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The Foreign Enlistment Act, International Law, and British Politics, 1819-2014

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Abstract:

Foreign enlistment has made headline news in the current Syria crisis and with the rise of the terror group ISIS. The problem is an old one. How can states prevent their citizens from joining foreign forces? Whatever the motives of volunteers, states have usually reacted with the implementation of domestic laws in the hope of gaining a grip on the situation. Britain has one of the oldest legislations in place, the so-called Foreign Enlistment Act. Dating back to 1819, the history of the Act is largely unexplored. An analysis of British state practice related to the Act brings a history to light, which reaches far beyond the domestic sphere where the Act is firmly placed today. The article shows that the Act originated in the realm of foreign policy, shaping legal concepts, such as non-intervention, recognition, and neutrality in the nineteenth century. In the twentieth century the Act was increasingly discussed in domestic policy, where also current debates on foreign enlistment take place. Thus, the article examines the changing role of the Foreign Enlistment Act in the context of 200 years of British domestic and foreign policy, illustrating how this domestic legislation shaped the understanding of concepts in international law.

Keywords: Foreign enlistment; Great Britain; recognition; international conflict; neutrality

On 14 January 2014, Lord Marlesford introduced an amendment to the Foreign Enlistment Act of 1870 in the House of Lords.¹ The proposed amendment strove to make it an offence for British citizens to participate as combatants in armed conflicts against foreign states at peace with Britain, and it proposed to take away passports from suspects in order to prevent would-be volunteers from leaving. Lord Marlesford's underlying intention for introducing the amendment was to target the enlistment of young British Muslims by Syrian rebel forces. Apart from Lord Marlesford, many British columnists and journalists have referred to the potential use of the Foreign Enlistment Act in preventing the armed engagement of Muslim sympathizers in the Syrian conflict.² Other states in Europe also discussed steps to prevent their citizens from joining irregular forces.³

Beginning in the late eighteenth century, various states introduced legislation prohibiting foreign enlistment, and thus enforcing one crucial aspect of neutrality in wartime.⁴ The British Foreign Enlistment Act is one of the earliest examples as only the United States had an older legislation in place after which the British version was modeled.⁵ Britain first adopted the Act in 1819 as a legal instrument to prevent the enlistment of British citizens in foreign conflicts and prosecute offenders, as well as to prohibit the building and equipping of ships in Britain for the use of foreign forces.

Literature on the subject is relatively sparse. The most comprehensive study was written in 1896 by a British barrister, Gerald John Wheeler, giving a detailed account of the British and American cases up to that date.⁶ The Act has also been mentioned in several treatises.⁷ More recently, historians, political scientists and international relations theorists have briefly touched upon the Act with reference to mercenaries and neutrality.⁸ However, those studies neglect the broader context in which the Act originated and developed. Looking beyond the immediate application

of the Act, this article argues that the Act served much more than only the deterrence of citizens from joining foreign forces or the enforcement of neutrality. Rather, our aim is to demonstrate the dual role of the Foreign Enlistment Act in bolstering both the domestic and international legal order, especially in the fields of recognition, non-intervention, and neutrality. Therefore, the aim of this article is to systematically assess the role and function of the Foreign Enlistment Act in British politics from its first adoption in 1819 to the present. By providing detailed insight into the mechanisms of the implementation of the Act, the article deepens our understanding of the Act's broader role in British politics.

The first part of the article examines the creation of the Act and its early application, the second analyses the major revision of the Act in the mid-nineteenth century, and the third assesses the challenges the Act faced in the twentieth and early twenty-first centuries. In doing so, the article shows the different contexts in which the Act was used by Britain as a political instrument to secure its international interests. It also illustrates how the Foreign Enlistment Act contributed to discussions on three concepts of international law: recognition, non-intervention, and neutrality. At the same time, discussions surrounding the Act reflect many of the changes that British decision-making processes pertaining to international conflicts and civil wars underwent in the course of the last 200 years.

Origins of the Foreign Enlistment Act and its application in the early nineteenth century

The creation of the British Foreign Enlistment Act of 1819 took place within the context of the struggle for independence of the Spanish American states.⁹ During the 1810s and 1820s when the struggle for independence raged, British public opinion

became increasingly sympathetic to the cause of the rebels.¹⁰ Apart from segments of British public opinion, which perceived Spanish America as the new land of milk and honey, a powerful commercial lobby in London saw the economic potential of the ex-colonies as a new market for British goods. They were therefore keen on seeing an end to the Spanish system of colonial monopoly and were supportive of Spanish American independence. Some of these supporters did not merely leave it at lobbying, but actually volunteered in the services of the Spanish American forces. It is estimated that well over 5,000 British volunteers sailed with the intention of going to Spanish America.¹¹ Most of these individuals were adventurers and some were unemployed veterans of the Napoleonic wars, among them most famously, the naval officer Lord Cochrane, who had earned his nickname ‘le loup des mers’ thanks to his exploits during the French Revolutionary and Napoleonic Wars.¹²

While the public applauded Cochrane’s heroic deeds, the British government headed by Lord Liverpool found them increasingly embarrassing. As since the invasion of Napoleonic forces in Spain in 1808 the latter had become an ally, Britain had decided to adopt a policy of neutrality. From 1813 onwards, Spain officially requested Britain to take specific measures against British subjects enlisting in the rebel armies.¹³ Britain had signed a treaty with Spain in 1814, which prohibited Britain from furnishing arms to the rebellious colonies, but did not contain any provisions on the enlistment of volunteers.¹⁴ To appease Spain, the British Foreign Secretary, Lord Castlereagh, asked the Law Officers – the principal legal advisers of the Crown – whether any legal measures could be taken to stop the enlistment of British subjects. Their reply was that there had in fact been a number of older statutes limiting foreign enlistment to some extent, but it was very questionable whether these applied to the present situation, as the old statutes spoke of the prohibition of enlisting

in the armies of foreign princes, states or potentates.¹⁵ Yet, the Spanish American rebels, due to their unrecognized legal status, could not be placed in any of these categories.¹⁶ The verdict of the Law Officers was therefore that on account of these laws the volunteers could not be prevented from sailing. They advised that should the government be keen on taking legislative action, they might want to adopt an instrument very much like the 1794 Neutrality Act of the United States.¹⁷

The advice of the Law Officers was followed, as the American Neutrality Act was the most far-reaching example in international law of a measure that enforced neutrality through domestic legislation.¹⁸ According to the new Bill, British subjects could not: '(...) without the permission of His Majesty enlist in the military services of any foreign prince, state, potentate, colony, province or part of any province or people, *or of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country (...)*.'¹⁹ Other provisions concerned the building, equipping and arming of ships for belligerents. The 1819 Foreign Enlistment Bill was therefore specifically designed to include the unrecognized Spanish American states.

The drafting of the Bill and its subsequent introduction into Parliament indeed brought to the fore the issue of recognition in international law. At the beginning of the nineteenth century the concept of the recognition of newly independent states and governments was a largely unexplored and ill-defined area of public international law.²⁰ The prevailing idea among the early commentators on the law of nations had been that sovereignty came from within the state and depended on dynastic legitimacy.²¹ This reasoning implied that new states did not need the consent or recognition of other states in order to be considered sovereign and independent. In the second half of the eighteenth century, and especially after the independence of the

United States, recognition slowly gained ground as an autonomous object of study within the law of nations. Even then, legal scholars such as Johann Klüber, Georg von Martens and Johann von Steck saw recognition as largely redundant; belonging more to the realm of politics than to that of law.²² The insurgency in 1776 of Britain's North American colonies, and during the 1810s and 1820s, of the struggle for independence of Spanish America, however, changed matters considerably. Could the claim of independence of the Spanish American rebels be recognized by other countries against the age-old and – supposedly – legitimate authority of the Spanish king?

