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UNPACKING FOREIGN FIGHTING: NEW ZEALAND'S LEGISLATIVE RESPONSES TO TRANSNATIONAL COMBATANTS

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Is it lawful for New Zealanders to travel overseas to participate in a foreign conflict? Political statements and travel advisories have discouraged the private participation of New Zealanders in the conflicts in Syria and Ukraine. Yet, prohibitions in New Zealand's law are currently restricted to criminal offences related to the 'mercenary' and the 'foreign terrorist fighter'. Foreign fighting or foreign incursion conceived more broadly are not specifically prohibited. At first glance, the chosen mercenary-terrorist binary appears unreflective, leaving unhelpfully unpacked any broader phenomena of transnational combatants who might not be fighting with designated terrorist entities or for financial gain as mercenaries – such as volunteers fighting in Ukraine or with Kurdish forces in Syria. This article brings together the various areas of law that address these questions, providing a historical account of how the law has evolved over time. It reveals how New Zealand's discourse in key moments of legislative debate has in fact continually preserved space for certain types of private involvement in transnational armed violence. The article suggests, therefore, that the unpacking still required is not necessarily that of seeking better understanding of transnational participation in war and its policy considerations, but rather further consideration of the values and assumptions underlying the permissive legal positions taken in the first place.

Keywords: New Zealand; law; armed conflict; solidarity; foreign fighting; foreign enlistment; counterterrorism; mercenaries; Ukraine; Syria

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Introduction

Ukrainian President Zelensky's March 2022 call for foreign citizens to join an international legion to help defend Ukraine, and the August 2022 death of a New Zealander fighting there, brought an old legal question to renewed prominence: was it lawful for New Zealanders to fight in Ukraine?[1]

Aotearoa New Zealand (New Zealand) currently maintains an advisory against travel to Ukraine and has explained that this includes "anyone thinking about travelling to join Ukraine's International Legion or otherwise take part in military action" and that the "Government's clear view is that New Zealanders should not travel to Ukraine for that purpose".[2] It appears, then, that the short answer to the question of lawfulness is no. However, the answer is actually yes. A government spokesperson clearly acknowledged that despite the warning not to do so, "it is ultimately up to individual New Zealanders to decide whether they want to travel for that purpose and the New Zealand Government cannot stop them from doing so".[3]

Other states have likewise demonstrated positions about transnational combatants that show disjunction between the country's actual legal position and its official messaging, although sometimes in opposite ways. For example, countries including Latvia, Denmark, Germany and Canada waived legal restrictions on such fighting or explicitly consented to their citizens choosing to go. Meanwhile, in a March 2022 public statement, several European Ministers of Justice jointly discouraged Europeans from joining the hostilities.[4] In a different example, the United Kingdom's (UK) Foreign Minister initially publicly supported Britons joining the fighting in Ukraine before having to retract this as being at odds with the UK's foreign enlistment law.[5]

While Ukraine's international legion is new, the underlying questions are not. In 2018, for instance, a New Zealand current affairs program reported on two New Zealanders who travelled to northern Syria to join the Syrian Kurdish forces.[6] That reportage stated that the two were not mercenaries but "idealists"; "volunteers in the battle against ISIS". As for any possible offences against New Zealand's law for taking up arms with an armed group, it was explained that they "haven't broken the law". While this example involved foreign fighting (fighting with a non-state armed group) rather than foreign enlistment (joining a foreign state's armed forces), it was correct that this was not unlawful *per se*. Already in 2015, then Attorney-General Chris Finlayson stated that New Zealand law did not prevent Kiwis from travelling to Iraq and Syria, while noting the official advice not to travel to these countries.[7]

The purpose of this article is not to answer the doctrinal question of the legality or not of fighting overseas – although it does set out the various areas of law that address these questions in the next section, providing also a historical account of how the law has evolved over time. Rather, the purpose is to explore the position adopted in New

Zealand's law and policy in light of its political discourse surrounding transnational combatants. Specifically, is the permissive nature of New Zealand's law around such examples of transnational combatants an omission or something more intentional? And how should we understand this?

After outlining the relevant legal architecture in Section 2, Section 3 discusses how the select focus on two specific types of fighters of concern – mercenaries and those involved in terrorist acts – makes New Zealand's law appear largely unreflective of the potential negative policy interests and legal questions posed by a broader range of transnational combatants not fitting within the mercenary or terrorist categories. This gives the impression that these questions may have fallen into the insufficiently-pressing and/or too-hard basket, and are left unpacked. However, examining the historical and contemporary discourse reveals New Zealand's position as more purposeful and pinpointed in preserving a certain space for private involvement in transnational armed violence; in effect, only certain types of transnational combatants are prevented and not others (Section 4). Thus, these choices are not entirely unreflective of other forms of private participation in war, and are certainly not politically neutral. They appear deeply conditioned in particular by the powerful framing of contemporary foreign fighting as a counterterrorism issue (Section 5). The insight from examining the legal debates helps us consider that the unpacking still required is not necessarily the work of seeking deeper knowledge and understandings of transnational participation in war and its policy considerations. Rather, the multiple issues underlying such voluntary participation of individuals in fighting merits a stepping back to observe the values and assumptions – and perhaps ultimately the lack of non-violent imagination – underlying the legal positions taken.

New Zealand's Legal Frameworks Governing Transnational Combatants

This section provides an overview of New Zealand's current law relevant to transnational combatants. A historical view is provided subsequently in section 4 below.

First, however, some definitions: In the 2010s, 'foreign fighter' was frequently used as shorthand to refer to volunteer fighters with Islamic extremist groups. More recently, people enlisting in Ukraine's foreign legion have likewise been referred to popularly as 'foreign fighters'.[8] In the relevant literature, the term commonly refers only to those joining insurgent groups or is limited by way of the ideological motivations of the volunteer fighter, including religion or kinship.[9] However, since non-state can also refer to armed groups outside of the state armed or security forces even if fighting alongside them, fighting with a non-state armed group even in support of the government side of a conflict can also raise legal and policy concerns. This could potentially include personnel of private military companies who directly participate in hostilities, as well as mercenaries. Therefore, in this article, 'foreign fighting' is used in this broad and straightforward sense to mean a foreigner joining a non-state armed group to directly

participate in hostilities, i.e. as a fighter. In contrast, 'foreign enlistment' refers to formal enlistment in a foreign state's armed forces.[10] Finally, I use the term 'transnational combatants' as shorthand to refer to both foreign enlistment and foreign fighting. While the current conflict in Ukraine has raised issues regarding both foreign enlistment and foreign fighting, this article focuses primarily on issues related to foreign fighting.[11]

Foreign Enlistment

Whether foreign enlistment is possible depends on the domestic law of the individual's home state (whether it allows its citizens to enlist elsewhere) and the destination state (whether it allows foreigners to enlist in its armed forces). For reasons including political loyalty, some countries do not allow foreign enlistment. However, it is generally a common practice,[12] and not prohibited by international law since it respects state sovereignty and the state monopoly of force of the current international legal order. It also retains state command and control and therefore the possibility of accountability over the individual soldier's conduct. For these reasons, soldiers have a combatant's privilege, which grants immunity from criminal prosecution for their hostile acts during armed conflict, provided they act in accordance with the law of armed conflict. Within this logic, foreign enlistees or legionnaires are not mercenaries even if well paid, because they are formally enlisted in a state's armed forces.

Reflecting this, enlisting in the armed forces of another state is not prevented by New Zealand law and, in practice, is possible provided the person is not still currently serving in the New Zealand Defence Force or any reserve period following service has been discharged or waived.[13] Non-New Zealand nationals may also enlist in the New Zealand Defence Force.[14]

Foreign Fighting

Foreign fighting poses more difficult questions for the law because of the lack of state command and control just mentioned. At its heart lies the knot of whether we think non-state actors should be able to resort to force and for what causes, but with the added complexity of whether foreigners should be able to take up arms in solidarity with that armed non-state cause.

