mirror, finds many 'others' selves, crossing and shaping its own image. Eventually, that very image will bear an original sense of void and incompleteness, an absence of stable grounds which has contributed to its very constitution. In other words, the image that the subject sought in order to recognize itself as a fully-fledged human being will always bear the stamp of those 'other' unsettling elements. *See* specifically Jacques Lacan, 'The Mirror Stage as Formative of the I Function as Revealed in Psychoanalytic Experience', in Lacan, *Écrits*, pp. 75–81.

[53] Lennon, *Imagination and the Imaginary*, pp. 53–54.

[54] This is not to undermine the fundamental contributions of other theorists in developing a theory of the imaginary. As Bottici explains: 'Psychoanalysis and structuralism both contributed to this development – the former with a new emphasis on the complexity of psychic life and the latter with a new attention to the products of imagination. Myths, fables, fairy tales, rituals, totemic practices, all have been analysed as part of the social imaginary – one just has to think of Freud's and Jung's contributions in this direction or, more recently, of the structuralist analysis inspired by Lévi-Strauss ... the most important result is perhaps the move away from a view of the self as a mere sum of separated faculties.' Chiara Bottici, 'From Imagination to the Imaginary and Beyond: Towards a Theory of Imaginal Politics' in Chiara Bottici and Benoît Challand (eds.), *The Politics of Imagination* (London: Birkbeck Law Press 2011) 16–37, p. 22.

[55] Jouannet, in Berman, *Passion and Ambivalence*, p. 19.

[56] *See* Cornelius Castoriadis, *The Imaginary Institution of Society* (Cambridge, MA: MIT Press 1997) and Cornelius Castoriadis, *World in Fragments: Writings on Politics, Society, Psychoanalysis, and the Imagination* (Stanford, CA: Stanford University Press 1997).

impossible to separate them'.[57] Additionally, Castoriadis suggests a viable route to think of the imaginary not only as a singular, individual enterprise, but as having a 'social' dimension:

> The merit of Castoriadis' concept of social imaginary is to point out that the *instituting* social imaginary is always at the same time *instituted*. No society could ever exist if individuals created by the society itself had not created it. Society can exist concretely only through the fragmentary and complementary incarnation and incorporation of its institution and its imaginary significations in the living, talking and acting individuals of that society.[58]

This vision of the social imaginary is extremely important, because it offers a framework to analyse individuals as active participants in the creation of society itself.[59] International lawyers, state representatives, national policymakers, all these groups come with certain figures of the foreign fighter in their mind: be it the adventurer international lawyers refer to during the interwar years, or the Spanish Civil War heroes state representatives evoke at the UN, or the freedom fighters in contemporary parliamentary debates. Yet these individuals do not operate in a vacuum. They are part of larger institutions or social groups that function through their own instituted imaginaries: international lawyers in the 1930s will thus frame the problem of volunteers through the laws of neutrality; state

[57] 'For Castoriadis, the imaginary is not constituted out of a relation to an external, and illusory, image. It is instead the product of the originary and creative capacity for making and grasping image or form in what is presented to us. Although such imaginary formations are multiple and historically variable, they are not necessarily distorting and illusory … The point of the imagination is not simply to provide images which will satisfy fundamental drives universally present in each psyche. It is rather that the nature of such psychic drives is not fixed independently of the images which express them. These images can be multiple and variable, and constitute the affective texture of the psyche's interior world.' Lennon, *Imagination and the Imaginary*, p. 76.

[58] Bottici, 'From Imagination to the Imaginary', p. 25.

[59] 'The social imaginary significations of any society form an immensely complex web of meanings, which nonetheless, for Castoriadis, display some unity and internal cohesion. This network of meanings he termed a magma of "social imaginary significations that are carried by and embodied in the institution of a given society and that, so to speak, animate it" … For Castoriadis, social imaginaries also yield a sense of what constitutes the society itself and what constitutes our own identity as members of the society … social groupings require a shared imaginary about that grouping … a sense of a "we" transparent between individual and collective which constitutes both individual and group identity. "Every society up to now has attempted to give an answer to a few fundamental questions: Who are we as a collectivity".' Lennon, *Imagination and the Imaginary*, p. 81.

representatives in the 1970s discuss the outlawing of mercenaries in contraposition to the combatant's privilege; today's policymakers operate under the global counter-terrorism agenda when deciding which of their citizens shall be prevented from leaving for Syria.