The thorny issue of recognition was itself also tied up with other difficult and relatively unexplored areas of international law, such as the principles of non-intervention and neutrality. In the 1820s, non-intervention had become a hotly debated topic in foreign policy. Since the Congress of Vienna (1815) and the establishment of the Holy Alliance, intervention had become the principle through which Austria, Russia and France preserved the conservative monarchic order within Europe. However, the new doctrine of intervention implied a departure from the traditional law of nations, as since the eighteenth century, the principle of non-intervention in the affairs of other states had become the rule, whereas intervention constituted the exception.²³ The Holy Alliance's interventionism proved unpopular in Britain, leading Foreign Secretaries Lord Castlereagh and George Canning to adopt a policy of non-intervention and strict neutrality.²⁴

Before the beginning of the nineteenth century, concepts such as intervention, neutrality or recognition were part and parcel of the political discourse of states. However, in legal terms, they were not yet clearly defined. Yet, the increased demands for independence in various regions of the world by secessionist groups,

combined with the counter-demands of the conservative interventionist order established at the Congress of Vienna, meant that it was in the interest of states to clearly define their international rights and duties and those of their citizens.²⁵

Therefore, even though the Foreign Enlistment Bill was introduced first and foremost for domestic purposes, its drafting was inherently tied up with larger questions of recognition, non-intervention and neutrality. First of all, this was – as we have seen – through the inclusion in section II of the Bill of a new category of unrecognized states and governments. Secondly, the introduction of the Bill into Parliament significantly raised the pressure on the British government to recognize the Spanish American states and brought to the fore the tension between recognition on the one hand, and non-intervention and neutrality on the other.²⁶ Thirdly, Britain's seeming commitment to neutrality through the adoption of the Foreign Enlistment Bill reflected the concern of the European powers to preserve peace in Europe through the European Concert system.²⁷ As Maartje Abbenhuis has recently argued, neutrality became one of the principal instruments to achieve this goal.²⁸

Parliamentary opposition against the Foreign Enlistment Bill was spearheaded by the imminent international lawyer and ardent defender of the Spanish American cause, Sir James Mackintosh, who had pushed the discussion about the Foreign Enlistment Bill into a larger debate about the meaning of neutrality, non-intervention and the recognition of new states. He argued that the Bill was clearly designed to the disadvantage of Spanish America and that the law of nations did not require Britain to change its domestic laws.²⁹ According to Mackintosh, neutrality meant, firstly, that Britain needed to maintain friendly relations with both belligerent parties. Secondly, it implied that national legislation should remain impartial. The Bill though was contrary to the principle of neutrality and favoured Spain.

Supporters of the Bill included famous law officers, common and civil lawyers such as Chris Robinson, Joseph Phillimore, Lord Eldon, who all claimed that the Bill was merely an expression of Britain's duty as a neutral state according to the law of nations.³⁰ Neutrality and certainly 'strict' neutrality had not received a definite meaning yet. During the parliamentary debates, however, the Foreign Enlistment Bill was portrayed as absolutely necessary to preserve not just neutrality, but to add to it the quality of 'strictness'.³¹ This was particularly the argument of Sir William Scott. He defined strict neutrality in terms of a total abstinence of any kind of assistance to either party of the conflict, which was best embodied through the enforcement of neutrality by means of domestic legislation.³² As judge of the High Court of Admiralty during the Napoleonic wars and adjudicator of numerous prize cases, Scott's arguments carried much weight.³³

Sir James Mackintosh, however, launched a number of ardent speeches in the House of Commons on the topic of recognition in the context of Spanish America.³⁴ As highlighted above, recognition had until the end of the eighteenth century been perceived by commentators of the laws of nations as largely redundant, because sovereignty stemmed from within the state. In fact, the recognition by Britain of the Spanish American states constituted an unjust intervention, as despite the Holy Alliance's new credo of interventionism, meddling in the affairs of other states was at the beginning of the nineteenth century still perceived by most Powers to be illegal.³⁵

However, Mackintosh cleverly circumvented this legal difficulty by laying the groundwork in his parliamentary speeches for the distinction between *de facto* and *de iure* recognition. *De facto* recognition was reserved for third states and merely had a declaratory nature, leaving the sovereignty of Spain intact.³⁶ Such recognition could never signify an intervention. *De iure* recognition was reserved for Spain and implied

the irreversible retraction of sovereignty over Spanish America and would have a constitutive effect on Spanish American statehood. By highlighting the mere declaratory and supposedly innocent nature of *de facto* recognition, Mackintosh paved the way for the conclusion of Britain's first commercial treaty in 1825 with the United Provinces of Rio de la Plata, which entailed *de iure* recognition. This was soon followed by treaties with Mexico and Columbia.

The opponents of the Foreign Enlistment Act therefore need not have worried. Even after the Bill was passed, it did not have the feared effect of harming the cause of the rebels as it failed to deter individuals from travelling to Spanish American states.³⁷ There had not been an official British proclamation of neutrality and the Act was specifically advertised as not entailing a recognition of belligerency of the Spanish American states. It is, therefore, safe to say that it was the expression in domestic legislation of Britain's desire to ensure the application of the rights and duties of neutrals to the unrecognized states of Spanish America, which had sparked debates on the recognition of the new states.

When the Greek struggle for independence began in the 1820s, public opinion rallied again to the cause of the Greeks, under the influence of the philhellenic intellectual movement.³⁸ Lord Cochrane would again offer his services to the Greeks, yet the most famous British volunteer was the renowned British poet Lord Byron.³⁹ Even though perhaps the sympathy of the British public rested with the Greeks, the British government was determined to adhere to a policy of strict neutrality.⁴⁰

The dilemma over the Greek volunteers greatly resembled that of the Spanish American context discussed above: again, Britain needed to show to the international community its willingness to take its neutrality seriously. The enlistment of British subjects therefore needed to be tempered. In June 1823 a Proclamation was issued

calling attention to the provisions of the Foreign Enlistment Act, which was reaffirmed by new Proclamations in 1824 and 1825.⁴¹ The June Proclamation entailed the recognition of the Greeks as belligerents and provoked protests from the Turkish government.⁴² It was one step further than the policy Castlereagh and Canning had pursued during the Spanish American wars of independence. It signified the growing importance of applying the laws of war to less traditional forms of warfare, such as civil wars and wars of secession.

Canning defended his position to the Turkish government by arguing that, according to the rules and principles of international law, other nations had no alternative but to recognize the belligerency of the Greeks.⁴³ A power or a community at war with another, which sends its cruisers out to sea, must either be recognized as a belligerent or as a pirate. If not:

The description of a rebel, under which alone the Porte [i.e. Turkey] was willing to consider the Greeks, was not one, which could constitute a rule for the conduct of Foreign Nations, except, either in a presumption that Foreign Nations have a right to cognizance of the internal disturbances of the Turkish dominions – (a right which, if admitted, some nations might exercise, in favour of the Greek side of the quarrel), *or* on the pretension that in a dispute between a Sovereign and a portion of his subjects, all Foreign Governments are bound by an overruling obligation to make common cause with the sovereign.⁴⁴

In other words, Britain did not preserve for itself the right to interfere with the internal affairs of Turkey, nor did it wish to adhere to the principle of dynastic legitimacy as

set forth by the Holy Alliance. As noted above, in the Congress of Vienna, the European powers established a new balance of power, based on a conservative and anti-revolutionary consensus and a willingness to intervene in the internal affairs of other states.⁴⁵ It underlined the sovereign rights of legitimate rulers and defended the idea of the use of force, if need be, to halt violent uprisings in Europe. Britain, however, wished to look merely at the facts that were relevant to the international order, namely the belligerent status of the Greeks, which in turn, necessitated the application of the Foreign Enlistment Act.

The official adherence by the British government to the Foreign Enlistment Act convinced the supporters of Greece in April 1823 that parliamentary action was needed to gain its abolition. In doing so, the discussions on the Foreign Enlistment Act brought to the fore, not so much questions of recognition, but more so on the principles of non-intervention and neutrality. A motion to abolish the Act was introduced by British parliamentarian Lord Althorp, who argued that, ‘(...) the duty of a neutral nation was, to act impartially between the belligerent parties. If, therefore, Great Britain said that neither party should enlist troops in her territory, she was strictly neutral; and if she said, on the other hand, that both parties might enlist troops in her territory, she was strictly neutral also.’⁴⁶ The soundness of Althorp’s reasoning that, in the end, it made little difference for neutrality whether there was a Foreign Enlistment Act or not, managed to make some impression on the international lawyer Sir Robert Phillimore. Canning, however, could not be persuaded. He argued that the Foreign Enlistment Act had indeed been adopted in 1819 in the first instance because of the existence of precedence in common law and the treaty with Spain of 1814. The circumstances may have changed, yet an abolishment of the Act now, might be

perceived as an outright favour to one of the belligerent parties and might drag Britain into a war with Turkey.⁴⁷

In the end, the Act itself was only half-heartedly enforced and when news reached Britain of atrocities committed against the Greeks, the political course of the British government changed. Secret reports talked of the possible involvement of Egyptian forces, sent by Turkey, to deport the Greek population into slavery.⁴⁸ When Russia threatened a forceful intervention in the conflict, Canning's carefully constructed policy of neutrality crumbled.⁴⁹ Russia could not be left to intervene alone, hereby possibly creating its own sphere of influence in the Mediterranean.⁵⁰

Britain's policy of neutrality was therefore abandoned with the conclusion of the Treaty of London in 1827, which set the course towards intervention in Greece, culminating in the Battle of Navarino on 7 October 1827 and the end of Britain's policy of neutrality.