Firstly, as an aside, although foreign fighting is not in itself a war crime,[15] any transnational combatant suspected of international crimes such as war crimes could be subject to prosecution through New Zealand's *International Crimes and International Criminal Court Act 2000* regardless of where the offence was alleged to have taken place.[16] By entering into the destination state, the transnational combatant will also become subject to that state's laws. Foreign fighters, not benefitting from the combatant's privilege mentioned above, could be charged with local domestic criminal offences such as illegal entry, weapons offences or violent offences such as assault, murder or damage to

property. Some home states would have the possibility of charging foreign fighters with similar offences or their inchoate counterparts using standard criminal law applied extraterritorially.[17] In New Zealand, criminal jurisdiction is generally territorially based although certain crimes can also be committed extraterritorially where an alternative jurisdictional link can be found, for example, if an act or omission forming part of the offence occurs in New Zealand's territory, such as where an agreement is made in New Zealand conspiring to commit an offence overseas.[18] Having said that, reliance on the *Crimes Act 1961* regarding foreign fighting has not been tested in New Zealand. Moreover, new offences added to the *Terrorism Suppression Act 2002* in 2021 amendments related to travel and planning (set out below) might now reduce the need for such reliance on the *Crimes Act*.[19]

Apart from these more general provisions, the frameworks currently at New Zealand's disposal should it want to disrupt plans for travel or respond to a returned foreign fighter consist of two main pieces of legislation: anti-mercenarism and anti-terrorism laws.

Anti-mercenary provisions

New Zealand's *Mercenary Activities (Prohibition) Act 2004* criminalises the recruitment, use, financing and training of mercenaries as well as participation as a mercenary in combat during an armed conflict or in a concerted act of violence, i.e. in organised violence not reaching the legal threshold of an armed conflict.[20] Prior to this Act, those activities were not specific offences under New Zealand law. For the purposes of this Act, a 'mercenary' is a person who is recruited to take part in hostilities in an armed conflict or in a concerted act of violence, one of whose purposes is to make private gain, and who is not a member of the armed forces of a party to the conflict.[21]

The requirement that the individual be motivated financially has seen mercenaries often being distinguished from foreign fighters, who might be considered 'soldiers of conscience' as a counterpoint to 'guns for hire' or 'soldiers of fortune'.[22] Yet, not only can it be difficult to establish an individual's motivations, especially given the mixed push, pull and personal factors affecting decisions to join a foreign armed struggle,[23] a mercenary might actually believe in the cause for which they are being paid to fight, and that cause might also be supported politically by the mercenary's home state. Overall, while concerns in the post-colonial period, in which the definition of 'mercenary' was first adopted, related also to questions around self-determination and democratic control, as well as the fighters' financial motivations,[24] today, given that being foreign, earning money from soldiering skills (see later discussion below in section 4) and even not being an enlisted soldier are relatively common occurrences in conflict. As such, we might understand the key concerns about mercenarism as only making sense in combination, i.e. not that an individual is motivated financially as such but that the monetary motivation substitutes for direct state accountability through enlistment.

In any event, given the cumulative nature of the definitional criteria, it is relatively difficult to fall into – or straightforward to evade – the legal categorisation of the 'mercenary'. The *Mercenary Activities (Prohibition) Act* has not yet been relied upon and was considered from the outset to be primarily deterrent in purpose.[25]

Anti-terrorism provisions

More relevant today is New Zealand's *Terrorism Suppression Act 2002* which criminalises certain acts linked to terrorist activity and ensures New Zealand complies with its obligations of diligent prevention under several terrorism-related international instruments. The Act responds to the threat of terrorism generally, of which foreign fighting is only one manifestation. Until amendments in 2021, it demonstrated no express concern about foreign fighting. The Act did, however, include an offence of participating in terrorist groups for the purpose of carrying out terrorist acts or enhancing a group's ability to do so. This can include acts committed overseas by New Zealanders, although there can be some evidentiary challenges regarding extraterritorial actions.[26]

Following rising international concern about Islamic extremist foreign fighters participating in the Syrian and Iraq wars, Security Council Resolution 2178 (2014) required states to ensure appropriate legislative means to disrupt the flow of foreign fighters to prohibited terrorist groups ("foreign terrorist fighters"[27]). As described below, New Zealand complied by making its laws relevant to foreign terrorist fighting more robust through three sets of amendments in 2014, 2019 and 2021.

First, amendments to various pieces of legislation set out in the omnibus *Countering Foreign Fighters Legislation Bill*, passed under urgency in 2014, provided greater powers of surveillance and denial or cancellation of travel documents in order to restrict or disrupt travel of would-be foreign terrorist fighters.[28]

Second, although in 2014, it was not considered that new criminal offences were required to comply with Resolution 2178, subsequent reports from the United Nations found New Zealand's law wanting.[29] Amendments enacted in the *Counter-Terrorism Legislation Act 2021* therefore introduced new, specific offences of travelling intending to commit the offence of participation in a terrorist group (s 13F) and planning or other preparations to carry out a terrorist act (s 6B). The purpose was to allow enforcement action to be taken before an individual leaves to become a foreign terrorist fighter, by also easing the extraterritorial evidentiary burden.

Third, in between these two sets of amendments, the *Terrorism Suppression (Control Orders) Act 2019* was passed to provide avenues of increased control over individuals returning to New Zealand after involvement or attempted involvement in terrorism-related activities (a "relevant returner").[30]

The Limits of the Legislative Frameworks – an 'unpacked' binary understanding of transnational combatants?

Based on the above, only specific categories of transnational combatants are criminalised today in New Zealand. Enlisting in another country's military is generally not prohibited and can be considered relatively commonplace. Regarding foreign fighting, joining a non-state armed group is not prohibited, provided the person's conduct does not amount to mercenarism or terrorist activity. There is no specific prohibition of foreign fighting or foreign incursion (hostile acts against a foreign state) conceived more broadly.

The mercenary-terrorist binary is limited. While anti-mercenarism provisions are certainly relevant to foreign fighting, in practice, they will rarely be applicable. As noted above, ideologically-driven (and largely unremunerated) foreigners are generally excluded from the category of 'mercenary' precisely because their foreign fighting is in solidarity with an armed cause, downplaying the aspect of material gain. Similarly, anti-terrorism provisions will not be the suitable tool for disrupting or responding to foreign fighting where an armed group is not designated as a terrorist entity nor considered otherwise to be involved in terrorist activity.[31] Attempts in other jurisdictions such as the UK to apply anti-terrorism provisions to British subjects volunteering with groups not falling cleanly into those categories have proved unsuccessful.[32] For example, one British volunteer's fighting with the Syrian Kurdish YPG was described by a UK judge as "not terrorism at all".[33] The actions and motivations of some foreign fighters therefore fall outside of the purview of the existing frameworks. Indeed, these frameworks were not designed to regulate such actions.[34]

Linda Darkwa's research about the engagement of the African Union with foreign fighting as a security issue observed that its similar focus on mercenaries and terrorists meant that there had been no attempts by the African Union to address foreign fighting as a broader phenomenon. She commented that this binary categorisation "is inaccurate because it fails to acknowledge and account for those whose involvement in foreign armed conflicts is inspired by other reasons";[35] and that without disaggregated data allowing some understanding of how and why different people engage in the various conflicts, it remains difficult to appropriately discuss the possible frameworks that may be desired, or required, to address the broader phenomenon of foreign fighting.[36]

Similarly, the silence and permissive stance in New Zealand's law appears unreflective at first glance, especially when complemented by its political statements advising against any involvement in overseas conflicts. It seems that New Zealand has left an analysis of the broader phenomena of transnational combatants and their legal and policy implications unhelpfully unpacked.

The New Zealand Government's discouragement of travel, as well as internal Defence Force disciplinary rules governing serving soldiers,[37] presumably recognises not only that the individual might be harmed in the fighting, but that foreign fighting, even foreign enlistment, can prove highly sensitive and even undesirable for a home state for a range of reasons and, should, therefore, give states pause for thought. Whether or not one agrees with the cause for which the person wants to fight, volunteers might become special targets of the enemy precisely because they are foreign supporters, might be captured and mistreated or charged with crimes, might be killed and the body difficult to repatriate, might become exposed to violent and/or extremist views and networks, might be injured and return with physical and mental health issues requiring specialised and/or long-term care, or might have trouble readjusting to 'civilian' work or life afterwards. The situation in which the armed group is fighting can also change. For example, Syrian Kurdish forces which were fighting against the Islamic State group subsequently fought against the Turkish military in Syria; or an armed group not previously considered to be involved in terrorism might then be so designated, or while not designated in New Zealand might be designated in another country through which the foreign fighter passes, risking arrest.

