Conceptualizing ISIS in international legal terms
–Implications, crises and failure of Westphalian notions of authority

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Thesis in International Law, 30 HE credits
Examiner:
Stockholm, Autumn, 2016
Acknowledgment

I would like to sincerely thank my supervisor Pål Wränge for his support and encouragement. At many stages in the course of this thesis I benefited from his advice, particularly so when exploring and developing new ideas. Pål’s positive outlook and confidence inspired me and gave me the energy to finish this paper. His careful reading and insightful comments contributed enormously.

I would also like to thank my former colleagues at the Department for International Law, Human Rights and Treaty Law at the Swedish Ministry for Foreign Affairs for providing me with insights on international law. In the course of my work I had the opportunity to meet and have inspiring discussions with wonderful people, among them Per-Axel Frielingsdorf, Negin Tagavi, Pernilla Nilsson, Emil Johansson and Maria Velasco.
Abstract

In this thesis I investigate whether the so-called Islamic State (ISIS) can be conceptualized in international legal terms, and what a potential non-conceptualization might tell. In chapter 1, I outline some issues related to ISIS and international law while underlining that a critical approach to international law permeates the thesis and that it is the conceptualization of ISIS that is of importance. In chapter 2, I argue that a critical approach is useful in analysing perceived crises of method as such crises indicate weaknesses in paradigms. I also discuss what role Westphalia plays for the imagination of the discipline, and why that imagination is under pressure. In chapter 3, I describe the emergence and formation of ISIS, arguing that ISIS can be understood as a locus of political authority. In chapter 4, I introduce three so-called international subjects: The State, the Belligerent community and the Individual. My conclusion is that ISIS cannot be conceptualized as neither a State nor a Belligerent community, and that the best legal basis for that claim is lack of State-recognition. As a subject, ISIS can only be conceptualized as a number of individuals. In chapter 5, I outline whether ISIS can be conceptualized by using international humanitarian law, human rights law as well as the law of international responsibility. I conclude that ISIS can be conceptualized as a Party to a non-international armed conflict, and that ISIS possibly has responsibility insofar as it is a Party to such a conflict. It remains unclear, however, how and to what extent ISIS has responsibility. I also conclude that ISIS cannot be conceptualized as “violating” international human rights law. Instead, it is its members that “abuse” human rights. In chapter 6, where I reflect on and discuss chapters 2-5, I first conclude that ISIS cannot be conceptualized by using international legal terms except by the laws of war related to non-international armed conflict. This evoke methodological questions. One would, e.g. think that customary law can conceptualize ISIS. However, legal method cannot include the actions and decisions by Non-State Actors; customary law cannot explain why ISIS should be bound by international law except by affirming States as the only loci of political authority. The conceptual exclusion of ISIS is therefore not only a consequence of the Westphalian narrative but a condition for its very existence. However, in order to avoid a state of exception – where the use of force against ISIS takes place outside the sphere of international law – conceptualization seems necessary but not without risks. I conclude that the issue of conceptualizing ISIS signals a crisis of the language of international law, and that this in turn may be a sign of the destabilization of the current paradigms of international law.
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<td>9/11</td>
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<td>APII</td>
<td>Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts</td>
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<td>ARISWA</td>
<td>Draft articles on Responsibility of States for Internationally Wrongful Acts</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>NIAC</td>
<td>Non-international armed conflict</td>
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<td>NSA</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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1 INTRODUCTION
– THE CHANGING NATURE OF WARFARE IS A FUNCTION OF CHANGING IDEAS ABOUT LAW.¹
– WE MAKE WAR IN THE SHADOW OF LAW, AND LAW IN THE SHADOW OF FORCE.²

1.1 Background

Establishing its so-called caliphate in 2014 through terrorist acts, methods of conquest and state-building, the so-called Islamic State (hereafter; ISIS) differs in relation to previous incarnations. Rather than just destabilizing certain institutions, ISIS established its own locus of power; rather than just striking at churches, mosques, synagogues and other public and private spheres of social life, ISIS prevailed against armies while capturing territory in countries such as Iraq, Syria, Egypt and Libya. Does it suffice to call it a terrorist organization? If not, how, to conceptualize it? One could argue it constitutes something reminiscent of the Kharijites, the ones that “deviated” from the Muslim community during the reign of the fourth Caliph Ali.³

But denoting something as barbarous or medieval, may not grasp its implications.

After the World Trade Center and the Pentagon were attacked in 2001 (hereafter; 9/11), the United States (hereafter; the US) government made various justifications for the indefinite detention of suspected terrorists. There were legal precedents for detention without criminal charge, the Bush administration argued, in the practice of the involuntary hospitalization of the mentally ill.⁴ This Proto-Foucauldian argument sets up an analogy between the suspected terrorist and the mentally ill. Terrorists are like mentally ill because their mind-set is unfathomable – outside of reason, politics and “civilization”. Paraphrasing Franz Kafka, terrorists are before the law because they are outside the law,⁵ and therefore not fought by means of normal domestic or international law. Or, as Antony Anghie argues, “the very invocation of ‘the terrorist’ suggests a threatening entity beyond the realm of the law that must be dealt with by extraordinary emergency powers, or even extra-legal methods.”⁶ Something outside the law cannot be dealt with by using the same law.

¹ Kennedy 2006, 8.
² Ibid, 165.
³ The Kharijites believed that whoever disagreed with them should be murdered as infidels (takfīr). This was the rationale for mass killings of civilians, including women and children (isti’rad). They also practiced an extreme form of inquisition to test their opponent’s faith (imtihan); see Obaid, S., Al-Sarhan, S., “The Saudis Can Crush ISIS” New York Times (08.09.2014).
⁴ Butler 2004, 72.
⁵ See generally, Kafka 1919. Philosopher Jacques Derrida: “since he is before it because he cannot enter it, he is also outside the law (an outlaw). He is neither under the law nor in the law. He is both a subject of the law and an outlaw” Derrida 1991, 204.
⁶ Anghie 2006, 299.
Non-State Actors (hereafter; NSAs) represent a threat to States and civilians for different reasons. Instead of "old wars" between States, "new wars", as political scientist Mary Kaldor calls them, blurs the distinction between State actors and NSAs, public and private, internal and external, local and global, war and crime. And in contrast to the initial discussions post-9/11 on how to deal with terrorists – as criminals addresses by policing actions or as an armed aggression best dealt with in the context of the laws of war – I believe it is difficult to argue that States should address direct threats posed by ISIS in the context of a regular justice systems.

But how to understand terrorist organizations when they resemble States? Wars are traditionally perceived as taking place between sovereign equals, i.e. States. The blurring of the distinction between international and internal wars seems to result in a crumbling of the distinction between peace and war. In terms of international human rights law and international humanitarian law (hereafter; IHRL and IHL respectively), international lawyers can no longer be certain whether some of today’s wars are to be conceptualized primarily under the umbrella of the former category or the latter. A permanent state of exception emerges, “some sort of quasi-permanent condition of juridical twilight, a state of neither peace nor war”.

War must presuppose some prior account of the opponents and their identity. Such identification presupposes that the actors involved are bound and distinct and that there is an identifiable locus of political authority within them that can account for their inner cohesion and capacity to act. But if the conceptualization of such loci collapses, the actors involved cannot be identified either. If there are no identifiable actors, it is difficult if not impossible to make sense of outbursts of violence in conventional terms, since there is no one there to whom we can attribute political motives or casual powers. This hinders our ability to explain the incidence of warfare with reference to the interests of parties to the conflict itself. In the eighteen

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7 UNSC Res. 2249 (2015).
9 Kaldor 2012, 2ff. The Secretary-General for the 2016 World Humanitarian Summit took notice of this development: “After declining in the late 1990s and early 2000s, major civil wars increased from 4 in 2007 to 11 in 2014. The root causes of each conflict are different and complex. [...]. Transnational criminal groups thrive in fragile and conflict-affected States, particularly in urban cities, destabilizing post-conflict countries, undermining State-building efforts and prolonging violence”; see UN General Assembly Seventieth Session Item 73 (a) One humanity: shared responsibility – Report of the Secretary-General for the World Humanitarian Summit (02.02.16) UN Doc. A/70709, para. 23.
12 Neff 2005, 394.
and nineteenth centuries only European States (and a few others) could legally be at war. The outbursts of violence projected against the “others” – the “barbarians” – was not perceived as war proper but outside the legal spectra altogether.13

Thus, the re-emerging discourse of the barbarian is worrying as it signals a belief of an entity existing “outside” of civilization. Originating from Greek and Latin, barbarus and balbus means “foreign”, “strange”, the “stammering of foreigners”. Viewing ISIS as barbarous is maybe the only way of making something unfathomable fathomable. But in the process, ISIS becomes a black hole of reason. This is dangerous. *Je suis Charlie* is followed by *Je suis Paris, Je suis Tunis, Je suis Bamako*, until I do not know who I am. And then: Am I? What am I? And, most importantly, I am not the Other. But what if that Other starts to resemble me?

As terrorism seems to be a category of violence that includes questionable instances of global difficulties, anyone can be called a terrorist.14 Judith Butler asks: “Is the war on terrorism, by definition, a war without end, given the lability of the terms “terrorism” and “war”?”15 In this kind of process, the reactions against what one perceive as the absolute other may destabilize our discourses and turn exceptional measures into the ordinary scheme of life.

My worry comes in the context of the justifications to punish and extinguish ISIS. Striking at ISIS becomes a *carte blanche*, including prima facie breaches of Article 2(4) of the United Nations Charter (hereafter; UN) and alleged violations on Sunni Muslims in Iraq and Syria, as well as crimes against the Syrian population in the ongoing civil war.16 ISIS is one of many forces tearing the Arab world apart, but it evokes reactions of a unique magnitude.

How should international lawyers frame the peculiar phenomenon of ISIS in the framework of international law? I believe that question must start at the beginning: how can one talk about it in international legal terms. And what are the implications if international law is incapable of doing just that? Let this be the question of this thesis.

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14 In the conclusion to her book, *Terrorism and International Law*, Rosalyn Higgins, writes that “[t]errorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both”, quoted in Walter, C., ‘Defining Terrorism in National and International Law’ (2003) *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, 2. This definitional problem has not, however, stopped States from declaring a right to use force against persons or groups they claimed were “terrorists”, neither has it stopped others from reacting to those assertions; see Dupuy, Sponsors of Terrorism: Issues of International Responsibility”, Bianchi 2004, 5.
15 Butler 2004, 79.
16 Harling, P., Birke, S., ‘The Islamic State through the looking-glass’ *The Arabist* (03.03.2015).
1.2 Purpose

The objective of this thesis is to examine the legal conceptualization of ISIS. Implied in this question is the consideration if there exists a deeper crisis of international legal method. Whether it is possible to conceptualize ISIS in an international legal fashion will permeate this thesis. Thus, this thesis basically consists of an assessment of certain legal concepts.

I want to stress that ISIS constitutes a foremost practical problem in itself – especially for all the women, men and children experiencing the horrors of ISIS’ brutalities, slavery and sexual violence. The well-being of those persons is, I argue, what makes international law a language worth fighting for. Although I write about ISIS for theoretical purposes, my intention is not to write in a theoretical vacuum as I hope it may help us understand what goes on “out there”.

1.3 Research Question

For an achievement of the purpose, the main research question of this thesis is: Can ISIS be Conceptualized in International Legal Terminology? In order to answer that question, more specific issues will have to be examined and analysed. Hence, this thesis will additionally investigate the following questions:

- Is ISIS a de facto-state? Can it be understood as a locus of political authority? Is ISIS a State in the legal sense of the word? If not, can ISIS be conceptualized as a Belligerent community and/or a number of individuals?
- Can ISIS be conceptualized through certain sub-disciplines of international law, e.g. the laws of war and international human rights law?

I will also investigate in what ways one can explain the conceptualization of ISIS in international legal terminology, and what non-conceptualization means for international law.

1.4 Method

As there are no “naked truths” “out there”, Michel Foucault’s method of “taking from things the illusion they produce” is a call for critically looking upon the sources of knowledge. To my understanding, legal method simply means the way jurists argue a point. But lawyers act and argue, knowingly or not, under a legal theory which determines their assumptions about

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17 Foucault 2006 [1961], x.
concepts, what a reasonable argument is, and what the legal sources are.\textsuperscript{18} As Michael J. Sandel writes: “our practices and institutions are embodiments of theory”.\textsuperscript{19}

This thesis asks whether ISIS can be conceptualized in international legal terminology. My main method will consist of assessing whether ISIS can be described by using concepts in international law. Here, I follow Martti Koskenniemi in that I believe international law to make more sense if one treats it as a language.\textsuperscript{20}

What, then, do I mean by “conceptualization” (begreppsliggöra)? Concepts are always unstable and violent.\textsuperscript{21} Using the philosophy of Emmanuel Levinas, the “said” is the conceptualization of the original and already-past “saying”. By giving phenomena names, language implies grasping: “as soon as saying, on the hither side of being, becomes dictation, it expires, or abdicates, in fables and in writing”.\textsuperscript{22} Conceptualization is therefore necessarily a violent and open-ended gesture. The Swedish words begrepp, att begripa, and the German words Begriff, begreifen captures that gesture of appropriation. Conceptualization is grasping, to take hold of, controlling it, mastering it under the domains of knowledge.\textsuperscript{23} This is why a discipline consisting of a certain discourse and practice is able to discipline its subjects. In Jacques Derrida’s words, there is no “language without phrase” and “no phrase… which does not pass through the violence of concept. Violence appears with articulation”.\textsuperscript{24} So when I ask whether ISIS can be conceptualized by using international legal terms I literally ask whether international law is able to grasp the entity that is ISIS.

\textsuperscript{18} Wrange 2007, 81.
\textsuperscript{21} No concept is ever entirely itself in that there is a certain otherness lurking within every assured identity. There is an out-of-place element in the system – a system, which never is quite as stable as it imagines. There is something within any structure that is part of it but also escapes its logic. See Derrida 1976, 215, 242. There is simply no more room for a linguistic or philosophical investigation on the meanings of “concept” and “conceptualization” as such; see Wrange 2007, 89ff. The meaning of concepts and their relation to “reality”, that is, the concrete phenomena, has been part of a debate going on since Antiquity.
\textsuperscript{22} Levinas 1998, 43, 185. Reading Levinas, philosopher Judith Butler makes a similar argument when she states that “discourse consists in the fact that language arrives as an address we do not will, and by which we are, in an original sense, captured […] So there is a certain violence already in being addressed, given a name, subject to a set of impositions”, Butler 2004, 10. For a critical discussion on the philosophy of Levinas, see Derrida 2001 [1978], 28. If all concepts are violent one cannot escape the “economy of violence”; how can I not be violent if the said always entails violence?
\textsuperscript{23} As Adriaan T. Peperzak puts it: “the phenomenon shows and identifies itself, thanks to the said” (le deja-dit) through which it can be grasped and named. Being is inseparable from its being said”, Peperzak 1993, 216.
\textsuperscript{24} Derrida 2001[1978], 185 (his emphasis).
My theoretical approach belongs to critical international legal theory as it emphasizes the inter-dependency of concepts and how concepts reflect particular power relationships.\(^{25}\) By saying “critical international legal theory”, “critical approach” or “critical theory”, I refer to an extremely heterogeneous discourse, united not by a common essence, but by a multiplicity of what Ludwig Wittgenstein would call family resemblances, the familiarity being the notion that contingency is the condition as well as limit of legal judgment. Thus, the critical approach disbeliefs or rethinks the foundations of international law.\(^{26}\)

A central theme is to doubt the prospect of unveiling a universal foundation of law based on reason.\(^{27}\) The critical approach emphasizes the pluralistic nature of the social world with the conflicts that pluralism entails – conflicts for which no singular rational solution could ever exist. If legal method means the way jurist argue a point, the critical approach asks how language employed by jurists shape the way in which they interpret “reality”. I use the word reality instead of international law because it is the international lawyer’s categories of thought which define his or her reality. This prompts, Anne Orford argues, a genealogical perspective on how legal concepts move across time and space.\(^{28}\) Rather than being fixed and immutable, the past – in the case of international law, an imperial past – remains present in a number of ways. One can therefore not contrast e.g. colonialism or just war theory from international law as they still condition the discourse. A good example is Antony Anghie’s postulation that international law was created in part through its confrontation with “the violent and barbaric non-European ‘other’”.\(^{29}\)

I will not use a specific critical theory,\(^{30}\) but I rest the linkage between this thesis and the critical approach with concluding that such a position is helpful in understanding the problem for

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\(^{25}\) Shaw 2014, 45. The generic phrase critical international legal theory covers approaches critical of the mainstream liberal (or “traditional”) approach to international law, e.g. Postcolonial, Feminist and Marxist approaches. For the purpose of this thesis, it includes scholars such as Richard Falk, Antony Carty, David Kennedy, Martti Koskenniemi, Antony Anghie, Susan Marks, B.S. Chimni, Anne Orford, Karen Knop and Wendy Brown. According to Pål Wrange, this line of writing appeared in the second half of the 1980’s through writers such as Carty, Kennedy and Koskenniemi; see Wrange 2007, 56.


\(^{27}\) Wacks 2012, 281.


\(^{29}\) Anghie 2006, 274.

\(^{30}\) One could e.g. decide to “use” the theories of one or several thinkers of critical international legal theory, e.g. David Kennedy, Antony Carty, Martti Koskenniemi or Nathaniel Berman, and “apply” them in a specific manner (if one could even say it is possible to “apply” a person). One could also use several critical or new approaches such as Marxist and Third World Approaches to International Law or postcolonial theory. However, I lack the resources and time to properly evaluate the pros and cons of such a methodology. Hence, I will use critical legal theory in a less coherent way. Also, as Pål Wrange shows, prominent scholars have shown the difficulty of creating coherent doctrine; see Wrange 2007, 55.
this study. For example, postcolonial approaches to International Law may be of interest as its writers share the notion of “othering”. Furthermore, I understand the critical approach to have an affinity to postmodern theory. Philosopher Chantal Mouffe captures postmodern thinking and postmodernity as an anti-essentialist rejection of metanarratives:

[W]hat one means when one refers to postmodernity in philosophy is to recognize the impossibility of any ultimate foundation of final legitimation that is constitutive of the very advent of the democratic form of society and thus of modernity itself. This recognition comes after the failure of several attempts to replace the traditional foundation that lay within God or nature with an alternative foundation lying in man and his reason. These attempts were doomed to failure from the start because of the radical indeterminacy that is characteristic of modern democracy. Nietzsche had already understood this when he proclaimed that the death of God was inseparable from the crisis of humanism.

Postmodernity does not imply modernity is no more. The prefix “post” designates a position located chronologically after, but not above it. It refers to a specific “after”: rather than having disappeared, the past conditions, even dominates, the contemporary world which nonetheless represents a breaking away from what was before. Using “post” means that I talk about the present as conditioned, bound and arranged by narratives of the past.

A word of caution. Postmodern thinking often gives a sense of anxiety in that it postulates the inherent instability of meta-narratives. All attempts to once and for all demonstrate a moral or legal code will fail. In this way, postmodern theory tells something is on the brink. But it implies the following question: what is the point of saying or arguing anything? Saying “everything is political”, or “international law is political” is meaningless; under such conditions, everything and nothing becomes political and the “political” itself worthless as a concept. Why, then, do many postmodern theorists argue for the impossibility to separate the two? Again, I believe Wittgenstein’s understanding of language is useful to clarify this dilemma. “Language-games” illustrate the irreducibility of every discursive practice: each type of discourse refers to a practice that has its own rules, its own grammars, its own narratives and histories. Language-games are social facts constructed upon implicit conventions. Wittgenstein’s famous duck/rabbit picture may illustrate this:

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31 Knox 2014, 73.
32 Mouffe, C., “Radical Democracy: Modern or Postmodern”, in Ross 1988, 34.
34 Koskenniemi 2001, 9f.
The relationship between law and politics is exactly the same as the relationship between the rabbit and the duck in this image. And what is that relationship? First, the distinction does not exist in the image or the world itself but in our minds. Sometimes it is easy to make the distinction; some act as suave operators between discourses. In other cases, it is difficult. Second, we visualize things as wholes. We always see the duck as a whole, not as a hybrid animal. When a person acts as a lawyer that person operates as a lawyer all the way. When someone acts as a political scientist that person too operates as that from beginning to end. Corollary, law and politics are in this way embedded while simultaneously having their own rules, agendas, sociologies, psychological predispositions, love affairs, structures, technologies, seductions, etc.

But why imagine oneself as either a duck or a rabbit? In this case, the question contains its own answer: I write a thesis of law; my language is international law. Language-speakers dwell in narratives that enable them to operate in the social world. But belonging to the language of rabbits can potentially make one temporary blind to the narratives of ducks. My aim is to look at my thesis question using legal sources and the vocabularies that follow such sources while at the same time recognizing the value of other arguments and narratives. This is why I argue that international law is best understood as a language, its sub-disciplines themselves understood as particular languages.

At the operative level, my approach consists of investigating the language coming from various legal or quasi-legal institutions, e.g. the International Court of Justice and the UN Security Council (hereafter; ICJ and UNSC respectively), and reading the works of scholars belonging to critical international legal theory as well as other approaches. In light of my theoretical approach, this also means that I assume international law to already be situated in a state where different narratives struggle for influence. International law lacks the capacity to provide coherent justification as indeterminacy follows as a structural property of the internation-

35 Here, I follow Martti Koskenniemi’s argument proposed at one of his lectures at The Lauterpacht Centre for International Law, University of Cambridge 28 October 2013.
al legal language itself. The normative value of rules or how those rules are to be applied in a particular situation is here less interesting than assessing various concepts that are offered by the language of international law. The vocabularies of that particular language is often found when investigating the so-called sources of international law.

International law has been plagued by disputes between “positivists” and “natural lawyers” as to what those legal sources are. Nowadays, however, I believe few would argue that international law is or can be based on anything other than the practice of States. In other words: international legal normativity is perceived by most international lawyers to stem from the consent of States. Consent is key, and States show their consent explicitly or tacitly. The sources of law are the instruments by which international lawyers are able to work out what this consent looks like. But it is also the positivist notion that law is the practice of States that causes much of the headache when talking about international law. On this matter, I agree with Anthony Carty that States exist in a Hobbesian state of nature since there is no international sovereign. This headache will be discussed in chapter 4.2 on statehood and in the forthcoming discussion, chapter 6.

Finding the sources of international law is usually done by reference to the formal sources of international law, in particular the triad of sources found in Article 38 of the ICJ Statute: treaty law, customary law, and general principles complemented by case law and the writings of eminent specialists. These sources are useful due to their perceived legal normativity. How States, international law-making institutions (e.g. the ICJ and the UNSC), and scholars interpret them is of interest as international legal language would be uninteresting if there were no normative rules accompanying that language in the first place.