Nonetheless, as Castoriadis posits, men are imagining being and, in the unconscious, representation, affect, desire are all mixed together. If individual and collective imaginaries are interdependent, then all those passions, desires and fantasies that Berman sees as constituting the raw material of the lawmaking process are indissolubly part of the same story.[60] And this is the decisive point which reconnects the cultural history of the foreign combatant as presented in this book and the figures evoked in various juridical settings. The idea is to offer a link to the way certain figures epitomize the fantasies, the desires and the passions of legal actors distant in time, and the idea of the social imaginary outlined by Castoriadis.[61] In this regard, I find it useful to turn to Canadian philosopher Charles Taylor, who has developed a workable definition of the social imaginary as the following:

> the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations ... this is not often expressed in theoretical terms, but is carried in images, stories, and legends.[62]

It is important to underline the normative aspect of the social imaginary, given that legal actors are constantly involved in the production of rules to capture foreign fighters' status. As we shall see, the various forms of normative projects that inform the debates on foreign fighters (both

[60] *See* specifically Castoriadis, *The Imaginary Institution of Society*, pp. 184–189. Bottici further explains: 'Otherwise put, the definition of the "real" is the result of the dialectics between the instituted and the instituting side of the social imaginary. Behind this idea there is a complex view of the relationship between individuals who cannot but exist within imaginary significations, and a social imaginary which cannot but exist in and through individuals themselves.' Bottici, 'From Imagination to the Imaginary', p. 27.

[61] 'Castoriadis offers a picture of the relation between the psyche and the social in which neither is reduced to the other. There is rather a relation of interdependency which he terms "leaning on". The psyche maintains a certain independence of the social, while necessarily being modified by the social imaginaries to which it is exposed. Nonetheless these social imaginaries are reinterpreted in its own terms. An individual is always socially formed, but also bears the distinctiveness of its own psychic formation.' Lennon, *Imagination and the Imaginary*, pp. 77–78.

[62] Charles Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press 2004) pp. 23–24.

nationally and internationally) are flooded with images that emerge from the actors' inner life. These form the magma of the social imaginary, and become a *repertoire* that in Taylor's words 'is carried in images, stories, and legends': the nobility of the adventurers à la Byron, the paternalism of the former European colonizers, the twisted romanticism of contemporary jihadists. An ambivalent repertoire, as it emanates from the fears and fantasies of the various legal actors who try to subsume foreign fighters within the rational endeavour of lawmaking. As Berman reminds us:

> the cultural approach explores the way international lawyers and policy-makers construct their images ... in accordance with their own implicit, culturally and historically contingent fears and fantasies ... one should not seek to get rid of cultural images but to make them explicit, evaluate them substantially, allow them to compete with alternative images.[63]

And so international lawyers and policymakers construct the law related to foreign fighters by resorting to their own culturally and historically contingent fantasies and fears. These crystallize into images of the 'good' and 'bad' foreign combatant, which help them to characterize *how* civil war should be conducted, *who* is a legitimate fighter, or *which side* of the trench is the right one to die for. Read this way, the imagination of legal actors should not be seen as a purely negative enterprise. If legal categories are necessarily ambiguous, this could in fact be seen, according to Berman, as an opportunity to 'allow [images] to compete with alternative images'. This approach is a way to rethink the story one is accustomed to, and most importantly to include other narratives. What is at stake is not only how one can write the history of the foreign fighter per se, but the histories of international law more generally. I will try to elucidate this point further in the next two sections.

I.5 Engaging with the Past

The historical work presented in this book has been influenced by the genealogical method developed by a variety of authors commonly

[63] Nathaniel Berman, 'Legalizing Jerusalem: Or, of Law, Fantasy, and Faith' (1996) 45 *Catholic University Law Review* 823–835, pp. 830–831. For an earlier – different – attempt to analyse the conscious and unconscious resort to images used by international lawyers see Georg Schwarzenberger, 'Images and Models of International law' (1966) 19 *Current Legal Problems* 192–207.

associated with French post-structuralism.[64] This has provided the background for articulating my claim around the different figures of the foreign combatant, via a reading of history centred on the study of discourse.[65] Broadly conceived, genealogy not only investigates how certain ideas and concepts are always rooted in specific historical, political and linguistic contexts, but it also suggests a vision of history in terms of accidents, ruptures and discontinuities.[66] Specifically, it seeks to identify the deviations which contributed to the formation of certain apparently stable and well-rounded truths. Or as Foucault put it: 'genealogy does not pretend to go back in time to restore an unbroken continuity . . . it seeks to make visible all of those discontinuities that cross us'.[67]

If genealogy focuses on the ruptures, the suppressions and the exclusions that cross us, Foucault himself remained cautious about the purpose of this method: 'its duty is not to demonstrate that the past actively exist in the present'.[68] At first glance, this seems to contravene the project of a theorist whose aim had always been to write a history of the present. But that the past can represent a means to understand the present is an idea that must be handled with due care.[69]

Every historical period comes with its own *episteme*, with a system of significations which introduces a form of radical discontinuity within any underlying idea of continuity of forms and concepts.[70] The interwar reliance on neutrality laws to read the phenomenon of foreign volunteers is very different from the post-Geneva 1949 landscape, to offer a blunt

[64] It would be impossible to sum up the diverse contributions of this movement. The works of the authors cited throughout the text represent those on which I have built the methodological framework of this study. For a general reference: Catherine Belsey, *Poststructuralism: A Very Short Introduction* (Oxford: Oxford University Press 2002).

[65] *See* generally Michel Foucault, *The Archeology of Knowledge* (Abingdon: Routledge 2002).

[66] Michel Foucault, 'Nietzsche, Genealogy, History', in Donald F. Bouchard (ed.), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Ithaca, NY: Cornell University Press 1977) 139–164.