The conflict over Spanish America and Greece and the creation and implementation of the Foreign Enlistment Act show that, during the first half of the nineteenth century, while an instrument of domestic legislation, the Act was used as a political tool to protect Britain's foreign interests. The most important effect of the Act, however, was that it advanced the development of a number of important doctrines of public international law. It first of all raised questions during the Spanish American wars of independence as to the nature of state recognition and non-intervention. Secondly, and more vehemently during the Greek conflict, it brought to the foreground the issue of whether the laws of war and the rights and duties of neutrals should apply to a situation of civil war. Following a brief suspension of the Act during the First Carlist War in Spain in 1835,⁵¹ it would again play a prominent role in the latter half of the nineteenth-century foreign policy.

The road to the revision of the Foreign Enlistment Act (1870) and its implementation

The American Civil War marked a turning point in the interpretation of the Foreign Enlistment Act and subsequently led to a major revision of the Act in the aftermath of the conflict, which would shape Britain's political and legal thinking in terms of neutrality until the outbreak of the First World War.⁵²

When the American Civil War broke out, the question of recognition played a central role in the first few months, as only recognition of a conflict would allow the European powers to take a formal position. The President of the United States, Abraham Lincoln, together with his Secretary of State, William H. Seward, repeatedly warned European powers, that if they were to establish diplomatic relations with the Confederates, the Union would treat this as a recognition of the enemy, and thus considering the possibility that the Union would declare war on them. For the Confederates, on the other hand, their aim had been from the very beginning of the conflict to gain recognition of their independence.⁵³

Therefore, when President Lincoln proclaimed the Union's intention to blockade the ports of the southern states on 19 April 1861, the British government grasped the opportunity to take a clear position towards the conflict. Despite considerable public and political support for intervention, the British government favoured neutrality over intervention.⁵⁴ Strong economic ties to the United States had been a major factor in the government's considerations, and, neutrality allowed, and required, Britain to maintain good economic relations with both belligerent parties.⁵⁵ Undeniably, neutrality was economically advantageous for Britain, as Maartje Abbenhuis has recently pointed out.⁵⁶

Britain's proclamation of neutrality had been a direct response to the Union's announcement of a blockade of the ports in the South.⁵⁷ According to international law, a blockade constituted an act of war, and thus, recognition of the existence of a conflict.⁵⁸ From the Union's point of view, the British had acted hastily in proclaiming neutrality, and thus, recognizing southern belligerency. In their eyes, the Confederates were rebels, who threatened the constitutional order of the United States.⁵⁹ For Lord Russell, the British Foreign Secretary, on the other hand, the Confederates' government was legitimate and just, and thus entitled to recognition. In support of his argument he cited Emer de Vattel, a legal philosopher, who had written on recognition in cases of civil war.⁶⁰ Lord Russell had also acted in accordance to legal advice from the Law Officers, who had cited the cases of Spanish America and Greece.⁶¹ The Law Officers regarded the American conflict as a *justum bellum* and, thus, it was a 'regular war'.⁶² The political debate in the British parliament underscored the legal difficulties in recognizing the Confederacy.⁶³

The decision had far-reaching political and diplomatic implications since it meant the recognition of the Confederacy as a belligerent and, thus, entitled them to exercise belligerent rights. This status allowed the Confederacy to apply for war loans, purchase arms and other war materiel essential to wage war against the northerners.⁶⁴ For the Union the British recognition of the South as a belligerent was a major blow to their diplomatic efforts. At the same time, the British decision boosted the confidence of the Confederates. Although the recognition of the status of belligerency did not constitute diplomatic recognition, the Confederates interpreted it as a first step in the right direction.⁶⁵

The Civil War was a legal minefield.⁶⁶ At the heart of the legal and diplomatic disputes between the Union and Britain were the rights and duties of neutrality, and

with it the provisions of the Foreign Enlistment Act, a domestic measure to enforce Britain's neutrality. It was not so much foreign enlistment as such which was disputed, but the law's provisions concerning the building, arming and equipping of ships, which up until this point had not been the focus of the debates surrounding the creation and implementation of the Act.

At the outbreak of war, the Confederates had no naval forces to match those of the Union. Yet, the Confederates needed ships to maintain the steady flow of war materiel and other essential goods. Their dependence on imports made the southern ports a vital lifeline to their war effort. This was why the Union's main objective in the war at sea was to cut off the Confederates from their supplies by blockading the ports in the South. Although the Union blockade was patchy at first, it gained in effectiveness as the war went on.⁶⁷ Overall some 1,500 prize cases⁶⁸ were accounted for the Union, which was a respectable number. The Confederates, on the other hand, did not have the financial means to build an adequate naval force to match that of the Union. They also had no shipyards to build cruisers, which they could have used as blockade-runners in order to maintain their supply lines. So the Confederates turned towards Britain. Liverpool's shipyards became the place where most of the Confederate cruisers were built. The city had strong ties to the South since its former involvement in the slave trade, and later the cotton trade.⁶⁹

The CSS *Florida* was one of the first ships to be completed in a Liverpool shipyard for the Confederates. She left the port in March 1862 disguised as a merchant vessel for Nassau in the Bahamas. There she was refitted and commissioned as a commerce raider for the Confederates, successfully operating off the east coast of the United States until she was caught in 1864. The most prominent of the Confederate cruisers, the CSS *Alabama*, followed a similar trajectory. A major

diplomatic uproar followed the escape of the two Confederate cruisers from British shipyards. The Union accused Britain of a breach of neutrality. The Law Officers had intensely watched the situation, and yet, they felt that the evidence was not strong enough to detain the ships since the Confederate ownership could not be verified. The CSS *Florida* was later detained in the Bahamas but the local Vice-Admiralty Court had to release the ship on the grounds of proof that the violations had happened outside the court's jurisdiction.⁷⁰

The growing pressure from outside led the British government to reconsider its application of the Foreign Enlistment Act, and decided on a more vigorous approach in dealing with suspicions of building and equipping ships for the Confederacy. The steamer CSS *Alexandra*, built in a Liverpool shipyard in 1863, was the first to be seized in the shipyard and tried under the Foreign Enlistment Act. Based on evidence collected by the Union's consul in Liverpool, Thomas H. Dudley, the Foreign Office ordered the ship to be detained in April 1863, thereby setting a precedent. The case, which unfolded in the following months, revealed the weaknesses of the Act and showed the difficulty in adopting a broader interpretation of its provisions. Evidence was weak, which made it hard for the prosecution to convince the court, and the inexperience of the Solicitor General, Roundell Palmer, did not help the matter. On the other hand, the defendant had hired the most prominent defence lawyers in the country, among others Sir Hugh Cairns and George Mellish. Their argument was plain and simple: The government, in response to information provided by a Union agent, acted upon suspicion rather than hard evidence. No conclusive evidence could be produced to prove that the *Alexandra* was built for belligerent purposes. Thus, the detention was unlawful and the defence lawyers demanded the immediate release of the ship.⁷¹

Lord Chief Baron of the Exchequer, Sir Frederick Pollock, felt compelled to decide in favour of the defence. In his verdict, he highlighted that the purpose of the Foreign Enlistment Act was to maintain Britain's neutrality. He signaled to the shipbuilding industry, that the building of a ship *per se* was not a violation of the Act. Yet, the *Alexandra* case created uncertainties among shipbuilders as to the government's future policy. The British government appealed the decision but after the House of Lords upheld Pollock's ruling, the ship had to be released. The outcome was an embarrassment to the British government, which had unsuccessfully tried to establish a new policy in order to prevent another *Alabama* incident.⁷²

When the Civil War ended in 1865, legal disputes were still going on between the United States and Britain. The *Alabama* claims would eventually be settled after the Treaty of Washington (1871) in the Geneva Arbitration in 1872, where the British had to pay \$15 Million in compensation.⁷³ While the treaty outlined the 'three rules' of neutrality, the British government independently sought to revise its domestic legislation, since the Foreign Enlistment Act proved to be of limited use to enforce Britain's neutrality.⁷⁴ On both sides of the Atlantic, international lawyers had intensely debated the legal issues, which occurred during the American Civil War, such as recognition, non-intervention, and neutrality.⁷⁵ While the Act was discussed among lawyers as part of British domestic legislation, Frederick W. Gibbs and Felix H. Hamel highlighted its impact on foreign policy and the understanding of neutrality.⁷⁶