Thus, my methodological approach mainly consists of working closely with the normative sources of international law. This becomes clear in chapters 4-5 where I describe the subjects of international law and the relevant content of international humanitarian law, international

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36 Bring et al 2014, 32ff. See also, Wacks 2012, 10ff, 77ff.
37 Although a new wave of scholars belonging to the new natural law theory approach is emerging; see, Searl 2016 PhD, 208. See also, Wacks 2012, 23.
38 That is, its claim to provide its legal subjects with exclusionary although prima facie reasons for action through binding legal norms, Besson, S., “Theorizing the Sources of International Law”, in Besson & Tasioulas 2010, 173. “Legality” is here understood as a quality of legal norms as opposed to other social norms, Raz 1979, 123-4.
39 This position does not mean that non-consensual customary international law is non-existing. Consent is a bedrock principle, but some customary rules of international law is undoubtedly not to the benefit of all States; see Guzman, A.T., Hsiang, J., “Some Ways that Theories on Customary International Law Fails: A Reply to Lázló Blutman” (2014) in EJIL vol. 25 no. 2, 559.
41 Besson, S., op cit, 164. See also, Shaw 2014, 50.
human rights law and international responsibility. The empirical data provided on ISIS (chapter 3) relate to the particularities to each of those chapters. Again, my intention is not to provide assessments or discussions on how to apply certain legal rules in relation to ISIS, but rather to investigate whether it makes sense to talk about ISIS in certain ways using international legal concepts. Sometimes these two realms of writing are virtually the same, e.g. in chapter 5.2. My interest however is not on the rule-based aspect of international law, but the language of international law. Here, I do recognize that language to be relevant mainly because of such rules.\(^{42}\) My theoretical approach becomes more apparent in chapter 6 where I make sense of my findings in chapters 4-5 by using philosophical notions of law.

A last note on conceptualizing from a methodological approach. Based on my research question, I am less interested in whether ISIS could be said to constitute an international legal person, i.e. a subject of international law. In this way, I avoid the confusing and complex debate regarding “subjects” of international law.\(^{43}\) However, these personalities may provide workable hypotheses that are suitable for me (see infra chapter 2 and 4).

1.5 Delimitations

In order to set the scope, I will focus on ISIS during the time period between early 2014 and September 2016. Lastly, I will not investigate whether ISIS is conceivable as a national liberation movement or as a colonial “people” seeking self-determination. The reason is that I could find almost no discussions on this topic. No empirical data clearly points to ISIS being a people’s movement although some scholars have observed that the bombing campaigns against ISIS evoke resentment among the population (see infra chapter 3). Because of limits in space and time, I cannot investigate the entire discourse of international law. This is perhaps the most obvious issue with this thesis.

1.6 Outline

Since I claim to analyse concepts of international law, the next chapter will look at why a critical perspective on international law is needed and what it means. This chapter will also further set the stage for the rest of the thesis, especially chapter 6.

\(^{42}\) In this sense, one could say that the language of international law is parasitic on its rules; the former would be of little or no value if the latter had no meaning.

\(^{43}\) See generally, Clapham 2006, 59ff.
Chapter 3 will tell the story of ISIS; much of it will revolve around its emergence, its organization, structure, operation and control of territory. I will conclude that ISIS should be viewed as a locus of political authority, an important conclusion for the rest of the thesis.

Following my conclusion on ISIS in chapter 3, the fourth chapter will discuss whether ISIS can be said to be conceptualized using so-called international legal personalities: Statehood, the Belligerent community and the Individual.

The fifth chapter will pick up where chapter four ends. Here, I will investigate the language of international humanitarian law, international human rights law, international legal responsibility, and consider whether these spheres of international law can conceptualize ISIS.

Lastly, in chapter six, I will reflect on my findings in chapters 4-5 using chapter 2 as a framework. In the course of this reflection, I will turn to more philosophical notions of international law in order to personally reflect on my findings. My goal is to highlight some of the issues inherent in the potential inability of international law to give ISIS a name.

2 WHY SO CRITICAL?

In this chapter, I explain why a critical approach is useful for the purposes of this thesis. I will in the course of that explanation make some historical and theoretical notes. What I want to do is to pave the way for chapters 4-5, and the theoretical discussion in chapter 6.

2.1 Problem-solving theories and critical theories: how to rise to meet the challenge

Theory, Robert Cox argues, can serve two purposes. The first purpose relates to the capacity of theory to give clear answers: “to help solve the problems posed within the terms of the particular perspective which was the point of departure”. 44 The second purpose relates to theory being more reflective as it investigates the process of theorizing itself: “to become clearly aware of the perspective which gives rise to theorizing, and its relation to other perspectives […] to open up the possibility of choosing a different valid perspective from which problematic becomes one of creating an alternative world”. 45

45 Ibid.
These distinct ways of theorizing give rise to on the one hand “problem-solving theory”, and on the other hand “critical theory”. The former theory “takes the world as it finds it, with the prevailing social and power relationships and the institutions into which they are organized, as the given framework for action”. Its aim is to deal with particular sources of trouble. The tools and institutions are presupposed and not called into question. Theory assumes itself to be stable, coherent. This approach is useful as it is able to “fix limits or parameters to a problem and to reduce the statement of a particular problem to a limited numbers of variables which are amenable to relatively close and precise examination”. However, while statements of laws or regularities appear to have general validity they are nonetheless dependent on the institutional and relational parameters assumed by the problem-solving approach itself.

By contrast, the latter theory does not take institutions and social power relations for granted; the critical theory “stands apart from the prevailing order of the world and asks how that order came about”. It concerns itself with the origins of the institutions and social power relations and asks whether they might be in the process of changing. It does not prima facie accept the prevalent framework for action, which problem-solving theory accepts as its parameters. It therefore lacks precision, which often is achieved by problem-solving theory in that it “posits a fixed order as its point of reference”.

However, the problem-solving theory is based on false presumptions. The social and political order is not fixed; concepts and institutions are in constant flux. The relative fixity presumed by problem-solving theory is not merely a convenience of method, but rests on ideological bias in that it implicitly accepts the prevailing order as its own framework. Critical theory may contain and use problem-solving theories, but while doing so it nonetheless focuses on the usefulness of questioning problem-solving theories as guides to action. Intended or unin-

46 There are similarities between Robert Cox’s notion of critical theory and the critical theory of the Frankfurt School. Both argue, e.g., that the subject is impacted on by material conditions, but that the material conditions can be made or unmade by the subject meaning that the fundamental importance of the production system in the shaping of everyday experience, and that positivism regards itself as autonomous from society thus not reflecting upon itself and regards the problems of society as anomalies that do not require systemic transformation (resulting in a quest for status quo); see Leysens 2008, 88.
47 Cox, R.W., op cit, 88.
48 Ibid.
49 Ibid. Notice how this is a problematic notion of critique: one cannot stand “outside” of the world and critically ask how that world came about. “Looking at the world” cannot be separated from the world itself.
50 “The critical approach leads toward the construction of a larger picture of the whole of which the initially contemplated part is just one component, and seeks to understand the processes of change in which both parts and whole are involved”, Ibid, 89.
51 Ibid.
tended, the problem-solving approach sustains the prevalent order, while the critical approach rejects the permanency of the existing order.52

Problem-solving theory suits the practitioners of a discourse in times of stability and fixed social and political structures. Conditions of uncertainty in power relations and instability, however, beckons critical theory to deal with the effects of change.53 To exemplify, there are many instances where States quite successfully regulate issues of their relations with one another. States use the more than 200,000 treaties registered at the UN on a daily basis.54 Disputes – especially between States – are infrequent.


Much of the law to do with territorial disputes is settled amicably international arbitration or ICJ cases – where it has to do with resolving the details of territorial delimitations left over from colonial times, or the demarcation of maritime boundaries.

Much of international trade and investment law are regulated by bilateral or multilateral treaty. The World Trade organization and the World Bank Centre for the Settlement of Investment Disputes handle these questions regularly.

This includes not only “regular” cases but also what Per-Olof Ekelöf would call “hard cases”, 55 or, in H.L.A. Hart’s words, “indeterminate cases”.56 The existence of such cases are attesting that applying a norm is part of the definition of that very norm. Viewed as a language, international law offers various tools for the multitude of problems that may arise. Indeed, this capacity gives support to the notion that international law is able to deal with its desired goals and tasks. Therefore, the problem-solving approach mostly refers to the “daily routine of international life”, 57 i.e. the large numbers of agreements and customs that are complied with. This does not mean that all practice rest on one or several solid theories. It means, however, that international legal practice refers to some sort of coherent order, out of which “some outcomes are preferred to others”.58 So problem-solving theory seemingly work fine even when anomalies occur: “[w]hatever uncertainty there might be about some particular the legal system itself is coherent, or at least it is possible, by the use of consistent princi-

52 Ibid, 90.
53 Ibid.
54 Bring et al 2014, 17.
55 In Swedish: “Säregna fall”; see Ekelöf 2002, 80.
56 “[W]hen the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us”, Hart 1961, 121.
57 Shaw 2014, at 9.
58 Klamberg 2013, 10. “[...] each situation has a pattern of its own, and the different types of interests and activities that might be involved are infinitely various. It is for the judge to translate the activity involved in the case before him in terms of an interest and to select the ideal with reference to which the competing interests are measured””, quoted, ibid.
But when anomalies grow in multitude and complexity, one wonders whether the discipline is in a permanent state of indeterminacy, that indeterminacy being a structural part of the original language itself. In times of greater fluidity in power relationships, e.g. crisis, there are openings for new developments directed to the problems of world order.\textsuperscript{60}

In other words, problems on the one hand are solved with regular tools and methods of international law. Crises, on the other hand test the limits of international law, challenging its foundations and may even transform its categories and concepts. This does not necessarily refer to the many situations of conflict and confrontation where international law is seen as unable to be the source of instant solution – situations which often strikes at the heart of the system. Rather, it evokes a critical approach in that crises questions how the discipline properly addresses those crises. Critical theory becomes more relevant, when there is a perceived crisis of world affairs or method.\textsuperscript{61}

\textbf{2.2 Crises, paradigm shifts and “Grotian moments”}

That problems and crises have distinct consequences for a discipline is not peculiar to international law. Historian of science Thomas Kuhn articulated the notion of the development of sciences. Sciences go through alternating periods of “normal science” when an existing model of reality dominates a protracted period of puzzle-solving, and “revolution”, when the model of reality itself undergoes drastic change.\textsuperscript{62}

A paradigm – a universally recognized scientific achievement that, for a time, provide model problems and solutions for a community of practitioners that share a paradigm\textsuperscript{63} – may therefore shift due to preceding crisis of method.\textsuperscript{64} “Paradigm shifts” occur at times when a given theory explaining “reality” gradually appears to those working with that paradigm to be no longer adequate in explaining reality. It is not a question of moral success but rather a ques-

\textsuperscript{59} Koskenniemi 2006, 62.
\textsuperscript{60} Cox, R.W. \textit{op cit.}, 91.
\textsuperscript{61} I want to stress that being critical in this sense is not the same thing as saying that when law and reality collide, it is law that must give way. Such a position would imply that existing law has been over-taken by facts on the ground and, therefore, must be revoked or ignored. Arguing that critical theory may be of use is not necessarily the same thing as stating that law is “giving way” only because it is overwhelmed by the frequency or intractability of violations.
\textsuperscript{63} Kuhn 1962, 176. Interestingly, Kuhn defines the community of practitioners “as sharing a paradigm”. In relation to international law and, say, international relations and international politics, all three share the same paradigm.
\textsuperscript{64} Kuhn, T.S., \textit{op cit.}, 80.
tion of which framework best suited to describe what is going on.\textsuperscript{65} When there is consensus within the discipline, normal science simply continues. Over time, however, as the number of anomalies grow, things become difficult to explain within the context of the existing paradigm. In some cases, anomalies may accumulate to the point where weaknesses in the old paradigm are revealed or when it simply is unable to provide coherent or convincing answers. Kuhn calls this a crisis-period. Even crises can be resolved within the context of normal science within the old paradigm. But eventually the problematic nature of applying the current paradigm becomes evident. Thus, a shift is the moment when underlying assumptions of the scientific field are re-examined as new paradigms are established.\textsuperscript{66}

Kuhn’s understanding of how scientific language change explains how and why crises change how we operate in a discipline. What kind of framework suits best to describe a situation? A number of crises may indicate that current paradigms no longer prevail. Does the principles of state-centricity and sovereign equality between States located in Article 2(1) of the UN Charter still explain reality? Or has a “Grotian moment” occurred, a “paradigm shifting development in which rules and doctrines of customary international law emerge with unusual rapidity and acceptance”?\textsuperscript{67} Michael P. Scharf mentions two examples:

The Nuremberg precedent, and the universal and unqualified endorsement of the Nuremberg Principles by the UN General Assembly in 1946, resulted in “accelerated formation of customary international law”, including the mode of international criminal responsibility known as Joint Criminal Enterprise liability.\textsuperscript{68}

The international community’s response in 2015 to ISIS in Syria in that it provided a “final push”, “confirming that use of force in self-defence is now permissible against NSAs where the territorial State is unable to suppress the threat that they pose”.\textsuperscript{69}

Related to the last point, we can further add the return of just war theory in the disguise of pre-emptive self-defence, as proposed by Antony Anghie who argues that the responses to 9/11 was indeed such a moment for international law as those responses suggested a new set of legal rules to deal with a perceived set of new threats, i.e. international terrorism.

It has brought back, Anghie argues, the distinction between States based on their sociological characteristics, namely between those civilized States being fully-fledged democratic and those uncivilized States being “rouge” or “failed”, and, the most recent vocabulary coming

\textsuperscript{65} In relation to the crises that paved the way for Einstein’s theory of relativity: “What occurred was neither a decline nor a raising of standards, but simply a change demanded by the adoption of a new paradigm”, Ib., 91.

\textsuperscript{66} Ib., 81. For example, in physics, Newton’s theory of gravity (there is a centre) was eventually replaced by Einstein’s relative theory (there is no centre). The latter proved better in describing “reality” than the former.


\textsuperscript{68} Ibid.

from Australia, Turkey and the US “unwilling or unable” to handle terrorist threats emerging on such countries’ territories. Rules vary depending on what “kind” of State one is dealing with. Then-UN Secretary-General Kofi Annan, commenting on the so-called Bush doctrine (which reflects the security thinking post-9/11) and pre-emptive force, noted that it was a “fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years”. We can presume the drafters of Article 51 of the UN Charter worked within the paradigm of interstate war. The question, then, is whether that paradigm still holds, and how anomalies in the language of international law reflects the unviability of that paradigm.

ISIS and the reactions against ISIS may very well be viewed as important parts to the particular moment of international law that began with the responses to 9/11. This makes critical approaches meaningful, especially those perspectives that look at the violence inherent in the discipline of international law and how the language of international law came to be. I will return to these matters when I discuss how international law can be said to handle its putative inability to conceptualize ISIS (see infra chapter 6).

2.3 Life under post-Westphalia

2.3.1 The story of Westphalia

The authority and equal sovereignty of States can be said to be the paradigm of international law and world order itself. This order is commonly believed to have emerged in 1648 after the Treaty of Westphalia, followed by perhaps the first international organization, the Con-


73 Article 2(1) of the UN Charter. This is not to say that international legal sovereignty is the same thing as “Westphalian” sovereignty. An entity may enjoy the former kind of sovereignty without necessarily enjoy the latter. See also Krasner, S.D., “The durability of organized hypocrisy” in Kalmo & Skinner 2015, 202. See, also Knop, K., “Statehood: territory, people, government” in Crawford & Koskenniemi 2012, 112, and Anghie 2006, 71. “Sovereignty, understood as a defeasible but protected status in the international system, carrying with it the presumption of full governmental authority over a polity and territory”, Crawford, J., “Sovereignty as a legal value” in Crawford & Koskenniemi 2012, 123.

74 “The treaties confirmed the supplanting of centralized imperial power by a juridical arrangement of autonomous sovereigns. Medieval theocracy gave way to early modern-legal rationalism (for some time after, the Vatican continued to think of international law as a Protestant conspiracy)’, Simpson, G., ‘International law in diplomatic history’, in Crawford & Koskenniemi 2012, 31. For an example of how such a view can be put forward, see Kissinger 2012: “The Peace of Westphalia became a turning point in the history of nations because the ele-
gress of Vienna in 1814-15 – a response to the critical issues arising from the French Revolutionary Wars and the Napoleonic Wars.\textsuperscript{75} “The Peace of Westphalia [...] ushers in the era of sovereign absolutist states which recognized no superior authority”.\textsuperscript{76} In this way, Westphalia is central to the imagination of the profession of international law: “It was then that international law emerged as a law of states understood as legal subjects of persons.”\textsuperscript{77}

Before 1648, the story goes, Europe was in a mess. Violent political ideology was all over the place. It was dangerous and dark and the lives of men were, using Thomas Hobbes’s words, nasty, brutish, and short. However, after 1648, law came as a philosophical notion, and the discipline of that law took us away from all that. David Kennedy explains:

International legal scholars are particularly insistent that their discipline began in 1648 with the Treaty of Westphalia closing the Thirty Year’s War. The originality of 1648 is important to the discipline, for it situates public international law as a rational philosophy, handmaiden of statehood, the cultural heir to religious principle. As part of their effort to sustain this image, public international law historians have consistently treated earlier work as immature and incomplete - significant only as precursor for what followed. Before 1648 were facts, politics, religion, in some tellings a ‘chaotic void’ slowly filled by sovereign states. Thereafter, after the establishment of peace, after the ‘rise of states’, after the collapse of ‘religious universalism’, after the chaos of war, came law - as philosophy, as idea, as word.\textsuperscript{75}

Westphalia did not herald an age of peace,\textsuperscript{79} but it was a project in the making. The law of nations and the modern state could provide “an alternative to the use of force in the ordering of human affairs. In this sense, all of international law is law of peace, peace being the antithesis of force, violence and armed conflict”.\textsuperscript{80} Thus there is in the discourse of international law and among international lawyers themselves\textsuperscript{81} a perceived progression from the world of politics to the world of law.

Out of this progression, one may say that international law came alongside a number of pledges, i.e. salvation in the form of the humanization of armed conflict, peace, development,
This promise offers a way of organizing political life, based on the transcendence available through universal acceptance of international law. Jennifer Beard: “The correlation between state sovereignty and an overarching peace would become the hallmark concern for international lawyers in the following centuries.”

This is a progressive narrative; it is not just a conceptual relationship but also a temporal relationship between a political past and a legal future. What followed was the incapacity to agree on the meaning of “law” and the meaning of “politics”, and their dislocation and delimitation. In the end, States became the unambiguous locus of political authority. Indeed, since Westphalia the fundamental legal actors have ever since consisted of States. This was pointed out by the ICJ in 1949: States are “political entities equal in law, similar in form […] the direct subjects of international law”. Judge Higgins pointed it out more clearly: “States are still the most important actors in the international legal system and their sovereignty is at the core of that system”. Higgin’s statement is non-equivalent to the view that international law only applies to States. International law has evolved to govern relations between States, and between States and individuals, corporations etc. It is a law that binds most aspects of situations around the globe.

2.3.2 The story of the end of Westphalia

However, several scholars argue that the international system “in reality” is of a different character. They argue that other forms of world order have emerged. These narratives see the waning sovereignty of States at the world stage. Instead, NSAs affect world order in fundamental ways. Three candidates are often proposed: (a) global empire, (b) international
corporations representing either (1) capital, or (2) organized violence,\(^{90}\) and (c) various groups and organizations of political-religious violence. Political philosopher Wendy Brown argues that (b)-(c) now enjoys the "central characteristics" of sovereignty:

Suveräniteten utraderas inte [...] vi träder inte in i vare sig ett postnationellt eller ett poststatligt tillstånd. Att nationalstaternas suveränitet avtar innebär inte att staterna och suveräniteten i någon enkel mening förlorar i makt och betydelse [...] Stater fortlever som ickesuveräna aktörer, och många av de kännetecken som utmärker suveräniteten [...] framträder numera i just de transnationella maktsfärer som den westfaliska freden syftade till att underordna och innesluta i nationalstaterna, nämligen den politiska ekonomin och det religiöst legitimerade väldet. I motsats till Michael Hardts och Antonio Negris påstående att den nationalstatliga suveräniteten har omvandlats till ett globalt imperium, och i kontrast till Giorgio Agambens påstående att suveräniteten har övergått i ett världsomspännande produktion av naket liv (ett globalt inbördeskrig), skulle jag vilja hävda att suveränitetens centrala karaktäristika är på väg att flyttas över från nationalstaten till kapitalets oinskränkta herravälde och det av Gud sanktionerade politiska våldet.\(^{91}\)

As new actors emerge, State sovereignty wane. So while the paradigm of Westphalia structures our understanding of world order it is at the same time unable to explain current relations in the social world. Although one should be careful in underestimating States in regards to their histories, struggles, capacities, e.g. their powers to transform societies, their use of force and their possession of certain weapons of mass destruction, Brown presents a view of the erasure of the conceptual meaning of sovereignty. Or, as Richard Falk points out “the political monoculture of territorial states remains formally the exclusive foundation of world order, but its political reality is being challenged in various settings".\(^{92}\)

Political scientist Mary Kaldor makes a similar argument when she states that the basic structure of the State is changing and that the perhaps most important aspect of this change is its relation to organized violence. “On the one hand, the monopoly of violence is eroded from above as some states are increasingly embedded in a set of international rules and institutions. On the other hand, the monopoly of violence is eroded from below as other states become weaker under the impact of globalization.”\(^{93}\) In other words, current thinking fails to grasp what is going on as NSAs are parasitical upon the concept of armed conflict,\(^{94}\) or, as historian Yuval Noah Harari points out, parasitical upon the concept of the State itself.\(^{95}\)

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\(^{90}\) At least 25 international corporations could be argued to be more powerful and more influential than many countries, see Khanna, P., et al 'These 25 Companies are More Powerful than Most Countries' Foreign Policy (2015).

\(^{91}\) Brown 2010, 25 (my emphasis).


\(^{93}\) Kaldor 2012, 205.

What I want to point out is that on the one hand there is a narrative in which States are the central actors and that this centrality is based on the modern state’s claim on monopoly of the legitimate use of force as well as providing forms of particular political-national life. Only States are considered sovereign; once statehood is generally recognized a “new situation arises, a category divide is established [...] the State is ‘sovereign’, has ‘sovereignty’; and this is true, no matter how, how diminutive its resources”.

On the other hand, there is the view that State sovereignty is losing its omnipotence and former value as the only central actor in the contemporary world, the reason being other locations and outbursts of violence and sovereignty. In such a post-Westphalian order, the question is how concepts of international law can grasp new phenomena in the social world by referring to them categories of law that can provide prima facie reasons for certain action through binding legal norms. In the battle of narratives, international legal language may “lose” its edge in those situations international law claims to handle and regulate. For example, what Mary Kaldor notes is a “growing illegitimacy of wars” may reflect a growing irrelevance of laws of war as this domain simply fail to address the actors concerned in armed conflicts.

The other side of the coin is how to respond to threats posed by the kind of political authority that cannot be adequately located. This is enunciated by Anghie and Scharf who both identify an increased use of pre-emptive self-defence against NSAs located at the territory of States. The result, Scharf argues, is a widened notion of “armed attack” in Article 51 of the UN Charter but in such a way that it cannot be integrated with Article 2(1), “the principle of the sovereign equality of all its members”. Meanwhile, Anghie argues that it signals the return to nineteenth century distinctions between the civilized and uncivilized.