[67] *Ibid*., pp. 146 and 162.

[68] *Ibid*., p. 146.

[69] One must not fall into the naïve misunderstanding against which de Certeau warned: '[d'identifier] une permanence de surface [qui] maintient identiques les mots, les concepts les thèmes symboliques . . . les mêmes mots ne désignent pas les mêmes choses. Des idées, des thèses, des classifications surnagent, passant d'un univers mental à un autre, mais chaque fois affectées par les structures qui les organisent et leur donnent une signification différente'. *See* Michel de Certeau, *Histoire et Psychanalyse Entre Sciences et Fiction* (Paris: Gallimard 1987) pp. 194–196.

[70] On this point see generally Michel Foucault, *The Order of Things* (New York: Routledge 2001).

example. This is not something undesirable, but rather enriching for the genealogist. In this sense, his task is to work at the hedge of continuity and discontinuity.[71]

I find the idea of working between continuity and discontinuity one of the peculiar traits of the so-called historical turn started by Martti Koskenniemi's *Gentle Civilizer*, which has since developed in multiple directions.[72] The historical turn has brought about one of the most significant shifts of international legal scholarship, especially because it translated into a critical strand that was able to problematize mainstream views of progress and modernization typically attached to the discipline.[73] This turn has produced breaks and ruptures, revealing a series of alternative stories, together with shedding light on instances that seemed forgotten, taken as natural or – and this is important – fell outside international law's traditional boundaries.[74]

The idea of working between continuity and discontinuity does not sound completely foreign to lawyers either. This is common practice in our profession. The fact that in the legal field the past is constantly retrieved as a source of rationalization of the present has been described by Anne Orford as the 'anachronistic' nature of the (international) legal method: 'the study of international law requires attention to the movement of meaning. International law is inherently genealogical depending as it does upon the transmission of concepts, languages and norms across

[71] 'La tâche de l'histoire n'est donc pas de choisir entre continuité et discontinuité, elle est d'assumer leur équivoque, d'examiner comment ces choses passées sont toujours présentes mais autrement qu'elles n'étaient, d'essayer de raconter le mieux possible cette altérité.' Mikhail Xifaras, 'Comment rendre le passé contemporain?', in Nicolas Laurent-Bonne and Xavier Prévost (eds.), *Penser l'ancien droit privé, volume II* (Paris: LGDJ 2018) 13–38, p. 32.

[72] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press 2004). *See* also Matthew Craven, 'Theorizing the Turn to History in International Law', in Hoffmann and Orford (eds.), *The Oxford Handbook of the Theory of International Law* 21–37.

[73] *See* specifically Thomas Skouteris, *The Notion of Progress in International Law Discourse* (The Hague: Asser Press 2010).

[74] For a selection see Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press 2006); Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press 2011); Martti Koskenniemi, Walter Rech and Manuel Jimenez Fonseca (eds.), *International Law and Empire: Historical Explorations* (Oxford: Oxford University Press 2017); and Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International* (Leiden: Brill 2007). *See* also Philip Allot, 'International Law and the Idea of History' (1999) 1 *Journal of History of International Law* 1–21.

time and space. The past, far from being gone, is constantly being retrieved as a source or rationalization of present obligation'.[75] This is to say that, unlike historians, legal scholars are interested in how concepts move across time and space, rather than seeking for a pure contextualization of the so-called historical archive.

Orford thus posits an important methodological distinction with both the Cambridge school and a vision of history as a product purely of the historian.[76] 'Between the meaning that has become an object, and the meaning that allows to understand it today', as Foucault notes, there is the juncture where it is possible to situate a workable methodological position.[77] Let me now offer an example which points to the idea of working between continuity and discontinuity that I have just evoked.

The three historical periods chosen in this study can be seen as moments of rupture – that is, moments where the discourse of legal

[75] Anne Orford, 'On International Legal Method' (2013) 1 *London Review of International Law* 166–197, p. 175.

[76] The writing of history – to use de Certeau's expression – passes inevitably from forms of emplotment dictated by the context and not ultimately by the author's views, an idea reiterated also by Collingwood and by the Annalistes. *See* Michel de Certeau, *The Writing of History* (New York: Columbia University Press 1992). *See* also Peter Burke, *The French Historical Revolution: The Annales School 1924–2014* (Cambridge: Polity Press 2015); Robin G. Collingwood, *The Idea of History* (Oxford: Oxford University Press 1994); Georg G. Iggers, *Historiography in the Twentieth Century: From Scientific Objectivity to the Postmodern Challenge* (Middletown, CT: Wesleyan University Press 2005); and Elizabeth A. Clark, *History, Theory, Text: Historians and the Linguistic Turn* (Cambridge, MA: Harvard University Press 2004).