Although it is not prohibited by New Zealand's law, and is state-controlled, as I have argued elsewhere, even foreign enlistment can present delicate considerations for an enlistee's home state, especially if the foreign state's military is accused of international crimes such as war crimes.[38] The relation between the home state and its citizen will also be strained, and in some circumstances risk charges of treason, if that foreign state becomes involved in hostilities against New Zealand or one of its allies.[39] The handing down of the death penalty in Russian-occupied Eastern Ukraine to three foreign enlistees in Ukraine's military in June 2022 also demonstrates practical risks and diplomatic headaches for a home state where foreign enlisted soldiers are treated differently than citizen forces, including being treated (in this case, unlawfully) as mercenaries or terrorists.[40]

The combination of the small numbers of implicated New Zealanders, the complexity of the legal and policy issues, the lack of public pressure about individuals becoming involved in organised violence overseas, and in some situations, clear solidarity with the fighting cause (such as helping Ukraine as a victim of unlawful aggression), could understandably lead to inertia in forming a clear statement of policy regarding an issue perceived as insufficiently important.

While the underlying questions are complex and the stakes potentially high, the number of New Zealanders choosing to fight overseas is admittedly small. Yet, transnational combatants are an enduring facet of armed conflict and New Zealanders have long been part of this phenomenon. New Zealanders have fought – and a few have been killed – in the Spanish Civil War,[41] in Southern Rhodesia[42] as well as possibly in other African countries,[43] in the conflicts in the former Yugoslavia[44] and in Myanmar/Burma.[45] More

recently, in addition to the "handful" of Islamic extremist terrorism-related cases,[46] New Zealand citizens or residents have fought for the Russian-supported separatists in Eastern Ukraine (one of whom was reportedly wounded and returned to New Zealand for treatment)[47] and various groups in Iraq and Syria such as the Syrian Kurdish forces and opposition groups often referred to as the Free Syrian Army.[48] At least ten New Zealanders have reportedly gone to fight in Ukraine in 2022.[49]

In short, any kind of transnational combatants – even where fighting is undertaken in solidarity with 'good' causes – can raise legal and policy concerns deserving greater reflection.

Given these challenges and ethical concerns, and the political statements discouraging overseas fighting, New Zealand's permissive legislative framework around transnational combatants who are uninvolved in mercenarism or terrorism appears at first glance to be not only disjointed, but unreflective, uninformed or even short-sighted, at worst. At best, it seems New Zealand is making diligent efforts to prevent foreign fighters of greatest concern (foreign terrorist fighters) but issues related to other types of transnational combatants have proved insufficiently pressing or overly sensitive. Given the seriousness of armed conflict and its humanitarian consequences, and the reality that New Zealand's current position allows people to conduct violent activities in other countries that it would not allow at home, these issues still seem to merit careful and full unpicking and unpacking.

A pinpointed purpose in the law governing transnational combatants?

The seeming silence starts to appear more purposeful, however, by looking at New Zealand's parliamentary debates in key legislative moments. This section illustrates how the legislative framework has developed from political choices made in key moments of legislative debate; choices which have operated to preserve space for certain forms of transnational participation in conflict through individual initiative.

New Zealand's earlier foreign enlistment law

New Zealand's domestic law previously contained a more specific law governing transnational enlistees and fighters which was subsequently dropped. In the late nineteenth and early twentieth centuries, state concern about nationals fighting for other powers, at least amongst European and American states, was primarily discussed through the rules of neutrality between states.[50] Britain's imperial *Foreign Enlistment Act 1870* was a domestic neutrality law "to regulate the conduct of Her Majesty's Subjects during the existence of Hostilities between Foreign States with which Her Majesty is at Peace".[51] It became part of New Zealand law through proclamation in the New Zealand Gazette in 1872.[52]

The Act penalised subjects enlisting in the armed forces of a foreign power without official licence of the Crown, where that foreign power was at war with a power with which Britain (and here its dominions) was at peace, as well as leaving the territory with intent to so engage. It also prohibited the recruitment of people for such enlistment within its territory.[53]

Being based as it was in notions of state relations, this law "served much more than only the deterrence of citizens from joining foreign forces or the enforcement of neutrality" but was important at that time in terms of foreign policy.[54] If applied today, for example, regarding Ukraine – and I have found no record of it ever being relied upon in New Zealand during the long period in which it was in force[55] – it would penalise enlistment with the Ukrainian military (unless authorised by New Zealand) since despite New Zealand's clear position of solidarity with Ukraine and against Russia's unlawful aggression,[56] it is still, legally-speaking, at peace with Russia.

The period of the 'true' mercenary

The *Foreign Enlistment Act* ceased to have effect in New Zealand 90 years later with the coming into force of the *Crimes Act 1961*.[57] By that time, anti-colonial and post-independence conflicts had forced the attention of international law from classical inter-state conflicts and the law of neutrality which had underlined the *Foreign Enlistment Act*, to the fight for national liberation and related post-independence civil wars. This period reignited questions about the right of self-determination, third state duties regarding civil conflicts in which governments were perceived to have lost legitimacy, and, relatedly, the rules regulating toleration or non-toleration of foreign fighting.[58] For some, if self-determination was to be supported, so-called foreign 'freedom fighters' could surely help?

Yet the phenomenon of foreign, often white European, soldiers being paid to fight in those conflicts, especially in African countries, also drew international attention to mercenaries as a security issue. The height of this concern did not occur, however, until the 1970s. Likewise, the issue of New Zealanders fighting with Ian Smith's politically unrecognised Rhodesian Army occurred in the late 1960s/1970s.[59] The enactment of New Zealand's *Crimes Act* in 1961, while moving on from the previous focus on questions of neutrality relevant to the involvement of transnational combatants, therefore also preceded legal developments on the international level regarding mercenaries – the provision in the *1977 First Additional Protocol to the four Geneva Conventions* defining mercenaries and denying their right to prisoner of war status,[60] and the *1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries* which prohibits mercenarism for state parties.[61] With seemingly no discussion at the time about the effect of dropping the foreign enlistment provisions, the *Crimes Act* did not replace the *Foreign Enlistment Act*'s restrictions around foreign enlistment and recruitment with any comparable offences.

New Zealand did subsequently enact domestic anti-mercenary legislation which enabled it to accede to the 1989 *International Convention against Mercenaries* but not until 2003. In the intervening 40-year period, New Zealand had no provisions specific to transnational combatants even though in the 1960s and 1970s in particular, the issue of transnational combatants caused some consternation for several states. The UK, for example, had been faced with diplomatic headaches from citizens fighting in eastern Congo, enlisting in the politically unrecognised Rhodesian military, and also charged and convicted as mercenaries in Angola.[62] This led to an assessment of its foreign enlistment law by a committee of Privy Councillors chaired by the judge Lord Diplock in 1976, finding the law largely antiquated and unworkable.[63] During this time, New Zealand was likewise affected by these questions, albeit more mildly, and the UK and New Zealand shared thinking on these issues.[64] New Zealand informed the UK that while it was aware that some New Zealanders were fighting in Rhodesia, there was little they could do to stop this.[65]

William Anderson explains that in 1977, with a definition of 'mercenary' included in the First Additional Protocol to the Geneva Conventions,[66] New Zealand decided that it required anti-mercenary legislation.[67] Australia, affected also by examples of foreign fighting and mercenarism in that time period,[68] enacted its *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)*. Broadening and updating the rules in the British *Foreign Enlistment Act*, which had also applied previously in Australia,[69] the *Crimes* (*Foreign Incursions and Recruitment) Act* prohibited persons preparing for or engaging in incursions against the government of a foreign country, i.e. rather than focusing on a financial or any other motivation.[70] Parliamentary debates indicate that the prohibition on incursions was designed to protect Australia's diplomatic relations in light of prior and planned incursions from Australia.[71]

In contrast, in New Zealand, there was little subsequent discussion and, as mentioned, no action until 2003. An official statement of the Foreign Minister at the time expressed "doubts about the effectiveness of any legislation aimed at preventing persons participating in overseas conflicts".[72] Two reasons were given: the issue that some fighters were motivated by ideology (meaning an ideology of solidarity rather than financial gain, i.e. 'freedom fighters' supporting self-determination), and the importance of the right to freedom of movement.[73] Regarding the latter, these discussions were occurring during the Cold War, so the question of communism more broadly and politically, and restrictions on movement more specifically and legally, especially the right to leave one's country, were sensitive points for liberal democratic nations.[74] The rights of people to leave New Zealand as well as rights of movement, work and association continue to feature in contemporary debates. In New Zealand's view at that time, while laws such as the UK's *Foreign Enlistment Act* might have had some deterrent effect, it was otherwise considered impossible to prohibit such volunteer fighting, and there was seemingly little political will to seek its prohibition.