Interestingly, Robert H. Jackson was indirectly or unintentionally talking about this development. His argument was that “quasi-states” – former colonies gaining “negative sovereignty” in the course of self-determination while lacking in resources, capacities and knowledge to effectively govern and uphold Western centralized notions of “actual statehood” – would fail at being members of the community of sovereign States. “Quasi-States” lack, in this terms,
“positive sovereignty”. Therefore, their achieving formal equality would imply a number of consequences:

Equal sovereignty for all states makes it impossible to address the domestic problems of some states by international means without the consent of their governments. Alternative arrangements which could supply greater expertise, responsibility, and probity in government decision-making are not only impossible without the permission of the government whose authority they would undermine but also unthinkable because they touch directly on a crucial issue which is ruled out of order by post-colonial international society: the domestic behaviour of independent governments. [...] The effect of establishing negative sovereignty across the board was to create an artificial institutional levelling of a world which in actual fact was and is anything but level.

Jackson’s investigation points to some consequences of the fact that international law and the UN Charter never solved one of the major contradictions pre-1945, namely between formal and “real” statehood, between normative and “effective” sovereignty.

How to conceptualize political authority beyond States and how to deal with issues stemming from an inability to do so raises a number of questions. Can the nexus between the two be understood in possible way without the paradigm of international law as a law governing the relations between equals as no higher guarantor exist in international law?

International law operates with the help of certain hypotheses. These may be conceptually traced to its “roots” in the eighteenth, nineteenth and twentieth centuries. States and the entities they created – e.g. the League of Nations or the UN – are adamant. This is why international law assume States not to “lose” sovereignty even in a state of extreme fragility or political cataclysm. Also, international law continually develops new fields of legal enquiry to address new kinds of complexities, such as economic and technological structures. Through fragmentation, international law is able to stay relevant. This is reflected by a multitude of international “expert” legal languages.

One can witness a legal landscape in which a situation can be described simultaneously by different legal disciplines in different ways. There is no longer a unified view of international law as an authoritative language, and many of the domains of international law have different, authoritative articulations and solutions to deal with problems. In the course of such development, unilateral action and domestic laws as well as counter-terrorism laws – “states of excep-

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99 Negative sovereignty is defined as the freedom from outside interference: a formal-legal condition. Positive sovereignty is where established states exercise effective dominion over their populations and territories. See Jackson 1991, 15ff.
100 Ibid., 198, 200.
102 As Anne Orford points out, the proper relation between law and order has ‘long been a contested one’. Orford, A., “Constituting order”, in Crawford & Koskenniemi 2012, 271.
104 E.g. international trade law, human rights law, security law, law of the sea; see Shaw 2014, 46–7.
tion” – may potentially become more capable in describing the social world. If something is located outside international law but at the same time has to be addressed, how, then, does the language of international law rise to the challenge? As I stated, problem-solving theories affirm paradigms. In contrast, critical theory investigates whether current paradigms are able to describe what is going on, and how the discipline of international law is meeting, in Kuhn’s words, the “demands” raised by crises, such crises preceding paradigm shifts.

Critical theory is therefore meaningful in order to theorize how the language of international law operates in relation to ISIS and how that operation affects international law itself. The international legal conceptualization of ISIS may therefore indicate how international law copes in a “post-Westphalian world”.

3 ISIS OF SIMULACRUM AND LOCUS OF POLITICAL AUTHORITY?

– WHAT KIND OF TERRORISTS DRIVE ARMoured VEHICLES AND TANKS? IS ISIS AN ORGANISATION, OR IS IT MORE LIKE AN ARMY?105
– WE HAVE TO UNDERSTAND THAT ISIS IS A COUNTRY NOW.106

3.1 Introductory remarks – ISIS: a fog of theories

First, I want to underline the contradictory nature of many sources of information regarding ISIS. Even giving it a name is problematic; it has been changed seven times and has had four leaders. Officially, it is frequently called “the Islamic State, also known as Daesh, ISIS or ISIL”. Former al-Qaeda member, Ahmad Fadhil, or as he was later known in the Jihad, Abu Musab al-Zarqawi, called it “Army of the Levant”, “Monotheism and Jihad”, “al-Qaeda in Iraq”, and “Mujihadeen Shura Council”.107 I will simply refer to ISIS. For convenience, I will also use “terrorist organization” without prejudice to the question of this thesis.108

ISIS remains inexplicable. Its founder Al-Zarqawi was killed by a US air strike in 2006. But his movement survived the full force of the 170,000-strong, $100 billion a year US troop surge,109 as well as competition from other Jihadist groups.110 After the US withdrawal in

105 Weiss 2015, xii.
106 Journalist Jürgen Todenhöfer, quoted in Goodwin, ‘We have to understand that Isis is a country now’ The Sunday Times (04.01.14).
108 It is denominated in such a way by the U.N. as well as the US, United Kingdom, and Swedish governments, see, e.g. UNSC res. 2253 (2015). See also Swedish government proposition 2014/15:104 Svenskt deltagande i den militära utbildningsinsatsen i norra Irak (2015), 4ff.
110 Ibid.
2011, the new leader, Abu Bakr al-Baghdadi, expanded into Syria and re-established his organization in northwest Iraq. In June 2014 ISIS took Mosul and in May 2015 Ramadi and the Syrian city of Palmyra. Later, ISIS-affiliates conquered the city of Sirte in Libya. In 2015, nearly thirty countries, including Nigeria, Libya, and the Philippines, had terrorist cells claiming to be part of the “movement”. All of this seems strange since ISIS should have been stopped in late 2014: the Iraqi army was restructured; old generals were removed; foreign governments provided equipment and training; some 3,000 US advisers appeared in Iraq; formidable air strikes and surveillance were provided by the US and others; the Iranian Quds force, the Gulf states, and the Kurdish Peshmerga joined the fight. ISIS was therefore expected to lose Mosul in 2015. Instead, it captured Palmyra in Syria and Ramadi in Iraq. How could no observer predict ISIS nor see it coming? The answer remains foggy. For example, theories struggle to explain why foreign fighters started to travel to ISIS in the first place, and contradictory reasons fail to explain why ISIS could stay in power. I cannot delve in these questions, but I want to underline them in a self-critical way, as a word of caution of how little we know about ISIS.

3.2 The rise of ISIS

ISIS’s roots can be found in the Sunni/Baathist-dominated Iraqi army of Saddam Hussein, one of the largest armies in the world before the US-led invasion of Iraq in 2003. After the army’s defeat, all members of the Baathist party were banned from participating in any government positions. Dispossessed and marginalized under the US occupation and the subsequent Shia-dominated Iraqi government, parts of the former Sunni army launched a rebellion, some


112 In this sense, one could actually talk about ISIS as phenomenon taking place outside boundaries, resembling a purely transnational movement, a terrorist internationale.

113 Several authors argue that ISIS’s media activity is the answer, but none is able to sufficiently provide adequate explanations why foreign fighters from all kinds of places and backgrounds decided to go there in the first place. The surge of foreign fighters was not driven by some recent fundamental change in domestic politics or in Islam. There were no fundamental shifts in the background of culture or religious belief between 2012, when there were almost no foreign fighters in Iraq, and 2014, when there were 20,000, perhaps 30,000 of them. Apparently, the only change was the sudden territory available to attract and house them. See generally, Berger & Stern 2015.

114 Yalda Hakim’s BBC documentary shows the rough brutality and incoherence of ISIS’s domination. Abdel Bari Awta describes a “well-run organization that combines bureaucratic efficiency and military expertise with a sophisticated use of information technology”. Zaid Al-Ali discusses in his account of Tikrit ISIS’s “incapacity to govern” and the total collapse of water supply, electricity, and schools, and ultimately population under its rule; see “Tikrit: Iraq’s Abandoned City,” NYR blog (04.05.2015).

115 Lister 2015, 36-7.
of them joining forces with a band of insurgents called “al-Qaeda in Iraq”, rebranded in 2006 as “Islamic State of Iraq” (hereafter; ISI – one of ISIS’s earlier incarnations).  

Many former members of the Baath party, especially members close to Saddam Hussein, were jailed by the Americans – together with high numbers of ISI Jihadists. During those years, former members of the Baath Party and ISI fighters merged. After his release in 2009, Al-Baghdadi, put former Baathist-members with military, technical and administrative skills as well as know-how at top positions. This merger was crucial.  

The civil war in Syria in 2012 presented ISI an opportunity to seize territory across the Iraqi-border. In April 2013, following a split between ISI and another terrorist organization, Jahbat al-Nusra, ISI changed its name to “Islamic State of Iraq and al-Sham” – ISIS. Soon thereafter, ISIS seized nearby Syrian oil wells and refineries, providing it with vast financial resources. In 2015, ISIS was reported to control approximately 60 per cent of Syria’s total oil production. The Syrian government as well as other insurgents have been reported to buy substantial quantities of oil produced by ISIS. Indeed, ISIS’s vast financial resources has been one of the principal targets of US sanctions and UNSC Resolutions.

Another reason behind the rise of ISIS as well as other Jihadist movements in the Middle East was the dramatic increase of arms in the region during the 1980s and 1990s. The oil crises of 1973 and 1979 lead to a spike in USD price per barrel of crude oil. The result was huge amounts of capital flowing to oil producing countries, e.g. Saudi Arabia. What the Saudis and others did was to put vast amounts of capital into European banks. In turn, this created a huge flow of USD to countries in the Middle East and Northern Africa, which in turn created enormous arms exports to the Middle East (see figure 1.1). The quantity of weapons in Algeria, Saudi Arabia and Syria reached levels never seen before and contributed to increasing

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116 Ibid., 39. One could say that ISIS first signalled its central ambitions in 2006 with the creation of ISI.
118 Lister 2015, 20ff.
120 Gerges 2016, 170ff.
121 Jahbat al-Nusra, the al-Nusra front, or al-Qaeda in Syria, now re-named as Jabhat Fateh al-Sham is branded by the US, UN, UK and EU as a terrorist organization that is implicated in the civil war in Syria. Like ISIS, it controls territory and high numbers of fighters. Unlike ISIS, it comes nowhere near ISIS’s ambitions and de facto power.
122 Lister 2015, 119.
123 Gerges 2016, 267.
124 Ibid.
125 “United Nations adopt plan to attack Islamic State’s funding” The Guardian (17.12.2015).
126 ‘How Saudi Arabia Turned its Greatest Weapon on Itself’ The New York Times (12.03.16).
waves of violence in the region; since 1980, Jihadist violence has dominated the total amount of terrorist attacks regionally and globally.\textsuperscript{127}

\textit{Figure 1.1} Arms Exports to the Middle East 1964-1997\textsuperscript{128}

<table>
<thead>
<tr>
<th>Period</th>
<th>Total (T) (USD Million)</th>
<th>Supplier (%/T): United States</th>
<th>Supplier (%/T): USSR/Russia</th>
<th>Supplier (%/T): Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>1964-1973</td>
<td>9,447</td>
<td>34,4</td>
<td>50,2</td>
<td>15,4</td>
</tr>
<tr>
<td>1974-1978</td>
<td>29,000</td>
<td>47,6</td>
<td>25,9</td>
<td>26,6</td>
</tr>
<tr>
<td>1979-1983</td>
<td>65,355</td>
<td>21,7</td>
<td>31,2</td>
<td>47,0</td>
</tr>
<tr>
<td>1984-1988</td>
<td>89,065</td>
<td>18,3</td>
<td>29,9</td>
<td>51,8</td>
</tr>
<tr>
<td>1989-1993</td>
<td>83,600</td>
<td>38,34</td>
<td>11,4</td>
<td>51,4</td>
</tr>
<tr>
<td>1994-1997</td>
<td>67,300</td>
<td>47,1</td>
<td>3,9</td>
<td>49,0</td>
</tr>
</tbody>
</table>

3.3 A few words on the war against ISIS

Mosul, the second-largest city in Iraq fell to ISIS in 2014.\textsuperscript{130} ISIS had now access to hundreds of millions of dollars from banks as well as tanks and armaments that it captured from the Iraqi army.\textsuperscript{131} With these kinds of resources, ISIS could capture several cities in Iraq and Syria.\textsuperscript{132}

I mentioned how former members of the Baath party were crucial in the creation of ISIS. During the years of 2014 and 2015 another group was arguably as crucial: foreign fighters from across the Arab world and Western Europe.\textsuperscript{133} As many as 20,000 to 30,000 fighters are believed to have joined ISIS during 2014 and early 2015.\textsuperscript{134}

The first US airstrikes against ISIS came as a response to the humanitarian catastrophe unfolding in northern Iraq in August 2014. After capturing Mosul, ISIS forces attacked a number of towns in the Sinjar area populated by a Kurdish minority known as Yazidis – killing thousands and capturing hundreds of women and children as slaves.\textsuperscript{135} The atrocities against the Yazidis have later been argued by a UN Commission to constitute genocide, crimes

\textsuperscript{127} Norell, M., “Islamistiska terrordåd ökar inte – men kryper närmre” \textit{Svenska Dagbladet} (28.03.16).
\textsuperscript{129} Total (T) in the three columns may not sum up to 100 per cent because of rounding.
\textsuperscript{130} Mosul was plagued by attempts at overthrow long before 2014, see Gerges 2016, 146.
\textsuperscript{131} Lister 2015, 95.
\textsuperscript{132} Ibid., 232ff.
\textsuperscript{133} The significance of the phenomenon of foreign fighters is described in UNSC Res. 2178 (2014): ‘Expressing grave concern over the acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, and resolving to address this threat […].’
\textsuperscript{134} ‘What is the “Islamic State”?’ \textit{BBC} (02/12/2015).
\textsuperscript{135} Hopkins, S., “Full horror of the Yazidis who didn’t escape Mount Sinjar: UN confirms 5,000 men were executed and 7,000 women are now kept as sex slaves” \textit{Daily Mail} (14.10.2014).
against humanity and war crimes.\footnote{UN: ISIL committing genocide against Yazidis” \textit{Al Jazeera} (17.06.2016).} At the time, Iraq had not yet given permission to the US to use force in its territory against ISIS, but with the Yazidis’ water and food supplies dwindling, the Obama administration authorized several airstrikes.

Shortly after the Yazidi operation, the new president Haidar al-Abadi requested the US to launch operation “Inherent Resolve”, consisting of airstrikes on ISIS targets.\footnote{“Pentagon Briefing On Operation Inherent Resolve” US DoD: https://www.youtube.com/watch?v=TWFFn9yXdnw.} In September and October 2014, France and the United Kingdom, joined the US in bombing ISIS in Iraq. In a letter dated 20 September from Iraq to the President of the UNSC, Iraq confirmed it was at “war” with ISIS and requested the US to lead a global coalition of States against ISIS and its “sites and military strongholds”:

\begin{quote}
We welcome the commitment that was made by 26 States to provide the new Iraqi Government with all necessary support in its war against ISIL […] in accordance with international law, without endangering the safety of civilians, ensuring that populated areas are not struck and respecting Iraq’s sovereignty. […] It is for these reasons that we, in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent. The aim of such strikes is to end the constant threat to Iraq, protect Iraq’s citizens and, ultimately, arm Iraqi forces and enable them to regain control of Iraq’s borders.\footnote{UN Doc. S/2014/691 (22.09.2014) (emphasis, mine).}

Without Syrian consent or Security Council authorization, the US began airstrikes on ISIS targets in Syria on 23 September 2015, supported by Bahrain, Jordan, Saudi Arabia, and the UAE. Later, in February and April, Jordan and Canada, respectively, joined the airstrikes against ISIS in Syria. The US refused point blank to cooperate with Syrian authorities, and its official legal argument was individual and collective self-defence based on the unwilling and/or incapable (“unable or unwilling”) nature of the Syrian regime to deal with ISIS. In a letter to the UNSC, the US representative Samantha J. Power wrote:

States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq […]\footnote{Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695 (emphasis, mine).}

Australia, Canada, the Czech Republic, the Netherlands, Germany, the United Kingdom and Turkey have explicitly endorsed this argument in relation to their own or their Allies’ attacks against ISIS in Syria against the will of Syria itself.\footnote{Deeks, A., Chachko, E., “Who is on Board with ‘Unwilling or Unable’?” Harvard Lawfare blog (10.10.2016). A number of other countries implicitly endorse this argument, e.g. Belgium, or are ambiguous on the matter.} 32
Between August 2014–August 2015, the US-led coalition conducted more than 5,500 air-strikes on ISIS targets in Iraq and Syria, resulting in the deaths of over 15,000 ISIS fighters.¹⁴¹ Despite American and British commanders’ claims of success, ISIS’s forces reportedly grew to over 31,500 during the period of bombing, with new recruits from around the world replenishing ISIS casualties.¹⁴² In May 2016, the UN Secretary General stated that although “the territorial expansion of ISIL in both States has been halted and, in part reversed over recent months, many Member States have noted that ISIL is not yet strategically and irreversibly weakened”.¹⁴³

On October 31, 2015, ISIS bombed a Russian jetliner over the Sinai desert, killing 224 passengers. And on November 13, 2015, persons allegedly members of ISIS attacked a rock concert and a sporting event in Paris, killing 130 and injuring 368. In response, the UNSC unanimously adopted Resolution 2249 determining ISIS to be “a global and unprecedented threat to international peace and security,” and called for “all necessary measures” to “eradicate the safe haven [ISIS] established” in Syria.¹⁴⁴

Since then, a coalition of 60 States now participate in the war against ISIS in Syria and in Iraq. Most of these countries (53) only participate in Iraq (e.g. Sweden), whereas the others are militarily engaged in both countries (e.g. the US).¹⁴⁵ Russia can also be mentioned, although it acts independently at the invitation from the Syrian government. Between August 2014 and March 2015, some 10,700 airstrikes were carried out against ISIS by 19 nations.¹⁴⁶ It can also be noted that the US conducted a number of airstrikes against ISIS targets in Libya near the city of Sirte in August 2016 – with the approval of the UN-, and EU-backed Libyan Government of National Accord (GNA).¹⁴⁷

Figure 1.2 Coalition Strikes against ISIS in Iraq and Syria as of September 2016

¹⁴¹ “Michaels, J., 15,000 killed, but ISIS Persists” USA Today (30.07.2015).
¹⁴² Ibid. The number of foreign fighters have recently decreased dramatically.
¹⁴³ UN Doc. S/2016/501 (31/05/2016) “Report of the Secretary-General on the threat posed by ISIL (Daesh) to international peace and security and the range of United Nations efforts in support of Member States in counteracting the threat”, 2.
¹⁴⁵ Government proposition 2015/16:40 Fortsatt svenskt deltagande i den militära utbildningsinsatsen i norra Irak, 7.
¹⁴⁶ “ISIS Being Dismantled in Syria but Spreading Regionally” The Washington Free Beacon (09.03.16).
¹⁴⁷ Yan, H., “US launches airstrikes on ISIS targets in Libya” CNN (02/08/2016). For a legal discussion, see Rylatt, J., ‘The Use of Force Against ISIL in Libya and the Sounds of Silence’ EJIL (06.01.2016).
3.4 Political structure, governance and territory

Its name reflects the group’s avowed goal to establish an Islamic caliphate across the Eastern Mediterranean. ISIS has described its goals and purposes in various propaganda videos, most notably the fifteen minutes long *The End of Sykes-Picot* and *Breaking of the Border* which basically visualizes what is discussed in the book *Management of Slavery* from 2004: Jihadists must destroy all colonial borders in the Levant as well as destabilizing the Middle Eastern governments through brutal and high amounts of violence.\(^{148}\) On its territory, ISIS has imposed repressive edicts and conditions on the inhabitants. ISIS has beheaded Christians, Kurds and Shia Muslims and destroyed shrines and archaeological sites in Syria and Iraq.\(^{149}\)

It should be emphasised that the structure of ISIS’s internal organization is sophisticated. It is organized hierarchically and is centralized, though flexible enough to delegate power downwards. ISIS is ruled by a single leader and its objective is to restore to power an ancient civilization through “enduring and expanding”.\(^{150}\) It has set up a bureaucratic system that in many

\(^{148}\) Naji 2006. The basic idea is that a shocking amount of violence will shock or enable the Arab people to rise up against its rulers, i.e. a call for an Islamic revolution and purging of the old, postcolonial societies.

\(^{149}\) “Inside Mosul: What's life like under Islamic State?” BBC (09.06.2015). One could say ISIS rule in Mosul consist mainly of: control of women; persecution of minorities; intimidation, punishment and torture; disruption of daily life; indoctrination and surveillance; and logistics.

aspects mimics that of a modern state. On top is Abu Bakr al-Baghdadi, and at the low-end of the structure, councils and administrative departments that are replicated at regional and local levels. These oversee a range of functions and services including security and intelligence, finance, media, health provision, and family or legal disputes (see figure 1.3). ISIS basically takes over factual structures of Syrian and Iraqi society and re-brand and re-order them with their own symbols, logistics, ideology and bureaucracy.\textsuperscript{151} ISIS thus employs high numbers of civil servants.\textsuperscript{152} As Middle Eastern scholar Michael Degerald points out, ISIS is not building a state from scratch:

They aren’t building institutions from square one, but rather drawing on a wide variety of existing institutions and infrastructure. Some of these include dams, roads, oil fields, schools, prisons, and border crossings. Daesh has been successful at attacking and seizing many of these kinds of existing infrastructure. It has destroyed others, and it has strategically withdrawn from territory when necessary. The group also has benefitted from a lot of institutional knowledge, getting key individuals to bring their skills from the Iraqi state with them.\textsuperscript{153}

\textit{Figure 1.3 ISIS command structure – hierarchically seen from top}

\begin{center}
\textbf{Islamic State (IS) command structure}
\end{center}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{isis_command_structure.png}
\caption{IS operates the same structure in nine provinces in Syria and seven in Iraq}
\end{figure}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{isis_wilayaat.png}
\caption{Wilayaat (provinces)}
\end{figure}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{isis_qitahaat.png}
\caption{Qitahaat sectors (local districts)}
\end{figure}

Source: IS investigation team

\textbf{Courtesy: the BBC, IS investigation team}

\textsuperscript{151} “Inside Mosul: What's life like under Islamic State?” \textit{BBC} (09.06.2015).
Taking territory, ISIS prioritizes on restoring security and basic services (primarily water and electricity) as quickly as possible.\textsuperscript{154} It has in some areas even taken over bread factories to provide free or subsidized food.\textsuperscript{155} Witnesses have said that ISIS’ police and courts initially try to build goodwill with the population by cracking down on ordinary crime.\textsuperscript{156} However, although the overall quality of services provided by ISIS—including sanitation, utilities, security, and healthcare may remained quite stable, from the perspective of civilians, life under becomes more dangerous and costly over time. Also, its “judiciary system” lacks any traces of rule of law, e.g. lacking clarity while exhibiting extreme brutality which is part of the so-called management of slavery.\textsuperscript{157}

The territory directly under ISIS control was in 2014 about the size of the state of New York; if one includes the swathes of land where it enjoys relative freedom of operation, it approximately was as big as the United Kingdom.\textsuperscript{158} As of September 2016, ISIS’s territory has shrunk about 50 per cent (compare \textit{figures 1.4} and \textit{1.5}), i.e. the size of Greece. Recent developments indicate even more losses of territory, especially in Iraq.