Only a revision of the Act could restore faith in the legislation as part of Britain's neutrality policy, as a group of Liverpool shipowners had suggested to the Foreign Office during the *Alexandra* trial in 1863. Their proposal demanded an expansion of executive powers, which would enable the government to act more

swiftly based on suspicion rather than evidence. Out of fear that cases such as the *Alexandra* would damage their reputation and destroy their business, they were willing to adhere to stricter regulations of the Foreign Enlistment Act.⁷⁷ In 1867, the British government invited the most eminent lawyers in Britain to discuss a revision of the Act in the Neutrality Laws Commission. Their report, published in 1867, recommended changes to the provisions of the building, arming, and equipping of ships. The aim was to make the detention of ships easier by acting upon suspicion rather than evidence. For this, the executive powers of the secretary of state should be expanded so that he could issue arrest warrants without conclusive evidence. At the same time, government officials such as customs officers should be given the power to make an arrest upon suspicion. With these measures, the commissioners hoped to improve the effectiveness of the Act, and thus, prevent the repetition of another diplomatic disaster as had happened during the American Civil War.⁷⁸

The report did not immediately lead to a revision of the Foreign Enlistment Act. Only when the Franco-Prussian War broke out on 19 July 1870 would the question of neutrality resurface and prompt a debate in both Houses. As a result, a Foreign Enlistment Bill was hastily put together, based on the recommendations of the report, and discussed in July and August of 1870.⁷⁹ The Attorney General, Sir Robert Collier, explained during the second reading of the Bill that its main objective was to serve as a domestic measure to enforce neutrality more vigorously within British jurisdiction, rather than to satisfy foreign powers or to engage in a principal discussion on international law regarding neutrality. The aim was to prevent cases such as the *Alabama* or *Alexandra* from happening again.⁸⁰ The changes concerned in particular the sections on shipbuilding. In section 8 of the new Act, the ‘intention’ to build, arm, and equip a ship for the military use of a belligerent was declared an

offence. At the same time, executive powers were expanded so that arrest warrants could be issued on suspicion rather than evidence (paragraphs 21-26 of the new Act). Government officials, such as ports or customs officers, were provided with special powers under paragraph 24 of the Act in order to detain ships swiftly if they suspected an imminent escape from a British port. These far-reaching measures intended to tighten controls of un-neutral behaviour by British citizens.⁸¹

The parliamentary debate illustrated, though, that the main issue concerned the rights and duties of neutrals. For some, such as the lawyer and politician Sir William Vernon Harcourt, the Bill went too far in restraining shipbuilders and might disadvantage the shipbuilding industry. They argued that the existing provisions would exceed the principle of neutrality in international law. Others feared that the regulations were not stringent enough and thus suggested an expansion of the Bill to include contraband goods, and prohibit the export of arms. In essence, the debate addressed the broader implications of the Foreign Enlistment Act for the understanding of neutrality.⁸² This also reflected the broader debate about neutral behaviour among other European powers during the Franco-Prussian War.⁸³

The parliamentary debate addressed at length the broader legal issues of recognition, non-intervention, and neutrality, which were closely tied to the application of the Act. Crucially, however, the revised Foreign Enlistment Act of 1870 strengthened domestic legislation, and thus, reflected Britain's willingness to enforce neutrality more strictly after the American Civil War.

With the new legislation, the Foreign Office and other government officials intervened more swiftly after 1870, using their executive powers to detain ships under suspicion. Thus, the number of arrest warrants increased in the following wars in which Britain had proclaimed neutrality, for instance during the Franco-Prussian War

of 1870/71, the Russo-Turkish War of 1877/78, the Sino-Japanese War of 1894/95, and the Russo-Japanese War of 1904/05.⁸⁴ Yet, none of those cases were brought to court. The provisions may not have had the desired effect in terms of preventing every escape of a ship, but, thanks to the early intervention of the Foreign Office and other government officials, major legal and diplomatic incidents were avoided.⁸⁵ The British shipbuilding industry, on the other hand, felt disadvantaged by the tightened provisions of the Act as they lost business due to Britain's enforcement of neutrality. During the Russo-Japanese War, pressure grew to relax the provisions, and shipbuilders argued that other states, such as Germany had no restrictions imposed on their industry.⁸⁶ While the British government adhered to the provisions of the Act, it was willing to reconsider its position in the interest of the shipbuilding industry. To relax the provisions concerning the building, arming and equipping of ships, the Foreign Office suggested changes to the Act. In October 1912, the Lord Chancellor, Viscount Haldane, presented a Bill in the House of Lords suggesting changes to paragraph 8 of the Act, allowing shipbuilders to fulfill contracts, which they made in time of peace, provided that they informed the Foreign Office about the content of the contract. The Bill received little attention in parliament, though, and was discharged in the House of Commons in February 1913.⁸⁷

The violation of Belgian neutrality at the outbreak of the First World War, the deterioration of neutral rights, the cooperation of neutral states with belligerents, and in many cases neutrals' subsequent intervention in the conflict, questioned the principle of neutrality with which the Foreign Enlistment Act was associated. Britain's wartime policy on neutrality marked a departure from its pre-war policy. To what extent, however, the application of the Act was still viable domestically, or

useful as a foreign policy instrument, remained to be seen in the years to come after the war.⁸⁸

Challenges to the Foreign Enlistment Act in the twentieth and early twenty-first centuries

The international and domestic landscape that emerged following the First World War created both old and new challenges for the Foreign Enlistment Act. The outbreak of the Spanish Civil War in 1936 revived debates in Britain regarding recognition, non-intervention, neutrality and the applicability of the Act. Following an attempted military coup in mid-July, Spain descended into violence, with the insurgents – eventually led by General Francisco Franco – seizing parts of the country and forces loyal to the Popular Front government holding on to others. The latter sought to purchase arms from the British government in late July. In London a consensus began to form among high-ranking British policy makers against aiding the increasingly weak government in Madrid. Conservative cabinet ministers and leading Foreign Office officials expressed concern that Moscow would use the war to increase Soviet influence in Western Europe, resulting in the emergence of Bolshevism in the Spanish Republic. Meanwhile the Foreign Secretary, Anthony Eden, was concerned about the growing influence of Nazi Germany and Fascist Italy. He sought to contain the conflict and prevent a European conflagration.⁸⁹

On 15 August 1936 Britain joined a French initiative and called for a general non-intervention agreement. Within two weeks several other countries joined the initiative, including Italy, Germany and the Soviet Union. The agreement was meant to halt the flow of weapons and war materiel into Spain. It became operative in late August 1936. An international Non-Intervention Committee composed of

ambassadors and chaired by the Conservative politician and Parliamentary Under-Secretary to the Foreign Office, the Earl of Plymouth, met regularly in London and attempted to oversee the agreement's implementation.⁹⁰ Notoriously ineffective, the Committee was powerless to thwart the support given by Italy and Germany to Franco's forces and by the Soviet Union to the Republican government.

Concerns about the repercussions of the participation of British citizens in the fighting on international efforts to secure non-intervention were raised by Britain's diplomatic representatives in Spain as early as mid-August.⁹¹ Some Britons, who were already in Spain when the war broke out, joined pro-government forces while other anti-Fascist volunteers began making their way to the Iberian Peninsula.⁹² By early September the Foreign Office started to consider the possibility of applying the Foreign Enlistment Act to the Spanish conflict. In contrast to nineteenth-century conflicts, where the pressure to enforce British neutrality came primarily from external powers such as Spain in the 1810s or the Ottoman Empire in the 1820s, in this case Foreign Office actions were pre-emptive and self-imposed. By issuing a public warning that the Act would be applied, officials at the Foreign Office hoped to reduce the number of British citizens going abroad to fight to a 'small trickle'.⁹³

Hence, it would be less likely that one of the other countries involved would use the presence of British citizens as a 'pretext for seeking to escape from the Non-Intervention Agreement in regard to the export of arms'.⁹⁴

The primary purpose of the Act was still to give credence to Britain's international obligations. However, because the Foreign Office had lost some of the dominance it had hitherto enjoyed within the policy-making process following the First World War, any decision regarding the enforcement of the Foreign Enlistment Act had to be reached in consultation with the Home Office.⁹⁵ As in previous cases,

the key dilemmas were whether the Act could apply without formal recognition of the regime set up by Franco, and whether a formal declaration of neutrality, establishing clearly that Britain was 'at peace' with both sides, was necessary. The Home Secretary, Sir John Simon, whose office would have to issue arrest warrants for offenders, was reluctant and asked whether Britain would have to grant Franco *de jure* recognition. However, the Foreign Office stressed the Act's potential as a deterrent over all other considerations and succeeded in convincing the Attorney General (the government's senior law officer), despite the reservations of the Home Office. Concerns about the implicit recognition the Act would grant and the need to formally establish Britain's neutrality receded to the background.⁹⁶

