

THE ISLAMIC STATE OF HORROR—WHO IS RESPONSIBLE FOR ATROCITIES COMMITTED IN THE TERRITORY OF THE SELF-DECLARED ISLAMIC STATE (DAESH)?

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INTRODUCTION

The Islamic State in Iraq and Syria (the “Islamic State”) is a terrorist organization that took over large swaths of territory in Iraq and Syria¹ and declared itself a “Caliphate” in June 2014.² Between 2014 and 2017, the Islamic State established its authority over territories and operated as a quasi-State, namely a political entity with significant State-like features.³ In the territories it

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1. This organization is also known as the Islamic State of Iraq and the Levant, ISIS (an acronym for “the Islamic State in Iraq and Greater Syria”), ISIL (an acronym for “the Islamic State in Iraq and the Levant”), Daesh (an abbreviation of the organization's name in Arabic, *al-dawlah al-islamiyah fil Iraq wa al-sham*) or the Takfiri. For discussion, see Xavier Raufer, *The “Islamic State,” an Unidentified Terrorist Object*, 25 POL. Q. INT’L AFFS. 45, 46 (2016); Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State* 3 (The Brookings Project on U.S. Relations with the Islamic World, Analysis Paper No. 19, 2015), <https://www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State-1.pdf> [<https://perma.cc/Q6J9-ZKZ3>].

2. Gerald III Waltman, *Prosecuting ISIS*, 85 MISS. L.J. 817, 826-827 (2016). For an elaborated account, see generally WILLIAM MCCANTS, *THE ISIS APOCALYPSE: THE HISTORY, STRATEGY, AND DOOMSDAY VISION OF THE ISLAMIC STATE* (2015); JOBY WARRICK, *BLACK FLAGS: THE RISE OF ISIS* (2015).

3. For discussion on quasi-States, see Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute*, 8 J. INT’L CRIM. JUST. 329, 334 (2010). Another term occasionally used in parallel is “*de-facto* States” or “*de-facto* regimes.” For discussion, see

controlled, it employed brutal methods such as public beheadings, mass executions, and gender-based violence, all prohibited under international law.⁴ In response to the threats posed by the group, two international coalitions were formed to battle it.⁵ This led to a few years of intense military operations, during which the group gradually lost control of territories⁶ and much of its resources.⁷ By 2019, the Islamic State had lost all the territories it previously held.⁸

This Article will discuss international responsibility for the atrocities committed by the Islamic State in the territories it previously held in Iraq and Syria. The structure of this Article is as follows. The first chapter will present the case study of the Islamic State. Then, the Article analyzes the possibility of the direct responsibility of the Islamic State through two avenues: Article 10 of the Articles on State Responsibility for Internationally Wrongful Acts (“A.R.S.I.W.A.”), if indeed the Caliphate could have been considered as the new government or a new State; or based on general principles of international responsibility. Then, the Article will discuss if Iraq or Syria may be held accountable based on the doctrine of Due Diligence (“D.D.”),⁹ or based on Article 9 of A.R.S.I.W.A. if the Islamic State was exercising elements of governmental authority in the absence or default of the official authorities and in circumstances that call for it. Finally, the Article will present a possible avenue of enforcement of legal responsibility against members of the Islamic State.

This Article suggests that the Islamic State was obligated to meet some international law demands, like other non-State armed groups which administer territories. The imposition of primary norms of international law on the Islamic State inherently leads to the application of secondary rules necessary for their execution. Once we establish the legal personality of an entity, it follows that it can incur responsibility.¹⁰ This is because responsibility is inherent in the notion

generally Jonte van Essen, *De Facto Regimes in International Law*, 28 MERKOURIOS-UTRECHT J. INT'L & EUR. L. 31 (2012).

4. U.N. Secretary-General, *Rep. of the Secretary-General on the Threat Posed by ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat*, ¶ 9, U.N. Doc. S/2016/92 (Jan. 29, 2016) [hereinafter *Rep. of the Secretary-General on the threat posed by ISIL*].

5. Paulina Starski, *Right to Self-Defense, Attribution and the Non-State Actor – Birth of the “Unable or Unwilling” Standard?*, 75 ZAÖRV 455, 488 (2015).

6. See SETH G. JONES ET AL., *ROLLING BACK THE ISLAMIC STATE* 20 (2017).

7. See Stefan Heissner et al., *Caliphate in Decline: An Estimate of Islamic State's Financial Fortunes*, INT'L CTR. STUDY OF RADICALISATION (2017), <http://icsr.info/wp-content/uploads/2017/02/ICSR-Report-Caliphate-in-Decline-An-Estimate-of-Islamic-States-Financial-Fortunes.pdf> [<https://perma.cc/L2QQ-YA9U>].

8. Jin Wu, Derek Watkins & Rukmini Callimachi, *ISIS Lost Its Last Territory in Syria. But the Attacks Continue*, N.Y. TIMES (Mar. 23, 2019), [https://www.nytimes.com/interactive/2019/03/23/world/middleeast/isis-syria-defeated.html?rref=collection%2Ftimestopic%2FIslamic%20State%20in%20Iraq%20and%20Syria%20\(ISIS\)](https://www.nytimes.com/interactive/2019/03/23/world/middleeast/isis-syria-defeated.html?rref=collection%2Ftimestopic%2FIslamic%20State%20in%20Iraq%20and%20Syria%20(ISIS)) [<https://perma.cc/BLW4-BJK6>].

9. See *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. Rep. 4, 22 (Apr. 9).

10. This is because responsibility is both an indicator and the consequence of international

of obligation.¹¹ In particular, this Article's claim is that the Islamic State can be held responsible for atrocities committed by its members in Iraq and Syria since they are considered agents of the group.¹² In addition, the group can also be held responsible for terrorist attacks outside Iraq and Syria committed by people who were not members of the group since these actions were later adopted and acknowledged by the Islamic State as its own.¹³

Notwithstanding, as there is no feasible way to seek a remedy from the group, the final chapter of this Article will discuss criminal enforcement against group members. My suggestion is that the Security Council ("S.C.") will make a referral to the International Criminal Court ("I.C.C."), based on a functional interpretation that will view the Islamic State as the *de-facto* sovereign in the said territories during that period. This solution is required as Iraq and Syria will not refer the situation to the I.C.C. given their concern that their referral will lead to investigation and prosecute their officials, rather than focusing solely on the Islamic State. This solution will also lead to more accountability and follow the lead of international judicial bodies according to which international law should evolve based on the needs of the community.¹⁴

I. THE ISLAMIC STATE AND THE HORRORS IT INFLICTED

The Islamic State had taken over significant territories in Iraq and Syria and proclaimed itself a Caliphate in June 2014.¹⁵ From 2014 to 2017, it attempted to establish its authority and govern these territories as if it was their sovereign.¹⁶

legal personality. See Alain Pellet, *The Definition of Responsibility in International Law*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 4-5 (James Crawford, Alain Pellet, Simon Olleson & Kate Parlett eds., 2010).

11. LAURA INIGO ALVAREZ, *TOWARDS A REGIME OF RESPONSIBILITY OF ARMED GROUPS IN INTERNATIONAL LAW* 32 (2020).

12. For discussion on the way this term was interpreted, see *Certain Expenses of the United Nations* (Art. 17, ¶ 2, of the Charter), Advisory Opinion, 1962 I.C.J Rep. 151, 168 (July 20); *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 I.C.J Rep. 62, 88-89 (Apr. 29).

13. *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Judicial Supplement, No. 37 ¶ 60-66 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 9, 2002).

14. See generally *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J Rep. 174, 178 (Apr. 11); Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, ¶ 12, U.N. Doc. A/20/14 (June 4, 2012).

15. The organization was originally created by Abu Musab al-Zarqawi, under the name of *Jama'at al-Tawhid w'al-Jihad* in 2003, and it was later commissioned by Osama bin Laden as Al-Qaeda in Iraq. After the death of al-Zarqawi in 2006, it renamed itself as the Islamic State in Iraq (ISI). For discussion, see generally Burak Kadercan, *What the ISIS Crisis Means for the Future of the Middle East*, 18 *INSIGHT TURK.* 63, 64-67 (2016).

16. For an elaborated account, see MCCANTS, *supra* note 2, at 121.

The group provided basic services, such as infrastructure maintenance and development,¹⁷ through a sophisticated bureaucratic structure.¹⁸ It employed a harsh penal and administrative system composed of the *Al-Hisbah* morality police, the general police force, courts, entities managing recruitment, tribal relations, and education.¹⁹

In response to the infringement on the sovereignty of Iraq and Syria²⁰ and the atrocious acts of the Islamic State,²¹ two coalitions were formed to join military forces against it:²² an Islamic Military Alliance and a coalition led by the United States.²³ This, in turn, led to a circle of violence that included the United States-led coalition, the Islamic Military Alliance, Russia, Iran, Iraq, Syria, and other non-State groups, such as the Kurdish Peshmerga.²⁴ After losing its declared capital, Raqqa, in October 2017, the Islamic State shifted back its focus from governance into its old guerrilla tactics.²⁵ Eventually, it lost all the territories it previously held in Iraq and Syria.²⁶ While today it is a beaten organization, at its height, the Islamic State was considered to be one of the most resourceful and organized terror groups in history.²⁷

17. MICHAEL WEISS & HASSAN HASSAN, *ISIS: INSIDE THE ARMY OF TERROR* 169 (2016).

18. *Report of the Secretary-General on the threat posed by ISIL*, *supra* note 4, at 2.

19. See Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 36, U.N. Doc. A/HRC/28/69 (Feb. 5, 2015) [hereinafter Report on the Syrian Arab Republic]; MCCANTS, *supra* note 2, at 121.

20. The United Nations adopted two resolutions forming coalitions in response to the ISIS threat. See generally S.C. Res. 2170 (Aug. 15, 2014); S.C. Res. 2249 (Nov. 20, 2015).

21. Waltman, *supra* note 2, at 826-27.

22. Annalise Lekas, *ISIS: The Largest Threat to World Peace Trending Now*, 30 EMORY INT'L L. REV. 313, 324 (2015); Aaron L. Jackson, *Hunting Down Terrorists "Wherever They Exist": ISIL in Syria and the Legal Argument for United States Military Operations Within the Territory of A Non-Consenting Nation-State*, 74 A.F. L. REV. 133, 134 (2015).

23. The United States led coalition also provided training and equipment to groups perceived as moderate, such as the Kurdish Peshmerga. See Kadercan, *supra* note 15, at 78-80. Other measures were also applied, such as the employment of sanctions. See Press Release, Security Council, Security Council Al-Qaida Sanctions Committee amends Three Entries on Its Sanctions List, U.N. Press Release SC/11424 (June 2, 2014).

24. JONES ET AL., *supra* note 6, at 20.

25. Margaret Coker, Eric Schmitt & Rukmini Callimachi, *With Loss of Its Caliphate, ISIS May Return to Guerrilla Roots*, N.Y. TIMES (Oct. 18, 2017), [https://www.nytimes.com/2017/10/18/world/middleeast/islamic-state-territory-attacks.html?rref=collection%2Ftimestopic%2FIslamic%20State%20in%20Iraq%20and%20Syria%20\(ISIS\)&_r=0](https://www.nytimes.com/2017/10/18/world/middleeast/islamic-state-territory-attacks.html?rref=collection%2Ftimestopic%2FIslamic%20State%20in%20Iraq%20and%20Syria%20(ISIS)&_r=0) [<https://perma.cc/5J6W-G28Q>].

26. Wu, Watkins & Callimachi, *supra* note 8. On October 27, 2019, the then acting leader of the group, Abu Bakr al-Baghdadi, was killed during a raid led by U.S. forces. See Martin Chulov, *Nowhere Left to Run: How the U.S. Finally Caught Up with ISIS Leader Baghdadi*, THE GUARDIAN (Oct. 27, 2019), <https://www.theguardian.com/world/2019/oct/27/nowhere-left-to-run-how-the-us-finally-caught-up-with-isis-leader-baghdadi> [<https://perma.cc/HJU2-RKLT>].

27. Helen Lock, *How ISIS Became the Wealthiest Terror Group in History*, INDEPENDENT

The focus of this Article is on the time period between 2014 and 2017, during which the Islamic State established its authority over territories and operated as a quasi-State.²⁸ During these years, the group employed brutal methods, such as mass executions,²⁹ torture,³⁰ use of children for military purposes,³¹ gender-based violence,³² and destruction of heritage sites.³³ Reports of the Office of the High Commissioner of Human Rights (the “O.H.C.H.R.”), one relating to *Iraq* and the other concerning *Syria*,³⁴ found that the actions of the Islamic State constituted war crimes,³⁵ crimes against humanity,³⁶ and maybe even genocide in the case of the Yezidi community.³⁷ A similar view was presented by the Human Rights Committee (the “H.R.C.”),³⁸ the Committee on the Elimination of Racial Discrimination (the “C.E.R.D. Committee”),³⁹ and the Committee on the Rights

(Sept. 15, 2014), <http://www.independent.co.uk/news/world/middle-east/how-isis-became-the-wealthiest-terror-group-in-history-9732750.html> [<https://perma.cc/JUL7-9LS3>]; Nadan Feldman, *How ISIS Became the World's Richest Terror Group*, HAARETZ (Nov. 10, 2015), <http://www.haaretz.com/middle-east-news/isis/1.686287> [<https://perma.cc/2CQ2-ZWRX>]; PATRICK B. JOHNSTON ET AL., *FOUNDATIONS OF THE ISLAMIC STATE: MANAGEMENT, MONEY, AND TERROR IN IRAQ, 2005–2010* (2016).

28. See generally Van Essen, *supra* note 3; Shany, *supra* note 3, at 334.

29. In the context of an armed conflict, unlawful killings constitute a grave breach of IHL. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 78 (July 8).

30. Comm. Against Torture, Concluding observations on the initial report of Iraq, U.N. Doc. CAT/C/IRQ/CO/1, ¶ 11 (Sept. 7, 2015).

31. *Report of the Secretary-General on the threat posed by ISIL*, *supra* note 4, ¶ 10.

32. Human Rights Council, Report of the U.N. High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-called Islamic State in Iraq and the Levant and Associated Groups, ¶¶ 35-43, U.N. Doc. A/HRC/28/18 (Mar. 13, 2015) [hereinafter Report on the Human Rights Situation in Iraq].

33. A notable example is bulldozing of the Assyrian city of Nimrud. See G.A. Res. 69/281, *Saving the Cultural Heritage of Iraq* (June 9, 2015); S.C. Res. 2199 ¶¶ 15-17 (Feb. 12, 2015).

34. See H.R.C., *supra* note 32, ¶ 45; Report on the Syrian Arab Republic, *supra* note 19, ¶¶ 37-39.

35. For a list of possible acts constituting war crimes, see Rome Statute of the International Criminal Court, art. 8, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Judgment, ¶ 573 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

36. For the definition of crimes against humanity, see Leila Nadya Sadat, *Crimes Against Humanity in The Modern Age*, 107 AM. J. INT'L L. 334, 337 (2013).

37. The Yezidi community believes in Melek Taus, the peacock angel, which is considered by the Islamic State as no less than Lucifer—making the Yezidis “devil-worshippers.” See WEISS & HASSAN, *supra* note 17, at 228. For the definition of Genocide, see Rome Statute, *supra* note 35, art. 6.

38. See Human Rights Comm., Concluding observations on the fifth periodic report of Iraq, U.N. Doc. CCPR/C/IRQ/CO/5 (Dec. 3, 2015).

39. Comm. on the Elimination of Racial Discrimination, Concluding Observations on the

of the Child (the “C.R.C. Committee”).⁴⁰

In response to a request for assistance by *Iraq*, a United Nations (“U.N.”) team was established under the auspices of the Security Council to support efforts to hold the Islamic State accountable.⁴¹ *Syria*, in contrast, refused to cooperate with international initiatives to prosecute those who committed atrocities in its territory.⁴² Consequently, the General Assembly (“G.A.”) established in 2016 the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes committed in Syria since 2011.⁴³ Another international body involved in the crisis is the Independent International Commission of Inquiry on the Syrian Arab Republic, established by the Human Rights Council in 2011.⁴⁴

The Islamic State has committed atrocious acts which are prohibited under both International Human Rights Law (“I.H.R.L.”) and International Humanitarian Law (“I.H.L.,” or *jus in bello*) in the territories it controlled.⁴⁵ The next chapter of this Article will delve into the question *if* international norms apply to non-State armed groups like the Islamic State. For now, it should be noted that I.H.L. and I.H.R.L. apply concurrently in times of an armed conflict such as the one which existed in the territories previously held by the group.⁴⁶ The International Court of Justice (“I.C.J.”) stated that the two regimes

Combined Twenty-second to Twenty-fifth Periodic Reports of Iraq, U.N. Doc. CERD/C/IRQ/CO/22-25, (Jan. 11, 2019) [hereinafter Observations on the Periodic Reports of Iraq].

40. Comm. on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Iraq, ¶¶19, 31, U.N. Doc. CRC/C/IRQ/CO/2-4 (Mar. 3, 2015); Comm. on the Rights of the Child, Concluding Observations on the Fifth Periodic Report of the Syrian Arab Republic, ¶¶ 31, 49, U.N. Doc. CRC/C/SYR/CO/5 (Mar. 6, 2019).

41. U.N. Security-Council, Letter dated Nov. 15, 2018 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant addressed to the President of the Security-Council, U.N. Doc. S/2018/1031 (Nov. 16, 2018) [hereinafter Letter to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq].

42. Rep. of the G.A., Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, ¶2, U.N. Doc. A/73/741 (Feb. 13, 2019).

43. G.A. Res. 53/144, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, ¶4, U.N. Doc. A/71/L.48 (Dec. 19, 2016).

44. Human Rights Council Res. 17/1, Situation of human rights in the Syrian Arab Republic, U.N. Doc. A/HRC/S-17/1 (Aug. 23, 2011).

45. H.R.C., *supra* note 32, ¶ 5.

46. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. Rep. 168, ¶ 168 (Dec. 19). *See*, in the context of the Islamic State, Comm. on Econ., Soc. and Cultural Rts, Concluding observations on the fourth periodic report of Iraq, ¶ 5, U.N. Doc. E/C.12/IRQ/CO/4 (Oct. 27, 2015).

complement each other, but in cases of normative conflict, I.H.L. is the *lex specialis*⁴⁷ that enjoys precedence.⁴⁸ The European Court of Human Rights took the view that I.H.R.L. should be interpreted in light of I.H.L. during armed conflicts.⁴⁹ A similar opinion was adopted by the Inter-American Commission of Human Rights (the “I.A.C.H.R.”)⁵⁰ and the African Commission of Human Rights.⁵¹ The H.R.C. focuses on the complementary relationship between the norms rather than on precedence.⁵²

Analysis of responsibility for infringements of I.H.R.L. and I.H.L. does not absolve individuals from the examination of possible criminal responsibility since individual responsibility is distinct from the question of collective responsibility of other actors.⁵³ For example, proceedings relating to the Genocide during the Yugoslav civil war have been conducted both on the State level, before the I.C.J., and, on the individual criminal level, before the International Criminal Tribunal for the former Yugoslavia.⁵⁴ As such, another relevant branch is International Criminal Law (“I.C.L.”).⁵⁵ On the normative level, I.C.L. complements I.H.L. and

47. The principle of *lex specialis*, a general principle of international law, originates from Roman law. See Martti Koskenniemi (Chairman of Int’l L. Comm.), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

48. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 106 (July 9); Dem. Rep. Congo v. Uganda, 2005 I.C.J. Rep. 168, ¶ 220 (Dec. 19).

49. See Hassan v. the United Kingdom, App. No. 29750/09, (Sept. 16, 2014).

50. Las Palmeras v. Colombia, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 67, ¶ 31 (Feb. 4, 2000). For discussion, see Michele D’Avolio, *Regional Human Rights Courts and Internal Armed Conflicts*, 2 INTERCULTURAL HUM. RTS. L. REV. 249 (2007).

51. Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan, No. 279/03-296/05, African Commission on Human and Peoples’ Rights [Afr. Ct. H.P.R.] (May 2009), <https://www.achpr.org/sessions/descions?id=190> [<https://perma.cc/T82Z-PSKV>].

52. Hum. Rts. Comm., General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶ 64, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) (“... both spheres of law are complementary, not mutually exclusive.”).

53. *Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int’l L. Comm’n 31, 142, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter *Responsibility of States*].

54. Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26). For discussion on the effectiveness of international courts, see YUVAL SHANY, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* (2012).