[77] I side with Orford when she states: 'I want to stress that the contextualist school of intellectual history and international lawyers find common ground in their focus on interpreting texts in "context". Much of the best recent work engaging with the relation between past and present in international law is in sympathy with Skinner's arguments for interpreting classic texts in that respect. For Skinner, legal, philosophical, or political texts should not be read as sources of timeless truths or authoritative statements about fundamental concepts. In order to understand a particular statement, utterance, or text, the historian needs to reconstruct what its author was doing in making that statement, uttering that utterance, or writing that text . . . But the polemical argument for "contextualism" in the work of intellectual historians is tightly bound up with an idea about time that marks the point at which international law and contextual intellectual history part company . . . it is important for lawyers to engage with the context of past texts or utterances, but that it is also appropriate for historical jurisprudence or those attempting to understand current law to trace the evolution or transformation of concepts across time.' Anne Orford, 'International Law and the Limits of History', in Wouter Werner, Marieke de Hoon and Alexis Galán (eds.), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge: Cambridge University Press 2015) 297–320, pp. 5–6. *See* also Anne Orford, *International Law and the Politics of History* (Cambridge: Cambridge University Press 2021).

actors drastically change. This is especially evident when analysing the argumentations of international lawyers around the three civil wars: the Spanish, Angolan and Syrian wars are in fact described as different from 'all that has happened previously'. This is also translated into how lawyers and experts understand the problems of foreign fighters. For instance, during the Spanish Civil War, many internationalists would begin their dissertations by claiming that 'adventurers of all sorts have always fought in wars abroad', yet the present situation had to be understood differently due to the presence of fascist volunteers on the ground (something that altered the way in which the problem was traditionally understood). The same line of argumentation goes with mercenaries during decolonization and with terrorists today.

In a sense, this is the story of international law as a discipline built upon subsequent crisis or, to put it otherwise, obsessed with crisis discourse.[78] If this is an integral part of the preoccupations that legal actors project over foreign fighters, their change of register is important to confirm a twofold aspect. On the one hand, lawmakers want to break away from the past, to conclude that the present historical period (with its own foreign fighters) is radically different from what has occurred previously. On the other hand, their imaginary is held hostage to certain figures who keep coming back, and from which they cannot free themselves: the adventurer à la Byron, the heroes of the Spanish Civil War, the freedom fighters of decolonization. Figures that rise to their contextual meaning when placed in a historical context.[79] Figures which must not be seen only as imprisoned in that context, however, but that travel through time and reappear in subsequent epochs.

The idea that the past is not to be considered as a dead letter, but rather something which informs present legal obligations, is also one of the workhorses of Third World Approaches to International Law (TWAIL).[80] If the aim of this scholarship is to revive past practices,

[78] 'A crisis provides a focus for the development of the discipline and it allows international lawyers the sense that their work is of immediate, intense relevance . . . crisis structure our thinking about international law . . . international law's obsession with crisis leads us to concentrate on a single event or series of events and often to miss the larger picture.' Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377–392, pp. 377, 382 and 384.

[79] For the idea that consciousness must always be historicized see specifically Thomas Khun, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press 1970).

[80] Among the vast TWAIL literature: Makau Mutua and Anthony Anghie, 'What Is TWAIL?' (2000) 94 *Proceedings of the Annual Meeting (American Society of*

institutions and discourses to show how they might form the basis of legal obligations in the present, its strand of critique remains rooted in a postcolonial approach to law.[81] As such, there is a tendency to emphasize the various encounters with the colonial 'other' and to put such encounters at the centre of their investigations. Although this critique is of fundamental importance for any stance against the universality of international law, the approach followed in this book does not go in that direction. I will try to explain this point by resorting again to the three contexts upon which this study is built.

Spain in the 1930s, Angola in the 1970s and contemporary Syria are undoubtedly *other* places with respect to the centrality of European consciousness, actors and institutions. They represent an alterity (for example, a 'barbaric/backward place', a 'space for adventure', a 'promised land') where different actors project their fantasies. The decisive point, however, is not to retrace an encounter with a colonial subject out there, or to unravel how legal discourses or practices have developed through the exclusion of certain others. The goal is rather to look at the *otherness* inherent in the figure of the foreign combatant itself. So that the 'barbarity', the 'fanaticism' or the 'heroism' attached to this figure are all fantasies that inhabit the consciousness of the actors who use and deploy them for different purposes.

International Law) 31–40; B. S. Chimni, 'Third World Approach to International Law: A Manifesto' (2006) 8 *International Community Law Review*; B. S. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 *Melbourne Journal of International Law* 499–514; James Thuo Gathii, 'Imperialism, Colonialism and International Law' (2007) 54 *Buffalo Law Review* 1013–1066; James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 *Trade Law and Development* 27–64; Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 *International Community Law Review* 371–378; and Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 *Osgoode Hall Law Journal* 171–191. This remains of course a non-exhaustive list.

[81] *See* Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29 *Adelaide Law Review* 315–357. *See* also Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Towards a History of the Vanishing Present* (Cambridge, MA: Harvard University Press 1999); Bart Moore-Gilbert, *Postcolonial Theory: Contexts, Practices, Politics* (London: Verso 1997); Henry Schwarz and Sangeeta Ray (eds.), *A Companion to Postcolonial Studies* (Malden, MA: Blackwell Publishing 2005); and Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton, NJ: Princeton University Press 2000).