By the end of 1936 the extent of foreign involvement in Spain was becoming increasingly apparent with Italian troops fighting alongside Franco's forces and the Soviet-backed International Brigades supporting the Republic. Evelyn Shuckburgh, who was responsible for Spanish affairs at the Foreign Office, wanted Britain to 'be able to say that we have taken all possible measures to enforce a prohibition of enlistment'. The Foreign Secretary concurred and sought to use the Act to induce other countries to stem the flow of volunteers into Spain.⁹⁷ He proposed that the British government 'would state publically that the Foreign Enlistment Act would be strictly enforced, to prevent the enrolment of any British volunteers.'⁹⁸ Subsequently, on 11 January 1937, the government declared through a press notice that, under the Foreign Enlistment Act, it was illegal to recruit or volunteer for the armed forces of all sides in the Spanish conflict. Those convicted would be liable to a prison sentence of up to two years or a fine or both.⁹⁹ Lord Halifax, the Lord Privy Seal, was concerned lest ineffective efforts on Britain's part would give the signatories of the Non-Intervention Agreement an 'unfortunate impression' and that the chances 'of an

international prohibition of volunteering might be seriously impeded'.¹⁰⁰ However, on the diplomatic front, Eden's initiative proved successful. On 16 February 1937 the Non-Intervention Committee agreed to extend the initial Non-Intervention Agreement beyond the traffic of arms to include the passage of international volunteers into Spain.

Domestically, the decision to implement the Act proved far less effective. The question of applicability was not resolved and government officials remained skeptical about whether prosecutions would be successful. The American jurist Norman J. Padelford claimed in 1937 that the enforcement of the Act did not confer recognition 'in the absence of an express pronouncement extending recognition or the proclamation of neutrality laws.' He believed that the Act was nonetheless applicable 'to insurgents who have not attained recognition of belligerency' and cited the precedent of the Cretan Revolt of the late 1860s as an example.¹⁰¹ However, the view from London was different. Although eleven cases were referred to the Director of Public Prosecutions, no legal action was taken.¹⁰² More generally, deterrence seems to have failed in light of the fact that over three-quarters of the volunteers who joined the British Battalion in Spain did so after January 1937.¹⁰³ As Tom Buchanan aptly points out, the revival of the Act was 'designed primarily to give a lead to other states rather than seriously to curb British volunteering.'¹⁰⁴

The precedent of the Spanish Civil War played an important role in discussions surrounding the Foreign Enlistment Act following the outbreak of another conflict, which at first bore the characteristics of a civil war. Hostilities between Jews and Arabs in Palestine began shortly after the United Nations adopted Resolution 181, calling for the partition of that country in late November 1947. As the outgoing mandatory power, Britain had historical, economic, strategic and military interests in

Palestine as well as extensive commitments and interests across the Middle East. The emerging Cold War forced Britain to deal with the situation in Palestine with great caution. As British forces began to withdraw from the country in early 1948, the government did not want to be seen as supporting either of the warring sides. Some contemporary observers in Palestine referred to Britain's policy as an attempt at 'benevolent neutrality'.¹⁰⁵

One way in which the British government sought to safeguard its impartial position in the conflict was by preventing the enlistment of volunteers for the Zionist cause in Britain. The possibility of British subjects being recruited to fight in Palestine was raised in the House of Commons as early as 12 December 1947.¹⁰⁶ As in 1936, the Foreign Office took the lead in seeking to clarify the government's policy. The Foreign Secretary, Ernest Bevin, urged the Home Office and the Director of Public Prosecutions to discuss the government's policy towards British subjects wanting to fight in Palestine, including the applicability of the Foreign Enlistment Act of 1870.¹⁰⁷

Much like their predecessors a decade earlier, Whitehall officials felt that there was insufficient time to prepare new legislation. As the Act specifically referred to sovereign states, officials from various ministries were in agreement in early 1948 that it would only be applicable after the termination of the mandate in May. Furthermore, they feared that the Act would not be a strong enough deterrent. As the precedent of the Spanish Civil War had shown, it was very difficult to prosecute because it was hard to prove that a person leaving the country was actually going to fight. That person could be prosecuted upon return, but 'the prospect of it will have little deterrent effect.'¹⁰⁸ Bevin nonetheless wanted to make use of a parliamentary question and answer to issue a warning to potential British volunteers. He also sought

to make clear that the applicability of the Act in this case ‘in no way implies recognition by His Majesty’s Government of the Jewish State which has been proclaimed in Palestine.’¹⁰⁹

In fact, the Israeli declaration of independence on 14 May 1948 and the entry of the neighbouring Arab states into the conflict complicated Britain’s policy of undeclared neutrality and deferred the enforcement of the Foreign Enlistment Act. Britain had a military alliance with Transjordan, which included the secondment of British officers to the Arab Legion whose forces were now fighting in Palestine. Both the Foreign Office and leading figures in the military saw a loyal and strong Hashemite kingdom as the best guarantee for the future of Britain’s position in post-mandatory Palestine.¹¹⁰ When the Foreign Office sought to issue a warning to prevent the enlistment of British volunteers in the Jewish armed forces in Palestine, the War Office noted that, ‘[i]t is to our advantage, from an operational point of view, that private persons should be allowed to join the Arab Legion, since this will assist in retaining good relations with Transjordan.’¹¹¹ Similarly, the Army Council sought assurances that ‘the Act will not operate against any British Army officers seconded to the Legion either before or after the 15th May or whatever date may be decided to be the operative one.’ The Council thought it best not to raise the question in Parliament ‘unless there are compelling reasons for doing so.’¹¹²

No statement was made. Supporters of the Zionist cause in the House of Commons pressed the government about whether the Act applied to Brigadier John Bagot Glubb, the British commander of the Arab Legion, in September 1948. Responding for the government, the Under-Secretary of State at the Foreign Office, Christopher Mayhew, explained that:

The Foreign Enlistment Act does not apply to persons who accepted service in the armed forces of a foreign State at a time when that State was not at war. Brigadier Glubb was an officer of the Arab Legion for many years before it became engaged in hostilities in Palestine. I am therefore advised that the Act has no bearing on his case.¹¹³

In other words, the Foreign Office only stated where the Act would not apply but kept quiet about the cases in which it would be enforced. As in previous cases where the Foreign Enlistment Act raised the question of recognition, the British government had to weigh diplomatic interests as well as domestic political considerations before deciding on its policy. In 1948 – unlike in 1823, 1861 or 1937 – neither diplomatic pressure nor domestic concerns were strong enough to force a decision. By the end of the war more than 500 volunteers from Britain had enlisted in the Israeli armed forces.¹¹⁴

The Foreign Enlistment Act, and its applicability in cases of civil war, came under scrutiny once again in the mid-1970s, following the capture and trial in Angola of thirteen British mercenaries. It was reckoned at the time that up to 160 men were recruited in Britain to serve with or somehow support the Frente Nacional de Libertacao de Angola (FNLA) in their struggle against the communist bloc-backed Movimento Popular de Libertacao de Angola (MPLA). Recruitment was carried out by the private company Security Advisory Services.¹¹⁵ On 16 February 1976 Prime Minister Harold Wilson appointed a committee of inquiry to ‘consider whether sufficient control exists over the recruitment of United Kingdom citizens for service as mercenaries; to consider the need for legislation, including possible amendment of the Foreign Enlistment Act; and to make recommendations.’¹¹⁶ The resulting Diplock

Report, which was presented to Parliament in August 1976, made a number of observations pertaining to international law.

First of all, Lord Diplock and his colleagues noted that, while the Act is 'broad enough to make it an offence to enlist in armed forces raised by rival governments in a civil war such as that which had been waged in the United States of America,' the question of when it becomes applicable raises 'so many doubts as to make this part of the Act unsuitable, in our opinion, to continue to be used as a penal statute.'¹¹⁷ Part of the problem was whether entities in conflict possessed the characteristics which, in international law, entitled them to recognition as being 'in war', thus making them able to exercise belligerent rights vis-à-vis neutral states. The report stated that, in practice, no offence can be committed until the government 'is prepared to accord recognition formally; and it would be a breach of the United Kingdom's own obligations under international law to grant this recognition to a *de facto* government before the criteria were satisfied.' It was therefore doubtful whether the Act could ever be applied to guerilla forces.¹¹⁸ Before recommending the abolition of any statutory offence preventing British citizens from enlisting for mercenary service either at home or abroad, the authors of the Report issued a warning:

The mere presence on the statute book of an Act of Parliament creating an offence for which it was hardly ever practicable to bring a successful prosecution would not, we think, be likely to mollify any foreign state or group of states that had resented the activities of British mercenaries in a particular country and observed that no prosecutions were in fact brought against returning mercenaries.¹¹⁹

Despite the Diplock Report's critical appraisal, no legislative changes were made.