55. *Responsibility of States*, *supra* note 53, at 33, art. 58 (“These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.”). The goals of ICL are to prevent impunity, to maintain an international rule of law, to deter from the commission of crimes and to maintain international peace and order. See generally LEILAN SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW* (2002). During recent decades, other goals have been promoted in post-

I.H.R.L. in the sense that most international crimes under I.C.L. are usually severe infringements of I.H.R.L. and grave breaches of I.H.L.⁵⁶ Therefore, prosecuting individuals based on I.C.L. promotes better protection of both I.H.L. and I.H.R.L. In line with that, the final chapter of this Article will discuss criminal enforcement against members of the Islamic State in the I.C.C.

II. INTERNATIONAL RESPONSIBILITY FOR ATROCITIES IN THE SELF-DECLARED-CALIPHATE

Alain Pellet, a former member and chair of the International Law Commission (“I.L.C.”), suggested that State responsibility arises out of the principles of sovereignty and equality of States.⁵⁷ As such, State responsibility is a fundamental concept in the international State-centred Westphalian legal order international law.⁵⁸ The rules of State responsibility were codified by the I.L.C.⁵⁹ Most of the rules relating to attribution and preclusion from responsibility, specifically the ones addressed in this Article, have been recognized as reflective of customary international law.⁶⁰

International law includes primary rules that contain substantive rights and obligations, namely to prescribe certain conduct and second-order rules that establish the conditions under which a primary rule is breached and the outcomes of such a breach.⁶¹ *Shaw* noted that the law of State responsibility is focused on principles concerned with second-order issues, namely attribution and

conflict situations like reconciliation. For discussion, see Phil Clarke, *Hybridity, Holism and “Traditional” Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT’L L. REV. 765 (2007).

56. An example is the prohibition against torture. See Rome Statute, *supra* note 35, art. 8.

57. Pellet, *supra* note 10, at 4-5. In his view, it is because the State is sovereign that coexists with other entities which are equally sovereign, that the State can engage its own responsibility and invoke the responsibility of others. *Id.*

58. The concept of sovereignty was first introduced in 1576 by *Bodin*, and later affirmed in the Treaties of Westphalia of 1648. Given the centrality of sovereignty in international law, it is common to refer to the international legal order as a Westphalian one. See Ioana Cisma, *Secession in Theory and Practice: the Case of Kosovo and Beyond*, 2 GOETTINGEN J. INT’L L. 531, 548 (2010); Yaël Ronen, *Entities that Can Be States but do not Claim to Be*, in STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 23 (Duncan French ed., 2013).

59. G.A. Res. 56/83, Responsibility of States for internationally wrongful acts (Jan. 28, 2002).

60. *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 344 (Sept. 28, 2007); *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 ICJ Rep. 7 (Sept. 25).

61. Nicholas Tsagourias, *Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule*, 29 LEIDEN J. INT’L L. 801, 807 (2016).

consequences flowing from a breach of a substantive norm of international law.⁶² As will be shown below, the execution of primary norms depends on secondary rules.

In recent decades, some of the gravest infringements of international law were committed by non-State actors.⁶³ And yet, international law does not provide a well-tailored framework on which non-State actors may be held responsible for violations of international law.⁶⁴ As such, the discussion of imputing international responsibility to non-State actors, and particularly to the Islamic State, is a move away from the traditional Westphalian State-centric character of international law.⁶⁵ The desired shift is from a State-centric legal order into a more pluralistic one in which different entities co-exist and interact with States and with each other.⁶⁶

The point of departure relating to non-State actors is that States are usually not responsible for abuses of international law committed by individuals or groups in their territory.⁶⁷ The responsibility of States for actions conducted in their territories is of great relevance today, just as it was during the early days of the development of international law. As early as 1758, *Vattel* opined in his writings that:

as it is impossible for the best regulated State, or for the most vigilant and absolute sovereign, to model at his pleasure all the actions of his subjects, and to confine them on every occasion to the most exact obedience, it would be unjust to impute to the nation or the sovereign every fault committed by the citizens.⁶⁸

The state of affairs today did not change dramatically. In the view of the

62. MALCOLM SHAW, *INTERNATIONAL LAW* 778 (7th ed. 2014).

63. *Report of the Special Rapporteur*, *supra* note 14, ¶ 12.

64. *See generally* PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART (André Nollkaemper & Ilias Plakokefalos Nollkaemper eds., 2014).

65. For discussion on the classic State-centered legal order, see WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964); SHABTAI ROSENNE, *PRACTICE AND METHODS OF INTERNATIONAL LAW* 2 (1984). For a critical view, see Guido Acquaviva, *Subjects of International Law: A Power-Based Analysis*, 38 *VAND. J. TRANSNAT'L L.* 345, 387 (2005).

66. INIGO ALVAREZ, *supra* note 11, at 7. *See also* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW (Jean D'Aspremont ed., 2011).

67. Antonio Coco & Jean-Baptiste Maillart, *The Conflict with Islamic State: A Critical Review of International Legal Issues*, in *THE WAR REPORT: ARMED CONFLICT IN 2014* 388, 406 (Annyssa Bellal ed., 2015).

68. EMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGN, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY* 299 (Knud Haakonssen, Richard Whatmore & Béla Kapossy eds., 1797), http://files.libertyfund.org/files/2246/Vattel_1519_LFeBk.pdf [<https://perma.cc/FL5J-DXLS>].

I.L.C., the general principle is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State.⁶⁹ Notwithstanding, States have certain positive D.D. obligations to prevent and punish acts by private actors,⁷⁰ as will be elaborated in sub-chapter 3.3 below.

The Islamic State asserted its authority for three years over millions of people in territories in Iraq and Syria.⁷¹ It presented a unique challenge by governing most of the fields of life in these territories while simultaneously waging terror campaigns in Iraq, Syria, and around the world.⁷² This chapter will first look into the possibility of the direct responsibility of the Islamic State through two avenues: Article 10 of A.R.S.I.W.A. and general principles of international responsibility. Later, it will discuss if Iraq and Syria are accountable based on either the doctrine of D.D.⁷³ or Article 9 of A.R.S.I.W.A.

A. Responsibility of the Islamic State under Article 10 of A.R.S.I.W.A.

The conduct of armed groups committed during a struggle with the constituted authority is not attributable to the State under international law, so long as it is unsuccessful.⁷⁴ Under Article 10 of A.R.S.I.W.A., responsibility is engaged when the armed group achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State.⁷⁵ The insurrectional movement's behavior is treated as if it were a government at the time of its internationally wrongful acts, from the beginning of the revolution.⁷⁶

Article 10 prescribes two different avenues of attribution.⁷⁷ *First*, under article 10(1) of A.R.S.I.W.A., the conduct of an insurrectional movement that

69. *Responsibility of States*, *supra* note 53, at 52. For the rationale, see *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J Rep. 4, 18 (Apr. 9).

70. Hum. Rts. Comm., General Comment No. 31, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Jan Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 38 (2005).

71. See Frédéric Gilles Sourgens, *The End of Law: The ISIL Case Study for a Comprehensive Theory of Lawlessness*, 39 FORDHAM INT'L L.J. 355, 379 (2015).

72. Darin Johnson, *The Problem of the Terror Non-State: Rescuing International Law from ISIS and Boko Haram*, 84 BROOKLYN L. REV. 475, 484 (2019).

73. *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J Rep. 4, 22 (Apr. 9).

74. This principle was recognized in the *Solis* case, see *G. L. Solis (U.S.A.) v. United Mexican States* (Mex.), IV RIAA 358, 361 (1928).

75. *Responsibility of States*, *supra* note 53, at 50.

76. An example of a situation that would fall within the scope of article 10 is the overthrow of the government of former President of the Central African Republic in 2013, by a coalition of armed groups called Séléka. See High Comm'r for Hum. Rts., *Situation of Human Rights in the Central African Republic*, ¶ 25, U.N. Doc. A/HRC/24/59 (Sept. 12, 2013) (“the Séléka, after it seized power, engaged the State responsibility of the Central African Republic for all violations committed by Séléka members in the country during the armed conflict.”).

77. G.A. Res. 56/83, *supra* note 59, art. 10.

becomes the new government of a State shall be considered an act of that State under international law. *Second*, under Article 10(2), the conduct of a movement that succeeds in establishing a new State shall be considered an act of the new State under international law. As will be shown, both options are not met in the case of the Islamic State.

Article 10(1) deals with a situation where a newly established government was in a position to adopt measures of vigilance, prevention, or punishment in respect of illegal conduct taking place during its struggle to become the new government.⁷⁸ The Islamic State never attempted to be the new government in Iraq nor in Syria, as prescribed under Article 10(1), rather it desired to establish a new entity.⁷⁹ Hence, we need to look into the second avenue, under Article 10(2), according to which attribution can exist if the self-declared Caliphate became a new State.⁸⁰ As will be shown, article 10(2) of A.R.S.I.W.A. is also inapplicable to the self-declared Caliphate of the Islamic State as it never became a State under international law.

The generally accepted requirements for determining Statehood are stipulated in the 1933 Montevideo Convention on the Rights and Duties of States (the “Montevideo Convention”):⁸¹ permanent population,⁸² defined territory,⁸³ effective government,⁸⁴ and capacity to enter into relations with other States.⁸⁵ Beyond these criteria, it is common to discuss the recognition of the entity in question.⁸⁶

78. JAMES CRAWFORD, *STATE RESPONSIBILITY* 552 (2014).

79. MCCANTS, *supra* note 2, at 121.

80. *Croat. v. Serb.*, Judgment, 2015 I.C.J. Rep. 118, ¶¶ 103-05 (Feb. 3).

81. Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 I.N.T.S. 19. For discussion, see OPPENHEIM’S *INTERNATIONAL LAW* 717-18 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Noel Cox, *The Acquisition of Sovereignty by Quasi-States: The Case of the Order of Malta*, 6 MOUNTBATTEN J. LEGAL STUD. 26 (2002).

82. There is no minimal threshold of nationals necessary for establishing a State, nor a demand for a population to be homogeneous. See *In re. Duchy of Sealand*, 80 ILR 683, 687 (Admin. Ct. 1978) (Ger.); Manfred Zuleeg, *What Holds a Nation Together? Cohesion and Democracy in the United States of America and in the European Union*, 45 AM. J. COMP. L. 505, 510 (1997).

83. The principal requirement is the exercise of effective governmental control over a particular piece of land. Permanent borders are not necessary. For discussion, see Cox, *supra* note 81, at 26; JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 46 (2nd ed. 2006).

84. International law does not dictate a preferred form of governance; hence a democracy and a dictatorship may equally meet the requirement. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. Rep. 14, ¶259 (June 27).

85. While the three previous elements are interdependent, this criterion pertains to the entity’s *ability* to conduct foreign relations, regardless of whether other States agree to maintain relations with it. For discussion, see JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 129 (8th ed. 2012).

86. Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EUR. J. INT’L L. 36, 64 (1993).

Recognition depends more on the legality of the establishment of an entity rather than on its practical capacity to conduct itself as a State. For example, several entities were recognized as States before they met the Montevideo criteria to allow them to gain strength in the international plane until eventually meeting all of the criteria.⁸⁷ Fabry noted that there has been a growing tendency to prefer *legality* over *effectiveness* in the field of Statehood.⁸⁸ In cases of secession from existing States, it was normally only after the State from which the entity seceded recognized the new entity as a State that statehood was crystallized *de jure* and *de facto*.⁸⁹

It can be claimed that the self-declared Caliphate partially met some of the Montevideo criteria, especially in the early days of its operation. However, the group illegally acquired the area that forms part of the territorial integrity of Iraq and Syria⁹⁰ and infringed the customary rule prohibiting the acquisition of territory through force.⁹¹ In addition, the management of the territories under the control of the Islamic State led to the commission of systematic international crimes.⁹² Finally, the group avoided raising claims for the exercise of national self-determination in the form of Statehood, as prescribed by international law, given its rejection of the international system and its desire to promote Wahhabism (with a vision going back to *pre-Westphalian structures*).⁹³ As such, no State recognized the self-proclaimed Caliphate established by the Islamic

87. Examples include the Czech Republic and Bosnia-Herzegovia. See Acquaviva, *supra* note 65, at 359; Beat Dold, *Concepts and Practicalities of the Recognition of States*, 22 SWISS. REV. INT'L & EUR. L. 81, 84 (2012). For discussion of additional examples during the de-colonization period in Africa since the 1960's, see generally Jure Vidmar, *Explaining the Legal Effects of Recognition*, 61 INT'L & COMP. L.Q. 361 (2012).

88. Mikulas Fabry, *Secession and State Recognition in International Relations and Law*, in ON THE WAY TO STATEHOOD: SECESSION AND GLOBALISATION 57 (Aleksandar Pavakovic & Peter Radan eds., 2008); Vidmar, *supra* note 87, at 365; Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENVER J. OF INT'L L. & POL'Y 209 (2011).

89. As was in the case of Bangladesh, which seceded from India, Eritrea, after its secession from Ethiopia, and East Timor, which was liberated from unlawful occupation by Indonesia. See, relating to Bangladesh, Dold, *supra* note 87, at 96. Regarding Eritrea, see Kathrun Sturman, *New Norms, Old Boundaries: The African Union's Approach to Secession and State Sovereignty*, in ON THE WAY TO STATEHOOD: SECESSION AND GLOBALISATION 75 (Aleksandar Pavakovic & Peter Radan eds., 2008). Concerning East Timor, see Vidmar, *supra* note 87, at 368.

90. S.C. Res. 2170 (Aug. 15, 2014); S.C. Res. 2249 (Nov. 20, 2015).

91. See, e.g., S.C. Res. 541, ¶ 6 (Nov. 18, 1983); S.C. Res. 217, ¶ 3 (Nov. 20, 1965); S.C. Res. 407 (May 25, 1977). This principle also came into play after the fall of the self-proclaimed Caliphate because the international community refused to recognize the Kurdish Regional Government in Iraq. See Robert J. Delahunty, *An Epitaph for ISIS: The Idea of a Caliphate and the Westphalian Order*, 35 ARIZ. J. INT'L & COMP. L. 1, 61 (2018).

92. H.R.C., *supra* note 32, at 17.

93. Delahunty, *supra* note 91, at 36. Relating the secular basis of the current international order, see MARK LILLA, *THE STILLBORN GOD: RELIGION, POLITICS, AND THE MODERN WEST* 7 (2008).

State.⁹⁴ Instead, the international community persisted in recognizing the continued sovereignty of Iraq and Syria during the time that parts of their territory were under the control of the Islamic State.⁹⁵

In sum, the Islamic State never actually became the new government in Iraq or Syria, as prescribed under Article 10(1) of A.R.S.I.W.A. The self-declared Caliphate also never became a new State, as envisaged in Article 10(2). Hence, Article 10 does not apply to the case at hand; therefore, the Article will explore if general principles of international responsibility can be of assistance in attributing responsibility to the group.

B. Responsibility of the Islamic State under General Principles of International Responsibility

An internationally wrongful act gives rise to different types of legal relationships.⁹⁶ As noted by the late Max Huber in his well-known *Spanish Zone of Morocco* arbitration award, “responsibility is the necessary corollary of a right.”⁹⁷ Pellet suggested, more broadly, that responsibility is the corollary of international law itself as it is the best proof of its existence and the top credible measure of its effectiveness.⁹⁸ The term *international responsibility* covers the relations which arise under international law from an internationally wrongful act, whether such relations are limited to a wrongdoing State and another injured State or whether they also extend to other States or to other *subjects* of international law.⁹⁹ James Crawford, I.C.J. judge and former Special Rapporteur on the issue of State Responsibility in the I.L.C., stated that international responsibility is a broad question inseparable from legal personality in all its forms.¹⁰⁰ Correspondingly, international responsibility as a regime also includes non-State entities.¹⁰¹

94. Gabor Kajtar, *The Use of Force against ISIL in Iraq and Syria – A Legal Battlefield*, 34 *WIS. INT’L L.J.* 535, 549 (2017).

95. S.C. Res. 2170 (Aug. 15, 2014); S.C. Res. 2249 (Nov. 20, 2015); Kajtar, *supra* note 94, at 548. Iraq and Syria benefited from a presumption of continuity; hence, a temporary loss of one of the criteria for Statehood does not affect their legal status. Relating to the presumption of continuity, see Acquaviva, *supra* note 65, at 378; S.C. Res. 733 (Jan 23, 1992); Sheekh v. Neth., App. No. 1948/04, 45 *Eur. H.R. Rep.* 50, ¶ 34 (2007).

96. *Responsibility of States*, *supra* note 53, at 33. See also CRAWFORD, *supra* note 85.

97. *British Claims in the Spanish Zone of Morocco* (Gr. Brit. v. Spain), 2 *R.I.A.A.* 615, 641 (Perm. Ct. Arb. 1924). By comparison, Visscher described State responsibility as the necessary corollary of the equality of States. See CHARLES DE VISSCHER, *LA RESPONSABILITÉ DES ÉTATS* 90 (1924).

98. PELLET, *supra* note 10, at 3.

99. *Responsibility of States*, *supra* note 53, at 33.

100. CRAWFORD, *supra* note 78, at 3.

101. *Responsibility of States*, *supra* note 53, at 30, art. 57 (“These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.”).

A significant consequence of being considered as a subject of international law also includes the reception of active legal entitlements, which, for example, allow the entity to claim rights at the international level.¹⁰² As stated by the I.C.J. in the Reparations Advisory Opinion that dealt with the status of the United Nations as an international legal entity (the “Reparations Advisory Opinion”), the subjects of law in any legal system are not identical in their nature or the extent of their rights.¹⁰³ The Islamic State, as will be shown, was obligated to meet international law norms, like other armed groups which administered territories.¹⁰⁴ As a result, they bear international responsibility.

The gist of the claim, elaborated upon in this chapter, is that when there can be the imposition of international law norms towards non-State armed groups in control of territory, the application of such primary norms inherently leads also to the application of secondary rules necessary for their execution. Non-State armed groups enjoy a variety of levels of legal personality, which depends mostly on their capacities, their legal relations with States, and the context in which they operate.¹⁰⁵ Since responsibility is both an indicator and the consequence of international legal personality,¹⁰⁶ once we establish the legal personality of an entity, it entails that it can incur responsibility as well. International responsibility derives from the function of an entity as an organic one. This logic also fits non-state armed groups with such a high level of organization.¹⁰⁷

The order of my claim is as follows: the chapter will first present that various entities can possess certain characteristics similar to a State and thereby be subject to international norms; then, it will present the general principles of responsibility that apply to them. As a first step, the coming sub-chapter will demonstrate that there are different players in the international arena capable of possessing rights and obligations under international law. Then, the next sub-chapter will delve into the general principles of international responsibility, which, in my view, can be applied to non-State armed groups administering a territory like the Islamic State.

102. Nicolas Carrillo Santarelli, *Non-State Actors' Human Rights Obligations and Responsibility under International Law*, 15 REVISTA ELECTRÓNICA DE ESTUDIOS INTERNACIONALES 3 (2008). For a similar view, see Robert McCorquodale, *An Inclusive International Legal System*, 17 LEIDEN J. INT'L L. 477, 484 (2004).

103. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 178 (Apr. 11).

104. While the status of non-State entities is different in comparison to States, they are nevertheless bound by certain rules of international law and are able to interact with States. For discussion, see Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 118-19 (2011).

105. KATHARINE FORTIN, *THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW* 154 (2017).

106. PELLET, *supra* note 10, at 4-5.

107. INIGO ALVAREZ, *supra* note 11, at 31.

i. Legal Entities in a State-Centred International Legal Order

International law traditionally recognized the rights and duties of entities other than the State, but their roles were at times uneven, shifting, and misperceived.¹⁰⁸ For example, recognition by States of belligerency status during the nineteenth century led to the application of certain rules of war to non-State armed groups, such as the law of neutrality.¹⁰⁹ Historically, non-State entities also had an influence on the development of norms. For example, the 1863 Lieber Code, one of the first documents attempting to codify I.H.L., examined the “practices and expectations of certain tribes, confederations, and other N.S.A. actors” besides analyzing the practice of States.¹¹⁰

In this subchapter, I will present three entities that bear international rights and duties: transnational corporations, International-Governmental Organizations (“IGOs”), and non-State armed groups. The main focus will be, naturally, on the third category. As will be seen, both corporations and IGOs enjoy their status based on their interaction with States.¹¹¹ In other words, the relation of an entity with States is crucial in granting it a place in the international arena and in the development of the content which this status entails. This relational notion was envisioned as early as during the nineteenth century when the late Henry Wheaton suggested that individuals or corporations may become subjects of international law with regard to rights growing out of their relations with

108. Jordan J. Paust, *Non-State Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. INT’L J.L. 977, 994 (2011).

109. See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: COMMENTARY TO ARTICLE 3: CONFLICTS NOT OF AN INTERNATIONAL CHARACTER, ¶ 360 (2016); Antonio Cassese, *The Special Court and International Law: The Decision Concerning the Lome Agreement Amnesty*, 2 J. INT’L CRIM. JUST. 1130, 1134 (2004); Thomas M. Franck & Nigel S. Rodley, *Legitimacy and Legal Rights of Revolutionary Movements with Special Reference to the Peoples’ Revolutionary Government of South Viet Nam*, 45 N.Y.U. L. REV. 679, 679 (1970). For case law on the issue, see *Woolverton v. United States*, 29 Ct. Cl. 107, 109 (1894); *United States v. The William Arthur*, 28 F. Cas. 624, 626 (D. Me. 1861). For earlier discussion, see HENRY W. HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR 151–53 (1866).