Gerry Simpson has suggested something in a similar vein when analysing the pirate, as a figure underpinning the legal category of the 'enemy of humanity'.[82] As pirates started to be back in vogue with the advent of the global war on terror, Simpson seemed at first inclined towards a grand narrative about international law and the ever-present problem of piracy: 'the international community fights humanitarian wars against outlaws and pirates'.[83] This would have been a story of how the figure of the pirate is used to mobilize particular legal regimes (such as universal jurisdiction or humanitarian intervention). Yet Simpson moves towards another kind of narrative within his recital about pirates. By claiming that pirates were not always seen as criminals, but also as a 'mode of production supported by great Powers and Empires', or as active participants in rebellions, wars and revolutions, the Australian scholar ends up telling a different story, one which goes in the direction of ambivalence:

> it is important here to do more than simply make an argument about the return of the pirate or, indeed, produce a Schmittian salvo in the direction of Empire. What I want to suggest is that the pirate is a deeply ambiguous figure . . . this ambiguity emerges precisely because of efforts to inject clear moral distinction into our dealings with enemies while at the same time erasing some of international law's most enduring demarcations . . . if the pirate is [a] foundational category . . . then it is little wonder that categories are blurring as this figure resurfaces. Indeed, the return of the pirate is a return to ambiguity . . . pirates turn out to be not enemies of humankind but humankind in its plural guises.[84]

And so for our foreign fighters. Recounting their recent history could have resulted in looking at how this actor has been mobilized, by whom, and for what purposes: the Russian Comintern at the time of the Spanish Civil War, Third World states throughout decolonization, Western countries in today's war on terror. One would therefore be tempted to seek the usual suspects of international law: foreign intervention, the crime of aggression, the laws of neutrality and the duties of states in civil war, or indeed the combatant's privilege. Let me be clear, all of these are integral and essential parts of the narrative, and the three chapters of this book make explicit references to such a legal context. But my story veers in

[82] *See* Gerry Simpson, 'Piracy and the Origins of Enmity', in M. Craven et al. (eds.), *Time, History and International Law* (Leiden: Brill 2007) 219–230.
[83] *Ibid.*, p. 224.
[84] *Ibid.*, pp. 225–230.

another direction. In this regard, and to make my position more explicit, a few words on the issue of indeterminacy.

I.6 The Stakes for International Law

I am of course very much indebted to Martti Koskenniemi's critique of the international legal argument.[85] The indeterminacy of norms and the binary opposition which structure legal rules are evident in the way actors engage in passionate fights to establish who is the 'good' and who is the 'bad' foreign combatant. Leaving aside the fact that such a model is built upon a liberal theory of politics, the story of how foreign fighters enter legal debates points to the inherent political premises of law.[86] For critics such as Koskenniemi, 'modern international law is an elaborate framework for deferring substantive resolution elsewhere'[87] – only to realize that 'a demonstration that "it all depends on politics" does not move one inch towards a *better* politics'.[88] Engaging in the language of expertise is certainly a tactic, and David Kennedy has demonstrated that strategy masterfully.[89] But what about the short-circuits of power, its grey areas, its ambiguities?[90] What about the inner passions, the

[85] *See* Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge: Cambridge University Press 2005).

[86] For a critique of Koskenniemi see Emmanuelle Jouannet, 'Koskenniemi: A Critical Introduction', in Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart 2011) 1–32.

[87] Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart 2011), p. 58.

[88] Of course, Koskenniemi realizes the different (political) projects which have informed his trajectory: 'If 20 years ago it seemed intellectually necessary and politically useful to demonstrate the indeterminacy (and, thus, political preference) within the idiom of public international law, today's critique will have to focus on the clash of different idioms – public international law just one competitor among many to global authority – and highlight the way their competing descriptions work to push forward some actors or interests while leaving others in the shadows.' *Ibid.*, pp. 64–68.

[89] David Kennedy, *A World of Struggle. How Power, Law and Expertise Shape Political Economy* (Princeton, NJ: Princeton University Press 2016).

[90] 'Martti Koskenniemi discussed the double aspiration of international lawyers in relation to power in terms of the competing discourses of "apology" and "utopia"; Richard Falk diagnosed it in terms of the twin desires for "normativity" and "relevance"; I have often referred to it as the relationship between "power" and "principle." International lawyers often dream of the final absorption of sovereign power by internationalist principle, of conflict by cooperation, of atomization by community … At a general level, these dynamics sometimes tip international lawyers over in the direction of "apology," in which the inequalities of wealth and power are simply denied in favor of abstract legalism; at other times, they tip international lawyers over in the direction of "utopia," in which

ambivalences of discourses, the fantasies that populate them? And why not reconsider our ambiguous relationship with power itself? This should not be read as an invitation to relativism, or to political disengagement, but rather to restart a dialogue with our own fractured self. Writing a purely Marxist or TWAIL or feminist history of international law are very important enterprises. But so is reflecting more on the ambivalences and contradictions of each of the above positions (and so of pro- and anti-colonial positions, pro- and anti-imperial positions, pro- and anti-jihadist positions, before pointing them out simply as fanatical, racist, sexist, or imperialist).[91]

To be fair, Koskenniemi's turn towards history has already directed critique from the analysis of ahistorical structures to the moving landscape of a whole diverse set of actors, places and chronologies.[92] What

the unjust present is juxtaposed with a future world in which the conditions for the rule of law would finally prevail. By contrast, especially in relation to specific problems, the dynamics of ambivalence often produce fascinating, multi-leveled discourses, rich in contradiction, paradox, and complex imagery.' Berman, *Passion and Ambivalence*, pp. 419–420.