The 'War on Terror' following the attacks of 11 September 2001 and the subsequent US-led invasion of Afghanistan drastically changed both the international and the domestic context within which the Foreign Enlistment Act was discussed. The Green Paper, presented at the House of Commons in February 2002, highlighted the deficiencies of the Act and depicted it as outdated. Concerned primarily with Britain's stance vis-à-vis private security companies providing quasi-military services overseas, the authors of the paper observed that '[t]he 1870 Act is paradoxical in that, were every country to adopt a similar law, it might mean that the recruiting activities of the British Government in Nepal and other countries would be illegal.'¹²⁰ The Paper called for the Act to be amended, a recommendation shared by the Ninth Report of the Select Committee on Foreign Affairs. This Report, submitted in August 2002, expressed concern about claims in the press 'that at least 3,000 British-based Islamic extremists have been trained in al-Qaeda and Taliban terrorist camps in Afghanistan.'¹²¹

Indeed, it was within the context of the 'War on Terror' that a number of Terrorism Acts were passed in Britain in the first decade of the twenty-first century.¹²² Present day debates do not revolve around the concepts of neutrality and recognition, but about whether conflicts in the Middle East lead to jihadist radicalization and the promotion of terrorism in Britain. Following the outbreak of the civil war in Syria, political leaders and the media expressed concern about the terrorist threat posed by returning British citizens who had taken part in the fighting there. Those Britons who have been detained and put on trial as a consequence of their participation in the conflict in Syria in 2014 were charged under the Terrorism Act of 2006 rather than the Foreign Enlistment Act.¹²³ In September 2014 Prime

Minister David Cameron went one step further in bypassing the Foreign Enlistment Act by asking Parliament to introduce new measures enabling police at the border to seize the passports of British jihadists returning from conflict zones.¹²⁴

In conclusion, the article has shown a much more complicated picture of the creation, change, and application of the Foreign Enlistment Act than previous literature has portrayed. Unlike wars between sovereign states, civil wars and wars of secession tended to create dilemmas for British policy makers when it came to the application of the Foreign Enlistment Act, not least because of the inherent tension between granting recognition to the belligerents, on the one hand, and adhering to neutrality and non-intervention on the other.

The analysis of British state practice has demonstrated that the Act has to be understood in its dual role as a domestic and foreign policy instrument. Domestically, it proved to be an ineffective deterrent in preventing British citizens from fighting abroad throughout the period. However, in terms of foreign policy, it has created significant debates about recognition, non-intervention, and neutrality.

The Act was originally conceived as a response to complaints made by the Spanish government, which had sought to ensure British neutrality and non-intervention in the conflict in Spanish America. The unpopularity of the Act in public opinion and debates on the Act in Parliament, however, gradually led the British government towards recognition of the emerging states of Latin America. During the 1820s, Britain's application of the Act in the context of the Greek uprising again illustrated the complexity of debates surrounding neutrality and non-intervention. At the outbreak of the American Civil War, questions regarding recognition and non-intervention resurfaced. Yet, it was Britain's understanding of neutrality, and its application of the Foreign Enlistment Act, which dominated the legal disputes

between Britain and the United States, and led to a revision of the Act in 1870. The changes, such as the expansion of executive powers, or the permission to act upon suspicion rather than evidence, made the revised Act a much more useful instrument in foreign policy, underscoring British neutrality during the latter half of the nineteenth century. In the period following the First World War, government attempts to enforce the Act were inconsistent and subject to political preferences. The question of whether or not the Act applied to the enlistment of foreign volunteers fighting in civil wars was never properly resolved as debates from the 1930s through to the 1976 Diplock Report illustrate. Domestic concerns about the radicalization of British Muslims came to the fore in the early 2000s. As the use of the Terrorism Act to prosecute British citizens returning from Syria in 2014 illustrates, contemporary decision-makers are more concerned with the danger posed by what foreign volunteers might do at home following their return than they are about non-intervention or the violation of British neutrality.

¹ Hansard, H[ouse of] L[ords] Deb[ates], 14 Jan. 2014, vol. 751, cc. 214-219.

² Crispin Black, 'What can Britain do About the Jihadists Returning from Syria?', *The Week*, 6 Dec. 2013; George Monbiot, 'Orwell was Hailed as a Hero for Fighting in Spain. Today he'd be Guilty of Terrorism', *The Guardian*, 10 Feb. 2014.

³ 'De Maizière will IS-Kämpfern Ausweise entziehen', *Frankfurter Allgemeine Zeitung*, 3 Oct. 2014; Sharon L. Cardash, Frank J. Cilluffo, and Jean-Luc Marret, 'Foreign Fighters in Syria: Still Doing Battle, Still a Multidimensional Danger', *Fondation pour la Recherche Stratégique* 24/13 (2013); Niklaus Nuspliger, 'EU-Innenminister: Besorgnis über europäische Syrien-Kämpfer', *Neue Zürcher Zeitung*, 27 Oct. 2014; Helmut Schwan, 'Wider den Terror-Tourismus', *Frankfurter Allgemeine Zeitung*, 10 Oct. 2014.

⁴ Janice E. Thomson, 'State Practices, International Norms, and the Decline of Mercenarism', *International Studies Quarterly* xxxiv (1990), 23-47.

⁵ William E. Hall, *The Rights and Duties of Neutrals* (London: Longmans, Green&Co., 1874), 63-73.

⁶ Gerald J. Wheeler, *Foreign Enlistment Act, 1870, 33 & 34 Vict. c. 90. With Notes of the leading Cases on this and the American Act* (London: Eyre & Spottiswoode, 1896).

⁷ Sherston Baker, *Halleck's International Law or Rules Regulating the Intercourse of States in Peace and War. Thoroughly Revised and in many Parts Rewritten*, 3 ed., vol. 1 (London: K. Paul, Trench, Trübner, 1893), 557-559; William E. Hall, *A Treatise on International Law* (ed. by J. B. Atlay), 5 ed. (Oxford: Clarendon Press, 1904); Lassa Oppenheim, *International Law. A Treatise*, vol. 2 (London/New York: Longmans, Green&Co., 1912), 357-377.

⁸ Maartje Abbenhuis, *An Age of Neutrals, Great Power Politics, 1815-1914* (Cambridge: Cambridge University Press, 2014); Nir Arielli and Bruce Collins, 'Introduction. Military Service since Eighteenth Century', in Nir Arielli and Bruce Collins (eds.), *Transnational Soldiers. Foreign Military Enlistment in the Modern Era* (Basingstoke: Palgrave Macmillan, 2012), 1-12; Sarah V. Percy, *Mercenaries. The History of a Norm in International Relations* (Oxford: Oxford University Press, 2007); Thomson, 'Decline of Mercenarism', 23-47.

⁹ See for an in-depth discussion of the circumstances that led to the adoption of the Foreign Enlistment Act of 1819: David A.G. Waddell, 'British Neutrality and Spanish-American Independence: The Problem of Foreign Enlistment', *Journal of Latin American Studies* xix (1987), 1-18.

¹⁰Gabriel Paquette, 'The Intellectual Context of British Diplomatic Recognition of the South American Republics, c. 1800-1830', *Journal of Transatlantic Studies* ii (2004), 75-95.

¹¹Rory Miller, *Britain and Latin America in the Nineteenth and Twentieth Centuries* (New York: Routledge, 2013), 37.

¹² Thompson, *Mercenaries*, 58; Matthew Brown, *Adventuring through Spanish Colonies: Simón Bolívar, Foreign Mercenaries and the Birth of New Nations* (Liverpool: Liverpool University Press, 2006), 25-6.

¹³ See for Spanish-British correspondence: T[he] N[ational] A[rchives, UK], F[oreign] O[ffice Records] 72/203.

¹⁴ 28 September 1814, Treaty between Spain and Britain, in Lewis Hertslet, *A Complete Collection of the Treaties and Conventions at Present Consisting between Britain and Foreign Powers*, vol. 2, (London: Egerton, 1820), 272; See also: Rafe Blaufarb, 'The Western Question: The Geopolitics of Latin American Independence', *The American Historical Review* cxii 112 (2007), 742-63; William W. Kaufmann, *British Policy and the Independence of Latin America* (New Haven: Yale University Press, 1967); Ernest M. Lloyd, 'Canning and Spanish America', *Transactions of the Royal Historical Society* xviii (1904), 77-105; John Lynch, 'British Policy and Spanish America', *Journal for Latin American Studies* i (1969), 1-30; John Rydjord, 'British Mediation between Spain and her Colonies', *The Hispanic American Historical Review* xxi (1941), 29-50.