110. Paust, *supra* note 108, at 97; see generally *The Lieber Code: Instructions for the Government of Armies of the United States in the Field*, in 1 LEON FRIEDMAN, THE LAW OF WAR, A DOCUMENTARY HISTORY 158-86 (1972). The modern attempt to codify this field took a different approach since the practice of armed groups, in the view of the authors, is of unclear legal significance. See generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW XXV-LI (2006).

111. IGOs particularly also derive their status from the function and capacity delegated to them by States. For discussion, see Adriana Nilsson, *Making Norms to Tackle Global Challenges: The Role of Intergovernmental Organisations*, 46 RSCH. POL’Y 171, 172 (2016); see generally Barbara Koremenos, *When, What, and Why Do States Choose to Delegate?*, 71 L.CONTEMP.PROBS. 151 (2008); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L.REV. 1492 (2004).

States.¹¹² When it comes to non-State armed groups that administer territories, these groups also interact with States (e.g., by signing agreements),¹¹³ and at the same time, they function in lieu of States as the administrators of a territory (with an obligation to meet international duties concerning the population and the territory they manage).¹¹⁴ The next sub-chapter will demonstrate that since non-State armed groups can enjoy a legal personality for the purpose of imposing international obligations on them, they can also be subject to general principles of responsibility.

The first type of legal entity discussed here is the transnational corporation. The classic State-centred view is that transnational corporations do not possess a legal personality under international law. However, the full picture is a bit more complicated. Since the seventeenth century, Spanish, Portuguese, English, Dutch, and other trading companies became increasingly important actors in the colonization efforts of European States.¹¹⁵ During that era, rules of an international character emerged in the service of the colonization project. Hugo de Groot (Grotius), known as one of the “fathers of international law,” advised in service of the Dutch East India Company and suggested doctrines concerning the law of prize (seizure of ships) and the status of the open seas (*Mare Liberum*).¹¹⁶ Some elements of the doctrines suggested by Grotius form part of the modern law of the sea.¹¹⁷ Corporations which operated during these times,

112. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 20 (6th ed. 1855).

113. *See, e.g.*, *Prosecutor v. Kallon*, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lome Accord Amnesty, ¶ 47 (Special Ct. for Sierra Leone Mar. 13, 2004) (“47. No doubt, the Sierra Leone Government regarded the RUF as an entity with which it could enter into an agreement.”).

114. For discussion, see Yuval Shany, *The End of the War/Peace Limit on the Application of International Human Rights Law: A Response to Andrew Clapham*, in *THE LIMITS OF HUMAN RIGHTS* 324 (Bardo Fassbender & Knut Traisbach eds., 2020); Andrew Clapham, *Human Rights Obligations for Non-State-Actors: Where are We Now?*, in *DOING PEACE THE RIGHTS WAY: ESSAYS IN INTERNATIONAL LAW AND RELATIONS IN HONOUR OF LOUISE ARBOUR* 11 (Fannie Lafontaine & François Larocque eds., 2019).

115. CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* 182 (2005); WILHELM GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 181 (2000).

116. Grietje Baars, *From the Dutch East India Company to the Corporate Bill of Rights: Corporations and International Law*, in *RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW* 260, 266 (Ugo Mattei & John Haskell eds., 2015); Philip J. Stern, *The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations*, 39 *SEATTLE UNIV. L. REV.* 424, 436 (2016); RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 79-81 (1999). For discussion on the legacy of Grotius and other “founding fathers” of international law, see Benedict Kingsbury & Benjamin Straumann, *The State of Nature and Commercial Sociability in Early Modern International Legal Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes, and Pufendorf*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 33 (Samantha Besson & John Tassioulas eds, 2010).

117. For reading on the law of the sea, see generally ROBIN CHURCHILL & VAUGHAN LOWE,

such as the British East India Company and the Dutch East India Company, operated between themselves and with non-European communities as unique entities: half private and half public, more or less independent, distinct from their sending States but nevertheless an instrument in their service.¹¹⁸ They combined private rights with features of public sovereign power, such as the prerogative “to wage war and conduct diplomacy, govern over people and places, coin money,” and more.¹¹⁹ While they were entitled to exercise sovereign power, they were treated as something separate from a State.¹²⁰ Such trading companies continued their operations until the nineteenth century, but their significance waned as their places were overtaken by the governments of their parent States which once sent them.¹²¹ An illustration of their demise in that era can be found in the 1856 Declaration of Paris, which annulled the authorization on the use of force given to private companies as part of the colonial enterprise.¹²²

Moving back to this time and age, one specific area of action which brings about both imposition of primary international norms of corporations and also elements of international responsibility is explorations through seabed mining in the open sea for commercial or scientific purposes.¹²³ As was explained by the Seabed Chamber of the International Tribunal of the Law of the Sea, there are two different possible responsible entities for a violation of international law involving activities of this sort: both the State involved in the project and also the company serving as a contractor in the project.¹²⁴ The obligations of the

THE LAW OF THE SEA (3rd ed. 1999); DANIEL PATRICK O’CONNELL, *THE INTERNATIONAL LAW OF THE SEA* (1982).

118. BAARS, *supra* note 116, at 268; *see also* THOMAS POOLE, *REASON OF STATE: LAW, PREROGATIVE AND EMPIRE* 188 (2015); MARKOS KARAVIAS, *CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW* 6 (2013).

119. Stern, *supra* note 116, at 433; GREWE, *supra* note 115, at 352; *see also* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 27 (2003). For discussion on the rise and expansion of such companies, *see generally* ROBERT TRAVERS, *IDEOLOGY AND EMPIRE IN EIGHTEENTH-CENTURY INDIA: THE BRITISH IN BENGAL* (2007); JON E. WILSON, *THE DOMINATION OF STRANGERS: MODERN GOVERNANCE IN EASTERN INDIA, 1780–1835* (2008).

120. WHEATON, *supra* note 112, at 17.

121. MIÉVILLE, *supra* note 115, at 284; STERN, *supra* note 116, at 439.

122. *See generally* Declaration Respecting Maritime Law. Paris, 16 April 1856, INT’L COMM. OF THE RED CROSS (Feb. 27, 2021), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=10207465E7477D90C12563CD002D65A3&action=openDocument> [<https://perma.cc/KY7Q-2AGG>]. For discussion, *see generally* Eyal Benvenisti & Doreen Lustig, *Taming Democracy: Codifying the Laws of War to Restore the European Order, 1856-1874*, 31 EUR. J. INT’L L. 127 (2020); Charles H. Stockton, *The Declaration of Paris*, 14 AM. J. INT’L L. 356, 358 (1920).

123. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, 468. For reading on the law of the sea, *see generally* CHURCHILL & LOWE, *supra* note 117; O’CONNELL, *supra* note 117.

124. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect

corporations in this field derive mostly from the agreement detailing the conditions for the exploration, which is signed with States (both hosting and sponsoring) and regulated by international law, but also based on international norms which are applicable to their actions.¹²⁵ International law norms which apply to exploration in the open sea derive mostly from the Convention on the Law of the Sea,¹²⁶ alongside international environmental law rules.¹²⁷ As for other fields of international law, one of the most timely debates today is the one concerning the imposition of I.H.R.L. on transnational corporations.¹²⁸ John Ruggie, former U.N. Special Representative for Transnational Corporations and Human Rights, suggested that corporate responsibility to respect I.H.R.L. is “a global standard of expected conduct for all business enterprises wherever they operate.”¹²⁹ This view represents, however, soft law at this point in time. As such, it reflects the *lege ferenda* rather than the *lex lata*.¹³⁰

Finally, on the practical level, until recently, a main avenue of enforcement against corporations was litigation in U.S. federal courts under the Alien Tort Statute, which allows private plaintiffs to bring cases against multinational corporations for violations of international law.¹³¹ Based on this unique legislation, a significant number of rulings recognized that corporations could have duties under treaty-based and customary international law.¹³² U.S. courts

to Activities in the Area: Advisory Opinion of 1 February 2011, 11 ITLOS Rep. 7, 63-64.

125. *Id.* at 40.

126. *See generally* United Nations Convention on the Law of the Sea, *supra* note 123.

127. *See, e.g.*, Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 14, 55-56 (April 20); Int'l Law Comm'n, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Rep. on the Work of Its Fifty-Third session, U.N. Doc. A/CN.4/516, at 154-55 (2001).

128. *See, e.g.*, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443 (2001); Ronen Shamir, *Between self-regulation and the Alien Tort Claims Act: on the Contested Concept of Corporate Social Responsibility*, 38 L. & SOC'Y REV. 635 (2004); ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993).

129. Human Rights Council, Rep. of John Ruggie (the Special Representative of the Secretary-General) on the issue of human rights and transnational corporations and other business enterprises, at 13, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

130. For elaboration, see Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, at 14-18, U.N. Doc. A/HRC/4/035 (2007).

131. 28 U.S.C. § 1350.

132. *See, e.g.*, *Baloco v. Drummond Co., Inc.*, 631 F.3d 1350, 1362-63 (11th Cir. 2011); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1270 (11th Cir. 2005); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000); *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, etc.*, 937 F.2d 44, 49 (2d Cir. 1991); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 271, 274-278, 289, 293 (E.D.N.Y. 2007); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1304-1305 (C.D. Cal. 2000). For discussion, see Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 803-10 (2002); Jordan J. Paust, *The History, Nature, and Reach*

also recognized that private vessels could commit violations of customary international law, ordering the confiscation of the vessel as a remedy.¹³³ However, in recent years the U.S. Supreme Court limited this option by setting a presumption against extraterritoriality, which bars [plaintiffs] from discussing actions committed outside the U.S. so long as there is no strong connection between the case and the United States, and also by limiting the ability to prosecute foreign corporations.¹³⁴

As for IGOs, the I.C.J. recognized in the *Reparation for Injuries* case that the United Nations is a legal entity, subject to international law, and capable of possessing international rights and duties.¹³⁵ Its legal personality is separate from that of the States that established it, and as such, it is responsible for acts that are carried out by its organs or officials.¹³⁶ In 2011, the I.L.C. adopted the Draft Articles on the Responsibility of International Organizations (“D.A.R.I.O.”) in a desire to respond to the growing number of IGOs and their increasing functions.¹³⁷ Article 3 of D.A.R.I.O. states that every internationally wrongful act of an IGO entails its international responsibility.¹³⁸ This proposition represents a general rule of international law according to which responsibility is the necessary corollary of a right.¹³⁹ In the view of Hirsch, this rule forms part of

of the Alien Tort Claims Act, 16 FLA. J. INT’L L. 249, 250–52 nn.3, 7 (2004). The majority of these cases come from the United States but other examples can be found from the International Military Tribunal in Nuremberg and also in the United Kingdom. See *United States v. Krauch (I.G. Farben Case)*, in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 1132–33 (1948); *The Fortuna* (1811) 165 Eng. Rep. 1240, 1241; *Madrazo against Willes* (1820) 106 Eng. Rep. 692, 694.

133. *The Emily*, 22 U.S. (9 Wheat.) 381, 390 (1824); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 7–8 (1827); *The Three Friends*, 166 U.S. 1 (1897); *Austin v. United States*, 509 U.S. 602, 615–16 (1993). For discussion, see Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 U. PA. L. REV. 39 (2009); Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L. J. 550 (2008).

134. *Kiobel v. Royal Dutch Petroleum Co.* 133 S. Ct. 1659, 1664 (2013); *Jesner v. Arab Bank, Plc.*, 138 S. Ct. 1386, 1398 (2018). For discussion, see generally Julian G. Ku, *Agora: Reflections on Kiobel: Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 AM. J. INT’L L. 835 (2013).

135. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 179.

136. *Responsibility of States*, *supra* note 53, at 141. For discussion, see Michael Wood, *International Organizations and Customary International Law*, 48 VAND. J. TRANSNAT’L L. 609 (2015).

137. *Draft Articles on the Responsibility of International Organizations*, [2011] 2 Y.B. Int’l L. Comm’n 54, U.N. Doc. A/66/10 [hereinafter *Responsibility of International Organizations*].

138. *Id.* at 80.

139. *British Claims in the Spanish Zone of Morocco*, *supra* note 97. In the context of IGO’s, see *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *supra* note 12.

customary international law.¹⁴⁰ In the next subchapter, I will delve extensively into the rules of responsibility under both D.A.R.I.O. and A.R.S.I.W.A. in a quest to extract additional general principles or responsibilities that can be applied to the main focus of this Article: non-State armed groups that administer territory and particularly the Islamic State.

Moving on to the third type of entity: non-State armed groups. I will discuss in this part the application of two of the most relevant legal regimes for the atrocities committed by the Islamic State: I.H.L. and I.H.R.L. Two preliminary comments are due: *first*, the imposition of I.H.L. norms on non-State armed groups is well established by now, but when it comes to I.H.R.L., there are still some doctrinal contestations and policy considerations that caution against it.¹⁴¹ *Second*, I discuss I.H.L. and I.H.R.L. given their central weight in the discussion, but it must be recalled that they are two illustrations of a more general issue. That is, while the international system is State-centered,¹⁴² it evolves in a way that allows for the imposition of international norms on players other than the State. As the subsequent sub-chapter will show, the next step after imposing primary obligations on a non-State actor is to recognize the existence of secondary norms that allow for attribution and enforcement in the effect of the primary norm.

Concerning I.H.L., the focus when examining the application of its norms to non-State armed groups is their level of organization and the intensity level of the hostilities.¹⁴³ In our case, various reports qualified the conflict in the territories previously held by the Islamic State as a non-international conflict.¹⁴⁴ There are several applicable I.H.L. norms in such a conflict. First, Common Article 3 of the four 1949 Geneva Conventions sets rules both for States and to other parties to such a conflict.¹⁴⁵ In light of the universal ratification of the 1949 Geneva

140. MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES 9 (1995). For a more recent reiteration of this view, see Mirka Möldner, *Responsibility of International Organizations: Introducing the ILC's DARIO*, 16 MAX PLANCK Y.B. U.N. LAW 281, 286 (2012).

141. Relating imposition of IHL on non-State armed groups, see Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), <https://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>. Concerning IHRL, see Shany, *supra* note 114. For earlier discussion, see Nigel S. Rodley, *Can Armed Opposition Groups Violate Human Rights?*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 317 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

142. Ioana Cisma, *supra* note 58; Frédéric Mégret, *International Law as Law*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 64, 66 (James Crawford & Martti Koskeniemi eds., 2012).

143. Andrew Clapham, *Human rights obligations of non-state actors in conflict situations*, 88 INT'L REV. RED CROSS 491, 492 (2006).

144. H.R.C., *supra* note 32, at 5; U.N. Rep. on the Syrian Arab Republic, *supra* note 19, at 3. For the definition of such a conflict, see Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 619-20 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf>.

145. INT'L COMM. OF THE RED CROSS, *supra* note 109, ¶¶ 351, 506; Geneva Convention

Conventions, Common Article 3 is the only provision that globally binds all conflicts, which include non-State armed groups.¹⁴⁶ Alongside this common Article, one should note the two Additional Protocols from 1977, which deal with wars of national liberation and additional types of hostilities which include non-State actors, and in particular, non-international armed conflict.¹⁴⁷ Doctrinally speaking, the imposition of I.H.L. on non-State armed groups is based on the three main norms of international law: treaty law, customary law, and general principles.

One of the most common understandings is that I.H.L. norms apply to non-State armed groups based on their customary status, as was noted by Meron,¹⁴⁸ Sivakumaran,¹⁴⁹ Sassòli,¹⁵⁰ and others.¹⁵¹ Another line of reasoning is that non-State armed groups are bound by I.H.L. rules since those rules are general principles of international law.¹⁵² As noted by Pomson, general principles aimed at ensuring that there will be no unfilled lacunae in international law.¹⁵³ They

Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. As noted in the commentary, common Article 3 developed precisely to address the realities of non-international armed conflict involving non-State actors.

146. INT'L COMM. OF THE RED CROSS, *supra* note 109, ¶ 354.

147. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol Relating to the Protection of Victims of International Armed Conflicts]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. For discussion of non-international armed conflict, see Dieter Fleck, *The Law of Non-international Armed Conflicts*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 605 (Dieter Fleck ed., 2008). Concerning the law of occupation, the *lex lata* as it is currently reflecting an international legal system that is State-centered since it only recognizes occupation by a non-State entity if the latter is operating on behalf of a State. For discussion, see Sandesh Sivakumaran, *Courts of Armed Opposition Groups: Fair Trials or Summary Justice?*, 7 J. INT'L CRIM. JUST. 489 (2009).

148. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS IN CUSTOMARY LAW 7-36 (1989).

149. Sandesh Sivakumaran, *Binding Armed Opposition Groups*, 55 INT'L AND COMPAR. L. Q. 369, 375-77 (2006). For earlier discussion, see Antonio Cassese, *The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30 INT'L AND COMPAR. L. Q. 423, 429 (1981).

150. Marco M. Sassòli, *Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law*, 1 INT'L HUMANITARIAN LEGAL STUD. 20-22 (2010). For further discussion, see Jonathan Somer, *Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict*, 89 INT'L REV. RED CROSS 655, 661 (2007).

151. For more of this view, see generally Annyssa Bellal et al., *International law and armed non-state actors in Afghanistan*, 93 INT'L REV. RED CROSS 47 (2011).

152. Sivakumaran, *supra* note 149, at 375.

153. Statute of the International Court of Justice art. 38(1)(c). For elaboration, see Ori Pomson, *A Basic Introduction to the Sources of International Law*, SSRN 9 (May 11, 2014),

include both general principles found in domestic law, like good faith and estoppel,¹⁵⁴ and also general principles of international law like sovereign equality.¹⁵⁵ There are four basic principles of I.H.L. which are recognized as customary law, but the two predominant ones are the principle of distinction¹⁵⁶ and proportionality.¹⁵⁷ From these general principles, more concrete rules are extracted; many of them enjoy a customary status like the prohibition against using human shields to gain military advantage.¹⁵⁸ In practice, most I.H.L. norms are applicable to non-State armed groups since they either fall under customary norms or general principles of law, and at times, they constitute both. Another example of a norm that fits both categories is the demand for precautions before an attack, which originates from the principles of distinction and proportionality, and is also anchored as a concrete rule of a customary status.¹⁵⁹

The last doctrinal reasoning originates from treaty law. It is suggested that when a State ratifies a treaty, it does so on behalf of all the individuals under its jurisdiction who can become the addressees of direct rights and obligations.¹⁶⁰ According to this view, after ratification, I.H.L. rules become part of domestic law and are binding on individuals in that State, including members of a non-State armed group.¹⁶¹ An additional view, inspired by the field of State succession and treaty law, suggests that when a non-State armed group claims to represent

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2437890 [<https://perma.cc/F6KR-LGKB>].

154. Rights of Nationals of the United States of America in Morocco (U.S. v. Fr.), Judgment, 1952 I.C.J. Rep. 176, at 200 (Aug. 27); Temple of Preah Vihear (Cambodia v. Thai.), Merits, 1962 I.C.J. 6, at 43 (June 15) (separate opinion of Vice-President Alfaro).

155. Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Provisional Measures, Order, 2014 I.C.J. 147, ¶ 27 (Mar. 3).

156. HENCKAERTS & DOSWALD-BECK, *supra* note 110; Rule 1: The Principle of Distinction between Civilians and Combatants; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 257 (July 8); Prosecutor v. Blaskic, Case No. IT-95-14-T, T. ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Prosecutor v. Galic, Case No. IT-98-29-T, Trial Judgment, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

157. Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VANDERBILT J. INT'L L. 683 (2009); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145 (2010).

158. Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, 22 STAN. L. & POL'Y REV 93 (2011).

159. HENCKAERTS & DOSWALD-BECK, *supra* note 110, at 51-67; Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT'L L. 279 (2011).

160. YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 66 (2014); Antonio Cassese, *La guerre civile et le droit international*, 90 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 553, 567 (1986); Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331, arts. 34-36.

161. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, VOL. I: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 34 (Jean Pictet ed., 1960).

the State or its parts, it enters into the international obligations of that State.¹⁶² Finally, one last reasoning which deserves attention is that non-State armed groups can consent to be bound by I.H.R.L. through the issuance of a unilateral declaration or special agreement between parties to an armed conflict.¹⁶³

Moving on to I.H.R.L., in the past, some argued that it should apply exclusively to the vertical relation between the State and its subject given its heritage as the historical response to the rise of the modern nation-State.¹⁶⁴ Today, however, such views are outdated, as I.H.R.L. is not only seen as a State obligation but also as an entitlement of the individual, protecting him regardless of who is in a position to affect these obligations¹⁶⁵ be that the State or non-State armed groups.¹⁶⁶ An additional objection is based on the proposition that non-State actors generally lack the capacity to uphold I.H.R.L.¹⁶⁷ This objection might be true at times, but less so in the case of a group like the Islamic State, which administered territories through a sophisticated bureaucratic structure.¹⁶⁸ Another concern from a State-centric view focuses on the danger of implying recognition and legitimacy to non-State actors that might interfere with the hegemony of States as the main player on the international plane.¹⁶⁹ A similar concern was also raised in the past regarding the applicability of I.H.L., which originated itself as a State-centric enterprise that reflected the understanding, that the initiation and

162. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, VOL. I: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 51 (Jean Pictet ed., 1952). See also David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE W. RES. J. INT'L L. LAW 55 (1979).

163. DINSTEIN, *supra* note 160, at 70-71.

164. Cedric Ryngaert & Math Noortmann, *New Actors in Global Governance and International Human Rights Law*, 4 HUM. RTS. & INT'L LEGAL DISCOURSE 5, 12 (2010); Rodley, *supra* note 141, at 299.

165. Yaël Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46 CORNELL INT'L L.J. 21 (2013).

166. KONSTANTINOS MASTORODIMOS, ARMED NON-STATE ACTORS IN INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW: FOUNDATION AND FRAMEWORK OF OBLIGATIONS, AND RULES ON ACCOUNTABILITY 175 (2015); Rep. of the G. A., Human Rights Defenders: Note by the Secretary-General, U.N. Doc. A/65/223, ¶ 2 (Aug. 4, 2010). This rationale was invoked specifically concerning the Islamic State and its obligations under IHRL. See Human Rights Council, Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, ¶¶ 30-31, U.N. Doc. A/HRC/29/51 (June 16, 2015).

167. LYNDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 194 (2002); Marco Sassòli & Laura Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 IRRC 599, 622 (2008). See also LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 53 (2002); Shany, *supra* note 114, at 324.

168. U.N. Secretary General, *supra* note 4, at 2; WEISS & HASSAN, *supra* note 17, at 169.

169. Clapham, *supra* note 114, at 3.

waging of war was a prerogative only held by States.¹⁷⁰

An additional aspect of the discussion is that of terminology. Some believe that non-State armed groups can only commit I.H.R.L. “abuses” since the expression “violations” should be reserved only for States or for infringements of I.H.L.¹⁷¹ Others presume that there is a doctrinal obligation of I.H.R.L. on non-State armed groups, which invites the use of the term “violation,” especially in cases of atrocious acts as the one perpetrated by the members of the Islamic State.¹⁷² In practice, there is a flux of examples. On the one hand, we can see numerous referrals to I.H.R.L. “violations” conducted by non-State armed groups in the Central African Republic,¹⁷³ the Democratic Republic of the Congo,¹⁷⁴ Myanmar,¹⁷⁵ Somalia,¹⁷⁶ Sri-Lanka,¹⁷⁷ and Palestinian armed groups.¹⁷⁸ On the other hand, we can also find referrals to “abuses” of I.H.R.L. committed by non-

170. INT'L COMM. OF THE RED CROSS, *supra* note 109, ¶ 358. For elaboration on the State-centric origins of IHL, see Benvenisti & Lustig, *supra* note 122; Dawn Steinhoff, *Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups*, 45 TEX. INT'L L. J. 297, 309-10 (2011). An additional challenge is the fact that non-State armed groups are not involved in the making of the law. In response, there is a growing trend to attempt to engage with armed groups over their IHRL responsibilities. See Ezequiel Heffes, *Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs*, in INTERNATIONAL HUMANITARIAN LAW AND NON-STATE ACTORS 147 (2019).

171. Andrew Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement*, 4 GENEVA ACAD. INT'L HUMAN. L. & HUM. RTS. 35 (2010).

172. At times, IHRL bodies simply rely on references to commitments undertaken by a group, or even leave aside the theory and point to the practical effects of their control on civilian population. See, e.g., Human Rights Council, Human Rights Situation in Palestine and Other Occupied Arab Territories, ¶ 9, U.N. Doc. A/HRC/8/17 (June 6, 2008); Human Rights Council, Rep. of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, ¶ 72, U.N. Doc. A/HRC/17/44 (June 1, 2011).

173. Human Rights Council Res. 23/18, at 3 (July 27, 2013).

174. U.N. Hum. Rits. Council, Rep. of the Independent Expert on the Situation of Human Rights in the Democratic Republic of the Congo, at 3, U.N. Doc. A/HRC/7/25 (Feb. 29, 2008) (“militias and armed groups . . . commit serious human rights violations with impunity, and in Bas-Congo.”).

175. Human Rights Council, Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar, ¶ 59, U.N. Doc. A/HRC/19/67 (Mar. 7, 2012).

176. Human Rights Council, Rep. of the Independent Expert on the Situation of Human Rights in Somalia, ¶ 31, U.N. Doc. A/HRC/18/48 (Aug. 29, 2011) (“Al-Shabaab, on the other hand, continues to perpetrate serious violations of humanitarian and human rights law.”).

177. Human Rights Council, Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 8, § 59, U.N. Doc. A/HRC/7/3/Add.6 (Feb. 26, 2008).

178. Human Rights Council, Rep. of the Independent Commission of Inquiry on the 2014 Gaza Conflict, ¶ 74, U.N. Doc. A/HRC/29/52 (June 24, 2015).

State armed groups in Mali,¹⁷⁹ Sudan,¹⁸⁰ and Somalia.¹⁸¹ At times, both terms are used interchangeably.¹⁸² This inconsistency particularly exists concerning the Islamic State. A report of the U.N. Secretary-General referred to “appalling human rights abuses” committed by the Islamic State,¹⁸³ while the Committee against Torture deplored the severe I.H.R.L. “human rights violations” committed by the group.¹⁸⁴ Such confusion even occurred in the same document.¹⁸⁵

Notwithstanding these objections, in practice, U.N. reports increasingly recognize I.H.R.L. obligations of non-State armed groups in control of territory.¹⁸⁶ Examples include Hezbollah in Lebanon,¹⁸⁷ Hamas in the Gaza

179. Human Rights Council Res. 21/25, U.N. Doc. A/HCR/RES/21/25, at 3 (Oct. 19, 2012) (“Repeats its call for an immediate halt to the abuses and all human rights violations and acts of violence, and for strict respect for all human rights and fundamental freedoms.”).

180. Human Rights Council Res. 21/27, U.N. Doc. A/HCR/RES/21/27, at 1 (Oct. 15, 2012) (“Noting with concern the human rights abuses and violations by all parties, in particular in the States of Darfur, South Kordofan and Blue Nile”).

181. Human Rights Council Res. 19/28, U.N. Doc. A/HCR/RES/19/28, at 2 (Apr. 12, 2012).

182. Human Rights Council Res. 21/31, U.N. Doc. A/HCR/RES/21/31, at 1, 4 (Oct. 25, 2012) (“1. Strongly condemns the grave and systematic human rights abuses and violations perpetrated against the civilian population.”); H.R.C. Res. 21/27, *supra* note 180, at 1; H.R.C. Res. 21/25, *supra* note 179, at 3 (“Repeats its call for an immediate halt to the abuses and all human rights violations and acts of violence.”).

183. Rep. of the Secretary-General on the threat posed by ISIL, *supra* note 4, at 3 (“ISIL continues to perpetrate appalling human rights abuses against populations under its control.”).

184. Comm. Against Torture, *supra* note 30, at 11 (“The Committee deplores the severe human rights violations committed by the so-called Islamic State.”).

185. Human Rights Council, The human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, U.N. Doc. A/HRC/RES/S-22/1, ¶ 1 (Sept. 1, 2014) (“Condemns . . . the systematic violations and abuses of human rights and violations of international humanitarian law”). In other instances, reports which concern the Islamic State do differentiate between IHRL abuses and IHL violations. Human Rights Council, The continuing grave deterioration in the human rights and humanitarian situation in the Syrian Arab Republic, U.N. Doc. A/HRC/RES/27/16, ¶ 11 (Oct. 3, 2014) (“stresses that such acts constitute violations of international humanitarian law and abuses of human rights”); Human Rights Council Res. 29/16, U.N. Doc. A/HRC/RES/29/16, ¶ 8 (July 22, 2015) (“continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law”).

186. MASTORODIMOS, *supra* note 166, at 175.

187. Human Rights Council, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari: Mission to Lebanon and Israel, ¶ 19, U.N. Doc. A/HRC/2/7 (Oct. 2, 2006).

Strip,¹⁸⁸ the National Transitional Council in Libya,¹⁸⁹ and more.¹⁹⁰ And still, given the State-centric logic underlying international law—that States are responsible for safeguarding it within their territory—there must be a doctrinal anchor for imposing I.H.R.L. on non-State armed groups.¹⁹¹ Yuval Shany, a member of the H.R.C. and former chair of the committee, believes that while there is much to be said in favor of imposing on entities exercising State-like powers to abide by analogous legal standards to those applicable to States, this assertion represents *lex ferenda*.¹⁹² At the same time, Shany recognizes that recent moves in I.H.R.L. bodies to condemn human rights abuses by non-State actors such as the Islamic State may suggest that customary law is gradually building up in this area.¹⁹³

A possible doctrinal justification is that private individuals who compose the groups are bound as nationals of the State that has made the commitment.¹⁹⁴ This justification can be appropriate for the imposition of I.H.R.L. obligations on a corporation, which operates subject to the domestic law of the State. However, it is less convincing where non-State armed groups are fighting to liberate themselves from the yoke of an existing State, and maybe, even secede from it. Particularly, it is less suitable to the Islamic State, which undermined the existing States of Iraq and Syria, and demonstrated no desire to adhere to neither their domestic law nor to their international obligations.

In instances that a group attempts to assert itself as a new State, similarly to the attempt of the Islamic State, it can also be claimed that the group is bound by the international obligations of the previous administration.¹⁹⁵ This claim borrows from the field of State succession,¹⁹⁶ and it relies on the understanding that, once

188. H.R.C., *supra* note 172.

189. H.R.C., *supra* note 172, ¶ 72 (“The Commission has taken the approach that since the NTC has been exercising de facto control over territory akin to that of a Governmental authority, it will examine also allegations of human rights violations committed by the its forces.”).

190. S.C. Res. 2067, ¶ 18 (Sept. 18, 2012); S.C. Res. 2071, ¶ 5 (Dec. 20, 2012). For an analysis of this practice, see Aristoteles Constantinides, *Human Rights Obligations and Accountability of Armed Opposition Groups: the Practice of the UN Security Council*, 4 HUM. RTS. & INT’L LEGAL DISCOURSE 89 (2010).

191. On this State-centric logic, see H.R.C., *supra* note 70, ¶ 8; Annysa Bellal & Ezequiel Heffes, ‘Yes, I Do’: *Binding Armed Non-State Actors to IHL and Human Rights Norms through Their Consent*, 12 HUM. RTS. & INT’L LEGAL DISCOURSE 120, 129 (2018).

192. Shany, *supra* note 114, at 324.

193. *Id.*

194. Clapham, *supra* note 143, at 492. In our case, members of the Islamic State come from more than eighty States, which makes such an inquiry complicated but not impossible. See Jackson, *supra* note 22, at 145.

195. This justification originates from the discussion of imposition of IHL on non-State armed groups. See PICTET, *supra* note 162, at 51.

196. Like the successor States to the Soviet Union, the Socialist Federal Republic of Yugoslavia and Czechoslovakia undertook responsibility for the obligations of their predecessor States. For discussion, see Paul Williams & Jennifer Harris, *State Succession to Debts and Assets:*

individuals are accorded the protection of I.H.R.L., such protection devolves with the territory and continues to belong to them even in times of crisis, changes in government or State succession.¹⁹⁷ This reasoning is being tested in the unique cases of Hong Kong and Macao: in the former, sovereignty was transferred from the United Kingdom to China in 1997, and in the latter, sovereignty was transferred from Portugal to China in 1999. In both cases, a joint declaration between China and the ceding State sought to maintain the existing way of life and safeguard I.H.R.L. norms, such as freedom of assembly and movement.¹⁹⁸ Since the transfer of sovereignty in Hong Kong and Macao, the H.R.C. evaluated the I.H.R.L. situation in these two areas through dialogue with the local authorities and not with the official authorities of China, since the latter did not ratify the International Covenant on Civil and Political Rights.¹⁹⁹ Concerning Macao, the H.R.C. even suggested that the International Covenant on Civil and Political Rights takes precedence over local law.²⁰⁰

Recently, however, the situation is changing dramatically in Hong Kong against the backdrop of the imposition of national security legislation by China, which threatens to undermine the existing situation and the protection of I.H.R.L. in the territory.²⁰¹ States like Australia, Canada, the United Kingdom, and the United States, alongside numerous international I.H.R.L. experts, believe that the steps taken by China violate the autonomy and fundamental rights guaranteed to

The Modern Law and Policy, 42 HARV. INT'L L.J. 355, 368-69 (2001).

197. U.N. Hum. Rts. Comm., General Comment on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997); Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Sri Lanka, ¶¶ 25–27, U.N. Doc. E/CN.4/2006/53/Add.5 (Mar. 27, 2006).

198. Regarding Hong Kong, see *UK cannot question HK security law*, CONSULATE-GENERAL OF THE PEOPLE'S REPUBLIC OF CHINA IN LAGOS (July 14, 2020), <http://lagos.china-consulate.org/eng/zlgxw/t1797659.htm> [<https://perma.cc/ES6U-BCBG>]. Concerning Macao, see *Resumption by China of the Exercise of Sovereignty over Macao*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18052.shtml [<https://perma.cc/9GQJ-DLWU>].

199. See U.N. Hum. Rts. Comm., Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013), U.N. Doc. CCPR/C/CHN-HKG/CO/3, (Apr. 29, 2013). For other committees, see, e.g., Comm. on the Rts. of Persons with Disabilities, Concluding observations on the initial report of China, adopted by the Committee at its eighth session (17–28 September 2012), U.N. Doc. CRPD/C/CHN/CO/1 (Oct. 15, 2012); Comm. against Torture, *Concluding observations on the fifth periodic report of China with respect to Hong Kong, China*, U.N. Doc. CAT/C/CHN-HKG/CO/5 (Feb. 3, 2016).

200. See H.R.C., U.N. Doc. CCPR/C/CHN-MAC/CO/1, *supra* note 199, ¶ 5.

201. See JOINT STATEMENT ON HONG KONG, U.S. DEPARTMENT OF STATE (Jan 20, 2021), <https://www.state.gov/joint-statement-on-hong-kong/> [<https://perma.cc/WN4Z-HWBC>]; Press Release, *UN experts call for decisive measures to protect fundamental freedoms in China*, OFF. HIGH COMM'R OF HUM. RTS. (June 26, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26006&LangID=E> [<https://perma.cc/G8UN-7ZFQ>].

the local population of Hong Kong, while China reiterates that it was only obligated to ensure a smooth transfer of sovereignty and not to grant any other State the authority to supervise China and its management of Hong Kong.²⁰² It is of importance to pay attention to how this situation will continue to unfold.

Moving on, one of the most dominant propositions for the imposition of I.H.R.L. on non-State armed groups derives from the Universal Declaration of Human Rights (“U.D.H.R.”) and the understanding that every organ of society is required to respect and promote human rights under it.²⁰³ This approach basically relies on norms of a customary status that originate from the U.D.H.R.²⁰⁴ It was presented, for example, concerning Hezbollah in Lebanon²⁰⁵ and the Liberation Tigers of Tamil Eelam in Sri Lanka,²⁰⁶ as well as, in the report of the Guatemalan Historical Clarification Commission.²⁰⁷ Another optional legal basis to impose I.H.R.L. norms on non-State armed groups is looking into peremptory norms of the system.²⁰⁸ In our context, it was asserted in several reports that non-State armed groups in Syria and Iraq, and particularly the Islamic State, are bound by core I.H.R.L. obligations constituting peremptory international law (*jus cogens*).²⁰⁹

When assessing the existence of obligations of non-State armed groups, Clapham suggested that emphasis should be granted to the capacity of the group to actually govern a territory.²¹⁰ Another aspect of importance is the presentation of an intent to meet I.H.R.L. obligations.²¹¹ It is not clear, though, if these two

202. *UK cannot question HK security law*, CONSULATE-GENERAL OF THE PEOPLE’S REPUBLIC OF CHINA IN LAGOS (July 14, 2020), <http://lagos.china-consulate.org/eng/zlgxw/t1797659.htm> [<https://perma.cc/7A3Q-A7WJ>].

203. G.A. Res. 217 A (III) Universal Declaration of Human Rights (Dec. 10, 1948), <https://www.refworld.org/docid/3ae6b3712c.html> [<https://perma.cc/5758-YD8E>]; Clapham, *supra* note 171, at 24.

204. Similarly, Bugnion argues that the binding nature of IHL on non-State armed groups derives from the customary nature of Common article 3. MICHAEL MEYER, FRANÇOIS BUGNION’S THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE PROTECTION OF WAR VICTIMS 336 (2003); *see also* Sassòli, *supra* note 150, at 20-22.

205. H.R.C., *supra* note 187.

206. H.R.C., *supra* note 197, ¶ 27.

207. G.A. Res. A/53/928 Annex Guatemala Memory of Silence, Executive Summary Conclusions and Recommendations (Apr. 27, 1999). *See also* Jean-Daniel Vigny & Cecilia Thompson, *Fundamental Standards of Humanity: What Future?*, 20 NETH. Q. OF HUM. RTS. 193 (2002).

208. U.N. Hum. Rts. Comm., *supra* note 52, at 11. The H.R.C. identified certain IHRL norms which constitute *jus cogens*, such as arbitrary deprivations of life and torture and inhuman or degrading treatment. *Id.*

209. Human Rights Council, Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶¶ 106–07, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012); H.R.C., *supra* note 166, ¶ 30.

210. Clapham, *supra* note 114, at 11.

211. Illustrations include the commitment declared by the Palestinian Authority to respect

factors are cumulative or interchangeable. As such, it can be claimed that even without the consent to apply I.H.R.L. generally, there can still be the imposition of customary norms and peremptory ones, as these are not deriving from consent. When it comes to the Islamic State, the group had the capacity to govern territory, and it presented itself as the new sovereign center of Muslims around the world.²¹² This desire can be seen in its invitation during the July 2014 month of Ramadan, a month after the declaration of establishing the Caliphate:

O Muslims in all places, rejoice, take heart, and hold your heads high!
For today you have, by God's bounty, a [S]tate and caliphate that will
renew your dignity and strength, that will recover your rights and your
sovereignty.²¹³

The use of the terms like rights, State, and sovereignty might imply some sort of acceptance or recognition of international law. However, at the heart of the Islamic State's philosophy lies deep resentment toward all un-Islamic systems, and it rests on a theological-political basis, while the Westphalian legal order rests fundamentally on human consent without a need for attachment to religion.²¹⁴ Also, the group employed brutal measures resulting in systematic violations of international law,²¹⁵ and it did not take upon itself any obligations as its public statements were contesting international law rather than embracing it.²¹⁶ And still, as the international community evaluates the conduct of non-State actors which possess governmental-like authority according to the U.D.H.R.'s common

IHRL, the indication of Hamas that it is determined to promote respect for human rights and the San Jose Agreement between El Salvador and the *Frente Farabundo Martí para la Liberación Nacional* which notes that the latter has the capacity and the will to assume IHRL commitments. See Human Rights Council, Rep. of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, U.N. Doc. A/HRC/29/CRP.4 (June 24, 2015); G.A. Res. A/44/971-S/21541, Annex (Aug. 16, 1990). Consent is an underlying principle in the State-centered international legal system. For discussion, see MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* 98 (2001). In the context of non-State armed groups, see Clapham, *supra* note 143, at 492.

212. WEISS & HASSAN, *supra* note 17, at 169; *Report of the Secretary-General on the threat posed by ISIL*, *supra* note 4, at 2.