\textit{Figure 1.4 – ISIS’s territory as of January 2015}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{isis_territory.png}
\caption{ISIS’s territory as of January 2015}
\end{figure}

\begin{itemize}
\item \textsuperscript{155} Ibid.
\item \textsuperscript{156} Ibid.
\item \textsuperscript{157} Weiss & Hassan 2015, 40ff. See Naji 2006 \textit{supra} note 148.
\item \textsuperscript{158} Bokhari, S., McCants, W., “Is ISIS Good at Governing?” \textit{Brookings Education} (17.02.16).
\end{itemize}
ISIS does not directly control vast stretches of territory. Rather, it controls important areas, e.g. roads, oil operations and cities. Less important is whether or not the territory changes over time. It is itinerant territoriality in that its territory is in constant flux. One may look at ISIS’s operations in early January 2014, when it was increasingly operating in Iraq to seize areas in Anbar. At one point it had to withdraw from multiple regions of Syria during intense fighting with other rebel factions. ISIS lost control of multiple municipalities in the first two weeks, but made efforts to hold on to Raqqa. It likewise concentrated efforts on keeping a number of areas close to the border with Turkey, like al-Bab, Jarablus and Manbij.

However, as much as it wants to create resilience and maintain control of territory and circulation within it, ISIS must continue to strive for expansion; it is dependent on an on-going war as the war itself nurtures its economy and destabilizes the region. ISIS cannot stabilize itself as it cannot maintain adequate stability to begin policies meant to stimulate growth: ISIS

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159 Interestingly, it resembles the structure of a colonial state; the United Kingdom – Iraq’s former colonial master – never effectively controlled the entire territory or even major parts of its strategic locations; what it maintained control of was roads, certain cities and harbours. Lister 2015, 90.
160 Ibid., 194.
161 Degerald, M., Sofos, S., Lecture held at Lunds Universitet – part 2 (22.11.2015). Available at: http://play.ht.lu.se/media/c29c7ddd.
has no control of harbours; it cannot create passports of their own; it cannot make an internationally recognized currency despite various attempts to do so; and it cannot mobilize soldiers in a “normal fashion”. While reminiscing a state in important ways it does not in other ways. It main priority is to leech vital elements out of two crumbling states (Iraq and Syria) and cobble them together into a new creation. ISIS produces enormous amounts of propaganda in a litany of languages to draw new fighters as that is crucial for its very being.

3.5 Conclusion. Contradictory ISIS: a simulacrum and locus of political authority

Based on what I have outlined above, together with a reading of its newspapers, documents and official administrative documents – statements of various kinds, fatwas, signs, the infamous Dabiq magazine with its mythical imagery, style of executions, etc.– one cannot deny the ISIS’s excessive use of symbols. In Loretta Napoleoni’s words: “[s]ofistikerad propaganda används för att sprida bilden av en riktig stat, godkänd av den muslimska befolkningen, inte bara lokalt utan också globalt.”

ISIS is resilient and (was) expanding. At the same time, it wants to be perceived as resilient and expanding. It tells narratives using contradictory symbols and signs. Looking at different videos and reading segments of its two propaganda magazines, Dabiq (mythological, excessive) and The News, (conservative, less excessive), one can observe its obsession of history: ISIS claims historical continuity in that it proclaims an end of the territorial demarcation of the Middle East. It also claims territorial sovereignty over a huge expanse based on the ancient caliphate. In this sense, ISIS wants to return to “pre-Westphalian times”. Another message is the upcoming apocalypse and final struggle between Muslims and Crusaders. Its excessive use of symbols become clear when viewing its sophisticated videos from inside the cities of Mosul and Palmyra: there are civil buildings with ISIS flags covering most of what

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163 Degerald, M., supra note 155.
164 Ibid.
165 The Islamic State official documents are saved and translated to English by Aymenn Tamimi, see http://www.aymennjawad.org/2015/01/archive-of-islamic-state-administrative-documents
166 The Clarion Project provides almost all issues of this magazine; see https://www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq.
167 Napoleoni 2015, 144-5.
168 See generally, The End of Sykes-Picot and Breaking of the Border both published in 2014 and accessible on various platforms. For a comment on these videos, see LeVine, M., ‘ISIL’s new model of resistance’ Al Jazeera (31.03.2015).
one is able to see. But according to witnesses, these buildings lack persons inside. The buildings seemingly express sovereignty. In reality, the State as such is in many of those places non-existing. The strategy is to create a mise-en-scène of state power. This brings me on the one hand to describe ISIS as, using philosopher Jean Baudrillard’s description of the state of postmodernity, a “simulacrum” of statehood.

However, on the other hand one cannot neglect that indications point to the fact that ISIS to some extent governs territory in Iraq and Syria. There are also credible signs of actual bureaucracy; a regime able to uphold some kind of law and order. There are no indications of other authorities having power on its territory. ISIS controls populations and its fighters take part in armed struggle to protect its borders. ISIS revolves around a permanent state of emergency in which it to some extent is able to decide, in Carl Schmitt’s words, the exception of things as it de facto creates law and is able to uphold that law. Is that sovereignty “empty”? Or can it be argued to be sovereign in the empirical meaning of the word? It also seems to fit Mary Kaldor’s description of “new wars” in that it is depending on the continuing presence of civil war and turbulence: a war economy.

ISIS is a beneficiary of the weak structures in Syria and Iraq. It has created a political authority and strives to meet the relevant demands: territoriality; sovereignty; bureaucracy; and some sort of legal foundation. But to reach these goals, ISIS uses new kind of methods: terrorism and warfare through conventional tactics. This is its modus operandi. At the same time, ISIS seeks the erasure of all colonial borders drawn. Simultaneously, it wants to provide an alternative to the modern state. A good illustration is the declaration of its statehood in 2014:

Here the flag of the Islamic State, the flag of tawhīd (monotheism), rises and flutters. [...] The frontlines are defended. [...] The people in the lands of the State move about for their livelihood and journeys, feeling safe regarding their lives and wealth. Wulāt (plural of wālī or “governors”) and judges have been appointed. Jizyah (a tax imposed on kuffār) has been enforced. Fay’ (money taken from the kuffār without battle) and zakat (obligatory alms) have been collected. Courts have been established to resolve disputes and complaints. Evil has been removed [...].

What I find interesting about this declaration is how modern ISIS want to be. It is as if it had the Montevideo-criteria in mind (see infra chapter 4.2). ISIS controls territory while simultaneously constituting a house of cards; It wants to re-create the caliphate while enjoying the

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170 Degerald, M., Sofos, S., Lecture held at Lunds Universitet – part 2 (22.11.2015). Available at: http://play.ht.lu.se/media/c29c7ddd.
171 Simulacrum denotes a “hyper reality” in which the reality of e.g. the media and an excessive use of symbols overcome actual reality. In this sense, reality vanishes, its place filled with symbols; see e.g. Rehn, A., “Under Strecket: En teoretisk bråkstake ur led med tiden” Svenska Dagbladet (09.03.2007).
172 Sovereignty is best found when asking “who shall decide on the exception?”; Schmitt 2010, 13.
173 Kaldor 2012, 33.
174 Weaver, M., ‘ISIS declares caliphate in Iraq and Syria’ The Guardian (30.06.2014).

benefits of modern technology. How to solve this contradiction? One way is to view its political philosophy as a means to offering an alternative model of modernity, and not to view ISIS as an anti-modern movement. In offering an alternative modernity, ISIS wants to create a narrative of a possible way forward, just like fascist movements did in the early twentieth century in Europe.\footnote{Napoleoni 2015, and Wåg, M., “Reaktionär Islamism” (2015) Tidningen Brand Nr. 1.} In this, ISIS follows the theories of the founder of Islamist revolutionary theory, Egyptian Sayyid Qutb, who’s goal was to establish an Islamic State as a modern state: enjoying Western science and technology while simultaneously have fundamental Islam as a moral framework for society.\footnote{Curtis, A., The Power of Nightmares. Parts 1-2 (2004) BBC Documentary. Available at: https://www.youtube.com/watch?v=dTg4qnyUGxg.} One could make the argument that ISIS, at least at some point, succeeded to establish such a state. History has seen many states of houses of cards as well as many states built on violence and fundamental rights abuses. Thus, ISIS will henceforth be understood as a, at least throughout the years 2014-2016, locus of political authority, a de facto-state, depending on one’s understanding of the concept of “state”. This thesis deals inter alia with the legal conceptualization of statehood; on this, the next chapter will turn.

\section*{4 ISIS CONCEPTUALIZED AS A “LEGAL SUBJECT”?}

\textit{– THE FORMATION OF A NEW STATE IS […] A MATTER OF FACT, AND NOT OF LAW.}\footnote{Oppenheim 2012, § 209(1).} 

This chapter investigates whether ISIS’ locus of political authority can be conceptualized by using the law of international subjects. I will present three personalities and discuss whether ISIS can be conceptualized as any of them.

\subsection*{4.1 International persons – according to Brownlie}

Ian Brownlie recognizes fourteen types of international subjects, i.e. “entities capable of possessing international rights and duties and having the capacity to maintain their rights by bringing international claims”\footnote{Reparations for Injuries case, ICJ Report (1949), para 179.}. Two categories exist: established legal persons and special types of personality. The former category consists of States, Political entities legally proximate to states, Condominiums, Internationalized territories, UN administration of territories immediately prior to independence, International organizations, and Agencies of states. The latter consists of Non-self-governing peoples, National liberation movements, States in \textit{statu}
I will begin by investigating the category of statehood. One could however make the argument that ISIS is not claiming to be a State. If that is the case, the situation of Taiwan raises the possibility that an entity not claiming to be a State will not be regarded as a State. There is however a principal difference between the two: Taiwan is without doubt considered to be a part of the international community. The same cannot be said in regards to ISIS. In 4.3, I will furthermore discuss whether ISIS can be conceptualized as a Belligerent Community. I will also touch upon the usefulness of the conceptualization of ISIS as a number of individuals.

4.2 ISIS as the challenger of legal theory on statehood?

At the beginning of the twentieth century some fifty entities were acknowledged as States. In 1945 there were about 75. Now, there are almost 200. Was this major political development regulated by international law? Or was their creation a matter of fact? I think few would argue that international law “creates” States. But many of its practitioners, e.g. James Crawford and Malcolm Shaw, argue it contains workable criteria for statehood. On the one hand there is the principle of *ex factis jus oritur* (law arises from facts; see *infra*, 4.2.2). On the other hand, there is seemingly a set of fundamental principles which is argued to impede the applicability of that principle, i.e. the principle of *ex injuria jus non oritur* (law does not arise from injustice; *infra* 4.2.4). In the case of ISIS there is a contradiction between facts and injustice. A related topic is State recognition of such facts and injustice. I will begin there.

4.2.1 Statehood and recognition – why the constitutive theory must prima facie be abandoned

There are two theories related to State recognition and statehood. One theory argues recognition as constitutive of statehood. According to this *constitutive theory*, the rights and duties pertaining to statehood derive from recognition by other States. Another theory sees recognition as declaratory. According to this *declaratory theory*, statehood is a legal status independent of recognition.  

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179 Brownlie 2008, 57ff.
180 Crawford 2007, 156. Regarding the status of Taiwan: “the conclusion must be that Taiwan is not a State because it still has not unequivocally asserted its separation from China and is not recognized as a State distinct from China”, ibid., 219.
181 Shaw 2014, 252.
Both theories are problematic. In relation to the declaratory theory, a State is not a fact in the same sense as a book is a fact; it is a legal concept in that it has a legal status linked to certain rules and procedures. Territorial entities cannot by virtue of their mere existence be classified as having a particular international legal status. In order to make sense of this theory, a prior evaluation of the entity in question is needed before taking into account the implications of recognition. The declaratory theory must assume there exists workable criteria for statehood.

At the same time, the constitutive theory is also problematic as it implies States are free to determine the legal status or consequences of particular situations and can do so definitely. This would declare international law to “a form of imperfect communications, a system for registering the assent or dissent of individual States without any prospect of resolution”. The declaratory theory is not viable if one argues for international law to be more than that. This theory is also unable to explain why entities certainly were States although other States refused to recognize them.

The declaratory theory is prima facie preferable. This means that the denial of recognition to an entity otherwise qualifying as a State does not entail the non-recognizing State to act as if the entity was not a State. Thus, the status of an entity as a State is, in principle, independent of recognition. This does not mean that recognition does not have (very) important legal and political effects. Recognition may work as proof of statehood and function as a unilateral legal commitment to continue to view the entity as a State in the future. Recognition becomes the strongest indication of the existence of a State, hence practically conclusive. But even in the absence of such recognition, ISIS may nonetheless be conceptualized as a State. However, this presupposes the existence of workable legal criteria for statehood. As I stated, James Crawford argues for the existence of such criteria; he therefore argues in favour of the declaratory theory. As I will show, the case of ISIS shows whether such criteria are workable; in 4.2.6 I will discuss whether the declaratory theory is viable in relation to ISIS.

183 Ibid., 20.
184 There are a number of examples of this, e.g. Guatemala not recognising Belize, Macedonia by Greece, Liechtenstein by Czechoslovakia and its successors.
185 Shaw 2014, 340.
186 Crawford 2007, 27.
187 “The conclusion must be that the status of an entity as a State is, in principle, independent of recognition”, Ibid., 28.
4.2.2 States of effectiveness

Although there is no universally accepted legal definition of statehood, the best-known formulation is found in the 1933 Montevideo Convention on Rights and Duties of States: (a) defined territory, (b) permanent population, (c) government and (d) capacity to enter into relations with other states. These criteria are based on the principle of *ex factis jus oritur*, thus viewed without regard to legality or legitimacy.

One could question the validity of the Montevideo definition. Its criteria were proposed in 1933, thus reflecting the view of statehood prevalent at that time. For example, the rule prohibiting the use of force was not conceived of at the time. Why use it? One reason is that it is the “least worst” conception of statehood. Another explanation is that the definition is to be found in treaty law; it is rather exact and fixed. But a problematic aspect of the Montevideo convention is that it becomes circular: It informs us what States should possess (Article 1), not what conditions the creation of States in the first place. Applying these criteria in relation to ISIS makes sense if they are to be seen as an indication of statehood. Under that assumption, the application of the Montevideo definition is useful.

(a) Defined territory

States possess some territory, but there is no requirement of a minimum area of that territory. Nor is there any rule requiring contiguity of the territory of the State. No doubt small size and fragmentation makes statehood difficult to achieve. It is however only indicative of disability or disorder, not determinative against a claim of statehood. Neither boundary nor territorial disputes (even substantial ones) are enough to affect statehood. Nonetheless, territory must be coherent and effectively governed.

In relation to ISIS, its control of territory is explicitly stated by Iraq and the US as well as in UNSC Resolutions, e.g. 2249 (2015) and 2170 (2014). However, ISIS gains and lose control of territory frequently. Also it hardly possesses defined borders, although clear delimi-

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188 “There has long been no generally accepted and satisfactory legal definition of statehood”. James Crawford describes in detail how various attempts throughout the twentieth-century to define the term 'State' have been futile or avoided; see ibid., 37ff.
189 Knop, K., *supra* note 73, 98.
191 Crawford 2007, 50-52.
192 “[ISIS]’ control over significant parts and natural resources across Iraq and Syria”, and “[...] territory in parts of Iraq and Syria is under the control of Islamic State in Iraq and the Levant (ISIL)” (emphasis, mine).
tation is not decisive.\textsuperscript{194} Rather, since its declaration, ISIS has been able to possess a coherent territory, e.g. the cities of Mosul, Fallujah and Raqqa and surrounding areas. Ongoing struggles raises serious issues as to its stability. In Mosul, ISIS is losing control and in Raqqa and surrounding areas, ISIS has difficulties maintaining stability. Based on coherency and its control of at least a number of places, e.g. oil fields, one can argue ISIS does possess defined territory; in contrast, based on over-all stability, it is difficult to make the same argument. The main cause for its instability is external intervention, and currently there are few indications such intervention will cease in the foreseeable future – at least in Iraq. More data is required, especially in relation to Raqqa. Therefore, I believe one could make a viable argument in either direction: ISIS possess territory but its stability can be highly doubted.

\textit{(b) Permanent population}

No minimum limit of “permanent population” is prescribed.\textsuperscript{195} For example, a nomadic population is not necessarily an indication of non-permanence.\textsuperscript{196} This criterion does not relate to the nationality of that population, rather its stability in relation to identity in space and time – “an aggregate of individuals who live together as a community though they may belong to different races or creeds or culture or be of a different colour”.\textsuperscript{197} Also, it relates not to governance; what matters is an existing permanent population effectively at the territory.\textsuperscript{198}

\textit{In relation to ISIS}, the territories within the control of ISIS had in June 2015 a population of eight million inhabitants.\textsuperscript{199} As ISIS gains and loses control of territory its population can be said to be in flux. However, this is unlikely to be considered detrimental. ISIS members themselves appear to be unstable and non-permanent in that they basically come and go. Empirical data is lacking on this matter. However, that citizens are of other nations is not determinative to this criterion.\textsuperscript{200} Also, international law does not prescribe a necessary correspondence between a State and a population.\textsuperscript{201} Accordingly, the requirement for ISIS to have a permanent population is likely to be met. A counter-argument based on legitimacy is the principle of self-determination of people, incorporated in the ICCPR and the 1966 International Covenant on Economic, Social and Cultural Rights. ISIS is not necessarily the unit of representation of

\textsuperscript{194} Crawford 2007, 47.
\textsuperscript{195} Ibid., 51.
\textsuperscript{197} Jennings & Watts (Eds.) Oppenheim’s International Law (1992) 9th Ed, Oxford University Press, 12
\textsuperscript{198} Crawford 2007, 52-3.
\textsuperscript{199} Emmerson, B., \textit{supra} at note 195, [15].
\textsuperscript{200} Shaw 2014, 145.
\textsuperscript{201} Knop, K., \textit{supra} note 73, at 101.
the people in e.g. Mosul simply because its military leadership exercises effective control.\textsuperscript{202} The populations suffering under ISIS rule could therefore arguably have an opposite right of self-determination from it. But the population-criterion is viewed from a \textit{de facto}-vantage point; self-determination is not part of this criterion. Therefore, ISIS arguably possesses a permanent population.

\textit{(c) Government}

This is possibly the most important criterion of statehood, “since all the others depend upon it”.\textsuperscript{203} The entity must possess a government or a system of government in general control of its territory. Such control must include some degree of maintenance of law and order and the establishment of basic institutions. The Arbitration Commission of the European Conference on Yugoslavia declared that “the state is commonly defined as a community [...] subject to an \textit{organized political authority}”.\textsuperscript{204} Determining the existence of such organized political authority can rest on, e.g., the government having longevity and is able to withstand changing circumstances as the “lack of a coherent form of government in a given territory militates against that territory being a State.”\textsuperscript{205}

\textit{In relation to ISIS} one could argue that the strategic leadership (the caliph) and the provinces (the \textit{wilayaats}) effectively controls a population and a territory. It remains unclear whether this is simulacrum. What is clear however is the presence of a sophisticated structure that gather taxes, manages courts, international recruitment, propaganda and media, intelligence and financials, ransoms, and antiquities dealings. Thus, ISIS ensures the dependency of the community on its form of governance.\textsuperscript{206} ISIS lack democracy and rule of law but the criterion of government is regarded as being agnostic on that matter.\textsuperscript{207} Also, in relation to the process of decolonization during the latter part of the twentieth century, the effectiveness requirement may have become less stringent.\textsuperscript{208} For example, when the Republic of the Congo was given independence in 1960, it achieved statehood despite deprivation of an effective government apparatus. This indicates a “low threshold” in regards to this criterion.\textsuperscript{209} ISIS could therefore arguably meet this criterion. Strangely, it seems ISIS actually made an explicit bid to this aspect of the Montevideo Convention when it declared its caliphate (see \textit{supra} 3.5).

\textsuperscript{202} Ibid., 101ff. See also, Shaw 2014, 183ff.
\textsuperscript{203} Crawford 2007, 56.
\textsuperscript{204} Quoted in Shaw 2014,144 (emphasis, mine).
\textsuperscript{205} Crawford 2007,60.
\textsuperscript{206} Emmerson, B., \textit{supra} at note 199, [19].
\textsuperscript{207} Knop, K., \textit{op cit.}, 73.
\textsuperscript{208} Zadeh 2011, 25.
\textsuperscript{209} Ibid., 26.
(d) Capacity to enter into relations with other States

Crawford criticizes this criterion as it is more of a consequence of statehood than a criterion for it.\textsuperscript{210} This may hold true as it is not exclusive for States.\textsuperscript{211} Also, capacity depends partly on the power of internal government of a territory, and partly on the entity in question being separate to other entities in relation to international relations.\textsuperscript{212} But it may prove crucial. For example, the Turkish Republic of Northern Cyprus non-status as State is arguably attributed to its lack of this capacity.\textsuperscript{213}

In relation to ISIS it evidently lacks “normal” engagement with other States. For example, it does not have any embassies. But the criterion requires capacity, not actual relations. Arguably, ISIS showed this capacity when it sold oil to the Syrian government. This indicates a capacity to engage countries although with substantial difficulties as various UNSC Resolutions e.g. 2253 (2015) sanctions key individuals. ISIS revels in its engagement with individuals across the globe as well as other NSAs, e.g. Boko Haram which pledges its allegiance to ISIS.

None of these contacts can however be said to be relevant in this regard. In light of what little empirical data there is, ISIS has showed a peculiar capacity to enter into relations with countries.

4.2.3 The “fifth criteria” – States of independence

James Crawford puts “independence” as the foremost prerequisite for statehood.\textsuperscript{214} According to the Permanent Court of International Justice (hereafter; the PCIJ), independence means

continued existence of [a State] within her present frontiers as a separate State with the sole right of decision in all matters economic, political, financial or other with the result of that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.\textsuperscript{215}

Arguable, independence is implied in the criteria of (a) and (c) as they would be incompatible with dependence.\textsuperscript{216} Where the Montevideo criteria are in place, the area concerned is potentially a State-area. However, besides flowing from the criteria themselves, this criterion informs that a further element is required – the absence of the authority of another State. But

\textsuperscript{210} Crawford 2007, 61.
\textsuperscript{211} For example, the UN and the EU enjoys this capacity in some aspects.
\textsuperscript{212} Crawford 2007, 62.
\textsuperscript{213} European Court of Human Rights, Loizidou v. Turkey [GC] (18.12.1996), para 42. See also Shaw 2014, 171.
\textsuperscript{214} See Crawford 2007, 64ff.
\textsuperscript{215} Customs Regime Between Austria and Germany (Advisory Opinion) PCIJ A/B No., 41, 45.
\textsuperscript{216} This was stated by the PCIJ in the Island of Palmas Case (1928 2RIAA 829): ‘Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State […] international law have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations’ (838).
Crawford’s position tends to reinforce the idea that the consent of States, in the form of the consent by other States and of the government of the putative States seeking statehood is central to statehood. It is a compelling argument, but one could aim criticisms at it. It entails, e.g. an exclusive role for States in deciding which entities appear to be most like existing States and so deserving of being acknowledged as States. Also, it puts forward a more abstract notion than the Montevideo-criteria. Furthermore, it refers to “territory” and “government” mentioned above. If an entity fulfils these criteria one would assume it also manifests independence towards other entities. This makes “independence”, in a way, self-referring.