[91] 'The basic paradox within international law meant that it could combine a universalist façade with discriminatory and imperialistic practices. Indeed, its extension to the universal level was not possible without completely recasting all non-Western political entities into the mould of modern European states, which in turn required the irreparable destruction of all traditional forms of polity in existence.' Emmanuelle Jouannet, 'Universalism and Imperialism: The True–False Paradox of International Law?' (2007) 18 *European Journal of International Law* 379–407, pp. 380–382. Berman also elucidates this point in relation to the ambivalences permeating the idea of self-determination: 'On one level, the lesson of this story is the elementary Legal Realist point that no formal distinction, like that between "self-determination" and "secession," is determinate without reference to auxiliary cultural and political judgments. The Legal Realist would show that the question of whether the Algerian FLN was a movement for "secession" or "self-determination" depended on competing theories of colonialism and that the doctrinal distinction only looks self-interpreting during periods when these kinds of judgments are not challenged. Yet the vicissitudes of self-determination do not simply demonstrate the indeterminacy of such distinctions, but rather, the ways in which the ever-renewed attempt to gain control over nationalism seems to generate the very forms of the resistance that threaten that control . . . In a very concrete way, the challenge emerges out of the dynamics of the internationalist ambivalence toward nationalism; in projecting the feared elements of nationalism into a forbidden zone, internationalists should not be surprised at the eventual "return of the repressed".' Nathaniel Berman, 'Nationalism "Good" and "Bad": The Vicissitudes of an Obsession' (1996) 90 *Proceedings of the Annual Meeting of the American Society of International Law* 214–218, p. 216.

[92] As Emmanuelle Jouannet points out: 'the denunciation of political liberalism within international law also reflects one possible principle driving the evolution of Koskenniemi's thought since *From Apology to Utopia*, a more complex development than can be accounted for by structuralism alone. The discourse is not self-contained, it is

remains to be seen is how to mould the historical material, how to expand the histories of international law.[93] On the one side, 'we do not need to always look at Westphalia',[94] and on the other, 'by confining themselves to the very same terms, categories and vocabularies of the linear disciplinary histories [they seek to disrupt], these new critical histories uphold more than they disrupt or displace'.[95] As one soon realizes, the limits of our imagination *are* the limits of history.

And so one can well advance the claim that categorizing foreign fighters as 'good' and 'bad' is a common trope used by states to legitimize/delegitimize forms of intervention in a foreign war. Or that the law in relation to foreign volunteers reflects the change in worldviews from the age of positivism and neutrality to postcolonial left-wing euphoria, to the fight against an absolute evil (such as Islamic terrorism). No one is denying such arguments. I have already mentioned international law's usual suspects as examples of histories one can write following those lines. Yet the present study wants to go beyond the dictates of the *raison d'état*, the pragmatic decisions of realpolitik, or law's ideological developments.

not only structure; international law cannot be analysed as a language alone. It is also a set of utterances that produce social effects; it is an instrument that can be manipulated; and it is a practice that can be the bearer of much promise. It is not only a language; it is also a discourse. It is a politics every bit as much as it is a language; and this political dimension opens up new perspectives that become, for Koskenniemi, new fields of investigation. Law is politics just as law is culture; law is alive. It is not the metaphor of the game, so commonly used today, that is appropriate to describe the manner in which Koskenniemi conceives of international law; rather, it is without doubt – as his works make clear – the old metaphor of the "tongue" that is best suited to this task; a tongue by now moulded by many centuries of culture, religion and history; a common tongue, constructed progressively, that has enriched other domains even as it has sombrely colonised them. Law belongs to the realm of the tongue, of lived experience, of history. To compare it to a game or to a system of rules, or even to a set of networks would without doubt appear reductionist to Koskenniemi, as it would be to ignore that in law which goes beyond the rules and the systems, beyond the networks, beyond the instruments used.' Jouannet, 'Koskenniemi: A Critical Introduction', p. 15.

[93] *See* Martti Koskenniemi, 'Expanding Histories of International Law' (2016) 56 *American Journal of Legal History* 104–112 and Martti Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27 *Temple International and Comparative Law Journal* 215–240.

[94] *See* Alexandra Kemmerer, '"We Do Not Need to Always Look at Westphalia. . ." A Conversation with Martti Koskenniemi and Anne Orford' (2015) 17 *Journal of the History of International Law* 1–14.

[95] Jean d'Aspremont, 'Critical Histories of International Law and the Repression of Disciplinary Imagination' (2019) 7 *London Review of International Law* 98–115, p. 103.