213. See Bunzel, *supra* note 1, at 41.

214. MCCANTS, *supra* note 2, at 121. The resistance to Western systems can also be explained historically, as the political goal of establishing a Caliphate is an ambition which arose since the dissolution of the Ottoman Caliphate in 1924, the rise of Western imperialism and the associated decline of Islam. For elaboration, see Bunzel, *supra* note 1, at 18.

215. See, e.g., Human Rights Council, *Rep. of the U.N. High Commissioner for Human Rights on the human rights situation in Iraq*, *supra* note 32.

216. Delahunty, *supra* note 91, at 36. For elaboration, see Hassan *Liberation, The Sectarianism of the Islamic State: Ideological Roots and Political Context*, CARNEGIE MIDDLE E. CTR. (June 13, 2016), <http://carnegie-mec.org/2016/06/13/sectarianism-of-islamic-state-ideological-roots-and-political-context/j1sf> [<https://perma.cc/97Y9-A63Z>].

standard of achievement,²¹⁷ or based on a general framework of rights and duties,²¹⁸ the Islamic State, which administered territories for three years with a sophisticated structure was also expected to meet such standards.²¹⁹

In sum, non-State entities are bound by rules of international law, based *inter alia*, on their interaction with States.²²⁰ This indicates that international personality is, to a large extent, a relational notion under which States confer a status by interacting with an entity in legally meaningful interactions.²²¹ As noted by Fortin, non-State armed groups enjoy different levels of legal personality depending on their capacities, their relations with third parties, and the circumstances in which they operate.²²² The next sub-chapter will complete the claim by demonstrating that the ability to impose primary obligations on non-State entities inherently also leads to the application of secondary rules necessary for the execution of the former. In particular, the next sub-chapter will show that primary rules can only be fully implemented and executed through secondary rules such as the ones prescribed by A.R.S.I.W.A. and D.A.R.I.O. In addition, the coming sub-chapter will delve into the essence of general principles of international responsibility and, in turn, apply them to the Islamic State.

ii. General Principles of Responsibility and the Islamic State

An entity can possess certain characteristics similar to a State, like being subject to international norms, but at the same time, not enjoy other characteristics of the State.²²³ As was stated by the I.C.J. in the Reparations Advisory Opinion, which dealt with the status of the United Nations as a legal entity (“Reparations Advisory Opinion”), the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.²²⁴ In the view of the Court, while the State possesses the totality of international rights and duties recognized by international law when it comes to other entities, their rights and duties depend upon their purposes and functions (in the case of IGOs—as

217. Human Rights Council, Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Sri Lanka, *supra* note 197, ¶ 27.

218. Clapham, *supra* note 143, at 501, n. 43.

219. *Report of the Secretary-General on the threat posed by ISIL*, *supra* note 4, at 2.

220. Roberts & Sivakumaran, *supra* note 104, at 118; MICHAEL SCHOISWOHL, STATUS AND (HUMAN RIGHTS) OBLIGATIONS OF NON-RECOGNIZED DE FACTO REGIMES IN INTERNATIONAL LAW: THE CASE OF ‘SOMALILAND’ 83 (2004); Prosecutor v. Kallon, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lome’ Accord Amnesty, ¶ 47 (Special Ct. for Sierra Leone Mar. 13, 2004).

221. As suggested by Wheaton, the status of non-State entities grows out of their relations with States. See WHEATON, *supra* note 112, at 20.

222. FORTIN, *supra* note 105, at 157.

223. Reparation Advisory Opinion, *supra* note 14, at 179. As was explained by the I.C.J., not all legal players are the same, although they might have certain similar characteristics.

224. *Id.* at 178.

specified or implied in its constituent documents and as developed in practice).²²⁵

Of course, IGOs are very distinct from non-State armed groups since their establishment is based on delegation of authority, willingly by States.²²⁶ For example, with the establishment of the United Nations, States delegated authority to the Security Council in the field of security and the primary responsibility of maintenance of international peace and security.²²⁷ The Islamic State, in contrast, operated separately from any sovereign State and desired independent authority and capacity—not one which is delegated from any State. The hostility of the Islamic State towards international law and the system underlying it is naturally also of relevance.

The I.C.J., in the Reparations Advisory Opinion, stated that the development of international law has historically been influenced by the requirements of international life, and as such, practice has already given rise to instances of action upon the international plane by certain entities, which are not States.²²⁸ Relating to I.H.R.L., it was suggested it must keep pace with a changing world in which atrocities are increasingly committed by non-State actors.²²⁹ Policy-wise, holding non-State armed groups like the Islamic State accountable sends a message about basic values that every member of the community must respect.²³⁰ Consequently, it was suggested by *Rodenhäuser* that if international law aims to protect its values, it must reach beyond the State, especially in situations where non-State armed groups act outside the control of States and international law does not apply effectively (as occurred with the Islamic State).²³¹

The previous sub-chapter demonstrated that the Islamic State was a legal player, in the sense that it could bear international rights and duties, as was demonstrated in the context of I.H.L. and I.H.R.L. Now, this sub-chapter will explain how these rights and duties are translated into international responsibility. To do so, it presents some key general principles of responsibility and explains their application to the Islamic State. Also, it shows more generally that primary norms can only be fully implemented through secondary rules.

International law includes general principles of responsibility that are of relevance to most legal players, while at times, there are special rules required by the particular nature of the legal player.²³² For example, D.A.R.I.O. was inspired to a very large degree by A.R.S.I.W.A., but at the same time, it grants weight to

225. *Id.* at 180.

226. For discussion, see Nilsson, *supra* note 111, at 171; Koremenos, *supra* note 111, at 151; Swaine, *supra* note 111, at 1492.

227. U.N. Charter, arts. 24-25, 41-42. For discussion, see Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 3 (1999).

228. Reparation Advisory Opinion, *supra* note 14, at 178.

229. Human Rights Council, Rep. of the Special Rapporteur, *supra* note 14, ¶ 12.

230. For a similar view, see Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 154 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

231. Tilman Rodenhäuser, *Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example*, 3 J. INT'L LEGAL STUD. 263 (2013).

232. Pellet, *supra* note 10, at 7.

the specific character of the organization, its functions, and its powers.²³³ The I.L.C. suggested that when there is a case not envisioned by D.A.R.I.O.—e.g., that questions of responsibility which arise in the context of an IGO administering territory—one would have to apply to that organization by analogy, the pertinent rule that is applicable to States.²³⁴ As was noted by Alvarez, analogy fills normative gaps by identifying similarities and deciding their relevance.²³⁵

The codification of A.R.S.I.W.A. and D.A.R.I.O. by the I.L.C. involved both analogy and induction—that is, generalizing rules based on the observance of specific cases.²³⁶ The techniques of analogy and induction also served in the past in the formation of treaties, customary international law, and general principles of law.²³⁷ Relating to I.H.L., for example, the development of customary rules on non-international armed conflicts was inspired by the rules applicable to international armed conflicts.²³⁸ In the context of responsibility, the I.L.C. frequently used the same sources of international law for both A.R.S.I.W.A. and D.A.R.I.O., alongside the practice of international organizations concerning the latter.²³⁹ Hence, the rules of A.R.S.I.W.A. and D.A.R.I.O., and the sources which substantiate them, can serve as a basis for analogy and induction towards non-State armed groups, alongside practice relating to such groups (e.g., special agreements with them, or their codes of conduct).²⁴⁰

When examining the appropriateness of a principle under analogy and induction, a useful criterion is to examine the object and purpose of the rule in

233. Responsibility of International Organizations, *supra* note 137, at 47.

234. *Id.* at 53.

235. ALVAREZ, *supra* note 11, at 13. See also Silja Vöneky, *Analogy in International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 5 (2008).

236. Kent Sinclair, *Legal Reasoning: In Search of an Adequate Theory of Argument*, 59 CAL. L. REV. 3 (1971); Roberto Ago (Special Rapporteur: The Internationally Wrongful Act of the State—Source of International Responsibility), *Third Rep. on State Responsibility*, U.N. Doc. A/CN.4/246 and Add. 1–3, at 202, ¶ 13 (Mar. 5, Apr 7, Apr. 28 & May 18, 1971).

237. Georg Schwarzenberger, *The Inductive Approach to International Law*, 60 HARV. L. REV. 4 (1947). For a critical view, see William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 GEO. J. INT'L L. 445, 453 (2014).

238. Sandesh Sivakumaran, *Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief*, 28 EUR. J. INT'L L. 1097, 1118 (2017).

239. See, e.g., *Responsibility of International Organizations*, *supra* note 137, at 61 (discussing the notion of control relating to Article 8 of DARIO).

240. ALVAREZ, *supra* note 11, at 78. See also SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS* 107 (2012). In the view of the ILC, conduct of non-State armed group may have an important indirect role in the identification of customary international law, by stimulating or recording practice and acceptance as law (*opinio juris*) by States. This is a State-centric view, as it focusses on the reaction of States. See Michael Wood, *Fifth Report on Identification of Customary International Law*, ¶ 40, U.N. Doc. A/CN.4/717 (Mar. 14, 2018).

conjunction with the general rule of interpretation in international treaty law.²⁴¹ The analysis of the object and purpose of the law serves as a tool against which similarities and differences can be evaluated to suggest if a comparison is reasonable in legal terms.²⁴² International responsibility intends to promote coherence and predictability by defining which acts are performed on behalf of a legal entity and should be attributed to it and which acts should not.²⁴³ As suggested by *Alvarez*, applying general rules of responsibility to additional entities, and particularly non-State armed groups, would promote the same coherence and predictability.²⁴⁴ In her view, the general principle of responsibility can be applied to non-State armed groups since they are collective entities within an organizational structure.²⁴⁵ When non-State armed groups are in control of territory and administer a population, as the Islamic State did for three years, they become a political entity with significant State-like features (referred to as quasi-States or de-facto regimes).²⁴⁶ The more organized the non-State armed group is, the stronger the logic in attributing to it general principles of responsibility.²⁴⁷ The Islamic State served as a prime example for such a case, given its sophisticated bureaucratic structure and control of the territory between the years 2014 and 2017.²⁴⁸

Against this backdrop, this chapter will explain why the Islamic State, as a legal entity, had legal responsibility for its actions while administering territories in Syria and Iraq from 2014 to 2017. In order to do so, it will highlight some general principles of responsibility—presented in D.A.R.I.O. and A.R.S.I.W.A.—that can be extracted and generalized to additional players in the international arena. As will be shown, there are several principles of responsibility that are of a general nature and can be of use in this context. The chapter will also explain, on a more general level, why primary norms can only be fully implemented through secondary rules.

The first general principle of responsibility of relevance can be found in Article 3 of D.A.R.I.O., which states that “every internationally wrongful act of an IGO entails its international responsibility.”²⁴⁹ This Article reflects a general rule of international law, according to which responsibility is the necessary

241. Vöney, *supra* note 235, ¶ 17. For the general rule of interpretation, see Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331, art. 31.

242. ALVAREZ, *supra* note 11, at 83.

243. UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS 27 (2012); IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I, 132 (1983).

244. ALVAREZ, *supra* note 11, at 90.

245. *Id.* at 83. In the context of IHL, see also INT’L COMM. OF THE RED CROSS, *supra* note 109, ¶ 429.

246. Shany, *supra* note 3, at 334; Van Essen, *supra* note 3.

247. ALVAREZ, *supra* note 11, at 84.

248. Rep. of the Secretary-General on the threat posed by ISIL, *supra* note 4, at 2. For an elaborated account, see generally WARRICK, *supra* note 2.

249. *Responsibility of International Organizations*, *supra* note 137, at 40.

corollary of a right.²⁵⁰ The same principle is also enumerated in Article 1 of A.R.S.I.W.A.²⁵¹ and is considered part of customary international law.²⁵² The I.L.C. explained that this general principle applies to whichever entity participates in the international arena and can bear international rights and duties.²⁵³ As noted, the Islamic State employed brutal methods, such as mass executions,²⁵⁴ torture,²⁵⁵ and gender-based violence.²⁵⁶ These methods resulted in systematic infringements of international law.²⁵⁷ To see if there is international responsibility for the group for these acts, there is a need to analyze if such acts constitute an internationally wrongful act entailing international responsibility.²⁵⁸

Article 4 of D.A.R.I.O. enumerates the two elements which need to be met for a wrongful act: (1) The act is in breach of an international obligation of the IGO, and; (2) that the act can be attributed to it.²⁵⁹ The exact same rule regarding States appears in article 2 of A.R.S.I.W.A.²⁶⁰ More generally, the view of the I.L.C. is that this is indeed another general principle that applies to every internationally wrongful act regardless of its author.²⁶¹ As discussed in the previous sub-chapter, the Islamic State was obligated to meet international law demands, both under I.H.L. and I.H.R.L.; additionally, the Islamic State committed systematic abuses of these two regimes of international law.²⁶² This fulfills one element required for an internationally wrongful act, that an act constitutes a breach of an international obligation. We will turn now to show that the second element, which requires the act can be attributed to the group, is also fulfilled in our case.

250. Spanish zone of morocco case (Spain v. UK), R.I.A.A., vol. II (Sales No. 1949.V.1), ¶ 641 (1925) (concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986, between the two States and related to the problems arising from the Rainbow Warrior affair). R.I.A.A., vol. XX (Sales No. E/F.93.V.3), ¶ 215 (1990). In the context of IGO's, see also *Difference Relating to Immunity Advisory Opinion*, *supra* note 12.

251. G.A. Res. 56/83, *supra* note 59, art. 1.

252. HIRSCH, *supra* note 140, at 9. For a more recent reiteration of this view, see Möldner, *supra* note 140, at 286.

253. Responsibility of International Organizations, *supra* note 137, at 52.

254. In the context of an armed conflict, unlawful killings constitute a grave breach of IHL. See Protocol Additional to the Geneva Conventions of 12 August 1949, *supra* note 147, at art. 48. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 257 (July 8).

255. *Concluding observations on the initial report of Iraq*, *supra* note 30, ¶ 11.

256. See generally Report of the U.N. High Commissioner for Human Rights on the human rights situation in Iraq, *supra* note 32.

257. *Id.* at 4; Rep. on the Syrian Arab Republic, *supra* note 19, ¶¶ 37-39.

258. *Responsibility of International Organizations*, *supra* note 137, at 46.

259. *Id.* at 53.

260. G.A. Res. 56/83, *supra* note 59, art. 2.

261. *Responsibility of International Organizations*, *supra* note 137, at 53.

262. *Rep. of the Secretary-General on the threat posed by ISIL*, *supra* note 4, at 3.

There are several avenues of attribution for actions done on behalf of an entity. Concerning States, Article 4 of A.R.S.I.W.A. sets the rule that “the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions.”²⁶³ Similarly, Article 6 of D.A.R.I.O. states that the conduct of an organ or agent of an IGO shall be considered an act of that organization under international law.²⁶⁴ The I.C.J. interpreted the term agent very broadly, in the sense that it includes any person, be that a paid official or not, and even if the employment is temporary, so long as he is charged with carrying out one of the functions of the IGO.²⁶⁵ In simple terms, any person through whom the IGO acts.²⁶⁶ This term is interpreted so broadly by the I.L.C. that it also includes: (1) persons or groups of persons that act under the instructions or the direction or control of an IGO, (2) a person or entity entrusted with functions of the organization, and (3) a person that acts according to the overall functions of the IGO, even if the conduct exceeds the authority of that person (*ultra-vires*) or contravenes instructions.²⁶⁷ In short, acts of organs or agents of both States and IGO’s lead to attribution based on a general principle of responsibility, which can be applied to non-State armed groups after consideration of relevant differences between them, States, and IGO’s.²⁶⁸

A relevant criterion in making this differentiation is the form of organization and structure of each of these entities, given the disparity between the formation of various non-State armed groups and given the influence of their structure on their strategy and performance.²⁶⁹ As such, the invocation of this general principle of responsibility to non-State armed groups depends on their level of organization and their structure. The more hierarchical and sophisticated the structure of an entity is—the more it will be apt to apply this general rule of responsibility to it.

The next step is to apply this general principle of responsibility to the Islamic

263. *Responsibility of States*, *supra* note 53, at 40.

264. *Responsibility of International Organizations*, *supra* note 137, at 55.

265. Reparation Advisory Opinion, *supra* note 14, at 177.

266. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. Rep. 177, 194 (Dec. 15).

267. Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. Rep. 151, 168; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. Rep. 62, 88–89 (Apr. 29); *Responsibility of International Organizations*, *supra* note 137, at 56–60.

268. ALVAREZ, *supra* note 11, at 121.

269. For discussion on the influence of the structure of armed groups on their performance, see Abdulkader H. Sinno, *Armed Groups’ Organizational Structure and their Strategic Options*, 93 INT’L REV. RED CROSS 311, 312 (2011). See also TILMAN RODENHÄUSER, ORGANIZING REBELLION: NON-STATE ARMED GROUPS UNDER INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS LAW, AND INTERNATIONAL CRIMINAL LAW 74 (2018); ROOS HAER, ARMED GROUP STRUCTURE AND VIOLENCE IN CIVIL WARS: THE ORGANIZATIONAL DYNAMICS OF CIVILIAN KILLING 48 (2015).

State. As noted, the Islamic State operated based on a sophisticated structure.²⁷⁰ It governed territories as if it was the sovereign²⁷¹ and provided basic services such as sanitation, price regulation, maintenance of roads, public gardens and infrastructure, and more.²⁷² Its management of the local affairs was done according to a strict penal and administrative system operated by various agents—under the broad definition given to the term by the I.C.J. and the I.L.C.²⁷³—including members of the *Al-Hisbah* morality police, members of the general police force or officers in the courts operated by the group, and other agents dealing with additional aspects of life.²⁷⁴ The Islamic State realized its policy and governed between 2014 and 2017 through agents and, as such, their actions in Iraq and Syria are attributed to the group. Pursuantly, the second element of what constitutes a wrongful act is also met. It should be noted that there are additional non-State armed groups that operate through persons who can be considered as agents—such as the Taliban, the FARC (*Fuerzas Armadas Revolucionarias Colombianas*) in Colombia, the M.L.C. (*Mouvement de Libération du Congo*) in Congo, and more.²⁷⁵ Pursuantly, *Heffes and Frenkel*,²⁷⁶ *Bilková*,²⁷⁷ *Mastorodimos*,²⁷⁸ *Kleffner*,²⁷⁹ and also *Alvarez*²⁸⁰ support the ability to

270. Rep. of the Secretary-General on the threat posed by ISIL, *supra* note 4, at 2.

271. See Raufer, *supra* note 1, at 46; Waltman, *supra* note 2, at 826-27.

272. WEISS & HASSAN, *supra* note 17, at 169, 211.

273. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 177 (Apr. 11); Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. Rep. 151, 168 (July 20); Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. Rep. 62, 88–89 (Apr. 29); *Responsibility of International Organizations*, *supra* note 137, at 56-60.

274. Rep. on the Syrian Arab Republic, *supra* note 19, ¶ 36.

275. Other examples include the LTTE (Liberation Tigers of Tamil Eelam) in Sri Lanka, the NRA (National Resistance Army) in Uganda, the UPC (Union de Patriotes Congolais) in Congo and Hezbollah in Lebanon. For discussion, see ALVAREZ, *supra* note 11, at 125. See also RODENHÄUSER, *supra* note 269, at 74. At times, agents enjoy more discretion in a decentralized structure. See JEREMY M. WEINSTEIN, *INSIDE REBELLION: THE POLITICS OF INSURGENT VIOLENCE* 138 (2007); Hum. Rts. Comm., Rep. of the U. N. High Comm'r for Hum. Rits. on the Hum. Rts. Situation in Colombia, ¶ 89, U.N. Doc. E/CN.4/2001/15, (Feb. 8, 2001) [hereinafter Rep. on the Hum. Rts. Situation in Colombia]; U.N. Secretary-General, *Rep. of the Secretary-General on Children and Armed Conflict in the Sudan*, ¶ 13, U.N. Doc. S/2006/662 (Aug. 17, 2006).

276. Ezequiel Heffes & Brian E. Frenkel, *The International Responsibility of Non-state Armed Groups: In Search of the Applicable Rules*, 8 GOETTINGEN J. INT'L L. 39, 65 (2017).

277. Veronika Bilková, *Direct Responsibility of Armed Opposition Groups*, in RESPONSIBILITIES OF THE NON-STATE ACTOR IN ARMED CONFLICT AND THE MARKET PLACE: THEORETICAL CONSIDERATIONS AND EMPIRICAL FINDINGS 279 (Noemi Gal-Or, Cedric Ryngaert & Math Noortmann eds., 2015).

278. MASTORODIMOS, *supra* note 166, at 124.

279. Jann K. Kleffner, *The Collective Accountability of Organised Armed Groups for System Crimes*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 262 (André Nollkaemper & Harmen Van

attribute responsibility to well-organized non-State armed groups for actions committed by their members.