The notion of independence embodies two elements, namely the existence of an organized community on a particular territory, exclusively or substantially exercising self-governing power in the absence of the exercise by another State (actual independence), and of the right of another State to exercise, self-governing powers over that territory (formal independence).\textsuperscript{217} The former category is seemingly a matter of political fact whereas the other refers to States’ rights over the territory possessed by the putative State. Crawford is unclear whether the former category refers to legitimacy or whatever laws and rules created by the political authority in question.\textsuperscript{218}

\textit{In relation to ISIS}, one could argue that since it has been shown to possess territory and a government, it is actually independent \textit{vis-à-vis} other entities. Here, “independence” is connected to sovereignty,\textsuperscript{219} In the \textit{Island of Palmas} arbitration, judge Huber stated:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries, and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.\textsuperscript{220}

ISIS was not created by States nor is it acting on behalf of States. It has been argued that ISIS received substantial funding from key figures in different locations, e.g. Qatar and Saudi Arabia.\textsuperscript{221} But no clear data points to the conclusion that ISIS would do someone’s bidding nor

\textsuperscript{217} Crawford 2007, 66, 437.
\textsuperscript{218} When it comes to occupation, the case is clear: an entity created during occupation does not deprive the State under occupation from formal independence, ibid, 67. However, the notion of occupation is irrelevant as the laws of war related to occupation only applies to States. “The law of belligerent occupation is inapplicable to non-international conflicts (‘so-called civil wars’). It is of the essence of belligerent occupation that it should be exercised over foreign enemy territory: in an internal conflict, neither territory controlled by insurgents nor that preserved or regained by the central government can be regarded as belligerently occupied”, see Dinstein 2009, 33-4.
\textsuperscript{219} See generally, Kalmo & Skinner 2010.
\textsuperscript{220} \textit{Island of Palmas} case (1928) 2 RIAA 829, 838.
\textsuperscript{221} Boghardt, L.P., “Qatar and ISIS funding: The U.S. Approach” \textit{The Washington Institute} (08.2014).
rely on protection. It is arguably dependent on a steady supply of foreign fighters and activities abroad. However, this is not a dependence; read oppositely, that argument entails all States to be dependent on individuals. Therefore, ISIS has *actual* independence *visa-vi* other States. When it comes to *formal* independence, we may have to turn to considerations of legitimacy depending on how the notion of “formal” is interpreted. Obviously, ISIS’ conquests contradicts the constitutions of Iraq and Syria; both countries have legal claims over the vast territories and resources at ISIS’ disposal. So what is the case when there is actual independence on the one hand, and lack of formal independence on the other? Is formal independence overridden by actual independence? Crawford gives no clear answer, but points to a probable yes with the catch that “recognition, longevity and the legal consequences of alleged lack of formal independence are important”. Given ISIS arguably possess all criteria found in the Montevideo Convention this discussion must move into the next chapter: the principle *ex injuria jus non oritur* in relation to ISIS.

**4.2.4 Montevideo is not enough**

Can ISIS be conceptualized as a State because it meets the Montevideo criteria? The existence of peremptory norms, or *jus cogens*, in international law show that the Montevideo Criteria cannot be based solely on the principle of effectiveness. Article 53 of the Vienna Convention on the Law of Treaties:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Peremptory norms have been applied outside the sphere of treaty law. There seems to be agreement that they relate to rules protecting the foundations of international order, e.g. the illegal use of force and rules protecting the most fundamental human rights. Treaties in conflict with these categories are legally void. The question is, however, what specific effects these norms have in the case of ISIS. Is the status of the entity to be denied because of breaches of such norms? The International Law Commission (hereafter; ILC) stated

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222 Crawford 2007, 88.
225 Vienna Convention, Art. 53. A treaty inconsistent with an existing peremptory norm cannot be severed but is invalid in whole: Art 44(5).
that it is necessary for the articles [Draft Articles of Responsibility of States for Wrongful Acts (hereafter, ARISWA)] to reflect that there are certain consequences flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility [...]. Serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole.

This obligation of third States not to recognize the consequences of a breach of a peremptory norm should be seen as limited to serious breaches. This means that States can be under an obligation not to recognize a situation that was created because of a breach of *jus cogens*.

But the next question is whether the illegality at hand is so central to the existence of the entity in question that international law may justifiably treat an effective entity as not a State. The arguably most fundamental peremptory norm concerns the use of force and is located in Article 2(4) of the UN Charter. Also established is the principle that territory may not be validly taken by States by the use of force. Under international law, States facing illegal invasion enjoy substantial protection against extinction, despite prolonged lack of effectiveness. However, “the question is whether modern law regulates the creation of States to any greater degree than this, in a situation involving illegal use of force”. Whereas a breach of Article 2(4) of the UN Charter entails an obligation not to recognize the situation, it is unclear whether such a breach precludes an entity of statehood.

But a theoretical catch lies in the fact that Article 2(4) only operates in the relations between States, not between States and NSAs. It remains a contested issue whether its customary equivalency regulates other relations. If one argues that ISIS breaks the peremptory norm in Article 2(4) one must also presuppose that Article 2(4) regulates the relationship between ISIS and, say, Syria. This is, as I will argue infra 4.2.6, not the case.

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226 ILC, Commentary to ARSIWA, Part Two, Chapter III, para (7) (emphasis, mine).
227 Bring et al 2012, 62; Crawford 2007, 104.
228 “Conquest, the act of defeating an opponent and occupying all or part of this territory, does not in itself constitute as basis of title to land”, Shaw 2014, at 500.
229 See Crawford 2007, 131-2, note 131 and the authorities there cited.
230 A good example of this practice is Kuwait which never was considered to be a part of Iraq, despite Iraq’s invasion of Kuwait in August 1990 and corollary Kuwait’s clear lack of independence.
231 Crawford 2007, 132.
232 The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State, see Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), 66.
234 Surprisingly, few writers have written about this problem. At least two scholars have discussed it: Nicholas Tsagourias who argues that the prohibition on the use of force is applicable in relation to NSAs, and Marko Milanovic who on the contrary argues that Article 2(4) “operates exclusively between states”; see Tsagourias, T., “Non-State Actors and the Use of Force” (2011) Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law, J. D’aspermont, Routledge, 4; and Milanovic, M., “Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum” EJIL (21.02.2010).
In relation to the case of fundamental human rights there is according to Crawford “so far in modern practice no suggestion that as regards statehood itself, there exists any criterion requiring regard for fundamental human rights.”\textsuperscript{235} This is based on numerous examples of governments violating fundamental human rights without calling into question statehood itself. Of course, this is not to say that violations of fundamental human rights have no consequences for States. Such consequences are, however, about responsibility, scrutiny and the loss of legitimacy; they do not necessitate the loss of status of the putative State concerned.

Where it is obligatory under international law,\textsuperscript{236} the effects of the duty of non-recognition may be explicitly spelt out in the instruments in relation to that particular obligation. But also important is to what extent particular actions are prohibited under international law as a result of an obligatory duty of non-recognition in lack of clear UNSC enumeration. In the Namibia Case, non-recognition meant abstention from treaty relations concerning the South African administration of Namibia; cessation of “active intergovernmental co-operation” under existing bilateral treaties relating to Namibia; abstention from all diplomatic or consular activity in Namibia; and abstention from “economic and other forms of relationship or dealing with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory”.\textsuperscript{237} Hence, any diplomatic action implying the legality of the situation was precluded. The ICJ has in later cases maintained this position.\textsuperscript{238}

To conclude, a breach by a State of an obligation arising under a peremptory norm of general law entails an obligation on other States not to recognize as lawful a situation created by such a breach.\textsuperscript{239} A duty not to recognize a situation based on the principle of \textit{ex injuria jus non oritur} is indeed important if recognition is viewed as constitutive for statehood. If one ap-

\textsuperscript{235} Crawford 2007, 148. The existence of so-called humanitarian interventions has not changed this, ibid., 150.

\textsuperscript{236} A duty of non-recognition may arise in two cases. First, when the illegality invoked is substantial, i.e. in particular when it involves a peremptory norm of international law, States have a duty under customary international law not to recognize the act as legal. This obligation does not entail an obligation not to recognize its effects. Second, implicitly through particular processes of collective non-recognition in international organizations, i.e. the UNSC, ibid., 160.

\textsuperscript{237} ICJ Rep 1971, para. 6.

\textsuperscript{238} See \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories} (ICJ Rep 2004): “Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention” (para 159).

\textsuperscript{239} This matches the wording in Arts 40-41 of the ARIJWSA.
proaches the question using the declaratory theory, collective non-recognition does not extinguish an entity’s status as a State. Corollary, in either case even if international law prohibits recognition of the new situation, there seems to be no clear rule or principle prohibiting the new existence as such.

4.2.5 In Relation to ISIS

No doubt ISIS has abused fundamental human rights. Several UNSC Resolutions,\textsuperscript{240} UN reports\textsuperscript{241} and reports from international human rights organizations, e.g. Human Rights Watch and Amnesty International,\textsuperscript{242} affirms this view. Also, ISIS has been described by the UNSC as a “global and unprecedented threat to international peace and security”.\textsuperscript{243} So what does all this mean in relation to the conceptualization of ISIS as a State?

As stated supra 4.2.1, the constitutive theory of recognition in relation to statehood was prima facie abandoned in favour of the declaratory theory on recognition of statehood. According to the latter theory, it would not, in principal, matter whether other States were under an obligation not to recognize the new situation; in the end it effectively possesses the relevant criteria. The principle of \textit{ex injuria jus non oritur} had to be added. But this view was adopted on the assumption that there were, in fact, workable criteria of statehood. As I have showed, breaches of fundamental human rights are not decisive. And it remains unclear whether the peremptory norm found in Article 2(4) of the UN Charter is applicable. Does this mean ISIS can be conceptualized as a State? It seems as if the declaratory theory lacks a clear answer. The ICJ had the possibility to provide an answer on the issue whether the Kosovo Declaration of statehood meant that Kosovo was a State under international law. But its explicit decision not to do so\textsuperscript{244} makes things unclear. So, does the result imply that the constitutive theory has returned, as it were, by the back door? If so, what are the implications of its return? The next chapter will discuss this.

\textsuperscript{240} UNSC Res. 2249 (2015) states, e.g. that the “continued gross systematic and widespread attacks directed against civilians, abuses of human rights and violations of international humanitarian law, including those driven on religious or ethnic ground, its eradication of cultural heritage and trafficking of cultural property [...]”.

\textsuperscript{241} Supra note 136 (chapter 3).

\textsuperscript{242} E.g. Human Rights Watch ‘Iraq: ISIS Car Bombings Are Crimes Against Humanity’ (11.05.2016); Amnesty International Report \textit{Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq} (2014).

\textsuperscript{243} UNSC Res. 2249 (2015).

\textsuperscript{244} In its Advisory Opinion (22.07.2010), the ICJ answered that the Kosovo declaration did not violate international law when it was asked whether the Kosovo declaration were in conformity with international law (para 123). However, the ICJ refused explicitly to address the consequences of that declaration, particularly the question of whether Kosovo is entitled to statehood (para 51). This narrow opinion failed to clarify the boundaries of the right to self-determination, while also weakening the principle of territorial integrity by giving separatist movements around the world legal license to declare independence. In my opinion, the ICJ should have affirmed Kosovo’s right to secede on the grounds that it suffered repression and denial of fundamental rights, thereby distinguishing Kosovo’s claim from weaker separatist claims.
4.2.6 Can ISIS be conceptualized as a State? Can international law give a definitive answer?

My initial conclusion is that ISIS cannot be conceptualized as State. It being an “unprecedented threat to international peace and order” block any notion of States recognizing it as a State in the community of States. Also, there may exist a legal duty not to recognize ISIS as a State.245 One could also argue – and this is a viable argument – that ISIS does not possess territory on the basis that its possession is unstable. However, there is a problem: international law seems to be unable to provide a clear answer.

So on what legal basis can I come to this conclusion? There are two initial problems. First, breaches of fundamental human rights are not decisive. Second, can ISIS be said to have breached the peremptory norm in Article 2(4) of the UN Charter? One explanation put forward by Nicholas Tsagourias is that ISIS is bound by customary international law as that law prohibits the use of force between all international actors.246 The problem, however, is that this explanation refers to an inter-connected question, namely whether customary international law binds ISIS. In other words, the explanation presupposes ISIS to be bound by a specific rule in international law, i.e. the same question that was asked in the first place. The customary norm in Article 2(4) was established in the relations between States, not between States and NSAs,247 and, according to the ICJ, the customary prohibition is identical as the one contained in Article 2(4).248 So one ends up answering the question by referring to a customary international law with the same content. Here, Tsagourias argues that “[a]lthough [NSAs] are not endowed with legal personality in the sense of being capable of possessing international rights and duties international law is obliged to recognize NSAs for certain purposes because of their ‘actorness’”. Therefore, he argues, NSAs are “still bound by the prohibition on the use of force because of their de facto power to employ it although they are not subjects of international law”.249 However, this argument assumes recognition of “actorness”. ISIS must be bound because it projects de facto power. But the issue emerged exactly because ISIS possesses de facto-power, not de jure-power. Tsagourias must therefore argue that international law regulates civil war. However, international law cannot be said to either prohibit nor con-

245 Here, UNSC resolutions may also be mentioned. One example being UNSC Resolution 2249 (2015) which confers upon States to take action upon ISIS in Syria without taking into account the putative sovereignty of ISIS.
246 Tsagourias, N., “Non-State Actors and the Use of Force” Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law, J. D’aspremont (2011) Routledge, 4,
247 As was established supra 2.3 is that Article 2(1) and (4) is an inter-state paradigm.
done civil war.\textsuperscript{250} As philosopher Giorgio Agamben points out, international legal theory is silent on the matter.\textsuperscript{251} Alternatively, Tsagourias’ argument implies that other loci of authority of political power somehow affect customary international law. As I pointed out in chapter 2.3, this goes against the notion that sovereignty is conceptually linked to the State. NSAs affecting customary law is highly contested for a number of reasons; see infra chapter 6.1. ISIS cannot therefore be said to be bound by Article 2(4).

Instead, I argue that the language of UNSC resolutions and the complete lack of recognition provide a better legal basis.\textsuperscript{252} In these resolutions, ISIS is perceived as an “unprecedented threat against world order and security”; ISIS is perceived to have abused human rights; States have a duty to put its fighters to justice; States must sanction ISIS; States may use all necessary means, under international law, to eradicate ISIS in Syria; ISIS must cease all violence and disarm with immediate effect.\textsuperscript{253} As one scholar puts it, ISIS is perceived as a “global public enemy”.\textsuperscript{254} Interestingly, my reading of all UNSC Resolutions related to ISIS point to the conclusion that none of them are addressing ISIS \textit{as such}.\textsuperscript{255} The resolutions do not appeal to ISIS to respect lives, human rights or security. Nor does the UNSC call upon ISIS to commit to its responsibility in protecting people or to ensure respect for human rights, Resolutions 2253 (2015) and 2258 (2015) being good examples.

In contrast, some of the UNSC Resolutions addressed the Taliban \textit{as such} in that they underlined the responsibility of the Taliban and calling upon the Taliban to act in a certain way implying they enjoyed certain rights and duties under international law.\textsuperscript{256} Resolution 1333 (2000) illustrates this, for example by “calling on” the Taliban to ensure safe and unhindered passage:

\begin{itemize}
\item \textsuperscript{250} “International law treats civil war as purely internal matters […] Article 2(4) of the UN Charter prohibits the threat or use of force in international relations, not in domestic situations. There is no rule against rebellion in international law”, Shaw 2014, 832–3. However, international law does prohibit and condone certain behaviour in such wars, see infra 5.2 and 5.3.
\item \textsuperscript{251} Agamben 2015, 2–3.
\item \textsuperscript{252} See also, Shaw 2014: “Should the rebellion succeed, the resulting situation would be dealt with primarily in the context of recognition” (833).
\item \textsuperscript{254} “ISIS, simply by the nature of their stated organizational intentions, should be considered ‘global public enemies.’ ‘Global public enemies’ is a concept that has been around for centuries even in the earliest conceptions of global unity”, Aubrey Davis, R., “The Search for Status: Charting the Contours of Combatant Status in the Age of ISIS” 223 Mil. L. Rev (2015), 560.
\item \textsuperscript{255} ISIS has only been addressed one time, namely the demands on armed organized groups to suspend all activities, see UNSC Res. 2170 (2014).
\item \textsuperscript{256} This means that, in spite of their non-recognition, the Taliban “enjoyed certain rights under international law”, see Wolfrum, R., Philipp, C.E., “The Status of the Taliban: Their Obligations and Rights Under International Law” in Frowein & Wolfrum, 2002, 601.
\end{itemize}
Strongly condemning the continuing use of the areas of Afghanistan under the control of the Afghan faction known as Taliban, which also calls itself the Islamic Emirate of Afghanistan (hereinafter known as the Taliban), for the sheltering and training of terrorists and planning of terrorist acts [...] Underlining the responsibility of the Taliban for the well-being of the population in the areas of Afghanistan under its control, and in this context calling on the Taliban to ensure the safe and unhindered access of relief personnel and aid to all those in need in the territory under their control [...] 257

But to return to the crux: ISIS arguably meets all factual criteria indicating it is a State. In this sense, it manifests sovereignty. James Crawford argues sovereignty is the result of statehood. 258 This implies that there is only one form of sovereignty that is of relevance to international law. But the notion of sovereignty comes with a more complex and intriguing legal philosophical narrative. As Martti Koskenniemi points out, being sovereign could on the one hand mean the power to decide on what is the exception in a specific context. 259 What sovereignty and the State are is a question of power, not of law. On the other hand, it could be interpreted as synonymous with the Grundnorm of a legal order, 260 as factual power cannot establish what ought to be. The State as a legal concept is separate from the State as a sociological concept. However, neither argument can be maintained without the other. Arguing that sovereignty is the “result” of statehood can always be countered with the argument that it is rather the “condition” of it and vice-versa.

If any legal basis is to be found, it is in the lack of States recognizing the situation. This means one can no longer support the prima facie conclusion on the declaratory theory. Instead, the constitutive theory explains the situation. This points to an awkward situation in international law: that States exist in a state of nature meaning there is no legal system able to govern States coming into existence. 261 As Antony Anghie points out, although international law presupposes an “international community” of sovereigns, the logically prior question, what created that sovereignty, remains elusive. 262 But what if there is a breakdown of Syria into different States or regions, 263 while ISIS consolidates its control of Raqqa and the surrounding? What if “normal” life for its inhabitants continues under the guise of ISIS? States may be able to avoid recognition solely based on the instability of ISIS’ control over its territory. But if that control stabilizes, what then? Even if States continue to not recognize the sit-

258 Crawford, J., “Sovereignty as a legal value” in Crawford & Koskenniemi 2012, 117.
260 The so-called descending argument. “The legal order is prior to factual power”, Koskenniemi 2006, 237.
263 Foreign political analyst Bitte Hammargren argues that the Syrian and Libyan Civil war most likely will, see Hammargren, B., ‘7 skäl till att kriget i Syrien fortsätter’ Svenska Dagbladet (06.09.2016).
264 Recognition, though highly unlikely, is not an impossibility. Prominent realist thinkers in the US have given credence to the idea, and that the States should “learn to live” with ISIS, see Walt, S.M., "What Should We Do if the Islamic State Wins? Live with it" Foreign Policy (10.06.2015).
266 Quoted in Crawford 2007, 20.
268 Koskenniemi 2011, 243.
of an entity and its putative creation as a State is a greater event than any rule regulating it; the significance of its status greater than the rule itself.

Like many other States created through civil war, violent revolutions and destruction of cultures, ISIS is about forming narratives of authorization to exercise power. As I argued in chapter 3, ISIS is not to be seen as anti-modern, but rather as offering an alternative modernity, a “way forward”. In this process of establishing a twentieth century caliphate with modern statehood in mind through terrorism it ignores fundamental norms of international law. Its rejection of international norms makes it difficult to conceptualize ISIS through an international society underpinned by the UN-, and Westphalia-system.

To sum up, the so-called constitutive theory on recognition and statehood had to be abandoned prima facie in favour of the so-called declaratory theory on recognition (4.2.1). Simultaneously, an application of the Montevideo-criteria points to the conclusion that ISIS possess all things States should (4.2.2). As ISIS is considered by States and the UNSC to lack stability as well as breaching norms it cannot be viewed to create a new legal situation (4.2.4). But on what grounds can it, under international law, not be conceptualized as a State? The best theoretical explanation for such a conclusion is the existence of an international community not recognizing the situation (4.2.6). This, however, means that the declaratory theory has to be abandoned in favour of the constitutive theory, meaning we have to rely on a theory of statehood in relation to ISIS that was rejected in the first place; it is problematic as it refers to a system in which it is up to States, not workable principles of international law, to decide on who to join the club. The problem becomes obvious if and when ISIS consolidates its power.

4.3 ISIS as a belligerent community or as individuals?

4.3.1 Belligerent community a domestic matter

Ian Brownlie mentions Belligerent community as a legal person. Can ISIS be conceptualized as such? Belligerency and recognition had a clear role in the nineteenth-century civil wars. However, is it a viable category in the case of ISIS? The answer is “no” for mainly

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269 See Ian Brownlie’s types of international personalities, supra 4.1. In the Hobbesian vocabulary, a belligerent is the “Behemoth”. Such entities are sometimes but not always synonymous with “rebels” or “revolutionaries”. In short, a state of belligerency exists between one or more sovereign states on one side and rebel forces, if such rebel forces are recognized as belligerents. If there is a rebellion, and those taking part in the rebellion are not recognized as belligerents, the rebellion is an insurgency. Such entities have been recognized by international law to enter into valid arrangements, or at least been able to enjoy some international legal capacity, see Bring et al 2012, 68, Shaw 2014, 179, Brownlie 2012, 63.  
two reasons. First, recognition by States of the belligerent party can strongly be argued to be constitutive of status as belligerent.\(^{271}\) Second, there has arguably been a desuetude of recognition of belligerency,\(^{272}\) and other candidates such as “recognition of insurgency” have failed to establish themselves in practice or doctrine.\(^{273}\) Third, the emergence of the 1949 Geneva Conventions of the Laws of War and Protocol II additional to the Geneva Conventions (1977), which provide international obligations on parties of an armed conflict irrespective of \textit{de jure} recognition granted by the State (see \textit{infra} chapter 5.2).

However, the possibility remains for States to recognize ISIS a Belligerent community. Antonio Cassese outlines how to be eligible for such recognition:

International law only establishes certain loose requirements for eligibility to become an international subject. In short, (1) rebels should prove that they have effective control over some part of the territory, and (2) civil commotion should reach a certain degree of intensity and duration (it may not simply consist of riots or sporadic and short-lived acts of violence). It is for states (both that against which the civil strife breaks out and other parties) to appraise — by granting or withholding, if only implicitly, recognition of insurgency — whether these requirements have been fulfilled.\(^{274}\)

Again, recognition is constitutive.\(^{275}\) To conclude, for ISIS to be conceptualized as a belligerent community under international law has more to do with the domestic decision-making than international law. ISIS has not been recognized in such a way by any State.

4.3.2 ISIS as individuals as international persons?

Ian Brownlie mentions individuals on his list of “special types of personality”. There are seemingly no international legal rules stating that an individual cannot be a subject, and in particular contexts individuals are evidently able to appear on the legal plane. ISIS can thus be conceptualized as a number of individuals. However, this category is unhelpful as it does not grasp the authority of ISIS; it merely states the obvious.

The PCIJ stated in 1928 that under international law, treaties did not as such create direct rights and obligations for private individuals, although particular treaties could potentially

\(^{271}\) There has been no clear case of twentieth-century recognition of belligerence, see ibid., 382, 419.