To retrace a cultural history of the foreign fighter might then well be a history of the phantasmatic figures which populate the imaginary of legal actors in different contexts and places. This is done by taking the concept of ambivalence as a pillar, and as such rejecting 'international legal history as an ever-advancing dialectic of restatement and renewal'.[96] The genealogist à la Berman does not see law merely as a repressive tool of power and control, but as a multifaceted instrument of regulation, emancipation and illusion: 'it is precisely international law's lack of coherence, the instability of its transitory configurations of rules and players that makes it a hopeful enterprise';[97] a discipline haunted by passions, fantasies and desires, which must necessarily reflect those of its creators.[98] It is in this sense that ambivalence should be understood, as traversing the whole structure of apologetic and utopian claims of international law.[99]

To restart a conversation on law's ambivalent side is a way to investigate further how and why certain norms are produced the way they are.[100] I believe there is a need to move away from technical expertise and to open other perspectives out of the hyper-procedural way in which international law is produced and enforced.[101] In this sense, the categorizations of foreign fighters are also the product of ambivalent passions,

[96] Berman, 'In the Wake of Empire', p. 1523.

[97] *Ibid*., p. 1524.

[98] Yishai Blank has worked on the idea of 'legal reenchantment', a position which I find particularly interesting to frame my own: 'contemporary antirealists are less interested in resisting the rehashed themes regarding law's indeterminacy and power – the familiar legal-realist challenges. Rather, they are offering the idea that there is "more" to law than its instrumentality, power, and distributive impact. This insistence on "more," I argue, lies at the heart of legal reenchantment.' Yishai Blank, 'The Reenchantment of Law' (2011) 63 *Cornell Law Review* 633–670, p. 643.

[99] 'Let's think about the meaning and uses . . . of break and continuity, let's think about the project's ambivalent history.' Berman, 'In the Wake of Empire', p. 1527.

[100] One should not misread this argument as posing a dichotomy between reason and emotions. On this point see specifically Antonio R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (New York: Avon Books, 1995). On the cognitive structure of emotions and their relevance for decision-making see in particular Andrew Ortnoy, Gerald L. Clore and Allan Collins (eds.), *The Cognitive Structure of Emotions* (Cambridge: Cambridge University Press 1988). In relation to international law see Andrea Bianchi and Anne Saab, 'Fear and International Law-Making: An Exploratory Inquiry' (2019) 32 *Leiden Journal of International Law* 351–365.

[101] In a similar vein, Gerry Simpson writes: 'Maybe it's time then to search again for international law's unconscious soul . . . to bring out the unexpected, perhaps unconscious, expressions of political desire at the base of the legal-technocratic procedure: international law's intimate subterfuges, its exiled subjects.' Gerry Simpson, *The*

fears and desires, and not of politics and self-interest alone.[102] This occurs because international law – like any other type of law – is finally a human product. As such it is influenced by the passions and the ambivalences of its creators. Hence the constant recourse to something *other than law*.

That approach can be enriching not only as a matter of history-writing, but also for the practitioner and the expert. My book can in fact push them to face their own inner tensions and ambiguities as something not to discharge, but to reconnect with. My suggestion is that coming to terms with this aspect of lawmaking could be beneficial, rather than hiding behind technical legalese. There is something to gain here in recognizing that our cultural biases, fantasies and fears come into play when we engage with certain non-state actors, for instance, and with international law more generally.

To offer some clearer markers, resorting to such an approach can be useful to: (1) de-exoticize today's foreign fighters under the recent global war on terror, and thus expand their histories and consequently the histories of international law; (2) clarify where our normative values come from, and what the assumptions are that we resort to when we look at the involvement of third-country nationals in armed conflicts; (3) show how the figure of the foreign combatant is always differentiated into a 'good' and a 'bad' version; (4) propose a broader reflection upon the reasons why the status of foreign fighters remains one of the problematic nodes of international law.[103]

One final yet essential point. As we shall see through the chapters, foreign volunteers' choices to join wars abroad point to the ambivalent

Sentimental Life of International Law: Literature, Language, and Longing in World Politics (Oxford: Oxford University Press 2021) pp. 10–11.

[102] 'If various emotions have the structure of cognition, and cognition itself often functions in an intuitive, affective way, then bringing the two together by recognizing the place of emotions in law does not seem anomalous after all.' Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions', in Susan A. Bandes, Jody Lyneé Madeira, Kathryn D. Temple and Emily Kidd White (eds.), *The Edward Elgar Research Handbook on Law and Emotion* (Northampton, MA: Edward Elgar 2021) 566–600, p. 580.