Returning to the Islamic State, there is a second avenue of attribution based on a general principle of responsibility that can apply to the Islamic State. In the event that a wrongful act is not conducted by a person considered an organ or agent of an IGO, it can nevertheless be considered an act of the IGO based on Article 9 of D.A.R.I.O. “if and to the extent that the organization acknowledges and adopts the conduct in question as its own.”²⁸¹ This rule mirrors Article 11 of A.R.S.I.W.A., which is identically worded save for the reference to a State instead of an international organization.²⁸² The customary rule stated in Article 11 of A.R.S.I.W.A. serves as general legal guidance, which can also be applied to IGOs, as noted in Article 9 of D.A.R.I.O., and to other entities like armed groups.²⁸³ Verhoeven, for example, suggested that there is no impediment to introducing this attribution rule for insurrectional movements that consider the conduct of sympathizers as its own.²⁸⁴ U.N. bodies and international judicial bodies have also considered acknowledgment and adoption as a way to link certain actions with a particular armed group.²⁸⁵ The ability to attribute to a legal entity an act which it acknowledges and adopts as its own is another general principle of responsibility that can be applied to non-State armed groups, and particularly to the Islamic State.²⁸⁶

As explained, the actions of members of the Islamic State in Iraq and Syria are attributed to the group since they were operating as its agents. Notwithstanding, at times, people who did not form part of the group operated on its behalf. This occurred mostly in instances of terror attacks committed outside of Syria and Iraq. One of the most memorable chain of attacks committed by the group took place on November 13, 2015, when operatives simultaneously attacked six locations in Paris, France, taking the lives of 126 persons.²⁸⁷ This

der Wilt eds., 2015).

280. ALVAREZ, *supra* note 11, at 135.

281. *Responsibility of International Organizations*, *supra* note 137, at 62.

282. G.A. Res. 56/83, *supra* note 59, art. 11.

283. Prosecutor v. Nikolić, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, Judicial Supplement, ¶ 26 (Int’l Crim. Trib. for the Former Yugoslavia June 5, 2003).

284. Sten I. Verhoeven, *International Responsibility of Armed Opposition Groups: Lessons from State Responsibility for Actions of Non-State Armed Groups*, in RESPONSIBILITIES OF THE NON-STATE ACTOR IN ARMED CONFLICT AND THE MARKET PLACE: THEORETICAL CONSIDERATIONS AND EMPIRICAL FINDINGS 301 (Noemi Gal-Or, Cedric Ryngaert, & Math Noortmann eds., 2015). For examples of groups that adopted and acknowledged crimes as their own, see . Rep. on the Hum. Rts. Situation in Colombia, *supra* note 275, ¶ 129; Human Rights Council, Rep. of the U. N. Fact-Finding Mission on the Gaza Conflict, ¶1629, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

285. *Responsibility of International Organizations*, *supra* note 137, at 62.

286. ALVAREZ, *supra* note 11, at 149.

287. The Islamic State justified the attack as a response to French participation in the coalition operating against the group. For discussion, see Marko Milanovic, *France Derogates from ECHR*

deadly attack drew momentous attention, yet it was far from being the only major attack outside Iraq and Syria. Between 2015-2019, more than two thousand people lost their lives in Islamic State-related attacks *outside* Iraq and Syria, for example, during the notable shooting in Sousse, Tunisia (38 people deceased), and the bombing of a Russian airplane in Sinai, Egypt (224 people deceased).²⁸⁸ The group adopted and acknowledged these terror attacks committed in its name in a clear and unequivocal fashion, as required under Article 9 of D.A.R.I.O. and Article 11 of A.R.S.I.W.A.; therefore, these acts are attributed to the group based on this general principle of responsibility.²⁸⁹

Moving beyond attribution, but still, in the realm of international responsibility, there are additional general principles of responsibility that can be learned from A.R.S.I.W.A. and D.A.R.I.O. of relevance to the case at hand. First, Article 30 of D.A.R.I.O., just like Article 30 of A.R.S.I.W.A., states that a State or an IGO that committed an internationally wrongful act must “cease that act, if it is continuing,” and “offer appropriate assurances and guarantees of non-repetition when circumstances so require.”²⁹⁰ In fact, non-State armed groups have taken upon themselves unilateral commitments to avoid the commission of future violations of international law, for example, in the recent Darfur and Uganda peace accords and in relation to anti-personnel mines and the use of children in armed conflicts.²⁹¹

Interestingly, the commentary of the I.L.C. to D.A.R.I.O. clarifies that the requirement to cease the wrongful act emanates from the *primary rule* providing for the obligation.²⁹² This illustrates a general point crucial to the claim raised in this Article: if there can be an imposition of international law norms towards non-State armed groups in control of territory, such as the Islamic State, then the

in the Wake of the Paris Attacks, EJIL: TALK! (Dec. 13, 2015), <http://www.ejiltalk.org/france-derogates-from-echr-in-the-wake-of-the-paris-attacks/> [<https://perma.cc/63ZU-D6H5>]; Marc Weller, *Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups*, EJIL: TALK! (Nov. 25, 2015), <http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/> [<https://perma.cc/C5ZM-85QX>].

288. For elaboration, see Karen Yourish, Derek Watkins, Tom Giratikanon & Jasmine C. Lee, *How Many People Have Been Killed in ISIS Attacks Around the World*, N.Y. TIMES, (July 16, 2016), <https://www.nytimes.com/interactive/2016/03/25/world/map-isis-attacks-around-the-world-DE.html> [<https://perma.cc/WP34-RMWG>]; Tim Listeret et al., *ISIS goes global: 143 attacks in 29 countries have killed 2,043*, CNN (Feb. 12, 2018), <https://edition.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/index.html> [<https://perma.cc/SQ6F-3AHG>].

289. Stipulated in article 9 of DARIO and article 11 of ARSIWA, see *Responsibility of International Organizations*, *supra* note 137, at 62; G.A. Res. 56/83, *supra* note 59, art. 11.

290. G.A. Res. 56/83, *supra* note 59, art. 30; *Responsibility of International Organizations*, *supra* note 137, at 76.

291. ALVAREZ, *supra* note 11, at 200-01.

292. *Responsibility of International Organizations*, *supra* note 137, at 76. In the context of States, see also LaGrand Case (Ger. v. U.S.), Judgment, Advisory Opinion, 2011 I.C.J. Rep. 466, 485 (June 27).

application of primary rules to their actions inherently leads to the application of secondary rules necessary for their execution. The rationale to this view was suggested by *Pellet*, according to which responsibility is both an indicator and the consequence of international legal personality: only a subject of international law may be responsible; hence, the fact an entity can incur responsibility is both a manifestation and a proof of its status.²⁹³

On the theoretical level, while primary rules are supreme in the sense that they dictate the nature and extent of a legal obligation, they can only be fully implemented through secondary rules such as the ones regulating international responsibility. In the words of *Koskenniemi*, however fundamental a norm is, it can only be realized fully “through the procedure that enables us to recognize it as such.”²⁹⁴ For example, many primary norms from the field of I.H.L. and I.H.R.L. are growingly realized given the rise of *second-order* norms such as the duty to investigate violations of norms from these regimes (discussed in the next sub-chapter).²⁹⁵ At times, even if a norm is higher in the hierarchy, like a primary norm, it might loop into the lower norm, such as a secondary norm of a procedural character, in the sense that the final say of the law will be decided by the procedural norm.²⁹⁶

Returning to the Islamic State, the last principle of use deals with the final phase of any discussion about international responsibility: the matter of reparation. Article 31 to both D.A.R.I.O. and A.R.S.I.W.A. set the general rule that requires full reparation for a wrongful act, and Article 34 to both instruments enumerates the forms of such reparation—restitution, compensation, and satisfaction, either singly or in combination.²⁹⁷ These two articles reiterate a general principle of international law, and even a general conception of law, according to which any breach of an engagement involves an obligation to make reparation.²⁹⁸ This obligation was applied to non-State armed groups by a U.N. Commission of Inquiry in Darfur and a U.N. Panel of Experts on Accountability in Sri Lanka, and in other instances to be discussed below.²⁹⁹ More generally,

293. Pellet, *supra* note 10, at 4-5.

294. Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT’L L. 566, 578 (1997).

295. Andrew Clapham, *The Limits of Human Rights in Times of Armed Conflict and Other Situations of Armed Violence*, in *THE LIMITS OF HUMAN RIGHTS* 305 (Bardo Fassbender & Knut Traisbach eds., 2020).

296. See GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 3 (1993).

297. G.A. Res. 56/83, *supra* note 59, art. 31, 34; *Responsibility of International Organizations*, *supra* note 137, at 77, 79.

298. The Factory at Chorzow, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 4, 29 (Sept. 13). Concerning non-State armed groups, see Ron Dudai, *Closing the Gap: Symbolic Reparations and Armed Groups*, 93 INT’L REV. RED CROSS 883, 783 (2011). For early discussion of this principle, see DIONISIO ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE: VOL. I: INTRODUZIONE TEORIE GENERALI 228 (1928).

299. Rep. of the Int’l Comm. of Inquiry on Darfur, transmitted on 18 September 2004 to the U. N. Secretary-General, Established Pursuant to Resolution 1564, ¶ 175 (Jan. 25, 2005) (“These

U.N. reports, peace agreements, and commitments taken by non-State armed groups during recent years indicate a growing trend in support of the obligation of non-State armed groups to provide reparations and particularly through compensation.³⁰⁰ The move to recognize a duty of reparation from non-State actors, both armed groups and individuals,³⁰¹ is a move away from the Westphalian State-centred legal order.

Out of the three forms of reparation, compensation is the most relevant one for the Islamic State. This is since restitution, namely the re-establishment as far as possible of the situation which existed before the internationally wrongful act, is impossible in relation to the horrific atrocities committed by the group—either towards individuals or towards property.³⁰² As stated both in D.A.R.I.O. and in A.R.S.I.W.A., when restitution is not feasible or does not make good the damage caused by an internationally wrongful act, the injuring entity should compensate for its actions.³⁰³ While satisfaction should be used when compensation is not feasible,³⁰⁴ experience shows that compensation is feasible for both States and

violations may also involve the international responsibility of the State or of the international non-State entity to which those authors belong as officials (or for which they acted as de facto organs), with the consequence that the State or the non-State-entity may have to pay compensation to the victims of those violations.”); Rep. of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, ¶ 191 (Mar. 31, 2011) [hereinafter Rep. on Accountability in Sri Lanka] (“Organizational responsibility is a concept that recognizes that international humanitarian law also places duties on non-State armed groups, including in this case the LTTE.”). For discussion, see ALVAREZ, *supra* note 11, at 43-44.

300. Alvarez, *supra* note 11, at 158. See also Heffes & Frenkel, *supra* note 276, at 65; Hector Olasolo & Joel M. F. Ramírez Mendoza, *The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition*, 15 J. INT’L CRIM. JUST. 1011, 1042 (2017); S.C. Res. 1071, ¶ 8 (Aug. 30, 1996); Int’l L. Ass’n Comm. on Reparation for Victims of Armed Conflict, Res. 2/2010 on International Law Principles on Reparation for Victims of Armed Conflict, ¶ 2 (Aug. 15, 2010); Rep. on Accountability in Sri Lanka, *supra* note 299, at 114, ¶ 419; Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed non State Actors: the Protection of the Right to Life, ¶ 21, U.N. Doc. A/HRC/38/44 (June 5, 2018).

301. Reparations can be demanded from an individual before the ICC, or through the Alien Tort Statute. See Rome Statute, *supra* note 35, art. 75(2); M. Cherif Bassiouni, *International Recognition of Victim’s Rights*, 6 HUM. RTS. L. REV. 203, 243 (2006); Alien Tort Statute, 28 U.S.C. § 1350 (1948); Valasquez Rodriguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988).

302. For discussion on restitution, see Religious Property Expropriated by Portugal, 1 R.I.A.A. 7 (1920); Legal Status of Eastern Greenland, Judgment, 1933 P.C.I.J. (ser. A/B), No. 53, at 22, 75 (April 5). In relation to non-State entities, see Government of Kuwait v. American Independent Oil Company (Aminoil) 66 I.L.R. 519, 533 (1982); BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic, 66 I.L.R. 297, 354 (1974).

303. G.A. Res. 56/83, *supra* note 59, art. 36; *Responsibility of International Organizations*, *supra* note 137, at 79.

304. There have been some examples of satisfaction on the part of IGOs, generally in the form of an apology or an expression of regret. See U.N. Secretary-General, *Report of the Secretary-*

non-State entities, including IGOs, corporations, and non-State armed groups.³⁰⁵ A very common form of execution against non-State entities is, as noted above, confiscation of their property.³⁰⁶

A particular manifestation of the duty to compensate can be found in Article 91 of the 1977 First Additional Protocol to the Geneva Conventions, which states that a party to the conflict in which persons forming part of its armed forces violated the protocol shall be liable to pay compensation.³⁰⁷ Article 91 reflects customary law and corresponds with general principles of responsibility, and applies to all parties to a conflict, including members of their armed forces.³⁰⁸ It also applies to non-State armed groups which participate in wars of national liberation.³⁰⁹

On the practical level, there is a problem to recuperate compensation from the Islamic State. Generally speaking, there is no institutionalized mechanism to impose reparations on non-State armed groups.³¹⁰ More concretely, numerous members of the Islamic State are in custody, in various States around the world, while others and particularly the leadership of the group, are in clandestine.³¹¹ As for the property the group owned, some was seized or got lost, and the rest were

General Pursuant to General Assembly Resolution 53/35: the Fall of Srebrenica, ¶ 503, U.N. Doc. A/54/549 (Nov. 15, 2009); *Responsibility of International Organizations*, *supra* note 137, at 80.

305. Regarding compensation, see *Responsibility of States*, *supra* note 53, at 99 (“Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice”); *Responsibility of International Organizations*, *supra* note 137, at 79 (“Compensation is the form of reparation most frequently made by international organizations”); *Hung. v. Slov.*, 1997 I.C.J. Rep. 7, 81 (Sept. 25). In the context of financing terrorism, see John F. Murphy, *Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects*, 28 REV. LITIG. 315, 320 (2008). In the context of IHL, see Sassòli, *supra* note 150, at 6.

306. For example, confiscation of a vessel see *The Slavers*, 69 U.S. 2 Wall. 350, 355–56 (1864); see also *Woodbury v. United States*, 1860 WL 4872 (Ct. Cl. Feb. 11, 1860); *Austin v. U. S.*, 509 U.S. 602, 615–16 (1993). For discussion, see Martinez, *supra* note 133; Jordan J. Paust, *Sanctions Against Non-State Actors for Violations of International Law*, 8 ILSA J. INT’L & COMP. L. 417(2002).

307. Protocol Relating to the Protection of Victims of International Armed Conflicts, *supra* note 147. For discussion of earlier versions of this rule, see Frits Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces*, 40(4) INT’L & COMP. L. Q. 827, 830 (1991).

308. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1053-1058 (Jean Pictet et al. eds., 1987); Naomi Roht-Arriaza, *Reparations in International Law and Practice*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* 655–98 (M. Cherif Bassiouni ed., 2010).

309. For discussion on conflicts with non-State armed groups that fall under the ambit of this protocol, and more generally IHL, see generally Fleck, *supra* note 147.

310. Dudai, *supra* note 298, at 786.

311. *Cf.* Coker, Schmitt & Callimachi, *supra* note 25; see also Wu, Watkins & Callimachi, *supra* note 8.

hidden like the remaining members of the group.³¹² Finally, there is no legal route that will grant civil jurisdiction over the group, such as the one prescribed in the past by the U.S. Alien Tort Statute before the limitation set by the presumption against extraterritoriality set by the U.S. courts.³¹³ These complications highlight more generally the systemic challenges of gaining jurisdiction over non-State actors and avoiding impunity.³¹⁴

The final part of this Article will discuss possibilities of criminal enforcement against members of the Islamic State since an analysis of responsibility does not absolve from the examination of a possible individual criminal responsibility.³¹⁵ Prior to that, this chapter will conclude by examining if Iraq and Syria can also be held accountable for the atrocious acts committed by the Islamic State.

C. D.D. of Iraq and/or Syria

I.H.R.L., as a system of law, evolved to protect the rights of individuals against States.³¹⁶ As such, States are responsible for ensuring with D.D. that I.H.R.L. is safeguarded within their territory—both by State organs and by private players.³¹⁷ This obligation entails taking possible measures to protect persons, properly investigate such actions, and punishing the perpetrators.³¹⁸ A failure to meet this standard gives rise to a violation even if the harm was done in practice by private persons or entities;³¹⁹ furthermore, this case deals with abuses of international law conducted by the Islamic State in the territories of Iraq and Syria.

D.D. sets a standard of conduct that depends on State capacity and its ability to operate in practice.³²⁰ This standard is also relevant to the relations of States

312. The Islamic State gained wealth by virtue of oil smuggling, theft, sale of antiquities and significant taxation of many fields of life. See BEN SMITH, *ISIS AND THE SECTARIAN CONFLICT IN THE MIDDLE EAST* 16 (2015).

313. Alien Tort Statute, 28 U.S.C. § 1350 (1948); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1669-1670 (2013); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018); *Ku*, *supra* note 134, at 837.

314. Jean d'Aspremont et al., *Sharing Responsibility between Non-State Actors and States in International Law: Introduction*, 62 NETH. INT'L L. REV. 49, 59 (2015). See also Human rights defenders: Note by the Secretary-General, *supra* note 166, ¶ 42.

315. *Responsibility of States*, *supra* note 53, at 142; see *The Prosecutor v. Jelusic*, Case No. IT-95-10, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, ¶ 176 (Feb. 26).

316. Johnson, *supra* note 72, at 494.

317. General Comment No. 31, *supra* note 70, ¶ 8.

318. Coco & Maillart, *supra* note 67, at 408.

319. General Comment No. 31, *supra* note 70, ¶ 8.

320. Tsagourias, *supra* note 61, at 817. For early discussion of this principle, see *The Alabama Claims of the United States of America against Great Britain (U.S. v. U.K.)*, 29 R.I.A.A. 125, 131 (1871).

and IGOs, in the sense that some claim that States are obligated to supervise vigilantly international organizations they are members of (based on the experience of the collapse of the International Tin Council).³²¹ However, since this Article deals with the actions of the Islamic State inside the territory of Iraq and Syria, the focus will be on D.D. relating to actions inside the territory of States.

As stated by the I.C.J., D.D. is an obligation of conduct, not one of result, in the sense that it demands from the State to employ all means reasonably available to it.³²² Similarly, it was stated by the H.R.C. that a failure to ensure I.H.R.L. would give rise to violations by State parties if they failed to exercise D.D. to prevent, punish, investigate or redress the harm caused by private persons or entities.³²³ Similarly, the Inter-American Court of Human Rights stated in the *Valasquez Rodriguez* case that responsibility could exist because of the lack of D.D. to prevent a violation or to respond to it.³²⁴ This rule reflects a classic State-centric view that the State is primarily responsible for protecting its citizens from human rights abuses committed by non-State entities.³²⁵ The E.C.H.R. noted in the *Ilaşcu* case that even where a State loses effective control over its territory, as occurred in the territories in Iraq and Syria, its obligation to protect continues, and it must endeavor to guarantee the enjoyment of I.H.R.L. norms towards people in their territory.³²⁶ The duty to investigate is also a second-order rule required in the application and enforcement of I.H.L. and from I.H.R.L.,³²⁷ demanding from States to investigate possible violations by an independent body, impartially, without delay, and transparently.³²⁸ Clapham notes there is growing importance on *second-order* norms, which are extracted from the *primary* rule of

321. See Romana Sadurska & Christine M. Chinkin, *The Collapse of the International Tin Council: A Case of State Responsibility?*, 30 VA. J. INT'L L. 845 (1989-1990); For further discussion, see Ian A. Mallory, *Conduct Unbecoming: The Collapse of the International Tin Agreement*, 3 AM. U. INT'L L. REV. 835 (1990).

322. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26).

323. General Comment No. 31, *supra* note 70, ¶ 8

324. *Valasquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988).

325. RODLEY, *supra* note 141, at 305; see also Hessbruegge, *supra* note 70, at 21.

326. *Ilaşcu and others v. Moldova and Russia*, Eur. Ct. H.R., ¶ 333 (2004).

327. HENCKAERTS & DOSWALD-BECK, *supra* note 110, at 568–611; see Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 31 (2011).