\(^{273}\) “Other candidates such as ‘recognition of insurgency’ have failed to establish themselves in practice or doctrine. Instead, recognition of insurgents as the government (as in Spain) or as a new State (as in Biafra) has effectively replaced belligerent recognition—despite the prematurity of recognition in most cases. Intervention on behalf of both parties—whether or not under the cover of recognition—has become a common phenomenon in civil wars of all types”, Crawford 2007, 419.

\(^{274}\) Cassese 2005, 125 (emphasis, mine).

\(^{275}\) It can be noted that national liberation movements such as the Palestine Liberation Organization (PLO) was granted UN observer status, e.g. PLO through UN General Assembly Resolution 3237 (XXIX), adopted in November 1974. The possibility of observer status in the UN and related organs for such movements appears to exist in international practice, see Shaw 2014, 180. However, such recognition is a rare happening in international law, and, as explained supra chapter 1.5 and 4.1, conceptualization of ISIS as a national liberation movement will not be further discussed.
provide for the adoption of individual’s rights and obligations enforceable by national courts.\textsuperscript{276} Since then, this view has gained momentum among international lawyers, summarized in June 2016 by judge Pinto de Albuquerque in a case before the European Court of Human Rights (Grand Chamber):

Individuals being the epicentre of international law, human rights are today the central factor of legitimation of international law. Like a new universal Esperanto, the language of international human rights law is individual-centred, not State-centred. The primary role of sovereignty is the responsibility to protect human rights. The relations between a State and its own nationals are no longer viewed, as in the past, as a purely domestic question. The Copernican revolution that international law faced with the birth of the twin human rights Covenants and their regional counterparts created a new narrative in international law with constitutional overtones, bearing its own counterfactual strength.\textsuperscript{277}

What is interesting to note is the simultaneous rise of international criminal law: individuals can violate international law; genocide, war crimes and crimes against humanity can be committed by both State agents and by others associated to NSAs being a Party to an armed conflict or with an organization engaged in such crimes.\textsuperscript{278} But in terms of possibilities to put ISIS fighters to justice is slim, at best. In the case of ISIS, the ICC jurisdiction is presently stagnated by the non-membership of Iraq and Syria, and the Russian veto over a Security Council resolution enabling a referral to the Court. The Russian alliance with Assad forms a similar barrier to the establishment of an ad hoc tribunal. As of yet, the ICC prosecutor has refused to open an investigation based on nationality of States Parties to the Rome Statute, given the inability of the ICC to target ISIS’s top tier of leadership.\textsuperscript{279} The possibility exists of a hybrid tribunal, yet the disarray of the domestic courts in Iraq and Syria, and the difficulty of combining different jurisdictions also puts this method in doubt. The only viable option it seems is domestic courts to prosecute ISIS fighters suspected of genocide, crimes against humanity, war crimes and terrorist acts.

It is in some ways true, as Albuquerque argued, that human rights have become in one sense the \textit{lingua franca} of international affairs. If one, as Philippe Sands and most other international lawyers do,\textsuperscript{280} argues that all individuals at all times and all places are protected by a set of fundamental human rights and, depending on jurisdiction, a set of regional human rights, this suggests that the members of ISIS as well as those under ISIS rule enjoy a set of fundamental rights and duties under international law. But what this thesis asks is \textit{whether or not they ac-}

\textsuperscript{276} Polish Postal Service in Danzig, PCIJ, Series B, No. 15 (1928), 17.
\textsuperscript{277} Concurring opinion, \textit{Al-Dulimi and Montana Management Inc. v. Switzerland} [GC], 21/06/2016, para. 7 (footnotes omitted).
\textsuperscript{279} “ICC has no jurisdiction to prosecute Isis despite 'crimes of unspeakable cruelty' The Guardian (08.04.2015).
ually possess them for any particular reason. Conceptualizing ISIS as a number of individuals does therefore not grasp the authority of ISIS; it merely states they have rights and can be criminally responsible like everybody else.

5 ISIS THROUGH IHL, IHRL, AND INTERNATIONAL RESPONSIBILITY

Previously, I investigated whether the authority of ISIS could be conceptualized as either a State, a belligerent community or a number of individuals. The conclusion was that ISIS could be conceptualized as the latter, which was unsatisfactory. In this chapter, I will explain some spheres of international law that address the consequences of ISIS’s activities. What I want to find out is whether these spheres can conceptualize the locus of political authority of ISIS. I will investigate discuss whether ISIS can be conceptualized as having obligations to respect human rights as that refers to a responsibility to ensure rights between individuals. On a last note, when I mention Non-State actors (NSAs), I refer to organized armed groups.

5.1 What to presuppose on IHL – ISIS bound as a number of individuals

Asking whether ISIS can be conceptualized through the spheres of international humanitarian law (IHL) presupposes a prior question, namely to what extent IHL can be said to be applicable. Evidently, ISIS had no part or saying in the creation of neither IHL treaties nor customary international law as customary law is based on State practice.281 The International Committee of the Red Cross (hereafter; the ICRC) shed light on the matter:

[…] the commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State. Although this argument has occasionally been questioned in legal literature, the validity of the obligation imposed upon insurgents has never been contested.282

ICRC assumes NSAs to be bound as a party to the conflict by Common Article 3. Additionally, the commentary stated that “all the rules [in relation to non-international armed conflicts] are based on the existence of two or more parties confronting each other […] These rules grant the same rights and impose the same duties on both the established government and the insurgent party, and all such rights and duties have a purely humanitarian character.”283

281 Bring et al 2012, 23. Customary law usus and opinio juris sive necessitatis both refer to State practice and how States view that practice to be binding upon them as law.
282 Sandoz et al 1987, para 4444.
283 Ibid., para 4442.
Furthermore, NSAs are bound by IHL, Dieter Fleck argues, because treaties are concluded “on behalf of states lawfully representing all their citizens […] customary international law is binding upon peoples”.\(^{284}\) Hence, Fleck presupposes that States make commitments under treaty or customary law that are binding upon all peoples, including those persons constituting ISIS. IHL can be said to bind ISIS because it is perceived as being part of “peoples”, not as a locus of political authority. Here, Andrew Clapham shows that practice upholds this notion that humanitarian rights can be claimed against individuals.\(^{285}\) The theoretical foundation therefore rests on the notion that ISIS is conceptualized as part of “peoples” bound by rules found in Treaties recognized by States and State practice. Lastly, in *Military and Paramilitary Activities*, the ICJ observed that acts of the Contras, fighting against the Nicaraguan Government, were governed by the law applicable to non-international armed conflicts (hereafter; NIACs).\(^ {286}\) The next chapter will discuss this in detail.

5.2 ISIS may trigger it but can ISIS enjoy it? NIACs and combatancy

5.2.1 What goes on there in non-international armed conflicts?

International humanitarian law has one primary objective: regulating armed conflict. The purpose of such regulation is to humanize warfare.\(^ {287}\) IHL assumes everyone inside its sphere of application to be on a peculiar field: armed conflict – a place where normal life has been suspended and where our assumptions about the way in which humans interact already have been upended. IHL concerns states of exception.

Although IHL is a peculiar field of law to enter when conceptualizing ISIS,\(^ {288}\) I think few would argue that terrorist organizations *per se* are omitted in the application of NIACs. For example, the position of the US administration in 2004, characterizing the conflict with al-Qaeda as an armed conflict with a non-party to the Geneva Conventions, in which even common Article 3 – the common denominator of NIACs – did not apply, was seen as an “errone-

\(^{284}\) Fleck, D., “The Law of Non-International Armed Conflicts” in Fleck 2013, 608.


\(^{286}\) Nicaragua Case, para 119.

\(^{287}\) This is clearly articulated by the ICRC on its website; see https://www.icrc.org/en/war-and-law.

\(^{288}\) At least one scholar has disregarded ISIS as a part to the civil war in Libya, see Rylatt, J., “The Use of Force Against ISIL in Libya and the Sounds of Silence” EJIL (06.01.2016).
ous” position and subsequently rejected by the US Supreme Court in 2006 on international legal grounds.289

As soon as violence reaches a certain threshold – “an armed conflict exists whenever there is […] protracted armed violence between governmental authorities and organized armed groups within a state”290 – it is a NIAC. No declaration of war is required for its application. Nor is de facto or de jure recognition of belligerents, insurgents, terrorists or other organized armed groups required. Put simply, the existence of an armed conflict in a certain area means IHL is applicable to all persons in that area.291 Hence, if deemed organized to a sufficient extent, ISIS can potentially be conceptualized through the language of IHL.292 ISIS can therefore by its own power “trigger” the application of IHL.

Before 1977, NIACs were solely regulated through Common Article 3 in the four Geneva conventions of 1949, which provide the following minimum safeguards:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in hostilities to be treated humanely without any adverse distinction based on race, colour, religion or faith, sex, birth or wealth. To this end the following are prohibited:
   a. Violence to life and person, in particular murder, cruel treatment and torture;
   b. Hostage-taking;
   c. Outrages upon human dignity, in particular humiliating and degrading treatment;
   d. The passing of sentences and carrying out of executions in the absence of due process.

2. The wounded and the sick are to be cared for.

[...] The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Common Article 3 bestows duties on “each Party” to an armed conflict. This designation implies a curious sort of international legal recognition on the parties involved.293 But this view counters the wording of the article, which states that “the application of the preceding provisions shall not affect the legal status of the Parties to the conflict”, which has to be seen in the context of States’ not wanting IHL to interfere with their capacity to recognize or not recog-

289 US Supreme Court, *Hamdan v Rumsfeld et al.*, (29.06.2006), 67-72, stating that Common Art 3 was applicable, emphasising that “the Executive is bound to comply with the rule of Law that prevails in this jurisdiction”.

290 Pictet 1952, 29.

291 “[…] den humanitära rätten blir tillämplig på alla i konfliktområdet oavsett om de ingår i en väpnad grupp eller inte.” Engdahl, O., “Terroristbrott och krigsförbrytelser – och respekten för krigets lagar” in Mänsklig säkerhet (08-06-2016).

292 See, e.g. UNSC Resolution 2249 (2015). In the context of IHRL, the word “violations” has to be strictly separated from the word “abuses”; see supra 5.3.

293 “[G]overnments are often loath to admit that the conditions have been met for the application of this customary international law; for to admit such a situation is seen as an admission that the government has lost a degree of control, and an ‘elevation’ of the status of the rebels”, Clapham, 2006, 272.
nize the opposing forces having a particular status. The concept “Party” does therefore not refer to a recognition of any kind of authority, nor does it define or explain what a “Party” to a NIAC is under international law.

Common Article 3 was reinforced in 1977 by Additional Protocol II to the Geneva Conventions (hereafter; APII), which applies by virtue of Article 1 to all NIACs which take place in the territory of a state party to the APII between its armed forces and dissident armed forces. The latter category of actors has to be under “responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [APII]”. Arguably, this constitute a higher threshold for applicability than Common Article 3, and suggests NSAs become bound through willingness to apply APII. This does not relate to whether NSAs follow the rules; what matters is the capacity to do so.

Neither Common Article 3 nor APII provide prisoner of war status (hereafter; POWS) in relation to NIACs. It also omits any reference to the legal status of the actors involved. The words “Parties”, “Party” or “parties to the conflict” are omitted; instead APII refers solely to the “High Contracting Party” i.e. the State. Instead, NSAs are in Article 1 referred to as “dissident armed forces or other organized armed groups”. Also, the word “combatant” is omitted. Thus, “combatants”, “Parties” and “POWS” are non-existing concepts in APII.

IHL views the battlefield as distinct between those things and persons that can be lawfully targeted and those that cannot. Members of States’ armed forces can therefore not be held liable for hostilities in conformity with the laws of international armed conflict – the so-called

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294 “Article 3 does not in itself constitute any recognition by the de jure Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion by all the means – including arms – provided by its own laws; nor does it in any way affect that Government's right to prosecute, try and sentence its adversaries, according to its own laws”, see Pictet 1960, 42. See also, supra chapter 4.3.
295 If the state that is a party to the conflict is not a party to APII, e.g. Syria Iraq, and the US, or if the organized armed group controls no territory, then APII does not apply.
296 Shaw 2014, 868.
297 AP II Art 1. See also, Shaw 2014, 868.
298 APII also qualifies what counts as an armed conflict; Art 1(2) provides: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”
299 Det [saknar] betydelse att gruppens medlemmar inte respekterar de humanitärrättsliga reglerna. Det avgörande är i stället att gruppens struktur och organisation möjliggör att reglerna kan följas, see Straffrättsliga åtgärder mot deltagande i en väpnad konflikt till stöd för en terroristorganisation (SOU 2016:40), 75.
301 Folkått i väpnad konflikt – svensk tolkning och tillämpning (SOU 2010:72), 277: "Kombatantbegreppet […] förekommer inte i den humanitära rätten rörande icke-internationella väpnade konflikter."
“combatant’s privilege”. Thus, IHL permits the killing of enemy combatants throughout the conflict regardless of whether the enemy combatant is about to launch an attack or not.303

In NIACs, combatant privilege is bestowed upon the armed forces of States.304 But is this “privilege” also conferred upon fighters belonging to ISIS? Although omitted, both Common Article 3 and APII can be argued to presuppose the existence of combatants in NIACs,305 as it is difficult to make the argument that combatants are non-existent in armed conflicts.306 However, the position in IHL is that NSA combatants do not exist.307

Not being able to enjoy combatant privilege means that NSAs fighters can be prosecuted by the territorial state under domestic law (for murder, treason, rebellion, terrorist acts, etc.). But does the presumption of the existence of fighters in NIACs mean that IHL conceptualizes those fighters as so-called de facto-combatants?308 Or, in other words, is its members to be regarded as civilians? The ICRC commented on this:

State practice, and international jurisprudence have not unequivocally settled whether the members of organized armed groups [do not qualify as civilians]. Because organized armed groups generally cannot qualify as regular armed forces under national law, it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation in hostilities. [...] However, this approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population. As the wording and logic of Article 3 GC I-IV and Additional Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict.309

Thus, to make sense of the fundamental principle of distinction between civilian and non-civilian targets, NSAs fighters may be conceptualized as belonging to an exclusive category.

303 Ipsen, K., “Combatants and Non-Combatants”, in Fleck 2013, 85ff.
305 “These references to the commentary [ICRC Commentary to AP I and APII] all point to the same conclusion: although the treaty law of NIAC does not include an express combatant definition, NIAC involves hostilities between state armed forces and non-state de facto combatants”; see Corn, G., Jenks, C., “Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts” (2011) University of Pennsylvania Journal of International Law, Vol. 33, No. 2, 331.
306 The binary distinction between civilians and combatants would be difficult to uphold otherwise.
307 Mégret, F., “Debate: The Regulation of Non-International Armed Conflicts: Can a Privilege of Belligerency Be Envisioned in the Law of Non-International Armed Conflicts? International Review of the Red Cross (2014), Vol. 96, 52. See also Corn, S.G. “Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?” 22 Stan. L. & Pol’y Rev. 253 (2011), 262–63. Corn notes that the US deemed Taliban fighters to be unlawful enemy combatants not because “they were not fighting on behalf of a state,” but rather because “they failed to meet the ‘right of person’ component . . . [by failing] to wear a distinctive uniform”.
308 Some writers argue that such fighters should be seen as civilians engaging in conduct; see e.g. Aubrey Davis, R., “The Search for Status: Charting the Contours of Combatant Status in the Age of ISIS” 223 Mil. L. Rev (2015), and Saul, B., Terrorism (2012) Hart Publishing Oxford. As will become clear, this position is untenable.
309 Melzer, N., Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (2009), 27-28 (emphasis, mine.).
Customary international law also applies to NIACs. In 2005, the ICRC’s customary IHL study confirmed the assimilation of the customary international law of NIAC to that of international armed conflicts.\textsuperscript{310} However, none of these customary rules could confirm the existence of combatants, “combatant privilege”, occupant or POWS in relation to NSAs:\textsuperscript{311}

While State armed forces may be considered combatants for purposes of the principle of distinction, practice is not clear as to the situation of members of armed opposition groups. Persons taking a direct part in hostilities in non-international armed conflicts are sometimes labelled “combatants”. However, this designation is only used in its generic meaning […] this does not imply a right to combatant status or prisoner-of-war status, as applicable in international armed conflicts. The lawfulness of direct participation in hostilities in non-international armed conflicts is governed by national law.\textsuperscript{312}

But customary law clarifies that the principle of distinction between combatants and non-combatants is applicable in relation to NIACs. In the commentary to the ICRC study, a Swedish Governmental Committee Review made the following remarks:

[Regeln om distinktion] anges vara tillämplig i både internationella och icke-internationella väpnade konflikter. Termen “combatant” syftar i regel på alla personer som inte har rätt till det skydd från attacker som civila har och är inte avsedd att uppfattas som innefattande en rätt till kombattant- eller krigsfängestatus.\textsuperscript{313}

This passage and the one by Nils Melzer supra argues in favour of the existence of de facto-combatants in NIACs although without prima facie legal privilege – as not viewing them as combatants would compromise the principle of distinction.\textsuperscript{314} But what does this binary distinction imply? What was already stated, namely that the language of IHL presuppose NSAs to be “Parties” to conflicts, i.e. the existence of an authority and obligation traditionally associated in war. Unlike civilians, combatants are subject to lawful attack by virtue of their roles within the armed group. They are therefore to be perceived as agents of the group leadership to achieve military goals, not civilians. The next question is whether de facto-combatants may enjoy legal privileges at the end of hostilities, i.e. amnesty or other kinds of immunity. Article 6(5) in APII states that

“[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained” (emphasis, mine).

In addition, customary international law provides that authorities “must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed con-

\textsuperscript{310} Henckaerts & Doswald-Beck 2005.
\textsuperscript{311} Folkrott i vapnadt konflikt – svensk tolkning och tillämpning (SOU 2010:72), 299.
\textsuperscript{312} ICRC, Customary IHL Database, rule 3 (emphasis, mine), available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.
\textsuperscript{313} Folkrott i vapnadt konflikt – svensk tolkning och tillämpning (SOU 2010:72), 337 (emphasis, mine).
\textsuperscript{314} Corn, G., Jenks, C., supra note 305, at 332.
lict”. Persons suspected for war crimes are omitted.\footnote{\text{315} “[…] the provision cannot not be construed to enable war criminals, or those guilty of crimes against humanity, to evade punishment”, see the ICRC Customary IHL Database, Rule 159, Exception, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159.} Terrorist acts has in several instances also been excluded from the scope of possible amnesty persons.\footnote{\text{316} Ibid, see note 11 in its rule and “Practice Relating to Rule 159”. Algeria, Russia and Tajikistan explicitly exclude terrorist acts.} To conclude, IHL potentially conceptualizes ISIS as a Party to a NIAC. This implies the existence of \textit{de facto}-combatants in such conflicts. It cannot be said, however, that IHL provide combatant immunity nor POWS to members belonging to NSAs. The operation of Common Article 3 is limited to persons taking no active part in the hostilities; it regulates the relationship between the State’s soldiers and civilians, not combat between Parties to the conflict. The legal status of the opposing Party and its combatants is therefore left to the mercy of customary international law and the discretion of the State.

5.2.2 \textit{In relation to ISIS – combatancy and… legitimate authority?}

Two questions will be dealt with: First \textit{(a)}, can ISIS be conceptualized as a party to a NIAC? Second \textit{(b)}, can its fighters be conceptualized as combatants, and if so, can they be conceptualized as having prima facie right to enjoy retroactive immunity for acts committed in a NIAC not constituting war crimes? An affirmative answer on these questions implies that ISIS can be conceptualized as a locus of political authority as its soldiers have a possibility to legally engage in an armed conflict based on their membership to that authority.

\textit{(a)} The nature of the armed conflict as well as the difference in applicability between an international armed conflict and a NIAC is decided on a case-by-case basis.\footnote{\text{317} \textit{Prosecutor v Tadic} (1995), the Appeals Chamber of the ICTY concluded that “an armed conflict exists whenever there is a resort to […] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.\footnote{\text{318} \textit{Prosecutor v Tadic II} (1997) the test was twofold, as the Appeals Chamber tested, the intensity of the conflict, and the organization of the parties to the conflict.\footnote{\text{319} \textit{Prosecutor v Tadic}, Case No IT-94-1-T, Opinion and Judgment of 7 May 1997, para 562.} These two criteria were used to distinguish armed conflicts from acts of banditry, unorganized acts and short-lived insurrections or} 317 In \textit{Prosecutor v Tadic} (1995), the Appeals Chamber of the ICTY concluded that “an armed conflict exists whenever there is a resort to […] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.\footnote{\text{318} \textit{Prosecutor v Tadic II} (1997) the test was twofold, as the Appeals Chamber tested, the intensity of the conflict, and the organization of the parties to the conflict.\footnote{\text{319} \textit{Prosecutor v Tadic}, Case No IT-94-1-T, Opinion and Judgment of 7 May 1997, para 562.} These two criteria were used to distinguish armed conflicts from acts of banditry, unorganized acts and short-lived insurrections or

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terrorist activities all of which “not subject” to IHL. Furthermore, the ICTY has listed several elements of interest in relation to whether an actor can be said to be a party to a NIAC:

the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords.

The level of intensity and organization has been used in jurisprudence to determine what constitutes a NIAC. This two-step method has also been applied by Swedish courts.

In relation to the conflict in Syria it must be said to qualify as a series of NIACs between ISIS and the Syrian armed forces in several parts of the country. ISIS can therefore be conceptualized using Common Article 3 and customary international humanitarian law as ISIS arguably fulfills the criteria mentioned above, e.g. a command structure with disciplinary rules and mechanisms, the existence of a headquarters, its control of certain territory, etc.

(b) Being conceptualized as a “Party” to a NIAC, ISIS’ soldiers have obligations to follow relevant rules and principles. This also implies that its fighters are de facto-combatants. The traditional view, that only the armed forces of States are to be conceptualized as combatants, is reflected in the requirement that individuals operate on behalf of the State – the only entity explicitly authorized within the Westphalian system to authorize legitimate violence. But if de facto-combatancy exists, it seems logical that the key factor is membership in ISIS exercising a function historically associated with belligerent operatives, i.e. “Parties” to a NIAC. As Nils Melzer points out: “[c]onsequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.