PMSCs and anti-mercenary legislation

When New Zealand did enact legislation on this topic, it retained the focus on the financial motivation of the fighters, in line with the United Nation's *Convention against Mercenaries* to which it was acceding. The introduction of the Bill in 2003 made clear that the Government felt that "the use of mercenaries is unacceptable as a method of conflict resolution".[75] In introducing the Bill, Phil Goff also stated, somewhat inaccurately legally-speaking, that the New Zealand Government "has long opposed the use of mercenaries".[76]

By that stage, in fact, the period of the 'traditional' mercenary had largely passed but the problem of the activities of private military and security companies (PMSCs) had certainly arrived on the agenda. The introduction of the 2003 Bill had noted the concerning role of PMSCs engaged to participate actively in military offensives, specifically, the example of Papua New Guinea's hiring of the company Sandline in 1997.[77] Otherwise, the most contentious issue during parliamentary and Select Committee debates was the definition of mercenary. Several parliamentarians and submissions expressed concern that the definition was unclear and overly broad; specifically, that it would criminalise otherwise lawful foreign enlistment or employment with PMSCs because those activities involved private financial gain.[78] This, they did not want to include under the new law.[79] One MP, Ron Mark, a former New Zealand soldier, had a personal interest as he had previously worked for Oman's military.[80] Others showed support for former New Zealand soldiers using their military expertise elsewhere such as in Iraq in security roles in terms of natural career development.[81]

Foreign enlistment was in fact not covered by the Act since the definition of 'mercenary' excludes members of state armed forces. That exclusion also worked to ensure that service in foreign legions such as Britain's Gurkhas or the French Foreign Legion – or today Ukraine's foreign legion – were not affected. Beyond foreign enlistment, what is noticeable is the push to restrict only a narrow category of fighter and retain open other possibilities. Thus, it was explained at the time that the new law was only intending to cover the narrowly defined category of so-called "true" or "traditional" mercenaries: "Unaffiliated individuals who are prepared to fight wars, overthrow Governments, or commit certain terrorist acts for money".[82] The Bill was expressly not purporting to deal with those "motivated to fight overseas by personally held convictions",[83] nor was the intention to deal with issues associated with the possible further regulation of PMSCs.[84]

This puts somewhat of a gloss on the actual wording of the Act, since it would be possible, although rare, for personnel of a PMSC to meet the definition of mercenary if they were recruited to directly participate in specific hostilities. The reassurances given in the debates and resulting legislation indicate that PMSCs were considered a different phenomenon and that there was no desire at the time to regulate them in any specific detail, even though it was acknowledged at the time – including by MP Ron Mark – that

the distinction between security activities in war zones and active military operations was at times grey in practice.[85] PMSCs were left as an issue for another day, with the focus left squarely on rogue individuals; the "true" mercenaries.

Foreign terrorist fighting and other foreign fighters

Although transnational combatants featured in conflicts throughout the remainder of the twentieth century – including Afghanistan, Myanmar/Burma, the Caucasus region, the Balkans region, Somalia – foreign fighting did not regain intense attention as a security threat of global concern until the 2010s related to the wars in Iraq and Syria. The significant number of foreigners travelling to fight with the Islamic State group in particular led to the adoption of Security Council Resolution 2178 in September 2014 requiring states to take action against foreign terrorist fighters.

While public statements at the time had included general dissuasion from participating in those wars as they do today regarding Ukraine – for example, Chris Finlayson in 2014 had reportedly said "[w]e do not want any New Zealanders getting caught up in this mess in the Middle East… whether they go off and want to fight for the Kurds or want to fight for ISIL"[86] – parliamentary debate about New Zealand's response in late 2014 indicated a clear desire to ensure that the provisions to be amended, for example, on passport cancellation, would distinguish terrorist activity from foreign fighting seeking to *counter* that terrorism threat. There were, thus, more-concerning and less-concerning examples of involvement of New Zealanders in overseas wars. Specifically, the opposition wanted to ensure that a person with national or ethnic ties to an area of conflict would not be prevented from traveling "to defend his or her home".[87] Other examples discussed as acceptable included someone going "to assist some family in Ukraine against the Russians" or someone going "across to Oman"[88] and "New Zealand Syrians wanting to go to Syria to fight for the Free Syrian Army against al-Assad".[89]

Politically, it was clear what kind of foreign fighter the amendments were concerned with. In that moment, in New Zealand as in many other countries, the term 'foreign fighter' was generally conflated with 'foreign terrorist fighter' which was in turn conflated with Islamic extremism. The Islamic State group in Syria and Iraq was the key concern to which the Government was responding.[90] Reflecting this, although referring to terrorism more broadly, Resolution 2178 specifically mentioned only Islamic fundamentalist groups. Thus, other 'persuasions' of foreign fighting also occurring at that time such as with Kurdish armed groups or in Ukraine, fell outside of the perceived threat to which the framework was responding.[91] The particular concern about safeguarding 'freedom fighters' was therefore quickly assuaged – similarly to the reassurances that the anti-mercenary law would cover only "true mercenaries". In line with what was required by the Security Council, it was clarified that these foreign fighter legislative amendments would only cover terrorism-related activity and were not targeting any other form of transnational combatants. Although political statements during the

debates had referred largely to the more politically palatable examples of people with family or national links returning to the affected country to defend their homes, it was in effect *all* non-terrorism-related categories of foreign fighter who were excluded from the legislative response in 2014.

In this light, there was specific discussion in 2014 about whether a definition of 'foreign fighter' was needed. During the Bill's second reading, Chris Finlayson explained, accurately, that a definition would be superfluous since the amendments were tied to the definition of "terrorist act" in section 5 of the Terrorism Suppression Act. Thus, legally-speaking, the

> legislation does not change the existing legal situation of a person in [the] position [of going home to Kurdistan, to defend his or her home] … the same principle applies to anyone who is planning to go overseas to engage in, or facilitate, a terrorist act as defined by section 5.[92]

Finlayson explained that trying to amend the definition of "terrorist act" to exempt certain persons or to make an intended terrorist act excusable, "for example, a person returning to Kurdistan to fight ISIL", posed a number of difficulties as "we would not want any New Zealander committing any terrorist act on any side".[93] This came in response to a proposal by NZ First Party MP Ron Mark, who asked for a statement that the legislation would not capture "New Zealanders who are going to fight people who deserve to be and need to be fought".[94] Finlayson explained that in a "chaotic and fast-developing situation", distinguishing "who is fighting for whom" might be difficult; and that the government was "targeting people by behaviour or intended behaviour, not by a label".[95]

This is clearly appropriate within the logic of the anti-terrorism legislative framework. It is also evidenced by how the predominant conception of terrorism as jihadist terrorism has been forced to change since this time. For example, it has since been queried whether existing domestic anti-terrorism laws could be applied to certain foreign fighters in Ukraine with far-right extremist links.[96] For New Zealand in particular, following the March 2019 attack on the Masjid Al Noor and Linwood mosques in Christchurch, attention has likewise been re-tuned to pay greater attention to far right and white supremacist terrorism. Nevertheless, appeals to universal norms such as the prevention of terrorism or crimes against humanity,[97] which clearly apply to *any* armed actor, can also operate to somewhat conceal political value judgements – the categorisations – underlying the law. In practice, it is clear that labels and the ideas behind them can be rather decisive, and clear whom the 2014 legislative amendments saw as a security threat and were seeking to govern. This is explored further in the final section of this paper.

For completeness, I also note that preparation of the 2021 amendments to the *Terrorism Suppression Act 2002*, which amongst other amendments sought to ensure full compliance with Security Council Resolution 2178 regarding foreign terrorist fighters, includ-

ed discussion around the possibility of a 'declared area offence' like that of Australia, which would have criminalised entering, or remaining in, a designated area except for certain lawful reasons.[98] Such a geographic offence would generally apply to *any* New Zealander fighting in the declared area i.e. also of fighters uninvolved with terrorist activity and those fighting *against* a terrorist group.[99] Thus, for those generally opposed to foreign fighting, such offences would offer a blanket prohibition requiring abstention from participation in fighting outside of official state structures, in line with government statements and travel advisories recommending people not to travel to warzones. Such a broad offence would also have eased prosecution challenges surrounding foreign fighting, especially evidentiary issues for extraterritorial crimes.[100] While the New Zealand Police were in favour of such an offence, the Ministry of Foreign Affairs and Trade and other stakeholders were not. Overall, this option was considered unsuitable due to issues with its perceived effectiveness and, importantly, its proportionality from a human rights point of view.[101] It was not included in the Bill presented to Parliament.