[103] The argument holds even more, given that it is still impossible for states to reach a definitive compromise over the legal status of foreign individuals in wars abroad: at various times, different definitions have been adopted, without however clarifying the legitimacy of foreign fighters for subsequent conflicts. *See* on this point Marnie Lloydd, 'Framing Foreign Fighting: Exploring the Scope of Prevention and the Categorisation of Fighters in International Law', in Christophe Paulussen and Martin Scheinin (eds.), *Human Dignity and Human Security in Times of Terrorism* (The Hague: Asser Press 2020) 207–238.

landscape of commitments related to various liberating projects. Their presence on the battlefield is framed through a good/bad dichotomy, this dichotomy translates into normative responses of different scales and, most importantly, it reflects moral–political stances of diverse kinds. These reveal how Europeans have certainly gone to fight in wars abroad before, but for quite different reasons. Most importantly, they have gone to fight against and for fascism, they have gone to fight for and against communism, and they have gone to fight against present-day dictatorships, though with different projects in mind. Read this way, we could ask how the presence of these individuals is contributing to shape our own perception of civil war and, consequently, how we think about our values and beliefs when we encounter any legislative measure on foreign fighters. If volunteering abroad has epitomized different political visions and passions, perhaps this can help us think about the larger picture, rather than apply a deficit model. Apart from any postmodern posture, shouldn't we ask ourselves what liberating projects we can commit to? What stances are we able to accept, or even hear? And how do we understand the claims made by present-day non-state armed groups, especially those pointing beyond the contours of the nation-state? The figures which populate the imaginary of legal actors are a way to reconnect with our own ambivalent conscience in this regard.[104] Perhaps leaving that space open is the most genuine emancipatory venture we can hope for in the anxious times that come after the fall of utopias.

[104] Butler recognizes for instance the ambivalent position of Klein with regards to love and aggression: 'In the work of Melanie Klein, guilt appears to emerge, not in consequence of internalizing an external prohibition, but as a way of preserving the object of love from one's own potentially obliterating violence. Guilt serves the function of preserving the object of love and, hence, of preserving love itself. What might it mean to understand guilt, then, as a way in which love preserves the object it might otherwise destroy? . . . It is in this sense that guilt emerges in the course of melancholia not only, as the Freudian view would have it, to keep the dead object alive, but to keep the living object from death, where death means the death of love, including the occasions of separation and loss . . . In order to preserve the object from one's own aggression, an aggression that always accompanies love (as conflict), guilt enters the psychic scene as a necessity . . . Because love and aggression work together, the mitigation of aggression through guilt is also the mitigation of love. Guilt works, then, both to foreclose and to continue love, or rather, to continue love (less passionately, to be sure) as the effect of a foreclosure.' Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford, CA: Stanford University Press 1997) pp. 25–26.

I.7 Content of the Chapters

Each of the three chapters starts *in medias res*, with a story immersing the reader in the historical context and delineating the legal contours of the civil war analysed. These narratives set the tone of the ideological struggles fought and offer a background to the legal concepts related to that particular war and its actors. The concepts treated are not left solely to these introductory stories, of course. They are organically developed during each chapter, taking the reader through the various sites where the figures of the foreign fighter eventually emerge.

Chapter 1 opens in May 1937 at the Council of the League of Nations (the Council). There, the Spanish representative is pleading his case to sustain the legitimate volunteers fighting on the Republican side, while denouncing the presence of fascist troops sent by Rome and Berlin. The chapter moves on to analyse the Anglo-American doctrine during the same years, as well as domestic discussions in France and the United Kingdom over the adoption of ad hoc legislation to prevent their citizens going to fight in Spain. It ends with an excursus on the Hague Peace Conferences of 1907, where early norms on volunteers were codified. The purpose of the first chapter is to delineate the legal, cultural and political terrain to understand how foreign volunteering was understood in the interwar period. It shows how the figure of the adventurer as a legacy of the long nineteenth century underpins the conversations of legal actors of the time, and the changes this figure undergoes through the Spanish Civil War years.

Chapter 2 opens with the mercenaries' trial in Angola (June 1976). This trial provides an entry point to the decolonization period, showing how foreign fighters are understood in a new historical context. The chapter moves on to analyse crucial debates at the UN General Assembly and at the Security Council in the period 1960–1976, as well as national responses to the condemnation of the British mercenaries in Luanda. It ends with an excursus on the advancement of the laws of war in Additional Protocol I to the Geneva Conventions (1977). The aim of Chapter 2 is to show the persistence and modification of the figure of the foreign volunteer (that is, the adventurer of Chapter 1). It highlights an interesting inversion of perspective from the Spanish Civil War era: now the noble volunteers of the International Brigades are taken as an example by the representatives of European states to legitimize the presence of their citizens in Africa. This figure will be contrasted with that of the soldier of fortune, who resembles and embodies an older one:

the white colonial ruler against whom wars of national liberation are being fought.

Chapter 3 focuses on the Syrian Civil War. In this context, the criminalization by the Security Council of the foreign terrorist fighter (2014) once again sparked passionate debates among experts, state representatives and politicians around the legal status of foreign volunteers. Chapter 3 retraces the debates at the Security Council and in domestic parliaments, and moves on to analyse some crucial court decisions in France and the United Kingdom concerning the jihadist foreign fighter. It puts in question the proscription of this actor as the current enemy of humanity. This final chapter shows how ad hoc legislation and court decisions on foreign terrorist fighters are still filled by a series of figures from the past. These figures contribute to making the legislative and adjudicative processes deeply ambiguous. Such images inform the legal conversations and point once again to the foreign fighter as an unsettling category.