¹⁵ 9. Geo. 2. Ch. 30 (1736) and 29 Geo. 2 Ch. 17 (1756) in Wheeler, *Foreign Enlistment Act*, 3.

¹⁶Law Officers' response to Castlereagh, 2 Aug. 1817, TNA, FO 83/2365.

¹⁷Ibid.

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- ¹⁸Abbenhuis, *An Age of Neutrals*, 36-37.
- ¹⁹Author's italics, Foreign Enlistment Act, 1819, Section II.
- ²⁰Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States since 1776* (Oxford: Oxford University Press, 2010), 272; Christian Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft, das völkerrechtliche Institut der Anerkennung von Neustaaten in der Praxis des 19. und 20. Jahrhunderts* (Frankfurt am Main, New York: P. Lang, 1998), 5; Inge Van Hulle, 'Britain's Recognition of the Spanish American Republics: The Gap between Theory and Practice in International Law (1810-1900)', *The Legal History Review* lxxxii (2014), 303-306.
- ²¹James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006), 12.
- ²²Johann L. Klüber, *Droit des gens modernes de l'Europe* (Stuttgart : La Librairie de J.G. Cotta, 1819), 44; Georg F. von Martens, *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage* vol. 1, (Göttingen: Jean Chrèt. Dieterich, 1789), 88; Johann C.W. von Steck, *Versuche über verschiedene Materien politischer und rechtlicher Kenntnisse* (Berlin: G.A. Lang, 1783), 55.
- ²³David Rodogno, *Against Massacre, Humanitarian Interventions in the Ottoman Empire, 1815-1914* (Princeton: Princeton University Press, 2012), 5.
- ²⁴John Bew, 'From an Umpire to a Competitor': Castlereagh, Canning and the Issue of International Intervention in the Wake of the Napoleonic Wars', in Brendan Simms and David J.B. Trim (eds.), *Humanitarian Intervention, a History* (Cambridge: Cambridge University Press, 2011), 123.
- ²⁵Mountague Bernard, *On the Principle of Non-Intervention: A Lecture Delivered in the Hall of All Soul's College* (Oxford: J.H. and Jas. Parker, 1865), B. See for the

history of neutrality in the nineteenth century: Stephen Neff, *The Rights and Duties of Neutrals: A General History*, (Manchester: Manchester University Press, 2000), 44.

²⁶For the importance of neutrality in the parliamentary debates on the Bill, see also: Elizabeth Roberts, “*Freedom, Faction, Fame and Blood*”, *British Soldiers of Conscience in Greece, Spain and Finland* (Brighton: Sussex Academic, 2010), 10.

²⁷Abbenhuis, *An Age of Neutrals*, 41.

²⁸Ibid.

²⁹Hansard, HC 15 June 1824, vol. 11, cc. 1344-406.

³⁰Ibid.

³¹Hansard, HC 3 June 1819, vol. 40, cc. 867-910; HC 21 June 1819, vol. 40, cc. 1232-85; HC 28 June 1819, vol. 40, cc. 1377-416.

³²Hansard, HC 21 June 1819, vol. 40, cc. 1232-1233.

³³For a biography of Sir William Scott, see Henry Bourguignon, *Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty* (Cambridge: Cambridge University Press, 1987).

³⁴See for Canning’s speeches: R. Therry (ed.), *The Speeches of the Right Honourable George Canning with a Memoir of his Life* (London: J. Ridgway, 1828). See for Mackintosh’ speeches: Sir James Mackintosh, *Substance of the Speech of Sir James Mackintosh in the House of Commons, June 15, 1824, on Presenting a Petition from the Merchants of London for the Recognition of the Independent States Established in the Countries of America Formerly Subject to Spain* (London: Richard Taylor for Longman, Hurst, Rees, Orme, Brown&Green, 1824); Sir James Mackintosh, *The Miscellaneous Works of the Right Honourable Sir James Mackintosh*, London: Longman, Brown, Green and Longmans, 1846). See other parliamentary speeches on South America: X., ‘Foreign Policy’, *Edinburgh Annual Register*, 17 (1824), 16-34.

³⁵Supra, 5-6.

³⁶Hansard, HC 15 June 1824, vol. 11, cc. 1344-406.

³⁷Waddell, 'British Neutrality', 15-18.

³⁸Virginia Penn, 'Philhellenism in England (1821-1827) II', *The Slavonic and East European Review* xiv (1936), 647-660; See also: William St.Clair, *That Greece might still be Free: The Philhellenes in the War of Independence* (Cambridge: OpenBook Publishers, 2008).

³⁹ Douglas Dakin, *The Greek Struggle for Independence, 1821-1833* (London: Batsford, 1973), 170. For the British involvement in the Greek independence, see: Charles W. Crawley, *The Question of Greek Independence: A Study of British Policy in the Near East, 1821-1833* (Cambridge: Cambridge University Press, 1930); Roberts, *British Soldiers*.

⁴⁰William St.Clair, *That Greece might still be Free*, 136.

⁴¹*British Foreign and State Papers*, vol. 10, 648.

⁴²Roscoe R. Oglesby, *Internal War and the Search for Normative Order* (The Hague: Martinus Nijhoff, 1971), 21.

⁴³Ibid.

⁴⁴ Augustus G. Stapleton, *The Political Life of the Right Honourable George Canning, from his Acceptance of the Seals of the Foreign Department, in September, 1822, to the Period of his Death, in August, 1827. Together with a Short Review of Foreign Affairs subsequently to that Event*, vol. 2, (London: Longman, Rees, Orme, Browne&Green, 1831), 409.

⁴⁵Bew, 'From an Umpire to a Competitor', 120.

⁴⁶Hansard, HC 16 April 1823, vol. 8, cc. 1020.

⁴⁷Hansard, HC 16 April 1823, vol. 8, cc. 1047-57.

⁴⁸Rodogno, *Against Massacre*, 79.

⁴⁹Ibid.

⁵⁰Loyal Cowles, 'The Failure to Restrain Russia: Canning, Nesselrode, and the Greek Question, 1825-1827', *International History Review* xii (1990), 661.

⁵¹ Martin Robson, "'Strangers, Mercenaries, Heretics, Scoffers, Polluters': Volunteering for the British Auxiliary Legion in Spain, 1835', in Nir Arielli and Bruce Collins (eds.), *Transnational Soldiers: Foreign Military Enlistment in the Modern Era* (Basingstoke: Palgrave Macmillan, 2012), 183.

⁵²Abbenhuis, *An Age of Neutrals*; Neff, *Rights and Duties of Neutrals*.

⁵³ Howard Jones, *Blue and Gray Diplomacy. A History of Union and Confederate Foreign Relations* (Chapel Hill: University of North Carolina Press, 2010), 1-40; Frank L. Owsley, *King Cotton Diplomacy. Foreign Relations of the Confederate States of America*, 2 ed. (Chicago: University of Chicago Press, 1959), 294-336.

⁵⁴ Stuart W. Bernath, 'British Neutrality and the Civil War Prize Cases', *Civil War History* xv (1969), 320-331.

⁵⁵ Jones, *Blue and Gray Diplomacy*, 31-38.

⁵⁶ Abbenhuis, *An Age of Neutrals*, 97-98.

⁵⁷ A Proclamation of Neutrality by the Queen Victoria, in *The London Gazette*, No. 22510, 14 May 1861, 2046-2047.

⁵⁸ Eric J. Grove, 'Blockade', in John B. Hattendorf (ed.), *The Oxford Encyclopedia of Maritime History*, vol. 1 (Oxford: Oxford University Press, 2007), 298-303.

⁵⁹ Jones, *Blue and Gray Diplomacy*, 39-45; Neff, *Legal History of the Civil War*, 32-34.

⁶⁰Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature Applies to the Conduct of Affairs of Nations and Sovereigns* (Dublin: Luke White, 1792), bk. 3, chap. 18.

⁶¹Jones, *Blue and Gray Diplomacy*, 50-51.

⁶²Russell to Lyons, 4 May 1861, in Nicholas Tracy (ed.), *Sea Power and the Control of Trade. Belligerent Rights from the Russian War to the Beira Patrol, 1854-1970* (Aldershot: Ashgate, 2005), 44.

⁶³James P. Baxter III, 'The British Government and Neutral Rights, 1861-1865', *The American Historical Review* xxxiv (1928), 9-29; Jones, *Blue and Gray Diplomacy*, 47-48.