While not enjoying ISIS combatant immunity nor POWS, there is a possibility of amnesty: after hostilities, the “authorities in power” “must” attempt to provide amnesty to all fighters who have conducted themselves to the rules of IHL and not committed war crimes or similar

320 Ibid.
322 Södertörns tingsrätt, B-2639-16 (05.11.2016), 36. See also, Engdahl, O., “Terroristbrott och krigsförbrytelser – och respekten för krigets lagar” in Mänsklig säkerhet (08-06-2016).
323 Bellal, A., “Armed Conflicts in Syria in 2014”, in Bellal 2015, 265. The ICRC qualified the situation in Syria as a non-international armed conflict in 2012. The level of intensity as well as of the organizations of the main armed groups involved remaining unchanged as of 2016. Both ICRC and the Syrian government attest there is an armed conflict going on; see case law from Swedish courts, Svea Hovrätt, Mål nr B 4770-16, 26-7.
324 Serious transgressions may constitute war crimes related to NIACS and crimes against humanity, see Rome Statute of the International Criminal Court, Arts 6-7 (genocide, crimes against humanity), and Art 8 (2) (a), (c), and (e)-(d) (war crimes in relation to NIACs).
325 Melzer, N., supra note 309, at 33.
crimes. This leaves room for retroactive immunity. As an Official Report of the Swedish Government (SOU 2016:40) points out, de facto-combatants may enjoy immunity for acts normally committed in an armed conflict:

Med beaktande av att den humanitära rätten accepterar våldsanvändning i en väpnad konflikt, även i icke-internationella väpnade konflikter där begreppet kombattant inte förekommer, bör det finnas ett utrymme att betrakta gärningar som inte är förbjudna inom regelverket som tillåtna.\footnote{Straffrättsliga åtgärder mot deltagande i en väpnad konflikt till stöd för en terroristorganisation SOU 2016:40, 83.}

In light of credible allegations of war crimes – e.g. indiscriminate violence against civilians\footnote{According to one source, as much as 90 per cent of ISIS’s operations are aimed at civilian targets, i.e. non-military targets, such as schools, police stations, government, utilities, etc., see Aubrey Davis, R., “The Search for Status: Charting the Contours of Combatant Status in the Age of ISIS” 223 Mil. L. Rev (2015), 596.} – most ISIS’s fighters cannot enjoy amnesty under IHL. But all ISIS fighters cannot be assumed to be suspected of committing war crimes or other international crimes. So what are the implications of ISIS being classified as a terrorist organization?

Many acts which constitute terrorist crimes listed in the Swedish Counter-Terrorism Penal Act also constitute acts which “normally” take place in an armed conflict, e.g. murder in order to damage the State.\footnote{Terrorist crimes are regulated in the Penal Act Lag (2003:148) om straff för terroristbrott. Certain acts, e.g. murder, kidnapping, arson, are viewed as terrorist crimes if the act (a) seriously damages a State, and (b) the purpose of such an act is to e.g. seriously destabilize or destroy basic political, economic or social structures in a State (2 §).} Recently, a Swedish lower circuit court – which dealt with members of the former al-Nusra front, which in some aspects can be compared to ISIS\footnote{See supra note 121.} – explicitly stated that the Swedish Counter-Terrorism Penal Act is non-applicable in relation to acts committed by “armed forces” in an “armed conflict”.\footnote{“State practice establishes this rule as a norm of customary international law applicable in international armed conflicts. For purposes of the principle of distinction, it may also apply to State armed forces in non-international armed conflicts”, see ICRC Customary IHL Database, Rule 4.} In IHL “armed forces” is a legal term exclusively related to the forces of States.\footnote{“Terroristbrottslagen är inte tillämplig på väpnade styrkors agerande och verksamhet under en väpnad konflikt som det definieras i den internationella humanitära rätten”, Göteborgs tingsrätt, Mål nr. B 9086-15 (12.2015), 10. This statement is not based on the wording of the counter-terrorist penal act (2003:148) but on the wording in EU Council Framework Decision of 13 June 2002 on Combating Terrorism which states that “Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision” (para 11).} The court’s statement is therefore unclear in relation to NIACS and fighters belonging to organized armed groups. If one however interprets this exemption as encompassing fighters belonging to armed groups – and I believe this is what the Swedish court intends to say – the Swedish counter-terrorist act is non-applicable in relation to acts committed by NSAs. From a Swedish perspective, if ISIS fighters commit acts normally taking place under armed conflicts while respecting the rules of war – e.g. killing enemy
combatants while respecting the principle of distinction – there is reason to believe they do not risk prosecution. In this sense, from a Swedish horizon, ISIS’ fighters may use force legitimately in an armed conflict as long as that force does not constitute a war crime. But this is not, however, the whole story.

Analysing the above-mentioned Swedish case, Ola Engdahl addresses the “risk of overlap” between IHL and counter-terrorism laws:

Engdahl argues that although an act may not constitute a war crime it may nonetheless constitute an act of terrorism. In such a case, an exception can be made for the members of armed forces. Engdahl develops the Court’s argument: organized armed groups who systematically fail to respect IHL are not exempted. SOU 2016:40 provides the same argument. However, it is difficult to find support for such a conclusion as neither treaty law nor customary international law provide clear rules stating that organized groups are either included or excluded. Common Article 3 which always is applicable clearly does not provide such a rule. So what Engdahl and SOU 2016:40 seemingly argue is that some entities are excluded if they systematically fail to respect humanitarian frameworks. IHL and counter-terrorism laws can therefore be “applicable simultaneously”:

There seems to be a theoretical possibility for organized armed groups’ fighters to enjoy immunity for acts normally taking place in a NIAC. This rests however on two assumptions: that they (1) have not committed war crimes or any other international crimes related to the NIAC, and (2) that they do not belong to an organization which makes violations of IHL its modus

332 Engdahl, O., supra note 291 (emphasis, mine).
334 Ibid., 94–5 (emphasis, mine).
operandi. From a Swedish horizon, what can be said is that the prospects for amnesty are slim at best for ISIS’ fighters. This argument is based on their organization being classified as a terrorist organization and the subsequent assumption of a modus operandi consisting of systematic disrespect of IHL. However, the Swedish Court decision discussed supra provides the possibility that fighters belonging to groups similar to ISIS may enjoy immunity. As SOU 2016:40 points out, the legal situation is rather unclear.335

ISIS-fighter’s prospects of immunity are slim, at best. This is not only the result of suspicion of war crimes but also because of the organization’s classification as a terrorist organization meaning it per default is deemed to use terrorist acts as their modus operandi in armed conflict, thus precluding its fighters from retroactive immunity. Further support for this conclusion can be found in UNSC Resolutions which explicitly point out that States have a legal duty to put ISIS fighters to justice. In Resolution 2178, the UNSC, acting under Chapter VII of the UN Charter, “decided” that all States shall ensure that “any person who participates in the financing, planning, preparation or perpetration of terrorist acts is brought to justice”.336 This resolution also confirms that terrorist acts are non-synonymous with war crimes as the same resolution also underline the importance of putting persons suspected of violations of IHL and abuses of IHRL to justice. Thus, terrorist acts outside the framework of IHL can be committed during an armed conflict.

To conclude, ISIS can be conceptualized as a Party to a NIAC. This means that its fighters have duties under IHL, in this case Common Article 3 and customary international law. However, ISIS’s soldiers cannot be said to have a right to participate in the conflict. Unlike soldiers belonging to States and fighters belonging to NSAs not on terrorist sanctions-lists, it is very difficult to argue that ISIS’ fighters may enjoy, theoretically, retroactive immunity for acts normally taking place in an armed conflict. The locus of political authority is therefore precluded any notions of legitimate authority.

5.3 ISIS: an “abuser” or “violator” of human rights?

5.3.1 NSAs transgressions of human rights – between different approaches to IHRL

In contrast to IHL, international human rights law (IHRL) has a far more flexible, permeable approach; it is heavily influenced by a variety of quasi-judicial and soft law mechanisms, in-

335 Ibid., 94.
336 Operative para 6.

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cluding the various UN treaty bodies, the work of the UN Human Rights Council, etc. In Susan Marks’ words, the applicability of IHRL is, “romantically”, endless.337

Whereas IHRL primarily governs situations outside of armed conflict, IHL only governs situations of armed conflict. Legal regimes such as domestic and international criminal law are always applicable to an armed conflict.338 Furthermore, human rights obligations in treaties are explicitly imposed only on States.339 The various UN bodies monitoring the conditions of human rights were created by States for the purposes of state responsibility; there is no treaty law on human rights obligations of NSAs; the international and regional human rights instruments are all formulated in terms of State’s obligations.340 Therefore, in treaty law, only States are perceived to be able to commit human rights violations.

This “state-centricity” is of a different kind than in regards to IHL. Because of it, States and their representatives are with few exceptions conceptualized as “violating” human rights. In contrast, NSAs are conceptualized as “abusing” them.341 Grave breaches, e.g. genocide, crimes against humanity and torture,342 imply penalization through the International Criminal Court (ICC), ad hoc-courts or national courts.343 The difference however is that “violations” refer to international responsibility (see infra 5.4). Does this mean ISIS cannot have international responsibility for IHRL transgressions beyond criminal law? Or, to turn the question around, can NSAs commit themselves to respect and respond to IHRL violations? As I will

337 Marks, S., “Human rights in disastrous times” in Crawford & Koskenniemi 2012, 324.
338 ICJ, Threat or Use of Nuclear Weapons (Advisory Opinion) ICJ Reports (1996), para 25. Also, most human rights treaties allow for derogations of its rules in times of crises (except non-derogatory rights, e.g., protection from torture). IHL, however, does not allow for derogations; the entire point of IHL is to find a balance in the state of exception of armed conflict.
339 Rodley supra note 278, 527. See also, Cryer et al 2014, 13. One exception is the Universal Declaration on Human Rights which speaks of the rights of “everyone”. However, reliance on the Declaration as positive law is difficult as its drafters intended it to be inspirational, rather than positive law. It may have become customary law, but if so it still reflects that inspirational aspiration.
341 Although “abusing” and “violating” may be used interchangeable in practice, the UNSC has seemingly decided to use the former in relation to transgressions by NSAs, and the latter in relation to transgressions by States; see, e.g. UNSC Res. 2170 (2014), 2249 (2015), 2253 (2015), 2258 (2015). Also, the jurisprudence of the European Court of Human Rights and Inter-American Court of Human Rights use the term “violation” in relation to State transgressions of rights in their respective conventions. It must be stated that NSAs often are said to “violate” the rules of IHL; this is so because they are conceptualized as “Parties” to a NIAC.
342 Art V of the Genocide Convention, and Art 49 of the Geneva Convention I, e.g. explicitly require necessary legislation. See also Cryer et al 2014, 79, 346.
343 When it comes to transgressions of rules in IHL, NSAs are often said to “violate” its rules and principles. This can be observed in e.g. UNSC Res 2170 (2015) operative para 1, in which the UNSC “condemns in the strongest terms the terrorist acts of ISIL and its violent extremist ideology, and its continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law” (emphasis, mine). Another example is the EU institutions, e.g. the Council, who use this distinction in the same way as the UNSC, see e.g. Council conclusions on the EU regional strategy for Syria and Iraq as well as the ISIL/Da’esh threat (16.03.2015).
argue, such responsibility presumes a locus of political authority that can enforce such rights between individuals on its territory and control.

It is intensively debated whether NSAs can be said to bear responsibility for violations of IHRL. One approach (the traditional approach) insists on the importance of States in the international system and therefore the only bearers of human rights obligations under international law. This focuses on state responsibility and demands that human rights problems concerning NSAs simply are dealt with as questions of the relevant government’s obligation to ensure respect for human rights.

Another approach (the radical approach) suggests that governments are increasingly irrelevant and that attention should be on actors such as transnational corporations and international institutions. This approach is, however, “difficult for international human rights lawyers to embrace fully, as many work from the assumption that human rights norms have some sort of special status which is legitimized through the accepted law-making process of national and international law.” It is therefore somewhat futuristic as it suggests a legal order where the rules for who has the authority to develop the rules have developed to include NSAs as rule-makers.

A third approach (the new approach) combines the previous approaches: while starting off with the principles and rules of public international law with its origins in Westphalia, the new approach argues that some of the human rights obligations found in treaty law, and traditionally only applied to states, also apply to NSAs as such. The main argument is that existing general rules of IHRL now fix on those actors so that they may be held accountable for violations, not just abuses (that is, accountability not only at the individual level).

There are several counter-arguments against the third approach. First, that an application of human rights obligations to NSAs trivializes, dilutes and distracts from the concept of human rights. Second, that such an application bestows inappropriate power and legitimacy on such actions. Andrew Chapman dismisses these arguments.

We can legitimately reverse the presumption that human rights are inevitably a contract between individuals and the state; we can presume that human rights are entitlements enjoyed by everyone to be respected by everyone.

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345 Ibid., 26.
346 Ibid., 27.
347 Ibid., 28.
348 These are primarily: (1) the trivialization argument, (2) the legal impossibility argument, (3) the political tactical argument, (4) the legitimatization of violence argument, and (5) the rights as barriers to social justice arguments; see ibid., 33-56.
Once we accept that human rights obligations can apply in this way, the idea of legitimizing non-state actors by subjecting them to human rights duties becomes illogical. 349

However, Clapham does not clearly state whether his approach is *de lege lata* or *de lege ferenda* as he cannot adequately explain how that framework could be said to be in place. 350 Rather, the limited practice that exists with respect to human rights obligations of territorial NSAs does not substantiate a claim that such obligations constitute customary international law at present. 351 Read *contra e contrario* the ARISWA articles does not cover this situation. Article 10(1) stipulates that the conduct of an insurrectional movement, which succeeds in becoming the new government, is conduct which gives rise to state responsibility under international law. 10(2) states that “other” movements that succeed in establishing a new state will also be held responsible, as a state, for their unlawful acts committed while they were a NSA. But article 10 only means ISIS would have responsibility first *after* becoming the new government. The possibility of an insurrectional entity having responsibility under international law for its own conduct was a question explicitly not dealt with by the ILC. 352

Clapham’s “reversal” – or, as he himself calls it, “paradigm shift” 353 – would not must presume some kind of locus of political authority able to respect human rights. Hence, Clapham must argue for some kind of recognition of that locus of authority of NSAs. He acknowledges how difficult such recognition is to achieve in the context of a NIAC:

> [O]ne is in reality asking a government to accept that rebels have control of territory and have achieved some sort of authority. Governments have been reluctant to do this or even recognize the arguably lower threshold in Common Article 3, namely that that there is an “armed conflict not of an international character occurring within the territory of one of the High Contracting Parties”. Although the treaties are at pains to point out that the application of the rules confers no recognition or status on the rebels, governments nevertheless often deny the applicability of these norms. 354

Thus, to argue that customary international law postulates obligations on NSAs one must assume there to be an adequate locus of authority to begin with; the customary character of IHRL was established in the relations between individuals and States. To conclude that they are binding upon NSAs would beg the question whether NSAs are conceptualized as having

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349 Ibid., 58.
350 See however Clapham, A., “Focusing on Armed Non-State Actors” in Clapham & Gaeta 2014, in which he makes a thorough investigation. But at the outset, he acknowledges that “the time has come for a radical rethinking of these issues due to the fact the international legal system itself has undergone major upheavals since the traditional approach first took hold”, 3[769].
352 “A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present Articles, which are concerned only with the responsibility of States”, Commentary to Article 10 at 118.
353 Clapham 2006, 56.
“actorness” on the international arena independent on Stats. It therefore only makes sense to argue that NSAs can have IHRL obligations if the NSA in question effectively controls territory and if that control is recognised as a locus of political authority, unclear by whom.

As Yaël Ronen meticulously shows, there are several cases and reports from State practice and EU practice, Decisions from Judicial and Quasi-Judicial Bodies, and Reports of Internationally Appointed Experts that indicate an establishment of IHRL obligations for territorial NSAs. However, she concludes that it still remains an indication: “the limited practice that exists with respect to human rights obligations of territorial NSAs does not substantiate a claim that such obligations constitute customary international law at present.”

Also, Nigel Rodley comes to the same conclusion in his study:

In any event, [IHRL] has not adopted to the proposed new paradigm. IHL [...] may catch acts committed by parties to an armed conflict or members of such parties or organizations involved in crimes against humanity that would, if committed by a state, involve state responsibility under IHRL [...] That does not make the non-state parties or their members violators of IHRL. In any event, they will remain – as they well deserve to be known – as criminals and/or terrorists.

5.3.2 ISIS: to be or not to be responsible for respecting human rights? Not to be

To go “beyond state-centricity” requires one of the two latter approaches to IHRL. Under the new approach, ISIS has an obligation to respect customary IHRL. One could therefore argue that it has an international obligation to make sure individuals under its control respect one another. For the purposes of this thesis, this would mean that ISIS can be conceptualized as a locus of political authority; one would assume therefore it is theoretically possible to make claims against ISIS, provided it “violates” human rights law found in customary law.

357 E.g. the EU Commission expressed concern, in a periodic practice review, about “human rights violations” by the Palestinian Authority, see European Commission, Implementation of the European Neighbourhood Policy in 2010 Country Report: Occupied Palestinian Territory 2, 4-6.
358 E.g. “[Indirectly] In Elmi v. Australia, the Committee Against Torture noted that for a number of years Somalia has been without a central government and that some of the factions operating in Mogadishu have set up quasi-governmental institutions. [...] Accordingly, the members of those factions could fall, for the purposes of the application of the Convention within the phrase ‘public officials or other persons acting in an official capacity’ contained in Article 1”, see Ronen Y., op cit., 44.
359 “It is clear that non-State actors that exercise government-like functions over a territory have a duty to respect human rights”, applying this to both the Palestinian Authority and Hamas, see Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, 12th Sess., (09-10.2009), 305–07, UN Doc. A/HRC/12/48.
360 Ronen, Y., op cit., 50.
361 Rodley, N.S., supra note 278, at 542.
But such conceptualization goes against the language of UNSC resolutions which so far only refer to “abuses” of IHRL. Interestingly, the UNSC Resolutions addressed the Taliban during the 1990s by using “violations” of human rights, in contrast to abuses.\(^{362}\) As I mentioned in chapter 4.2.4, the Taliban was addressed in a different way by the UNSC; belonging to a political structure, the Taliban was considered to possess certain rights and responsibilities under international law. In other words, the Taliban was considered to constitute some kind of authority able to have international responsibility. This is not the case with ISIS.

However, there are some indications of a relaxation of the abuses/violations-dichotomy in other legal fora. Despite regular drafting issues at the Human Rights Council where government lawyers scour resolutions replacing the word violation with abuse, “most speeches and statements at the UN refer to human rights violations being committed by ISIS as well as other armed groups”.\(^{363}\) For example, the Human Rights Council’s Resolution on ISIS makes no reference to acts by the Iraqi State. One could therefore interpret it as limiting itself to acts of ISIS although referring to both abuses and violations:

Condemns in the strongest possible terms the systematic violations and abuses of human rights and violations of international humanitarian law resulting from the terrorist acts committed by the so-called Islamic State in Iraq and the Levant and associated groups taking place since 10 June 2014 in several provinces of Iraq [...]\(^{364}\)

Ben Emmerson, Special Rapporteur on the Protection of Human Rights While Countering Terrorism goes further. Not only does he underline the human rights violations committed by ISIS, but he also addresses the doctrinal debate head on:

 [...] as the Special Rapporteur has previously highlighted in other contexts, a central tenet of international human rights law is that it must keep pace with a changing world. Human rights apply at all times, inherently belong to individuals and are key to individual dignity. Increasingly, non-State armed groups control parts of territories in which populations live. This is the case with ISIL, which now controls large swathes of territory in which millions of individuals live; it has declared itself a ‘State’, and runs both a civil and a military administration, including the establishment of a ‘court’ system. The threshold for ISIL to be bound by human rights obligations has clearly been met. This means, at a minimum, that ISIL is bound under international law to respect core human rights obligations, such as the right to life, the absolute prohibition of torture, cruel, inhuman and degrading treatment, the prohibition of slavery and the prohibition of enforced disappearance, as well as the right to freedom of thought, conscience and religion. [...] In addition, where ISIL engages in violations that are unrelated to the conflict and not direct consequences of it, the governing legal framework should be international human rights law. [...] the more effective control ISIL has over a territory or individuals, the greater is the extent to which human rights law will constitute the appropriate legal framework.\(^{365}\)

This vocabulary is drastically different from the language one finds in UNSC resolutions related to ISIS. ISIS is bound to IHRL due to the fact that it effectively controls territory, is a

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\(^{365}\) A/HRC/29/51 (16.06.2015), paras 30-31 (footnotes omitted, emphasis, mine).
locus of political authority; a power with a responsibility to create a social sphere. But Emerson and a group of IHRL lawyers seemingly stand alone in a State-centred landscape.

So what to make of these contrasting languages? The new approach seems to exist somewhere between *de lege lata* and *de lege ferenda*. ISIS is mostly conceptualized as committing “abuses”, especially by the UNSC resolutions. However, practice from human rights lawyers indicates that, in theory, ISIS may be bound by IHRL as such. Is ISIS to be conceptualized as a locus of political authority able to violate individual’s human rights? Or is it to be conceptualized as a bunch of individuals abusing human rights? While it seems clear ISIS can be conceptualized as abusing IHRL, general acceptance among international lawyers regarding the third approach (Emmerson, Clapham) combined with State practice is required for one to safely argue that it can be conceptualized as “violating” IHRL. To conclude, IHRL cannot conceptualize ISIS as a locus of political authority; instead IHRL re-affirms the answer already provided in chapter 4.3.

5.4 ISIS having international responsibility?

In this chapter, I discuss whether ISIS can be conceptualized as having international responsibility; much of what was said in 5.3 is of equal importance here. I want to stress the difference between accountability and international responsibility. It is only accountability of ISIS as a locus of political authority is of interest here and to separate it from other kinds of accountability, e.g. at the individual level, I hereafter refer to it as international responsibility.

5.4.1 Responsibility for NSAs in general

International responsibility is basically state-centred as it arises out of the nature of the international legal system and the doctrines of State sovereignty and equality of states (see *supra* chapter 2). If a State commits an internationally wrongful act against another State, international responsibility is established between the two.\(^{366}\) The law of international responsibility regulates a number of situations when NSAs act from a State. For example, the 1970 Declaration on Friendly relations states that “[e]very State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State”.\(^{367}\) Also, once the NSA accede to government, the principle of state responsibility applies in full.\(^{368}\)

\(^{366}\) Shaw 2014, 566.

\(^{367}\) Cahin, G., “The responsibility of other entities: Armed bands and criminal groups” in Crawford et al 2010, 323-33. There are three principal situations in which the acts of armed groups and criminal gangs may be at-
But ISIS have no association to a State; nor can it be said to have acceded to government. So the question is whether ISIS can have international responsibility based on other principles. This domain of international law is currently underdeveloped, meaning there is a “double lack of responsibility of both the State and armed groups”.\(^{369}\)

One finds in UNSC resolutions referrals to the responsibility of NSAs. For example, when addressing “all parties, including those other than States”, “all parties and other interested persons”, or “all forces and armed groups”, or to individual named groups such as “the Serbs of Bosnia”, “elements of the Croatian Army” or “the Kosovo Liberation Army or all other groups or individuals”.\(^{370}\) The UNSC has repeatedly called upon these entities to fulfil their obligations “under international law, in particular international humanitarian, human rights and refugee law, and to implement fully the relevant decisions”.\(^{371}\) Furthermore, various sanctions, e.g. military and oil embargos, the blocking of funds, possession and other economic resources, and the refusal of entry and transit of its leaders on and through the territory of any State, imposed on entities and individuals by the UNSC, points in the direction of some kind of international responsibility for such entities.\(^{372}\)

However, the UNSC has so far not imposed duties on NSAs to make reparations for the damage caused by their actions. Also, the UNSC imposes duties and sanctions solely when such entities are parties to armed conflicts in order to demand a respect of IHL, relevant IHRL provisions and peace accords. “Outside these cases, armed bands and criminal groups are not the direct addresses of resolutions by the Security Council, which, above all, are addressed to States requiring them to make measures designed to prevent and suppress the illegal behaviour of such organizations”.\(^{373}\)

Moreover, in its customary IHL study the ICRC pointed out it can be “argued” that NSAs incur responsibility for acts committed by persons forming part of that entity. However, it remains unclear “what the consequences of such responsibility are”.\(^{374}\) In the commentary to Article 14(3) – which deals with the international responsibility of liberation movements which are, ex hypothesi, not States – of the ILC Draft Articles of State Responsibility, the

\(^{368}\) Zegvald 2002, 229.