It is harder to know how to best interpret this decision compared with the parliamentary debate examined above. Given that legal critique of the Australian provision regarding civil liberties and procedural rights has been strong[102] and, in that sense, the appropriateness of New Zealand's decision against such a geographic offence, it would seem inaccurate to interpret the decision as one actively seeking to keep open the possibility of certain types of foreign fighting. Moreover, the fact that *other* types of fighters, i.e. those not involved in terrorist activity, might be captured by the offence would have been out of place in what is, after all, an anti-terrorism statute. The Australian provision sits more comfortably in this sense as it is found in Australia's Federal Criminal Code, although Australian practice shows prosecutorial discretion has also been relied upon, for example, to distinguish between individuals fighting with ISIS or with Kurdish forces in Syria.[103] In support of the earlier 2014 Foreign Fighter Legislation Bill, Chris Finlayson had explained that New Zealand's proposed amended law was not going "anywhere near as far as the Australian legislation, which seeks to ban Australian citizens from even travelling to certain areas unless they have lawful excuse".[104] In any event, the effect of the decision was to limit the attention of the 2021 amendments to the *Terrorism Suppression Act* related to foreign fighting strictly to foreign terrorist fighters and not other kinds of combatants.

Concluding Reflections: "Going to fight people who deserve to be and need to be fought" versus the moral courage required for non-violent responses?

The above legislative history highlights how, at key moments of legislative debate both historically and today, New Zealand has actively preserved a certain space for individual citizens to become involved in organised violence on their own initiative, by carefully delineating who was to be covered by restrictions. The discourse reveals that New Zealand opted to drop its earlier foreign enlistment/neutrality law provisions in

1961 without enacting any replacement legislation; that it opted to continue without any law governing foreign fighting throughout the rest of the twentieth century; that it enacted its anti-mercenary law only after the key period of such mercenarism was over and opted at that time not to deal with PMSCs; and that it made significant efforts to comply with international diligence duties to suppress terrorism related to foreign fighting, while continuing to distinguish other categories of fighters, preserving space for certain individuals to choose to go to war.

The debates suggest that New Zealand's resulting permissive position is not, as it may initially appear, unconsidered or ignorant of broader phenomena of transnational combatants and their associated policy implications. The discourse reveals clear awareness of certain *other* kinds of transnational combatants, but also the fact of sufficient public and parliamentary support – or at least lack of sufficient disagreement or outcry – for individuals wishing to fight overseas for causes and actors considered acceptable. In New Zealand's case, we see something common in the response of many states; as I have stated elsewhere, while not necessarily encouraging foreign fighting, states might "turn a blind eye to citizens who fight overseas when it suits their foreign policy, when there is little threat to the home State, when the person's allegiance is not in question and the causes are considered just."[105] The debates indicate what was considered to be at stake in the different political and legislative moments and demonstrate a weighing up of costs and benefits and an interpretation of international legal obligations and domestic political risks. New Zealand's position is, thus, not neutral, but involves "a value judgment made from a particular vantage point".[106] As mentioned in the introduction, what I want to suggest, then, is that the unpacking still required is not necessarily the work of seeking deeper understanding of transnational participation in war and its policy considerations. Rather, in my view, the multiple issues underlying such voluntary participation of individuals in fighting merits a stepping back to critically reflect on the values and assumptions underlying the legal positions taken.

A key assumption appears to be that this policy issue is understood as a natural and inescapable dilemma between security and violence, i.e. that the constraint on achieving the peace or non-violence that we all hope for is the continuing need to resort to violence (usually by states) in order to keep people safe. It assumes that we cannot – or at least not yet – have both security and non-violence; that certain forms of violence remain a necessary evil. Ultimately, New Zealand's realist position could in this sense be seen to distinguish *violent* violence from a perceived *peaceful* or at least *peace-loving* violence.[107]

This assumed starting point creates the associated need to seek to accommodate these two aspects of security and violence in a way that purports to find an appropriately balanced solution, e.g. by managing to 'perfectly' determine the universal good and bad

amongst mercenarism, terrorism or foreign fighting. The determination of legal definitions and rules seeks to reconcile these factors, setting the limits of what is considered acceptable as we see in the legislative debates.

One problem is that at different political moments, different legal questions have been prioritised depending on the predominant framing of the issue at the time: for example, neutrality and non-intervention were key themes or frames in the early twentieth century, self-determination and mercenarism in the second half of the twentieth century. More recently, the fight against terrorism has operated as a powerful driver of thought and conceptual understanding of the legal issues at play; of how the stakes of the debate are seen and discussed; of good and bad; and of moderate and radicalised. The intense focus on terrorism as a key security issue has led to discourse understanding foreign fighting near-exclusively as a manifestation of terrorism threat (and moreover largely a domestic terrorist threat to the home states of returned foreign fighters). This combines with focus being placed squarely on individual – and universal – enemies or monsters such that the terrorist (or the mercenary) becomes the key threat or problem. This operates in place of the departure of citizens on their own initiative to take up arms being reflected upon as a whole or being considered to pose a potential harm or an important foreign relations question in itself.

More than just leading to distinction between different persuasions of fighter, the terrorism framing of the issue has helped to create and normalise other forms of transnational fighting. Indeed, several of these *other* kinds of foreign fighters not covered by mercenary or terrorism legislation have fitted a counter-jihad identity. As they were "going to fight people who deserve to be and need to be fought",[108] they sometimes claimed a 'humanitarian' badge, even though they were becoming involved in violence. The way New Zealand's debates about foreign fighting have played out, therefore, provides an example of what critical terrorism scholars have described as often overly simplistic assumptions of the "honourable against the duplicitous".[109]

Such approaches can be overly simplistic because each framing of the key issue underlying the form of foreign fighting being considered in any particular political moment will face certain limits. Legal categorisations may only hold for a moment before being revealed as either overly exclusive or inclusive as soon as the political context changes, and the key considerations supporting the legal categorisation evolve. The adopted rules and definitions may work in 'easy' cases, but cannot take into account the broad range of legal considerations that underlie 'hard' cases. What about New Zealanders fighting with the Syrian military, for example, or the Israeli Defence Force, with armed groups making up the so-called Free Syrian Army, in Russian-supported opposition groups in Eastern Ukraine, in South Sudan, Libya or Myanmar/Burma, in the wars in the former Yugoslavia, or with PMSCs?

Further, any particular framing of an issue, such as the intense focus placed on counter-terrorism, can cast light on some important legal considerations but in doing so, place other considerations into shadow. Each framing will demand a response primarily to one part of international legal obligations – here, the duty to diligently prevent terrorism – but can downplay the significance of other obligations potentially relevant to foreign fighting or interpret them in a particular way. The richer, historical view visible in debates over a longer time period can become obscured. As well as thinking about the ills of people fighting for financial profit and reducing the threat of harm to New Zealand from terrorism as a matter of individual criminal liability, other parts of international law remain highly relevant: duties of non-intervention, friendly relations, not tolerating harm caused to other states, arguably even of neutrality, human rights, as well as civilian protection and the (admittedly unsettled) duty to ensure respect for the law of armed conflict.

In these ways, the relatively low setting of the bar for entry into hostilities by individuals on their own initiative could be understood as a relatively privileged position of states like New Zealand with little threat of, and able to cope with, the imposition of transnational combatants and/or their return. It can be seen as a privileged position that in certain circumstances allows citizens to take up arms overseas when the same conduct would not be acceptable at home, and that takes actions to protect populations at home that it does not take for populations overseas suffering armed conflict. This can give an impression that regions suffering armed conflict are already perceived as 'lawless' in some way because of the fighting and perhaps cannot be harmed by further private engagement in that violence. Consider, for example, that if the New Zealand Defence Force engages a PMSC, it requires clearance and must undertake checks on the past conduct of the PMSC personnel for concerns such as violent crimes, sexual offences or violations of the laws of armed conflict.[110] The PMSC's engagement must anyway not involve offensive military duties amounting to direct participation in hostilities. In comparison, while it might be assumed that a foreign military would perform similar checks for foreign enlistees, there are no such standards for foreign fighters which New Zealand's law allows to fight. Firearms licensing in New Zealand, and requiring that NZDF soldiers have sufficient training and legal knowledge would provide further examples of oversight that New Zealand has decided is necessary at home for those potentially involved with firearms or armed conflict, but which will not necessarily apply where individuals take up arms privately overseas.

To conclude, the purpose of this article is not necessarily to suggest new and more restrictive laws nor that all types of foreign fighting should be treated equally, and certainly not that all foreign fighting should be treated as forms of terrorism (nor mercenarism). Rather, to my mind, deliberate reflection about transnational combatants as a broader issue of potential concern provides a rich ground for thinking about deeper issues regarding violence, who participates in it and how, and who gets to decide.