328. General Comment No. 31, *supra* note 70, ¶ 15; *Anik v. Turkey*, Eur. Ct. H.R., ¶¶ 71-72 (2007); *Tangiyeva v. Russia*, Eur. Ct. H.R., ¶¶ 73, 106-8 (2007); *Khatsiyeva v. Russia*, Eur. Ct. H.R., ¶ 3 (2008); *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Judgment, ¶¶ 97, 100 (Int'l Crim. Trib. for the Former Yugoslavia, Nov. 16, 2005); *Abuyeva v Russia*, Eur. Ct. H.R., ¶ 174 (2010).

D.D., such as the duty to investigate violations of international law.³²⁹

Iraq and Syria are parties to several human rights treaties, including the International Covenant on Civil and Political Rights, the Convention Against Torture, the Convention on the Elimination of Discrimination Against Women, and the Convention on the Rights of the Child.³³⁰ In relation to the obligations of Iraq in the territories previously held by the Islamic State, it was noted in an O.H.C.H.R. report that Iraq should investigate allegations that Iraqi Security Forces and armed groups acting under its control failed to protect communities persecuted by the Islamic State.³³¹ As for the situation in Syria, it was noted by a U.N. Independent International Commission of Inquiry that “the human cost of the ongoing conflict in the Syrian Arab Republic is immeasurable” and that “Syria has manifestly failed to protect its citizens from mass atrocities.”³³² Several U.N. treaty bodies reiterated the obligation of Iraq and Syria to investigate and prosecute for infringements of I.H.R.L. in their territory.

Relating to Iraq, the Committee on the Elimination of Discrimination against Women (“C.E.D.A.W. Committee”) requested in the List of issues and questions in relation to the seventh periodic report of Iraq that the latter inform the Committee about measures taken “to investigate, prosecute and adequately punish members of Islamic State” for “rape and other crimes of sexual violence.”³³³ Similarly, the C.R.C. Committee, in its concluding observations on the report submitted by Iraq under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, urged Iraq to promptly criminalize, investigate, and prosecute attacks against hospitals, schools, and recreational areas, associated with children.³³⁴ The C.E.R.D. Committee, in its concluding observations on the combined twenty-second to twenty-fifth periodic reports of Iraq, also requested Iraq to “take steps to ensure accountability for crimes perpetrated by members of the Islamic State,” and also to conduct “effective and independent investigations, prosecute those responsible, and, if convicted, punish them adequately.”³³⁵

Concerning Syria, the C.R.C. Committee, in its concluding observations on the fifth periodic report of the Syrian Arab Republic, urged Syria to promptly investigate, prosecute, and sanction members of security forces and non-State

329. Clapham, *supra* note 295, at 305. For further discussion, see SHANY, *supra* note 114, at 321.

330. Johnson, *supra* note 72, at 494.

331. Rep. on the Human Rights. Situation in Iraq, *supra* note 32, ¶ 73.

332. Rep. on the Syrian Arab Republic, *supra* note 19, ¶ 47.

333. Comm. on the Elimination of Discrimination against Women, List of Issues and Questions in Relation to the Seventh Periodic Report of Iraq, ¶ 9, U.N. Doc. CEDAW/C/IRQ/Q/7 (Mar. 18, 2019).

334. Comm. on the Rights of the Child, Concluding Observations on the Report Submitted by Iraq under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, ¶ 18, U.N. Doc. CRC/C/OPAC/IRQ/CO/1 (Mar. 5, 2015).

335. Observations on the Periodic Reports of Iraq, *supra* note 39, ¶ 18.

armed groups for committing acts of rape and sexual violence against children and women.³³⁶ In addition, the Committee urged Syria to “ensure that allegations of crimes related to gender-based violence” are “independently and thoroughly investigated and that perpetrators are brought to justice and victims provided with remedies.”³³⁷

Neither Iraq nor Syria have prevented the commission of I.H.R.L. abuses in their territories, but, as mentioned above, D.D. also includes the need to investigate and prosecute where appropriate. As for *Iraq*, in response to its request for assistance, the U.N. established a team to support domestic efforts in holding the Islamic State accountable for its crimes.³³⁸ For *Syria*, in an effort to facilitate fair and independent national, regional, and international courts, the G.A. established the International, Impartial and Independent Mechanism for investigations and prosecutions of persons responsible for crimes committed in Syria since March 2011.³³⁹

While Iraq attempts to cooperate with the international community in this effort, Syria does not demonstrate similar intentions. One existing problem for both States is that neither judicial system meets international standards such as due process.³⁴⁰ For example, an Independent International Commission of Inquiry stated that Syrian national courts are not an effective mechanism for pursuing justice since they do not possess “the will or capacity to fulfill international obligations to prosecute perpetrators of serious international crimes.”³⁴¹ Time will tell if and how the domestic and international initiatives for investigation and prosecution for crimes committed by the Islamic State will eventually work, and the outcome will dictate if indeed Iraq and Syria met their D.D. obligations.

D. Responsibility of Iraq or Syria under Article 9 of A.R.S.I.W.A.

The underlying principle of Article 9 derives from the idea of *levée en masse*—self-defense of the citizenry in the absence of regular forces³⁴²—as a

336. Concluding observations on the fifth periodic report of the Syrian Arab Republic, *supra* note 40, ¶ 31.

337. *Id.* ¶ 32.

338. Letter to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq, *supra* note 41.

339. See generally G.A. Res. 71/248 (Dec. 21, 2016). For discussion, see Natalia Krapiva, *The United Nations Mechanism on Syria: Will the Syrian Crimes Evidence be Admissible in European Courts?*, 107 CALIF. L. REV. 1101 (2019).

340. Concerning Syria, see Rep. on the Syrian Arab Republic, *supra* note 19, ¶ 103. Regarding Iraq, see U.N. Off. of the High Comm’r for Hum. Rts., *Report on Human Rights in Iraq: January – June 2014*, at 8-9 (Aug. 2014), https://www.ohchr.org/Documents/Countries/IQ/HRO_Jan-Jun2014Report_en.pdf [<https://perma.cc/4YHA-VM5H>].

341. Rep. on the Syrian Arab Republic, *supra* note 19, at ¶ 103.

342. Convention for the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 2, Oct. 18, 1907, 36 Stat. 2277; Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316,

form of agency of necessity.³⁴³ This rule deals with a unique situation that does not occur very often.³⁴⁴ The I.L.C. stated that such a situation usually arises: (1) “during revolution, armed conflict, or foreign occupation”; (2) where the authorities dissolve, disintegrate, suppress, or are inoperative; or (3) if authority is gradually being restored in the aftermath of a conflict.³⁴⁵ Furthermore, Article 9 establishes three conditions that must be met in order for attribution to occur: (1) the conduct must effectively relate to the exercise of elements of the governmental authority; (2) the conduct must have been carried out in the absence or default of the official authorities; and, (3) the circumstances must have been such as to call for the exercise of those elements of authority.³⁴⁶

Concerning the *first* condition, the person or group acting must be performing governmental functions.³⁴⁷ This may happen on the part of the territory of a State that is temporarily out of control or in other specific circumstances.³⁴⁸ This condition of performing governmental functions is met in the case of the Islamic State since it administered the territories it controlled through a sophisticated bureaucratic revenue-generating structure that was both flexible and diversified.³⁴⁹ The Islamic State governed the territories as if it was the sovereign³⁵⁰ by coercing municipal personnel to work for the maintenance of roads, public gardens, and infrastructure, providing government services such as sanitation, regulating prices of public goods, and more.³⁵¹ Additionally, the Islamic State’s management of local affairs included a strict penal and administrative system operated by various agents operating in all fields of life, such as tribal relations and education.³⁵² The group even maintained a gun control policy, a fundamental part of governance (the monopoly on the use of force).³⁵³ Consequently, the Islamic State established a regime through the performance of governmental functions, satisfying the first condition.

Next, the *second* condition covers both the situation of a total collapse of the

75 U.N.T.S. 135. For discussion on the development of this concept, see Benvenisti & Lustig, *supra* note 122.

343. *Responsibility of States*, *supra* note 53, at 49.

344. Tatyana Eatwell, *State Responsibility for Human Rights Violations Committed in the State’s Territory by Armed Non-State Actors*, 13 GENEVA ACAD. INT’L HUMANITARIAN L. & HUM. RTS. 30 (Dec. 2018), <https://www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2013.pdf> [<https://perma.cc/HGG4-S4L9>].

345. *Responsibility of States*, *supra* note 53, at 49.

346. *Id.*

347. *Id.*

348. *Id.*

349. Report of the Secretary-General on the threat posed by ISIL, *supra* note 4, ¶ 4.

350. Raufer, *supra* note 1, at 46; *see also* WARRICK, *supra* note 2.

351. WEISS & HASSAN, *supra* note 17, at 169, 211.

352. Rep. on the Syrian Arab Republic, *supra* note 19, ¶ 36.

353. WEISS & HASSAN, *supra* note 17, at 210; On the monopoly on the use of force by States in their territory, *see* Ditter Grim, *The State Monopoly on the Use of Force*, in INTERNATIONAL HANDBOOK OF VIOLENCE RESEARCH, 1043 (W. Heitmeyer and J. Hagan eds., 2005).

State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect.³⁵⁴ This occurs, for example, in the case of a partial collapse of the State or its loss of control over a certain locality.³⁵⁵ This condition is also met in the present case since the emergence of the Islamic State was facilitated by the protracted conflicts in Iraq and Syria and the resulting political and security instability, as well as by the weakening of State institutions and the inability of the two States to exercise effective control in their territories and borders.³⁵⁶

The *third* condition conveys the idea that some exercise of governmental functions was called for. Namely, that the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority.³⁵⁷ As will be explained, this condition is not met in the case of the Islamic State.

The principle underlying Article 9 derives from the idea that actions by private individuals in the absence of regular forces are “a form of agency of necessity.”³⁵⁸ An example brought by the I.L.C. in their Article 9 commentary was the Revolutionary Guards in Iran (“*Komitehs*”), which operated immigration, customs, and similar functions at Tehran airport immediately after the revolution of 1979.³⁵⁹ In the present case, while the Islamic State did administer the territories under its control, it did not do so in the circumstances calling for it, and hence this criterion is not met.³⁶⁰

The Islamic State battled to *replace* the agencies of Iraq and Syria with agencies that promote the religious-political vision of the group³⁶¹ while attempting to dismantle and ignore the existing border between Iraq and Syria.³⁶²

354. *Responsibility of States*, *supra* note 53, at 49.

355. *See id.*

356. WEISS & HASSAN, *supra* note 17, at 200-201; *See generally* *Concluding observations on the fourth periodic report of Iraq*, *supra* note 46, ¶ 5 (“The Committee acknowledges that the armed conflict hinders the State party’s effective control over parts of its territory and that it is consequently unable to ensure that the Covenant rights are fully implemented in the entirety of its territory.”).

357. *Responsibility of States*, *supra* note 53, at 49.

358. *See id.*

359. The ILC envisaged situations falling under article 9, like this example, where the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. *See Responsibility of States*, *supra* note 53, at 49; *Yeager v. The Islamic Republic of Iran*, I.U.S.C.T. Case No. 10199, Award, ¶¶ 43, 61 (Nov. 2, 1987).

360. *Rep. on the Syrian Arab Republic*, *supra* note 19, ¶ 33-36; WEISS & HASSAN, *supra* note 17, at 169, 211.

361. MCCANTS, *supra* note 2, at 121; *see* HASSAN, *supra* note 216.

362. *See* S.C. Res. 2170, 1 (Aug. 15, 2014) (“Reaffirming the independence, sovereignty, unity and territorial integrity of the Republic of Iraq and Syrian Arab Republic”); *see also* S.C. Res. 2249, 1 (Nov. 20, 2015).

In other words, the Islamic State did not act in the circumstances calling for it; rather, it tried to establish new circumstances that fit its religious-political vision. As Rodenhäuser noted, Article 9 was not meant to deal with situations in which an armed group first expels the government from parts of a territory and later engages in abuses of international law as part of its governance policies.³⁶³ In particular, Fortin stated that one cannot attribute responsibility to Iraq for I.H.R.L. abuses committed by the Islamic State on Iraq's territory.³⁶⁴ In conclusion, the third condition is not met, and Article 9 is not applicable to Iraq or Syria.

III. POSSIBLE ENFORCEMENT—WHERE CAN WE GO TO NOW?

As discussed above, a main preoccupation when it comes to non-State actors is the matter of impunity,³⁶⁵ given the lack of international bodies, judicial or quasi-judicial, that enjoys legal jurisdiction over them.³⁶⁶ Prosecution based on individual responsibility remains feasible, though, as it is “distinct from the question of responsibility.”³⁶⁷ The primary responsibility for prosecution lies with the sovereign States—Iraq and Syria. However, Iraq and Syria face instability and hostilities, and their judicial systems do not meet international standards such as due process.³⁶⁸ As such, Iraq and Syria are arguably unable or unwilling to carry out genuine proceedings in the sense of Article 17(2) of the I.C.C. Statute.³⁶⁹

363. RODENHÄUSER, *supra* note 269, at 139.

364. FORTIN, *supra* note 105, at 309.

365. Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, *supra* note 166, ¶ 42.

366. d'Aspremont et al., *supra* note 314, at 59; Zegveld, *supra* note 167, at 157.

367. *Responsibility of States*, *supra* note 53, at 142. See generally Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26). Criminal liability can arise out of one of two possible avenues—direct attribution (committing, aiding and abetting, planning or ordering, joint criminal enterprise) or indirect attribution (command or superior responsibility). See Prosecutor v. Simic et al., Case No. IT-95-9-T, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003); United States v. Flick, Judgment, at 1187, 1202 (1947); Military Government for the French Zone of Occupation v. Roehling, XIV TWC, at 1097, 1136, (1949). Naturally, at times the avenues for prosecution may overlap. See, e.g., Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, ¶ 439 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003).

368. Concerning Syria, see Rep. on the Syrian Arab Republic, *supra* note 19, ¶ 103. Regarding Iraq, see Rep. on Human Rights in Iraq: January – June 2014, *supra* note 340, at 8-9.

369. See Rome Statute, *supra* note 35, art. 17(2); Prosecutor v. Lubanga, ICC-01/04-01/06-8, Decision on the Confirmation of Charges, ¶ 186 (Jan. 29, 2007); Prosecutor v. Ruto, ICC-01/09-01/11 OA, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ¶¶ 1, 47 (Aug. 30, 2011); Prosecutor v. , ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, ¶ 210 (Oct. 11, 2013).

Outside of Iraq and Syria, domestic courts of other States have jurisdiction to prosecute international crimes. Generally, domestic courts prosecute international crimes when States anchor their jurisdiction over international crimes using domestic, criminal legislation or the principle of universal jurisdiction.³⁷⁰ Members of the Islamic State can either be prosecuted in domestic courts based on a link of nationality (in the case of foreign fighters who joined the group) or based on universal jurisdiction in any State with jurisdiction.³⁷¹ Universal jurisdiction is a customary³⁷² doctrine allowing the exercise of criminal jurisdiction against individuals for international crimes,³⁷³ regardless of the existence of the traditional avenues of jurisdiction in criminal law, such as territorial jurisdiction.³⁷⁴

370. Anthony D'Amato, *National Prosecution for International Crimes*, in INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 3 (M. Cherif Bassiouni ed., 3rd ed. 2008). There have already been a number of cases investigated or prosecuted by domestic authorities in European States such as France, the Netherlands, Spain, and more. *See, e.g.*, Agence France Presse, *Dutch Find 30 Suspected War Criminals Among Last Year's Refugee Wave*, THE GUARDIAN (Feb. 29, 2016, 14:32 EST), <https://www.theguardian.com/world/2016/feb/29/refugees-europe-dutch-war-criminals-migration> [<https://perma.cc/36TF-MSDW>]; Paul Day, *Spain Court Drops Complaint Against Syrian Security Forces*, REUTERS (July 21, 2017, 8:45 AM), <https://www.reuters.com/article/us-mideast-crisis-syria-spain/spain-court-drops-complaint-against-syrian-security-forces-idUSKBN1A61J1> [<https://perma.cc/538D-ABU7>]; Laurence Frost, *France Investigates Syria's Assad for Crimes Against Humanity*, REUTERS (Sept. 30, 2015, 5:38 AM), <https://www.reuters.com/article/us-france-syria-assad/france-investigates-syrias-assad-for-crimes-against-humanity-idUSKCN0RU11320150930> [<https://perma.cc/X29X-FT2U>]; *see also* Krapiva, *supra* note 339.

371. Rep. of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *supra* note 166, ¶ 34; Human Rights Council, Rep. of the U.N. High Comm'r for Hum. Rts. on the protection of human rights and fundamental freedoms while countering terrorism, ¶ 44, U.N. Doc. A/HRC/28/28 (Dec. 19, 2014); Rep. on the Syrian Arab Republic, *supra* note 19, ¶ 107.

372. *See* Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 121 (Apr. 14); Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 L. & CONTEMP. PROBS. 153, 160 (1996).

373. This norm was first recognized out of the desire to address pirates, which were considered as an enemy of mankind—*hostis humani generis*. *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 V.A. J. INT'L L. 81, 86 (2001). For examples of invocation of this doctrine, *see* Attorney-General v. Eichmann, Judgment, 36 I.L.R. 5 (Dis. Ct. of Jerusalem 1961); R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 119 I.L.R. 135 (U.K. 1999). For discussion on the doctrine, *see* Julia Geneuss, *Universal Jurisdiction Reloaded?: Fostering a Better Understanding of Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 945 (2009).

374. The rationale is that some crimes compromise interests which are shared by the entire international community, or shock the human conscience; thus, every State has an interest in prosecuting them. *See* Attorney-General v. Eichmann, *supra* note 373, ¶ 12. For discussion on

The application of universal jurisdiction has created controversies in recent decades relating to the sovereignty of States, particularly the extent of immunity granted to State officials, and claims have been raised with regard to the political and selective use of this principle.³⁷⁵ However, prosecution of Islamic State members might not cause any frictions of this sort given two reasons: (1) the perpetrators did not act on behalf of any sovereign State which might invoke their immunity; (2) the international community is united in its commitment to avoid impunity for their crime. The approach of the international community is evidenced by the establishment of two military coalitions against the group³⁷⁶ and aided groups involved in hostilities against the Islamic State, such as the Kurdish Peshmerga.³⁷⁷ In addition, S.C. Resolution 2170 called upon States to prosecute members of the Islamic State.³⁷⁸

Another possible avenue is prosecution in the I.C.C. Granted, theoretically, an *ad-hoc* tribunal can be established relating the conflicts in Iraq and Syria.³⁷⁹ Still, as there is no practical move towards the establishment of such a tribunal, the focus remains on the only existing international criminal tribunal with potential jurisdiction over the crimes committed by the Islamic State.³⁸⁰ The I.C.C. received two main criticisms during its period of operation: (1) disproportionate focus on developing areas in the world, and in particular, in Africa;³⁸¹ and (2) lack of effectiveness given the low number of proceedings before the Court.³⁸² I believe that dealing with the Islamic State can actually be of great benefit to the Court in order to redeem itself from the criticisms raised against it.

In order for the I.C.C. to exercise jurisdiction, the alleged crime must be committed in the territory of a Member State to the Statute; by a person who possesses a nationality of a Member State to the Statute; or, in the alternative, that

traditional avenues of criminal jurisdiction, see ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW (William Schabas & Nadia Bernaz eds., 2011); *The Case of the S.S. "Lotus"* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

375. Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1059 (2004); Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 890 (2003); Zachary Mills, *Does the World Need Knights Errant to Combat Enemies of All Mankind? Universal Jurisdiction, Connecting Links, and Civil Liability*, 66 WASH. & LEE L. REV. 1315, 1331 (2009).

376. Jackson, *supra* note 22, at 156, 177-78.

377. Kadecan, *supra* note 15, at 78-80.

378. See S.C. Res. S/RES/2170 (2014).

379. See, e.g., JOHN HAGAN, *JUSTICE IN THE HAGUE: PROSECUTING WAR CRIMES IN THE BALKANS* (2003); see generally VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* (1998).

380. Interestingly, six of the eleven situations currently before it deals with acts committed by members of armed groups. For discussion, see ALVAREZ, *supra* note 11, at 36.

381. Thomas Obel Hansen, *Africa and the International Criminal Court*, in *HANDBOOK OF AFRICA'S INTERNATIONAL RELATIONS* 165 (Tim Murithi ed., 2014).

382. ANTONIO CASSESE ET AL., *CASSESE'S INTERNATIONAL CRIMINAL LAW* 269 (3rd ed. 2013).

the S.C. or the territorial state or State of nationality refer a situation to the prosecutor of the I.C.C. to open an investigation.³⁸³ The I.C.C. may prosecute crimes committed in Syria and Iraq in one of two scenarios: (1) Iraq or Syria can refer a situation to the I.C.C.; or (2) the I.C.C. can act based on a S.C. referral. I will explain why the first option is more theoretical than practical and focus on the second one, which can still be pursued.