⁶⁴Jones, *Blue and Gray Diplomacy*, 5-6, 47.

⁶⁵*Ibid.*, 11-20; Neff, *Legal History of the Civil War*, 168-169. For a full account on the legal argument, see 166-121.

⁶⁶Stuart W. Bernath, *Squall Across the Atlantic. American Civil War Prize Cases and Diplomacy* (Berkeley: University of California Press, 1970).

⁶⁷Owsley, *King Cotton Diplomacy*; David G. Surdam, 'The Union Navy's Blockade Reconsidered', in Bruce A. Elleman and S.C.M. Paine (eds.), *Naval Blockades and Seapower. Strategies and Counter-Strategies, 1805-2005* (London: Routledge, 2006), 61-69; Craig L. Symonds, *The Civil War at Sea* (Santa Barbara, CA: ABC Clio, 2009).

⁶⁸A prize is a lawfully captured war or merchant ship, along with its cargo, during war at sea. The term originates from the French *prendre*, which means 'take'. For more detail on prize court procedure, see: Richard J. Hill, 'Prizes', in John B. Hattendorf (ed.), *The Oxford Encyclopedia of Maritime History*, vol. 3 (Oxford:

Oxford University Press, 2007), 384-388; For prize court and blockade, see also:

Neff, *Legal History of the Civil War*, 186-202.

⁶⁹ Nigel Hall, 'The Liverpool Cotton Market and the American Civil War', *Northern History* xxxiv (1998), 149-169. James M. McPherson, *Battle Cry of Freedom. The Civil War Era* (Oxford: Oxford University Press, 1988), 546-550; Symonds, *Civil War*.

⁷⁰ Hansard, HC 27 March 1863, vol. 170, cc. 33-72; Hansard, HC 27 March 1863, vol. 170, cc. 90-109; David P. Crook, *The North, the South, and the Powers, 1861-1865* (New York: John Wiley&Sons, 1974), 292-299; Coy F. Cross II, *Lincoln's Man in Liverpool. Consul Dudley and the Legal Battle to Stop Confederate Warships* (DeKalb: Northern Illinois University Press, 2007).

⁷¹ Crook, *The North*, 299-301; Cross II, *Lincoln's Man*, 71-88; Frank Merli, 'Crown Versus Cruiser: The Curious Case of the Alexandra', *Civil War History* ix (1963), 167-177.

⁷² Court of the Exchequer at Westminster, *Attorney-General v. Sillem and others, Claiming the Vessel "Alexandra" Seized under the Foreign Enlistment Act (59 George III. Chapter 69). Report of the Trial before the Lord Chief Baron and a Special Jury* (London: Her Majesty's Stationary Office, 1863); Hansard, HC 24 April 1863, Vol. 170, cc. 703-759.

⁷³ Maartje M. Abbenhuis, 'A most Useful Tool for Diplomacy and Statecraft: Neutrality and Europe in the 'Long' Nineteenth Century, 1815-1914', *The International History Review* xxxv (2013), 10, 1-22; Tom Bingham, 'The Alabama Claims Arbitration', *The International and Comparative Law Quarterly* liv (2005), 1-25; Adrian Cook, *The Alabama Claims. American Politics and Anglo-American Relations, 1865-1872* (Ithaca: Cornell University Press, 1975).

⁷⁴Hansard, HC 23 Feb. 1866, vol. 181, cc. 994-1014.

⁷⁵George Bemis, *Hasty Recognition of Rebel Belligerency and our Right to Complain of it* (Boston: A. Williams&Co., 1865); Mountague Bernard, *Two Lectures on the Present American War* (Oxford: J.H. and Jas. Parker, 1861); Mountague Bernard, *A Historical Account of the Neutrality of Great Britain during the American Civil War* (London: Longmans, Green, Reader&Dyer, 1870); Hall, *The Rights and Duties of Neutrals*.

⁷⁶Frederick W. Gibbs, *Recognition. A Chapter from the History of the North American and South American States* (London: W. M'Dowall, 1863); Felix H. Hamel, *International Law in Connexion with Municipal Statutes Relating to the Commerce, Rights, and Liabilities of the Subjects of Neutral States Pending Foreign War Considered with Reference to the Trial of the Case of the "Alexandra," Seized under the Provisions of the Foreign Enlistment Act* (London: Butterworths, 1863).

⁷⁷North America. No. 13 (1863). Memorial from certain Shipowners of Liverpool, suggesting an Alteration in the Foreign Enlistment Act, 8 July 1863; 1863 (3200) LXXII.563.

⁷⁸Report of the Neutrality Laws Commissioners together with an Appendix containing Reports from Foreign States and other Documents. 1867-68 (4027). Command Papers. Vol. XXXII.265.

⁷⁹Foreign Enlistment. A Bill to Prevent the Enlisting or Engagement of Her Majesty's Subjects to Serve in Foreign Service, and the Building, Fitting out, or Equipping, in Her Majesty's Dominions, Vessels for War-Like Purposes, without Her Majesty's Licence, 1870 (228), II.61; Foreign Enlistment. A Bill [as Amended in Committee] to Prevent Prevent the Enlisting or Engagement of Her Majesty's Subjects to Serve in Foreign Service, and the Building, Fitting out, or Equipping, in Her Majesty's

Dominions, Vessels for War-Like Purposes, without Her Majesty's Licence, 1870 (258), II.77.

⁸⁰Hansard, HC 1 Aug. 1870, vol. 203, cc. 1365-1372.

⁸¹ Foreign Enlistment Act, 1870 (33 and 34 Vict., cap. 90), in: http://www.legislation.gov.uk/ukpga/1870/90/pdfs/ukpga_18700090_en.pdf (accessed 11 Sept. 2014).

⁸²Hansard, HC 1 Aug. 1870, vol. 203, cc. 1365-1381; Hansard, HC 3 Aug. 1870, vol. 203, cc. 1502-1513; Hansard, HC 4 Aug. 1870, vol. 203, cc. 1550-1556; Hansard, HC 5 Aug. 1870, vol. 203, cc. 1592-1593; Hansard, HL 8 Aug. 1870, vol. 203, cc. 1676-1680.

⁸³Abbenhuis, *An Age of Neutrals*, 123-143.

⁸⁴ Gabriela A. Frei, *Britain, International Law, and the Evolution of Maritime Strategic Thought, 1856-1914*, Oxford Historical Monographs (Oxford: Oxford University Press, Forthcoming).

⁸⁵Ship "Sharpshooter." Copy of Warrant issued by the Secretary of State authorising the Detention of the British ship "Sharpshooter" on the 17th Nov. 1870; 1871 (73) LXI.447; Turkey. No. 27 (1877). Warrant of Her Majesty's Secretary of State for Foreign Affairs for the Seizure of the "Hamidieh" under the Foreign Enlistment Act, 1870, 1 June 1877; 1877 (C.1831) XCII.993.

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⁹³ Mackenzie, 'The Foreign Enlistment Act', 55.

⁹⁴ Lord Cranbourne to the Attorney General, 14 Sept. 1936, cited in: Roberts, *"Freedom, Faction, Fame and Blood"*, 93.

⁹⁵ For more on the diminished position of the Foreign Office following the First World War, see for instance: Ephraim Maisel, *The Foreign Office and Foreign Policy, 1919-1926* (Brighton: Sussex Academic Press, 1994), 1-3.

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⁹⁷ Foreign Office minutes, signed by C. E. Shuckburgh, 14 Dec. 1936, TNA, FO 371/20589; James K. Hopkins, *Into the Heart of Fire* (Stanford: Stanford University Press, 1998), 401.

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- ⁹⁹ Alpert, *A New International History*, 140; Mackenzie, 'The Foreign Enlistment Act', 58.
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- ¹⁰² Tom Buchanan, *Britain and the Spanish Civil War* (Cambridge: Cambridge University Press, 1997), 55.
- ¹⁰³ Mackenzie, 'The Foreign Enlistment Act', 62.
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- ¹⁰⁵ Michael J. Cohen, *Palestine and the Great Powers, 1945-1948* (Princeton: Princeton University Press, 1982), 299.
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¹¹⁸ Diplock Report, 9.

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¹²⁰ 'Private Military Companies: Options for Regulation', HC 577 (London: The Stationary Office, 12 Feb. 2002), 20.

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¹²³ See, for instance: Sandra Laville, 'First British Conviction for Syria-related Terror Offence', *The Guardian*, 20 May 2014.

¹²⁴ 'David Cameron outlines new anti-terror measures to MPs', *BBC*, 1 Sept. 2014.