Foreign fighting and the legal argumentation which surrounds it need to be reflected upon not only as a manifestation of individual determinations to act, discernible as either *bad* such as foreign terrorist fighting or *good* such as fighting against terrorism or against an unlawful aggressor, but something with a far more complex relationship to the state and to the general securitisation of international issues; that is, as part of the complex relationship between authority and solidarity through violence. In this sense, I agree with Darkwa that the binary mercenary-terrorist approach leaves the broader phenomena (and its richer and more historically-contextualised legal background) unpacked, even if the 'silence' and permission in the law regarding some foreign fighting is intentional. The question is not whether someone is motivated by 'good' reasons, by wanting to help, and not even whether their chosen actions *will actually* help, but whether one wants to accept a framework that allows unlicensed participation in violence in other states or whether it is possible to imagine a non-violent yet still effective response in solidarity with a community under threat.

It can be politically difficult for states which have expressed full support for one side in a war, for example, the defence of Ukraine against the Russian aggression, to then refuse their citizens permission to join the fight. This is perhaps especially so where the destination state has *required* some of its population to remain and support the country's defence, as Ukraine has done; in other words, where there are already people without previous military training picking up arms to defend a country. But that political difficulty reflects a position and value judgments which accept a role for individuals to choose to enter into hostilities; which start, arguably, from an assumption that such fighting in solidarity with good causes helps the situation, rather than simply contributing to it.

As such, greater ownership and transparency of the current permissive political position could be taken, i.e. the position that some participation in organised violence is considered acceptable and even necessary, in order to at least reduce the disjunction between the dissuasive political statements and the permissive legal position. That kind of clarity and ownership would take certain moral and political courage. Even greater moral and political courage would be required to step outside the assumptions behind the attempts to reconcile the perceived stark and single choice between security and non-violence and to opt for a position encouraging solidarity only through non-violent methods.

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1 See e.g. Ellen O'Dwyer, "Ex-NZ soldier planning Ukraine mission: 'It could be a one-way trip'", *Stuff*, 18 March 2022; Marnie Lloydd, "There is little to stop New Zealanders leaving to fight in Ukraine – but few legal protections if they do", *The Conversation*, 18 March 2022; Charlotte Graham-McLay, "New Zealand soldier who joined Ukraine foreign legion confirmed killed", *The Guardian*, 25 August 2022.

2 New Zealand Foreign Affairs & Trade, "Russian invasion of Ukraine", https://www.mfat.govt.nz/en/countries-and-regions/europe/ukraine/russian-invasion-of-ukraine/.

3 Quoted in James Halpin, "More than 500 Kiwis have offered to fight in Ukraine, honorary consul says", *Stuff*, 8 March 2022.

4 Teun Van Dongen, Gijs Weijenberg, Martijn Vugteveen & Joshua Farrell-Molloy, "Foreign Volunteers in Ukraine: Security Considerations for Europe" International Centre for Counter-Terrorism, 4 May 2022.

5 Andrew Sparrow, "Liz Truss criticised for backing Britons who wish to fight in Ukraine", *The Guardian*, 28 February 2022.

6 TVNZ, "Kiwi Foreign Fighters", *Sunday*, 11 March 2018.

7 Quoted in Isaac Davison, "Kiwis want to join fight against Isis", *New Zealand Herald*, 23 April 2015.

8 See e.g. Marnie Lloydd, "Foreign Fighting a diplomatic minefield", *Newsroom*, 27 August 2022.

9 David Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford: Oxford University Press, 2013), p. 9 (although referring to insurgencies in his definition of foreign fighting, Malet's case examples reflect foreign fighting in non-state armed groups); Sandra Krähenmann, *Foreign Fighters under International Law* (No 7, Geneva Academy of International Humanitarian Law and Human Rights, October 2014) p. 6: "primarily motivated by ideology, religion, and/or kinship". The Security Council's definition of 'foreign terrorist fighter' requires the individual to be acting with terrorist intent and includes persons travelling for terrorism training and participation outside of armed conflict situations. See SC Res 2178, UN Doc S/RES/2178 (24 September 2014) preamble: "for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts".

10 Referred to generally as 'legionnaires' in some literature, although I would reserve that term for enlistees in formally established foreign legions. See Elizabeth M.F. Grasmeder, "Leaning on Legionnaires: Why Modern States Recruit Foreign Soldiers," *International Security* 46:1 (2021), p. 147.

11 Discussion of New Zealanders working overseas with private military or security companies who do not directly participate in hostilities, as well as volunteers with armed groups providing training, medical care or financial support without directly participating in hostilities fall beyond the scope of this article. Specific issues related to dual citizens or national or ethnic diaspora who return to a state of nationality or former residence to fight raise additional legal considerations which are likewise beyond the scope. Finally, situations in which armed forces or armed groups intervene across borders or otherwise in foreign states (and become in this sense foreigners participating in the conflict) are not contemplated.

12 See generally Elizabeth M.F. Grasmeder, "Leaning on Legionnaires: Why Modern States Recruit Foreign Soldiers," *International Security* 46:1 (2021), p. 147.

13 See e.g. comments by former NZDF legal advisor about internal rules, which include disclosure of travel plans for periods of leave, in Charlotte Cook, Hamish Cardwell and Ben Strang, "Kiwi killed in Ukraine: Government does not know where body is", *RNZ*, 26 August 2022. In addition, ss 22 and 23 of the *Defence Act 1990* govern the ability of currently serving members of the armed forces to transfer to another armed force.

14 Although citizens of Commonwealth countries receive preferential treatment. Other nationalities need authorisation: *Defence Act 1990*, s 33.

15 Robert Heinsch, "Foreign Fighters and International Criminal Law" in *Foreign Fighters under International Law and Beyond*, eds. Andrea de Guttry, Francesca Capone & Christophe Paulussen (The Hague: Springer/Asser, 2016) p. 161.

16 *International Crimes and International Criminal Court Act 2000*, s 8.

17 See e.g. Jessie Blackbourn, Deniz Kayis & Nicola McGarrity, *Anti-Terrorism Law and Foreign Terrorist Fighters* (New York: Routledge, 2018), pp. 10 and 21.

18 *Crimes Act 1961*, ss 6, 7 and 310. See also Andrew P. Simester, Warren Brookbanks & Neil Boister, *Principles of Criminal Law* (5th ed, Wellington: Thomson Reuters, 2019), p. 376.

19 For completeness, I note also that unlawful activity or violence undertaken while serving in a foreign military or foreign fighting might affect immigration- or naturalisation-related assessments of character or security risks posed (e.g. *Immigration Act 2009*, s 16) or become relevant regarding exclusions from refugee status.

20 *Mercenary Activities (Prohibition) Act 2004*, ss 7–13. Because a 'mercenary' can be a person recruited to participate in a concerted act of violence rather than only hostilities, it is possible for the same conduct to constitute prohibited mercenary and terrorist activity, i.e. a person could be paid as a mercenary to conduct a terrorist attack.

21 Amongst other criteria. See Mercenary Activities (Prohibition) Act 2004, s 5.

22 Elizabeth Roberts, *'Freedom, Faction, Fame and Blood': British Soldiers of Conscience in Greece, Spain and Finland* (Brighton: Sussex Academic Press, 2010), p. 3.

23 This is one of the reasons New Zealand opted for a definition of 'mercenary' which requires private gain to be only one of the purposes behind the individual's participation in the fighting, while definitions on the international level require it to be a primary purpose. Compare s 5 of the *Mercenary Activities (Prohibition) Act 2004* with Article 47(2) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977 (Additional Protocol I).

24 See e.g. Marnie Lloydd, "Persisting Tensions: The Framing of International Legal Debates on Foreign Fighting" PhD Thesis, Melbourne Law School, 2020, Chapter 4.

25 Foreign Affairs, Defence and Trade Committee, Report on the Mercenary Activities (Prohibition) Bill (83–2), 15 April 2004, pp. 1–2.

26 *Terrorism Suppression Act 2002*, ss 13–15.

27 Defined 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 …": SC Res 2178, UN Doc S/RES/2178 (24 September 2014), preamble. See also paras 5–6, 10.

28 Parliamentary Library, Bills Digest No. 2181 "Countering Terrorist Fighters Legislation Bill 2014" (2014 No 1–2), 9 December 2014. See also John Ip, "New Zealand and the Global Security Law Complex" in *International Law in Aotearoa New Zealand*, eds. Anna Hood & An Hertogen (Wellington: Thomson Reuters), p. 297; John Ip, "The Making of New Zealand's Foreign Fighter Legislation: Timely Response or Undue Haste?" *Public Law Review* 27 (2016), p. 181.