As for the first option, it is not probable Syria or Iraq will make a referral to the I.C.C. given their concern, the Court might also investigate and prosecute their own officials rather than focusing on crimes committed by members of the Islamic State. Uganda was the first State that made a referral to the I.C.C. when it requested the Court to investigate the actions of the Lord's Resistance Army.³⁸⁴ In response, the I.C.C. Prosecutor clarified that the scope of jurisdiction of the I.C.C. includes all crimes committed in Uganda—both by the Lord's Resistance Army and by official Ugandan military forces.³⁸⁵ Put simply, the I.C.C. is not constrained by the information contained in a State referral when conducting investigations to determine whether specific persons should be charged.

The Prosecutor's decision to investigate *situations* rather than *cases* is reflective of the general approach of the court. According to *Philippe Kirsch*, former president of the I.C.C., the rationale is to reduce the prospect of States referring complaints against specific individuals, which, in turn, can create a perception of using the Court to settle scores or tailor one-sided proceedings in a biased way.³⁸⁶ This approach prevents Syria or Iraq from referring complaints to the I.C.C. regarding the Islamic State without enabling the Prosecutor to investigate actions of the forces of Syria and Iraq, as well.³⁸⁷ As such, the first

383. Rome Statute, *supra* note 35, arts. 12(2), 13(a). There are three preliminary demands before the ICC will apply its jurisdiction. First, the Court will exercise its jurisdiction only if there is no other State with jurisdiction that is willing and able to prosecute him. Second, The ICC will only deal with the gravest crimes that are of interest to the international community. Third, the Prosecutor of the ICC will not initiate an investigation that will be considered against the interests of justice. For elaboration, see ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* (2007). For discussion concerning the relation between domestic and international court, see YUVAL SHANY, *REGULATING JURISDICTIONAL INTERACTIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS* (2007).

384. Prosecutor v. Kony et al., ICC-02/04-01/05, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, ¶ 3 (Dec. 2, 2005). For discussion, see Mohamed M. El Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC*, 5 INT'L CRIM. L. REV. 5 (2005).

385. Prosecutor v. Kony et al., *supra* note 384, ¶ 4 (Dec. 2, 2005).

386. Philippe Kirsch & Darryl Robinson, *Referral by States Parties*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY 623 (Antonio Cassese et al. eds., 2002). See generally Antonio Marchesi, *Referral of a situation by a State Party*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OBSERVERS' NOTES, ARTICLE BY ARTICLE 575-79 (Otto Triffterer ed., 2d ed. 2008).

387. For documentation of violation of international law committed by the Iraqi and Syrian

option of a State referral by Syria or Iraq is not highly probable.

Regarding the second option of S.C. referral, there have been numerous calls by organs and actors at the U.N. level for the involvement of the I.C.C. regarding the Islamic State.³⁸⁸ However, a suggested S.C. referral to the I.C.C. was not adopted given vetoes presented by China and Russia.³⁸⁹ The Security Council did adopt resolutions generally calling for the prosecution of foreign fighters but not through the I.C.C.³⁹⁰

The I.C.C. does not have jurisdiction over crimes committed by the Islamic State since the two sovereign States in the territories previously held by the group are not willing to grant the I.C.C. authority based on their self-interests. In addition, the Security Council was unable to refer the situation to the I.C.C. given the veto right of Russia and China. We face a situation in which the Islamic State controlled territories for three years and exercised authority there. Notwithstanding what occurred on the ground, these areas still remained under the sovereignty of Iraq and Syria. Such complexity showcases the tension which arises at times between the legal reality and the actual conditions on the ground. A possible solution is the invocation of a *functional* approach, by analogy to the increasing use of a functional approach in other fields such as Statehood and the law of occupation. I will present the invocation of functionalism in other fields shortly and then explain my suggestion relating to the Islamic State and the I.C.C.

Beginning with *Statehood*, in recent decades, we witnessed the invocation of functionalism in the application of the Statehood criteria towards quasi-States.³⁹¹ In practice, quasi-States have been treated as States for certain purposes since they possess certain State-like features. Examples include India's U.N. membership prior to its independence,³⁹² participation of Taiwan, Puerto Rico,

forces, see Rep. of the U.N. High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, *supra* note 32, at ¶¶ 50-69; Rep. on the Syrian Arab Republic, *supra* note 19, at ¶¶ 3-5.

388. Rep. of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *supra* note 166, ¶ 33; Rep. on the Syrian Arab Republic, *supra* note 19, ¶ 96.

389. Rep. of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *supra* note 166, ¶ 33.

390. On August 15, 2014, the Security Council adopted S.C. Res. 2170 calling U.N. Member States to take national measures to prevent fighters from travelling from their soil to join the Islamic State, placing economic sanctions against the group, imposing travel restrictions on six of its members and calling for prosecution of foreign fighters. See S.C. Res. S/RES/2170 (2014). Another important resolution is S.C. Res. 2249, which *called* upon States to take all necessary measures to redouble and coordinate their efforts to prevent and suppress terrorist acts committed by ISIL on the territory under ISIL's control. See S.C. Res. S/RES/2249 (Nov. 20, 2015). For discussion on the SC resolutions, see Lekas, *supra* note 22, at 324.

391. For discussion, see Sterio, *supra* note 88, at 225; see generally van Essen, *supra* note 3.

392. Vera Gowlland-Debbas, *Note on the Legal Effects of Palestine's Declaration under Article 12(3) of the ICC Statute*, in IS THERE A COURT FOR GAZA? A TEST BENCH FOR

and Palestine, the work of several IGO's, most notably the U.N., and more.³⁹³

In the context of *occupation*, there is a growing tendency to analyze the existence of a situation of occupation functionally. For example, the Ethiopia-Eritrea Claims Commission found that when an army is present in a hostile state on a transitory basis, “not *all of the obligations*” of an occupant can reasonably be applied, but “some of them *may*.”³⁹⁴ As Gross noted, the legal obligations of an occupier arise in correlation with its actual exercise of power.³⁹⁵

In contrast to a binary approach, the advantage of a functional approach is that it allows for a more nuanced analysis of a situation in complicated cases where several players exercise power in the same territory.³⁹⁶ In the present case, the hostilities in Iraq and Syria included a US-led coalition, an Islamic Military Alliance, and several other States such as Russia, Iran, Iraq, Syria, as well as non-State groups, such as the Kurdish Peshmerga.³⁹⁷ These hostilities took place on the sovereign territories of Iraq and Syria, with the Islamic State managing some areas de-facto for a few years,³⁹⁸ a situation requiring a nuanced analysis via functional approach.

The invocation of a functional approach also leads to more accountability.³⁹⁹ This rationale can also be promoted if the Security Council will refer to the I.C.C. the situation in the territories held by the Islamic State during 2014-2017, based on a functional interpretation of the Islamic State as the *de-facto* sovereign during that period. Granted, an I.C.C. referral will not bring about accountability

INTERNATIONAL JUSTICE 513 (Chantal Meloni & Gianni Tognoni eds., 2012).

393. Shany, *supra* note 3, at 334; Roberts & Sivakumaran, *supra* note 104, at 120. For additional discussion relating Taiwan, see Jure Vidmar, *States, Governments, and Collective Recognition*, 31 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 136 (2017); Dold, *supra* note 87, at 88.

394. Eritrea-Ethiopia Claims Comm'n, *Partial Award Western Front, Aerial Bombardment and Related Claims 1, 3, 5, 9-13, 14, 21, 25 & 26*, ¶ 27 (Dec. 19, 2005).

395. AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* 7 (2017). Similarly, some claim that non-State actors that exercise government-like functions and control a territory are obliged to respect IHRL when their conduct affects the human rights of the individuals under their control. See MASTORODIMOS, *supra* note 166, at 175.

396. For illustration on the problem of binary application of occupation law in the context of the Gaza Strip, see Yuval Shany, *Forty Years After 1967: Reappraising the Role and Limits of The Legal Discourse on Occupation in the Israeli-Palestinian Context: Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 ISR. L. REV. 68 (2008).

397. There have been various non-State actors involved in the Syrian civil war, including, but not only: *The Free Syrian Army; Ahrar Al-Sham Coalition; Jaish Al-Islam; Katazb Thuwar Al Sham; Jaish Al-Islam; Shamia Front; Mujahidi Ibn Taimia; Liwa Miqdad Bin Amro; Jaish Al-Mujahidin; Tajamu Fastaqim Kama Umirt; Sukour Al-Sham; Jabhat al-Nusra (The Nusra Front); Kurdish Democratic Unity Party; Popular Protection Units; National Coalition of Revolutionary and Opposition Forces.*

398. Another challenge arises from the fact that members of the Islamic State came from over eighty different States, complicating even more the ability to prosecute them in a consistent and systematic manner. See Lekas, *supra* note 22, at 321-22.

399. GROSS, *supra* note 395, at 8.

regarding all players operating in Iraq and Syria during recent years—including non-State actors, Iraq, and Syria. However, the gravity of the Islamic State's crimes and the threat level the group posed necessitate a feasible option for prosecution of members of it. Thus far, the I.C.C. Prosecutor has only accepted referrals dealing with a situation, without specifying which players should be investigated, to avoid the perception of one-sided proceedings or a bias.⁴⁰⁰ And still, a functional approach deviating from the existing policy is both warranted and justified in the case of the Islamic State.

Shany noted that quasi-States tend to be regarded functionally when two conditions are met: (1) the differences which exist between the quasi-State at hand and other States can be seen as of no critical importance for the purposes of the institution at play; and (2) the decision is to be made in light of the nature and function of the legal instruments regulating the situation.⁴⁰¹ For example, when Palestine declared its acceptance of I.C.C. jurisdiction, first in 2009 and later again in 2015, the I.C.C. Prosecutor faced the dilemma of whether to functionally treat Palestine as a State under the Rome Statute.⁴⁰² In *Shany's opinion*, if the Rome Statute's main goal is to “end impunity through the exercise of complementary international jurisdiction,” then “the object and purpose of the Statute pull in favor of a broad reading of its jurisdiction that would contribute to the fulfillment of the Court's mandate.”⁴⁰³ In the context of the Israeli-Palestinian conflict, acceptance of the declaration promotes the Court's goals of exercising jurisdiction over possible international crimes and preventing the possibility that no State will exercise its legal authority over the actions.⁴⁰⁴ The same reasoning also applies to the Islamic State, as the group committed heinous crimes, there is no efficient prosecution mechanisms with jurisdiction over members of the group, and neither Iraq nor Syria chose to delegate jurisdiction to the I.C.C.

A main obstacle before this option remains the possibility of a veto by China and Russia based on their strict understanding of State sovereignty and illegal interference of State sovereignty.⁴⁰⁵ Yet, a functional approach is still justified

400. Kirsch & Robinson, *supra* note 386, at 623.

401. Shany, *supra* note 3, at 334-36.

402. For discussion, see Amichai Cohen & Tal Mimran, *The Palestinian Authority and the International Criminal Court*, ISR. DEMOCRACY INST. (Feb. 10, 2015), <https://en.idi.org.il/articles/5216> [<https://perma.cc/4D4E-QWMT>].

403. Shany, *supra* note 3, at 334. See also William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B. U. INT'L L.J. 115 (2009); Michael G. Kearney, *Why Statehood Now: A Reflection on the ICC's Impact on Palestine's Engagement with International Law*, in IS THERE A COURT FOR GAZA? A TEST BENCH FOR INTERNATIONAL JUSTICE 391 (Chantal Meloni & Gianni Tognoni eds., 2012).

404. Shany, *supra* note 3, at 334.

405. This customary rule is anchored in article 2(7) of the U.N. Charter, and it stems from the principle of State sovereignty. See U.N. Charter art. 2, ¶ 7; Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT'L SEC. J. 349, 353-354 (2014); *Military and paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986

based on the interests that I.H.L., I.H.R.L., and I.C.L. promote—in particular to protect human dignity, prevent impunity, deter international crimes, and sustain international peace and order.⁴⁰⁶ A resolution based on a functional interpretation will mitigate any possible interference with Iraq and Syria's sovereignty by strictly limiting I.C.C. jurisdiction to the period during which the Islamic State managed the territories and to these territories alone. In addition, such a referral will not be considered biased given the international consensus against the group. Finally, in the case of Iraq, it sought international assistance. As such, the U.N. team established by the Security Council can be seen as a first step, preparing for the second layer of international involvement—prosecution by an international tribunal.

From a historical perspective, during the 1920s, one main theme was the power of States as epitomized in the concept of sovereignty in addition to the notion that individuals are *also* worthy of being subjects of international rights and obligations.⁴⁰⁷ During that era, *Brierly* suggested that States maintain a legal personality only insofar as they represent the will of individuals.⁴⁰⁸ *Politis* also suggested that States are merely systems of relationships among the men of which compose them.⁴⁰⁹ Both *Brierly* and *Politis* advocated for disaggregation and functionalization of the State concept, intending to promote the proposition that *individuals* should also be considered subjects of rights and obligations in the international plane.⁴¹⁰ In the words of Bhuta, this view purports that States are a *functional* convenience reflecting not ontological priority but expediency.⁴¹¹ Such

I.C.J. 14, ¶ 205 (June 27).

406. See, e.g., Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81 (2006); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001); YUTAKA ARAI-TAKAHASHI, *THE LAW OF OCCUPATION: CONTINUITY AND CHANGES OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW* 419 (2009).

407. Nehal Bhuta, *The Role International Actors other than States can Play in the New World Order*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 64-65 (Antonio Cassese ed., 2012). During the 1920s individuals did not hold international rights or obligations. Instead, violations of international law inflicted upon them could have been pursued under the international claim by a State, based on the doctrine of diplomatic protection. These avenues were, however, subject to the discretion of the individual's State. A notable exception to the existence of international obligations on individuals was the principle of universal jurisdiction, recognized since the seventeenth century. See CHITTHARANJAN F. AMERASINGHE, *DIPLOMATIC PROTECTION* 150 (2008); Mohamed Bennouna (Special Rapporteur on Diplomatic Protection), *Preliminary report on diplomatic protection*, U.N. Doc. A/CN.4/484 (Feb. 4, 1998); *Mavrommatis Palestine Concessions (Greece v. U.K.)*, Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 21 (Aug. 30).

408. JAMES LESLIE BRIERLY, *BASIS OF OBLIGATION IN INTERNATIONAL LAW* 49 (Lauterpacht & Waldock eds., 1958).

409. NICOLAS POLITIS, *THE NEW ASPECTS OF INTERNATIONAL LAW* 25 (1928).

410. Bhuta, *supra* note 407, at 65.

411. *Id.* at 64.

propositions have been considered at the time as more theoretical than normative, but today they are integrated into positive international law in fields like I.H.R.L., I.H.L., and I.C.L., all of which are of tremendous importance when discussing the Islamic State.⁴¹² Today, there are important tools to promote the protection of individuals and hold them accountable, if necessary, thereby fulfilling the visions of *Brierly*, *Politis*, and those who followed their paths.

Prosecuting members of the Islamic State in the I.C.C., based on a functional interpretation of the jurisdiction of the court, will also follow the lead of the I.C.J. and U.N. bodies, according to which international law should evolve based on community needs and the developments of reality—in our context the rise in power and impact of non-State actors like the Islamic State.⁴¹³ Prosecution is also justified since it promotes better protection of both I.H.L. and I.H.R.L. and mitigates interference with Iraq and Syria's sovereignty. Put simply, using functional interpretation to grant the I.C.C. jurisdiction over members of the Islamic State is both feasible and desirable.

CONCLUSION

The Islamic State took over significant territories in Iraq and Syria and declared itself a Caliphate in June 2014. The group employed brutal methods constituting war crimes, crimes against humanity, and maybe even Genocide. This Article explored four possible avenues for attributing responsibility for these atrocious acts: (1) direct responsibility of the Islamic State based on Article 10 of A.R.S.I.W.A.; (2) direct responsibility of the Islamic State based on general principles of international responsibility; (3) responsibility of Iraq or Syria based on the doctrine of D.D.; and, (4) responsibility of Iraq or Syria based on Article 9 of A.R.S.I.W.A. As was demonstrated, the best option for attribution of the atrocious acts committed by the Islamic State is through general principles of international responsibility since the remaining avenues do not lead to any attribution (neither to the Islamic State nor to Iraq or Syria).

Concerning D.D., neither Iraq nor Syria have prevented the commission of crimes in their territories. Nevertheless, D.D. also includes the need to investigate and prosecute where appropriate. Iraq requested assistance in the investigation and prosecution of such crimes, prompting the establishment of a U.N. team to support domestic efforts in holding the Islamic State accountable for its crimes. Regarding Syria, given its lack of cooperation, the General Assembly established the International, Impartial and Independent Mechanism to assist in the

412. For reading relating to international human rights and its institutions, see generally ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW (Sir Nigel Rodley & Scott Sheeran eds., 2012); CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM (2008). For reading relating to international criminal law and its institutions, see generally ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2nd ed. 2008).

413. Reparation for Injuries Suffered in the Service of the United Nations, *supra* note 14, at 178; Rep. of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *supra* note 14, ¶ 12.

investigation and prosecution of persons responsible for crimes. Time will tell if and how the initiatives for investigation and prosecution will work, and the outcome will dictate if Iraq and Syria met their D.D. obligations.

Regarding Article 9 of A.R.S.I.W.A., the envisaged situation falling under this Article is the existence of a government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. The Islamic State battled to replace the Iraqi and Syrian agencies with agencies that promote the religious-political vision of the group while attempting to dismantle the existing border between Iraq and Syria. The group did not act in circumstances calling for its actions; rather, it tried to establish new circumstances that fit its religious-political vision. As such, the case of the Islamic State does not fall under the ambit of the Article. As for Article 10 of A.R.S.I.W.A., the Islamic State was unable to become the new government in Iraq or Syria as prescribed under Article 10(1), nor did it become a State as enumerated under Article 10(2). Consequently, Article 10 does not apply to this case.

Thus, the most suitable avenue for the case of the Islamic State is direct responsibility through general principles of international responsibility. This Article demonstrated that the Islamic State was obligated to meet international law demands, similarly to other non-State actors. The legal personality of non-State actors is founded on a relational notion under which States confer a status by interacting with an entity in legally meaningful interactions. This Article demonstrated that if international law norms apply towards non-State armed groups in control of territory, then the application of primary rules to their actions inherently leads to the application of secondary rules necessary for their execution. The rationale for this assertion is that responsibility is both an indicator and the consequence of international legal personality in the sense that the responsibility of a non-State entity is both a manifestation and proof of its international legal personality. Practically speaking, primary rules can only be fully realized through secondary rules. The Islamic State operated based on a sophisticated, bureaucratic revenue-generating structure and provided basic services in most fields of life. Its management of the local affairs was operated by various agents, and their actions are attributed to the group. In addition, the Islamic State adopted and acknowledged its own terror attacks committed in its name outside of Iraq and Syria, and as such, there can be attribution of those acts to the group.

The outcome of responsibility is that any breach of an engagement involves an obligation to provide reparations. Out of the forms of reparation prescribed by international law, compensation is the most relevant one for the Islamic State since restitution is impossible in relation to the horrific atrocities committed by the group and since experience shows that compensation is the most common avenue for reparation (both relating to States and also relating to non-State entities). Yet, there is no feasible way to currently promote a remedy, such as compensation, from the group since there is no institutionalized mechanism to impose reparations on non-State armed groups. More concretely, Islamic State members are currently spread globally, and most of the property the group owned has been seized, lost, or hidden.

Against that backdrop, my suggestion is to invoke a *functional* approach

rather than a binary approach because a functional approach allows for a more nuanced analysis of complicated cases where several players exercise power in the same territory. The SC can refer the situation of Islamic State's held territories during 2014 to 2017 to the I.C.C., and the I.C.C. can use a functional interpretation to view the Islamic State as the *de-facto* sovereign during that period. This approach is required since it is not likely that Syria or Iraq will make a referral to the I.C.C. in light of their concerns that the I.C.C. might also investigate and prosecute their own officials. This approach follows the lead of the I.C.J. and U.N. I.H.R.L. bodies, according to which international law should evolve based on community needs and the developments in reality. The functional approach also allows for prosecution of heinous crimes and prevents legal black holes while mitigating possible interference in Iraqi and Syrian sovereignty. Finally, from a historical perspective, the functional approach promotes the vision of *Brierly, Polities*, and those who followed their paths. In sum, utilizing the functional approach is a suitable and feasible way to move forward from the Islamic State's atrocities.