29 United Nations Counter-Terrorism Committee Executive Directorate, "Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters: A Compilation of Three Reports (S/2015/338; S/2015/683; S/2015/975)" (United Nations, 2016) p. 17.

30 This was subsequently amended to include the possibility of control orders also for persons convicted and imprisoned in New Zealand for terrorism-related offences (a "relevant offender"): *Counter-Terrorism Legislation Act 2021*, s 45, amending s 6 of the *Terrorism Suppression (Control Orders) Act 2019*.

An interim control order was granted for the first time in May 2021 for a person who would be returning to New Zealand: *Commissioner of Police v R* [2021] NZHC 1022.

31 See also Andrew Geddis, "Kurdish Bombs Over Kobane", *Pundit Blog*, 9 December 2014.

32 See e.g. Blackbourn et al, *Anti-Terrorism Law and Foreign Terrorist Fighters*, pp. 23–25.

33 *R v Aidan James*, Judiciary of England and Wales, Central Criminal Court, Sentencing remarks (Justice Edis, 7 November 2019), p. 2.

34 Linda Darkwa, "The African Union and the Phenomenon of Foreign Fighters in Africa" in *Foreign Fighters under International Law and Beyond*, eds. Andrea de Guttry, Francesca Capone & Christophe Paulussen (The Hague: Springer/Asser, 2016), p. 377.

35 Darkwa, "The African Union and the Phenomenon of Foreign Fighters in Africa", p. 375.

36 Darkwa, "The African Union and the Phenomenon of Foreign Fighters in Africa", p. 376.

37 See comments by former NZDF legal advisor in Charlotte Cook, Hamish Cardwell & Ben Strang, "Kiwi killed in Ukraine: Government does not know where body is", *Radio New Zealand*, 26 August 2022. Certain restrictions also apply to those still in a reserve period following the end of their military service.

38 Marnie Lloydd, "Challenges in the Application of the Obligation to Ensure Respect for IHL – foreign fighting as an example" in *Ensuring Respect for International Humanitarian Law: State Responses to Common Article 1,* eds. Eve Massingham & Annabel McConnachie (Abingdon, Oxon, United Kingdom: Routledge, 2020), pp. 239–240.

39 *Crimes Act 1961*, s 73. See also New Zealand Defence Force DM 69 (2 ed) Volume 4 Law of Armed Conflict Manual, 6.3.26: "Traitors who have gone over to the opposing force' and *Citizenship Act 1977*, s 16 'Deprivation of New Zealand citizenship in special cases".

40 Andrew Roth & Emine Sinmaz, "Britons sentenced to death after 'show trial' in Russian-occupied Ukraine", *The Guardian*, 9 June 2022.

41 Mark Derby, ed., *Kiwi Compañeros: New Zealand and the Spanish Civil War* (Christchurch: Canterbury University Press, 2009); Susan M. Skudder, "Bringing it Home: New Zealand responses to the Spanish Civil War 1936 to 1939", PhD Thesis, University of Waikato, 1986.

42 William Jeffrey Cairns Anderson, "Shadow Cultures, Shadow Histories: Foreign Military Personnel in Africa 1960–1980", MA Thesis, University of Otago, November 2011, p. 119; Hugh Pattenden, "Britain and the Rhodesian Mercenary Issue, c. 1970–1980" *Journal of Imperial and Commonwealth History* 49:4 (2021), pp. 786 and 794 (citation omitted).

43 Matt Conway, "Fact and fantasy of mercenary world", *The Press*, Christchurch, 19 March 2005, p. A21; "New Zealander dies in Ivory Coast cell, *New Zealand Herald*, 6 April 2005; Anderson, "Shadow Cultures, Shadow Histories: Foreign Military Personnel in Africa 1960–1980", pp. 76, 79, 115, 120.

44 Rob Krott, *Save the Last Bullet for Yourself: A Soldier of Fortune in the Balkans and Somalia* (Casemate, 2008), p. 121; Andrew Geddis, "Kurdish Bombs Over Kobane", *Pundit Blog*, 9 December 2014, citing comment from Wayne Mapp on an earlier blogpost.

45 Mike Crean, "Out of trouble", *The Press*, Christchurch, 15 February 2003, p. D4; David Everett with Kingsley Flett, *Shadow Warrior* (Penguin, 2009), p. 239.

46 Isaac Davison, "Government 'lost contact' with Kiwi rebel", *New Zealand Herald*, 10 June 2014. See also Aaron Y. Zelin & Jonathan Prohov, "How Western Non-EU States Are Responding to Foreign Fighters: A Glance at the USA, Canada, Australia, and New Zealand's Laws and Policies" in *Foreign Fighters under International Law and Beyond*, eds. Andrea de Guttry, Francesca Capone & Christophe Paulussen (The Hague: Springer/Asser, 2016), p. 440; Aaron Zelin, "New Zealand's jihadis" (2015) *New Zealand International Review* 13.

47 Michael Field, "New Zealander wounded in Ukraine", *Stuff*, 9 September 2014; Kim Sengupta, "Ukraine crisis: Meet the foreign nationals fighting for the Donetsk People's Republic", *The Independent*, 24 September 2015.

48 Amy Maas & Talia Shadwell, "Kiwi joins fight against Islamic State in Syria", *Stuff*, 25 October 2015; Michael Field, "I didn't die in Syria; Kiwi artist", *Stuff*, 10 June 2014; Shashi Jayakumar, "Transnational Volunteers Against ISIS", International Centre for the Study of Radicalisation, King's College London, 2019, pp. 11 and 25.

49 TVNZ, "Fighting Spirit", *Sunday*, 10 April 2022.

50 Marnie Lloydd, "Retrieving Neutrality Law to Consider 'Other' Foreign Fighters Under International Law", *European Society of International Law (ESIL) SSRN Conference Paper Series*, ESIL Research Forum, Granada, March 2017.

51 *Foreign Enlistment Act 1870* 33 & 34 Vict, c 90, still in force in the UK.

52 Proclamation by G. F. Bowen, Governor of the Colony of New Zealand, *The New Zealand Gazette*, Wellington, 16 January 1872.

53 *Foreign Enlistment Act 1870*, ss 4–5.

54 Nir Arielli, Gabriela A. Frei & Inge Van Hulle, "The Foreign Enlistment Act, International Law and British Politics, 1819–2014" [2015] *International History Review*, p. 2.

55 There has similarly been almost no reliance on this Act and its 1819 predecessor in the UK. See e.g. "Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries" (Privy Council Committee Report 1976), Cmnd.6569, London,1976) [38]; David Anderson Q.C., "The Terrorism Acts in 2015", Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, December 2016, p. 103. There was a rare prosecution in Victoria, Australia in 1865 for "attempting to enter in service of [a] foreign power" contrary to the preceding *Foreign Enlistment Act 1819*. See Mark Finnane, "A foreign fighter", Research Brief 25, *The Prosecution Project*, 1 November 2016.

56 New Zealand Foreign Affairs & Trade, "Russian invasion of Ukraine", https://www.mfat.govt.nz/en/countries-and-regions/europe/ukraine/russian-invasion-of-ukraine/.

57 *Crimes Act 1961,* s 412(1) and Schedule 4.

58 See generally Marnie Lloydd, "Persisting Tensions: The Framing of International Legal Debates on Foreign Fighting" PhD Thesis, Melbourne Law School, 2020, Chapter 4.

59 See Muldoon statement cited in Anderson, "Shadow Cultures, Shadow Histories: Foreign Military Personnel in Africa 1960–1980", p. 86.

60 Additional Protocol I, Article 47(2).

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

62 Privy Council Committee Report 1976, [2]–[4]; Anderson, "Shadow Cultures, Shadow Histories: Foreign Military Personnel in Africa 1960–1980", pp. 89, 91, 93, 100, 110.

63 Privy Council Committee Report 1976.

64 Anderson, "Shadow Cultures, Shadow Histories: Foreign Military Personnel in Africa 1960–1980", pp. 87, 114–119.

65 Hugh Pattenden, "Britain and the Rhodesian Mercenary Issue, c. 1970–1980" *Journal of Imperial and Commonwealth History* 49:4 (2021), p. 794, citing G. R. Archer (British High Commission, Wellington) to P. J. Barlow (Rhodesia Department, FCO), 30 July 1976, item 199, FCO 36/1875

66 Additional Protocol I, Article 47.

67 Anderson, "Shadow Cultures, Shadow Histories: Foreign Military Personnel in Africa 1960–1980", p. 120.

68 Beatrice Scheepers, "Mercenarism: The Australian Connection" (1985) *Australian International Law News* 64; Andrew Zammit, "Citizenship Revocation and Australia's Counter-Terrorism History", *Avert Research Network Blog*, 31 October 2019.

69 While the Imperial 1870 Act was never expressly repealed in Australia like it was in New Zealand, it was found likely to be impliedly repealed at least to the extent that its provisions were superseded by the *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth).* See Australian Law Reform Commission, "Criminal Admiralty Jurisdiction and Prize", Report No. 48 (Commonwealth of Australia, 1990), [127]–[139].

70 See also Kim Sorensen, "To Leash or Not to Leash the Dogs of War? The Politics of Law and Australia's Response to Mercenarism and Private Military and Security Companies", *Adelaide Law Review* 36 (2015), p. 443. The 1978 Act was subsequently repealed and its provisions incorporated into Part 5.5 of the Australian Federal Criminal Code by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*, together with Australia's new "declared areas" offence provisions.

71 See e.g. Commonwealth of Australia Parliamentary Debates, Senate, 30 March 1977, pp. 673–674 (Durack); Senate, 31 March 1977, p. 720 (Durack); Senate, 7 March 1978, pp. 362–364 (Durack); Senate, 8 March 1978, pp. 429–445. See also Sorensen, "To Leash or Not

to Leash the Dogs of War?", p. 443–444. Terrorism became another concern and, with the Taliban in mind, a 2004 amendment broadened the offence to include fighting with a proscribed organisation, even where it could be considered the armed forces of a state. See discussion in Sorensen, "To Leash or Not to Leash the Dogs of War?", p. 444–445.

72 Quoted in Anderson, "Shadow Cultures, Shadow Histories: Foreign Military Personnel in Africa 1960–1980", p. 121.

73 Anderson, "Shadow Cultures, Shadow Histories: Foreign Military Personnel in Africa 1960–1980", p. 121.

74 See e.g. Privy Council Committee Report 1976, [10], [15] and [52(3)].

75 613 *NZPD* 9769, 5 November 2003 (Goff).

76 613 *NZPD* 9769, 5 November 2003 (Goff).

77 613 *NZPD* 9769, 5 November 2003 (Goff). See also Maria Bargh, *Māori in the Privatised Military Industry* (Wellington: Huia (NZ) Ltd, 2015), p. 31.

78 Foreign Affairs, Defence and Trade Committee, Report on the Mercenary Activities (Prohibition) Bill (83–2), 15 April 2004, pp. 2–6; 613 *NZPD* 9769, 5 November 2003 (Goff); 617 *NZPD* 12827, 11 May 2004 (various speakers); 618 *NZPD* 14235, 29 June 2004 (various speakers); 618 *NZPD* 14249, 29 June 2004 (various speakers).

79 See generally Benedict Sheehy, Jackson Maogoto and Virginia Newell, *Legal Control of The Private Military Corporation* (Basingstoke, Hampshire, United Kingdom: Palgrave Macmillan, 2009), p. 127.

80 617 *NZPD* 12827, 11 May 2004 (Mark); 618 *NZPD* 14235, 29 June 2004 (Mapp); Bargh, *Māori in the Privatised Military Industry*, p. 33. For a brief description of Mark's earlier employment by Oman's military including reportedly through a PMSC structure, see Phil Miller, *Keenie Meenie: The British Mercenaries Who Got Away with War Crimes* (London: Pluto Press, 2020), pp. 258–59.

81 e.g. 618 *NZPD* 14235, 29 June 2004 (Collins).

82 Foreign Affairs, Defence and Trade Committee, Report on the Mercenary Activities (Prohibition) Bill (83–2), 15 April 2004, p. 2. See also New Zealand Defence Force DM 69 (2 ed) Volume 4 Law of Armed Conflict Manual, 6.6.4 regarding mercenaries.

83 613 *NZPD* 9769, 5 November 2003 (Goff).

84 Foreign Affairs, Defence and Trade Committee, Report on the Mercenary Activities (Prohibition) Bill (83–2), 15 April 2004, p. 6.

85 617 *NZPD* 12827, 11 May 2004 (Mark). See also Sheehy et al, *Legal Control of The Private Military Corporation*, pp. 128–129.

86 Quoted in 702 *NZPD* 1229, 9 December 2014 (Goff).

87 Responding to Opposition concerns, 702 *NZPD* 1207, 9 December 2014 (Finlayson). See also 702 *NZPD* 1229, 9 December 2014 (Goff):

It might not be sensible for a New Zealander to go and fight in Kobani—they are putting their life at risk—but they might believe fundamentally that that is the right thing to do to protect their people, their families, and their homes, and I do not think that this House has any place stopping somebody from going to engage in a conflict for those reasons.

88 702 *NZPD* 1242, 9 December 2014 (Mark).

89 702 *NZPD* 1260, 9 December 2014 (Goff).

90 See 701 *NZPD* 609, 5 November 2014 (various speakers).

91 See similarly John Ip, "Reconceptualising the Legal Response to Foreign Fighters" *International & Comparative Law Quarterly* (2020), p. 104: "The approach taken by UNSCR 2178 is to treat foreign fighting as a form of terrorism, thereby conflating two distinct phenomena".

92 702 *NZPD* 1207, 9 December 2014 (Finlayson).

93 702 *NZPD* 1207, 9 December 2014 (Finlayson).

94 702 *NZPD* 1242, 9 December 2014 (Mark).

95 702 *NZPD* 1207, 9 December 2014 (Finlayson).

96 e.g. Soufan Center, "White Supremacy Extremism: The Transnational Rise of the Violent White Supremacist Movement", Report, September 2019; United Nations Counter-Terrorism Committee Exec-

utive Directorate, “Member States Concerned by the Growing and Increasingly Transnational Threat of Extreme Right-Wing Terrorism”, *Trends Alert*, April 2020.

97 As well as Finlayson quoted above, see also e.g. 701 *NZPD* 609, 5 November 2014 (Goff) regarding groups committing crimes against humanity or war crimes but immediately linking this only to proscribed terrorist organisations.

98 Ministry of Justice, Regulatory Impact Assessment: Options to strengthen counter terrorism legislation (terrorist financing and terrorism travel offences), 2021, pp. 17–23. A 2014 amendment to Australia’s *Criminal Code Act 1995 (Cth)* allowed the Minister of Foreign Affairs to demarcate certain areas of a foreign country if “satisfied that a listed terrorist organisation is engaging in a hostile activity in that area” and created a new offence of entering, or remaining in, that designated area (ss 119.2, 119.3). The UK and Denmark have since enacted similar geographic provisions: *Counter-Terrorism and Border Security Act 2019* (UK), s 4 and *Criminal Code* (Denmark), s 114 j.

99 Lloydd, “Retrieving Neutrality Law to Consider ‘Other’ Foreign Fighters Under International Law”, p. 17.

100 Blackbourn et al, *Anti-Terrorism Law and Foreign Terrorist Fighters*, pp. 19–20.

101 Ministry of Justice, Regulatory Impact Assessment: Options to strengthen counter terrorism legislation (terrorist financing and terrorism travel offences), 2021, pp. 19–23.

102 See e.g. Law Council of Australia, “*Submission to the Parliamentary Joint Committee on Intelligence and Security on the Review of the Declared Area Provisions”,* 1 November 2017.

103 See, for example, Australian Associated Press, “Ashley Dyball, Australian Who Fought against Isis in Syria, Released after Return”, *The Guardian*, 7 December 2015.

104 702 *NZPD* 1207, 9 December 2014 (Finlayson).

105 Lloydd, “Retrieving Neutrality Law to Consider ‘Other’ Foreign Fighters Under International Law”, p. 4.

106 Richard Jackson, “Extremist or freedom fighter? NZ’s double standard”, *Newsroom*, 13 April 2022.

107 Darryl Li, “A Universal Enemy?: ‘Foreign Fighters’ and Legal Regimes of Exclusion and Exemption under the ‘Global War on Terror’” *Columbia Human Rights Law Review* 41 (2010), p. 373.

108 702 *NZPD* 1242 9 December 2014 (Mark).

109 Lydia LeGros, “A History of Violence: A Critical Overview of Aotearoa New Zealand’s Approach to ‘Terrorism,’” in this Special Issue.

110 New Zealand Defence Force DM 69 (2 ed) Volume 4 Law of Armed Conflict Manual, 6.8.6.