\(^{369}\) Cahin, G., \textit{op cit.}, 335.

\(^{370}\) E.g., UNSC Resolution 1160 (1998).


\(^{372}\) Cahin, G., \textit{op cit.}, 339.

\(^{373}\) Ibid., 340.

\(^{374}\) ICRC Customary IHL Database, Rule 149, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule149#Fn_14_37.
Special Rapporteur noted that, although it fell outside the scope of the draft articles, “[t]he responsibility of such movements, for example, for breaches of international humanitarian law, can certainly be envisaged”.\^375 Lastly, the ICRC also noted that there were examples of attribution of responsibility to NSAs in a report on the situation of human rights in Sudan, the Special Rapporteur of the UN Commission on Human Rights stated that the Sudanese People’s Liberation Army was responsible for the killing and abduction of civilians, looting and hostage-taking of relief workers committed by “local commanders from its own ranks”.\^376 So it seems to be fairly established that certain NSAs to some extent *can* have international responsibly. But it must be viewed from a case-by-case basis as it also is unclear in what way such an entity is responsible.

5.4.2 In relation to ISIS

It has been established *supra* how the UNSC addresses ISIS in its resolutions. I could not find any mentioning explicitly aimed at ISIS having to “respect” IHRL or IHL nor any calling upon it to act in a certain way, nor take responsibility or fulfil its obligations. In addition to what has been already established, my investigation points to the conclusion that ISIS cannot be said to be conceptualized in this way, namely as having international responsibility.

Another example is a White House Executive Order of 4 July 1999, imposing sanctions on the Taliban for refusing to extradite Osama bin Laden. It defined the Taliban as the “political/military entity headquartered in Kandahar, Afghanistan that as of the date of this order exercises de facto control over the territory of Afghanistan [...] its agencies and instrumentalities, and the Taliban leaders”.\^377 But the same cannot be said about either the US nor UNSC sanctions against ISIS as none of them addresses ISIS in a similar way.\^378

As Liesbeth Zegvald observes: “holding armed opposition groups accountable for humanitarian law violations is considered to be incompatible with the fundamental right of the state to preserve its existence and to remain the only authority. These considerations make the further prospect of the international accountability of armed opposition groups very small indeed”.\^379 In conjunction with what was sad, *supra*, ISIS cannot be conceptualized as having international responsibility, except, by referring to it as a Party to a NIAC that can commit violations

\[^{375}\text{UN Doc. A/CN.4/490 and Add. 1-7, para 272.}\]
\[^{376}\text{ICRC Rule 149.}\]
\[^{377}\text{The White House Executive Order Blocking Property and Prohibiting Transactions with the Taliban, Order 13129 of 4 July 1999, Federal Register, Section 4(c).}\]
\[^{378}\text{See *supra* chapters 4.2, 5.2, 5.3, and generally “U.N. Security Council puts sanctions focus on Islamic State” \textit{Reuters} (17.12.2015).}\]
\[^{379}\text{Zegvald 2002, 163.}\]
of IHL. This conclusion does not advance the conclusion in 5.2.2. Besides the position taken by the Special Rapporteur Ron Emmerson mentioned supra there are no indications that ISIS has responsibility as such.

6 ISIS LOST FOR WORDS

- STATES OF LEGALITY CAN NEVER BE ANYTHING BUT EXCEPTIONAL STATES, AS PARTIAL RESTRICTIONS OF THE TRUE WILL TO LIFE, WHICH SEeks POWER AND TO WHOSE OVERALL PURPOSE THEY SUBORDINATE THEMSELVES AS INDIVIDUAL MEASURES, THAT IS TO SAY, AS A MEANS OF CREATING GREATER UNITS OF POWERS.

6.1 An answer to my research question and summarization of chapters 3-5

In this chapter, I comment on the findings in chapters 2-5. In 6.1, I will discuss methodological issues which were implicitly mentioned in chapter 5. In 6.2, I will reflect on the conceptualization of the locus of political authority of ISIS. In 6.3, I will make a final remark.

First, a summarization and a conclusion. I first established that ISIS can be understood as being a locus of political authority (chapter 3). Answering the research question of this thesis as outlined in chapter 1.3, ISIS could not be conceptualized in international legal terms (chapter 4), except as a number of organized individuals that are violent to such an extent that they constitute a Party to a NIAC based on Common Article 3 (chapter 5.2). Although its fighters can be conceptualized as de facto-combatants, it was difficult if not impossible to conceptualize them as combatant with immunities (chapter 5.2.2). Furthermore, ISIS could not be conceptualized by using human rights vocabulary; it can only be conceptualized as “abusing” human rights referring to individual accountability (chapters 4.3.2 and 5.3). Nor are there enough data indicating that ISIS has international responsibility, except in relation to IHL violations, which refers to ISIS as a Party to a NIAC. It remains unclear how and to what extent ISIS has such responsibility (chapter 5.4).

6.2 Failure of international legal method in dealing with ISIS?

What I have been trying to do is to grasp the phenomenon of ISIS by using international legal terms. It proved difficult. Only Common Article 3 of the Geneva Conventions gave a relatively straightforward answer: ISIS can be conceptualized as a Party to an armed conflict. This implies that its fighters are combatants, referring them to a category of persons that can legal-

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380 ICRC Customary IHL Database, Rules 139 and 149.
381 Nietzsche 2006, §11.50.
ly be killed – with due regard to their fundamental human rights in both armed conflict and when there is no conflict (see supra chapter 4.3.2). At the same time, it also refers to a category of persons with prospects of engaging in armed conflict without risking prosecution. However, the classification of ISIS as a terrorist organization makes this prospect slim indeed.

Other spheres of international law failed to grasp the phenomenon of ISIS, namely by being unable to refer to it as a locus of political authority. I took notice of a discourse struggling to grasp entities similar to ISIS. This became clear in the doctrinal debates of the different approaches to IHRL and territorial NSAs in armed conflict, e.g. between Nigel Rodley and Andrew Clapham (5.3). Clapham’s proposal of a “paradigm shift” in the thinking of human rights and responsibility of rights is a good example: it goes back to the paradigm of international law, namely States are the only loci of power, the only authorities able to use legitimate violence; the double bind between political authority and the use of force. This refers to Hobbes’ Leviathan as the only one able to tame the predatory jungle that is the state of nature, bringing into being a condition in which the fundamental principle of natural law – that men “seek peace and follow it” – could be realised on earth. In other words, legitimacy from an ability to ensure the respect and security between people within the territory.

This is why Clapham calls his argument paradigm-shifting; rights and duties can, and should, happen outside the manifestation of interstate will. If an entity effectively controls territory it should also be responsible outwards to protect persons from each other. However, as no territory is considered terra nullius this contradicts one of the fundamental presumptions of international law formulated by Judge Huber in the Island of Palmas case:

The development of the national organization of States during the last few centuries, and as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.

States have exclusive competence in regards to territory to settle question at the international sphere. This is why Nigel Rodley’s response to Andrew Clapham’s proposal is interesting.

For this [Clapham’s proposal] is the implicit, if not explicit, condition precedent for some of the claims made on behalf of NSA legal personality which challenge the state-oriented nature of international law. A positive answer to this question would necessarily entail the development of a set of techniques to determine what the rights and obligations are that are wholly alien to those international lawyers presently use.

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382 Bartelson supra note 267, at 82.
384 Shaw 2014, 144.
385 Island of Palmas case, 2 R.I.A.A. 829, at 838.
386 Rodley, N.S. supra note 278, at 526 (emphasis, mine).
Rodley points to a methodological problem. In an earlier paragraph, he identifies the founding myth of Westphalia, and acknowledges that changing positions of loci of authority would challenge current narratives and create problems for the method as such. Our presumptions international legal method would no longer work:

The so-called sources of international law would be by-passed, for they are overwhelmingly state-cantered, requiring state-will or state-recognition. So far, there seems to be no alternative route map available or even proposed to determine the content of the law. Nor does one seem likely to become available, as long as states themselves are unwilling to allow it to happen. The advocates who suggest that alternative loci of power may be identified, fail to come to grips with the trumping power of the (inter-) state system.

He pinpoints the close connection between the dynamics of international legal language and its sources which is dependent on consent – “state-will or state-recognition”. The “trumping power” of States trumps because State-consent – as I stated in chapter 1.4 – is perceived as key in regards to the normative sources of international law. Consequently, it is States who decide what the objectives of that system should look like. In this sense, “State-centeredness” is just thoroughly practical as international lawyers assume that state-will and state-practice can be interpreted in a scientific or methodological way, i.e. the search for an opinio juris; they suppose that States have an objective, perhaps “living” and organic personality which somehow is “conscious” of having legal obligations. This perspective was formulated in the S.S. Lotus case when the PCIJ studied whether a State could prosecute a ship crew flying the flag of another State, where they were thought to have damaged a ship flying its own flag. One question was how to interpret the absence of practice related to this issue. The Court said:

Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.

As Brownlie shows, lawyers argue that State practice can be meaningfully measured in the presence of a subjective criterion applied by a court itself as the court cannot suppose that the history of State practice has some “inner” meaning. Rodley seems to point to what would be an even more complex problem of applying such tools in relation to NSAs.

To argue that ISIS has “personality” would emphasise its authority. And such authority would point to the double bind that the traditional Westphalian notion of world order posits to exist

387 Ibid., 527-8.
389 “The Statute [of the ICJ] refers to ‘a general practice accepted as law’. Brierly speaks of recognition of a certain practice ‘as obligatory’, and Hudson requires a ‘conception that the practice is required by, or consistent with, prevailing international law’. Some writers do not consider this psychological element to be a requirement for the formation of custom, but it is in fact a necessary ingredient. The sense of legal obligation [...] is real enough and the practice of states recognizes a distinction between obligation and usage”. Brownlie 2012, 7 (emphasis, his; footnotes, omitted).
among States. And therein lies the methodological catch. The issue of method seems to concern what kind of legal knowledge lawyers can employ in the absence of an overarching sovereign power. Less important is whether the State is understood as a power issuing commands backed by threats (Austin), or if it is a legal order, somehow accepted within a specific space in time, which affords a fixed procedure for the formulation of what is accepted as a legal principle and rule (Hart). The essential point is that social organisation through law has become cut off from every authority except the State. Political theorist Cornelia Navari explains this by using the “frame” theory of knowledge as an example of “state theory”; it solves the problem of how claim knowledge without reference to philosophical study about what is “right” or “good”.

This was affirmed in 1996 by the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* Opinion. In response to the question about the lawfulness of the threat or use of such weapons, the Court concluded that whatever the consequences it could not exclude such use to be lawful “in an extreme circumstance of self-defence, when the very survival of a State would be at stake”. In other words, States and their survival are the highest objectives of the system. Hence the importance of IHRL to be State-centered; although human rights empower right-holders, they also empower States to order and control the social environment in which right-holding arises and becomes consequential in the first place. In one of Rodley’s later paragraphs, it becomes clear he assumes a universalism stemming from that order at work in the language of international law. Indeed, it is the firm belief in the interstate system as filling the chaotic void: “[I]t becomes uncertain what purpose our new paradigm would serve. Common criminals (murderers, batterers, thieves) remain, after all, criminals. Their behaviour is universally condemned [...] the same applies to terrorists”.

However, state-centrism – and the myth why only state objectives should count – cannot explain why States also can be perceived as “evil” or illegitimate as any terrorist organization plaguing the Arab world. Nor does it explain why such an order would be impervious to other loci of political authority. As Anthony Carty shows, the dominant methods of legal argument

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390 Wacks 2012, 67ff and 81ff.
391 Navari, C., “Knowledge, the state and the state of nature”, in Donelan 1978, 107.
392 Ibid., 108.
394 Rodley, N.S., *supra* note 278, at 529 (emphasis, mine).
were evolved at a time when it was thought that nation-States were not merely the subjects of an international legal order, but the only subjects of that order.\textsuperscript{395} However, I believe international lawyers perceive the multiplicity of actors in international society as a reason for doctrine and method to seek new revenues beyond current paradigms. For example, it is difficult to theoretically conclude that NSAs are bound by customary international human rights law without referring to a system which already excludes all other loci of authority except the State. As Samuel Moyn points out, IHRL is a technical vocabulary that grew out from some struggles in the 1960s and 1970s.\textsuperscript{396} Arguing IHRL addresses something “universal” or “particular” is unhelpful \textit{in itself} as human rights constitute a type of language with more or less powerful moments in the discourse of international law.

Conceptualizing ISIS into frameworks of international law shows the methodological difficulties in such a gesture as the method itself assumes a particular frame theory of knowledge that cannot conceptually incorporate territorial NSAs as loci of political authority. This becomes problematic and perplexing when such entities \textit{de facto} control territory, people, resources. One is tempted to conclude that ISIS is, in Ian Brownlie’s words, a \textit{sui generis} actor only conceptualized in armed conflict, and that such “actorness” can be said to conceptualize its locus of political authority. But where does such conceptualization really lead us?

\section*{6.3 After or before Westphalia? Violence and language}

\subsection*{6.3.1 The violent foundation of law and order}

In 6.1, I traced the problem of conceptualizing ISIS to the origins of state-centricity. In this part, I will argue that such exclusion conditions the paradigm of international law itself.

What grounds a system of law? In a careful reading of Walter Benjamin and Carl Schmitt, Jacques Derrida insists that the basis of law consists of a founding violence – a violence which cannot be encompassed by law because it is its precondition. Founding a new system of law can therefore never be carried out within legal boundaries. “The origin of authority, the foundation or ground, the position of the law cannot by definition rest on anything but themselves”.\textsuperscript{397} Derrida therefore underlines that the foundation of law \textit{exceeds} the boundaries of legality rather than offend them. This is why he argues that “all revolutionary moments are

\begin{footnotes}
\item[396] Moyn 2012, 177ff.
\end{footnotes}
fundamentally uninterpretable and undecipherable”. But what category does this “founding violence” belong to? If legal action corresponds to authorized violence and illegal action corresponds to unauthorized violence, would an action that is neither of the two correspond to pure violence? Derrida does not solve this paradox, but he finds the paradox helpful to understand that violence is internal rather than external to any order of law.

In a thought-provoking analysis of Derrida’s thought, philosopher Martin Hägglund shows that there can never be justice which is “nonviolent” as no system of justice ever can be inherently “good”, “peaceful” or “just”. Arguing that there is in fact such a system would presuppose that there is a way to objectively define and measure violence, which is an untenable presupposition. Every definition and every measure of violence is itself violent, since it is based on decisions that are haunted by what they exclude. The criteria for what counts as violence are therefore always open to challenge. Indeed, there would be no chance to pursue political critique and to transform the law if the definitions of violence were not subject to possible alteration.

Any definitions of violence and justice are violent as such definitions require exclusion of other notions of violence and justice. Any notion of sovereignty can therefore be seen as constituting a particular moment of law-making without prior justification.

Does the Westphalian order and its notion of sovereignty rest upon such a founding moment not encompassed by law, in philosopher Giorgio Agamben’s words, neither inside nor outside? Interestingly, this “priority of order”, as Anne Orford calls it, originated from the attempt to challenge the authority of the Pope and the Holy Roman Emperor, which exercised dual forms of universal jurisdiction. Today’s paradigm, even if it took centuries to establish, was a response to exactly those notions of sovereignty and its subsequent chaos with various actors with all kinds of notions of sovereignties. For the whole point of Hobbes’ political theory was not to ground authority upon inheritance or a set of moral values or some authentic relationship with God. Rather, his argument was the creation of an order dependent upon the establishment of common power with the capacity to protect its subjects. The rest

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398 Ibid., 166.
399 Derrida 2005, 75.
402 Medieval Europe was not constructed around the concept of statehood. Instead, there were a number of different types of actors – the pope, various bishops as both secular and clerical holders of power, city-states, kingdoms, princedoms, the Roman Emperor, etc., and the legal relations between them were not at all clear. See Orford, A., supra note 102, at 272–3.
403 Orford 2007, 112.
is, as they say, history. Now, what is political is no longer framed by religious institutions, but by the modern State.

So any order of law presumes some kind of primordial violence to be the possibility of law, since otherwise there would be nothing for law to regulate and to distinguish and nothing to prompt the emergence of law in the first place. But what Derrida does not explain is whether there was some actual violence present in the beginnings of law. Rather, and here I agree with Jens Bartelson, what seemed to have mattered was that the possibility and necessity of violence was imagined by law itself as a condition of itself. The whole point of establishing the double bind between “right” authority and “right” violence was to prevent the chaotic violence and disorder that would ensue in its absence.

What is ISIS trying to achieve? On the one hand, ISIS can be explained by looking backwards, before the Westphalian order had consolidated itself, when “right” authority was exercised by a multitude of empires, States, quasi-States and even corporations, e.g. the East India Company. On the other hand, ISIS positions itself on modern lines of statehood with the crucial difference that it is not based on revolution (contrasting e.g. the creation of France and the US) but on what we call terrorism. ISIS arguably has no interest to be a part of world order as that order only allows the political to be framed by modern notions of statehood. At the same time, ISIS distinguishes itself from other similar organizations by proclaiming a rather modern State based on notions similar to those proclaimed by Hobbes and the criteria found in the Montevideo Convention. In the course of its establishment, ISIS has been excluded: like pirates and barbarians existed outside the norms of the contemporary (European) international law of the eighteenth and nineteenth centuries, their “Piratical” or “Barbary” states being “outlaw states”, ISIS is considered a global enemy, hostis humanis generis. Thus, ISIS and its actions constitute that originating violence order that the current paradigm of world order wanted to get away from in the first place.

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404 Bartelson 2015, 5.
406 “Piratical Barbary States [were] characterised by Grotius as bands of robbers. Criminality on this scale permits concerted police action on behalf of civilised states”, see Simpson 2004, 240.
6.3.2 Carl Schmitt’s Partisan as the absolute other

There is an interesting affinity to Carl Schmitt’s theory on the Partisan – a modern but ambiguous theoretical figure that confounds existing legal categories. As “one of the last sentries of the earth” the Partisan was in Schmitt’s worldview the true bearer of “the political” at a historical moment when there was no consolidated European interstate system. In this way, Schmitt argues, the Partisan, blurs all distinctions between war and peace, non-combatant and combatant, and legal and illegal conflict. An irregular force, the Partisan operates outside the system.

Schmitt argues that in periods of transition from one legal, territorial grounded order to another, irregular political phenomena become difficult to subject to current notions of law. The Partisan was therefore a symptom of the decay of the European State as a particular locus of political authority. The Partisan cannot be dealt with by using current legal categories; forcing it into existing categories in fact hastens the dissolution of State-centricity of international law. This has to be viewed in light of Schmitt’s utter repulsion of what he saw was the destruction of European international law in the twentieth century. According to him, European international law had depended for its meaning on the recognition that “European soil or soil equivalent to it had a different status in international law from that of uncivilized or non-European peoples”. Once it had been transformed into “a universal international law lacking any distinction” it ceased to be meaningful.

New protagonists of the political – incarnated as the Partisan – dislocates the former coordinates that had informed political thought, and subsequently robbed the State of its monopoly of the political. Schmitt’s Partisan is therefore on a peculiar spot: it is the absolute other. And in that position, it knows that current notions of law and order can be revoked. The Partisan knows that there cannot exist non-violent justice as all forms of justice and systems of law and order must exclude someone from its orbit of frame. This is why it is difficult for international legal theory to explicitly define and contain the monopoly of States.

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409 Ibid., 7–14.
Here, Schmitt argues that the Geneva Conventions deserves “admiration” for their “humane disposition” in regulating the irregular. However, they remain parasitic on the classical distinctions.\textsuperscript{413} The genuine Partisan ceases to be if he or she is assimilated to regular armies. But there can be no “valid regulation of the irregular”; the irregular only dissolves if the regularity of armies and States, against which the Partisan defines himself, also dissolves.\textsuperscript{414} In a couple of vague paragraphs, Schmitt celebrates the genuine Partisan for this reason: it is a figure who by definition is hors la loi – who takes the risk of being “eliminated” and whom States can legitimately eliminate.\textsuperscript{415} The relation between the Partisan and the State becomes in this way a black hole. This is why Schmitt explicitly claims that if the Geneva Conventions do apply, the Partisan actually ceases to be a Partisan; terrorists are no longer terrorists.\textsuperscript{416}

So the current paradigm is based on an original violence. This violence has been argued to exist in the existence of “others” – barbarians, the uncivilized – whether located in the prehistory of the sovereign State or relegated to the “non-European outside”. However, what mattered more for the emergence of law was, as I argued, a primordial violence imagined as a condition by law as a condition for itself, and the basis for what would be the ultimate justification for international law: to differentiate between lawful violence and unlawful violence, to regulate armed conflict.\textsuperscript{417}

This is also why the paradigmatic other and the emergence of the modern notion of sovereignty cannot be found, as Antony Anghie argues, in the colonial experience of the management and confrontation of cultural difference between the colonizer and the colonised,\textsuperscript{418} but rather in the lawless past of European civilization itself – a “cauldron of hostility simmering inside European civilization”. The oppressive operation of the West against the rest was therefore never just about racism or orientalism, but originated from the paradigm itself, in the violent attempts to put political authority on a secular footing “by conceptualizing hostility and enmity as the ultimate sources of law, and then reinforcing claims to secular authority with recurrent appeals to social, religious and cultural differences between European peoples”.\textsuperscript{419}

By conceptualizing ISIS as a “Party” to armed conflict, international law grasped another locus of power – based on facts, i.e. organization and high levels of violence. What Schmitt’s

\textsuperscript{413} Schmitt, C., \textit{op cit.}, 20.
\textsuperscript{414} ibid., 23.
\textsuperscript{415} ibid., 40.
\textsuperscript{416} Ibid., 29.
\textsuperscript{417} Ibid., 7.
\textsuperscript{418} Anghie 2006, 6-8.
\textsuperscript{419} Bartelson 2015, 63.
Partisan can illustrate is that irregular phenomena may disrupt the very categories by which one uses to make it regular. However, while ISIS may be said to creep into legal language, ISIS is excluded from both statehood and international subjectivity as well as from being a locus of legitimate political authority. As I showed in chapter 5.2.2, a number of international tools can be used as instruments to exclude ISIS’ fighters from the prospect of immunity, and thus excluding ISIS from the realm of legitimate violence. In this way, the exclusion of ISIS is not something that takes place outside the paradigm. Rather, it is a central part of that paradigm to define sources of illegitimate and legitimate forms of violence – again, the double bind between authority and the use of force.

Hence, as Peter Hilpold argues, a sub-discipline of international law of counter-terrorism distinct from specific counter-terrorist treaties, is being developed for this reason: to justify the use of force against internal threats to regional and international order as well as excluding from the realm of law terrorist entities. Two examples are (a) self-defence against territorial NSAs and (b) UNSC Resolutions 2178 (2014) and 2249 (2015), the former an instruction of penalizing all acts of terrorism by ISIS, the latter a vague call for States to combat ISIS by all necessary means.

While I am not going to discuss whether there has been a “widening of the concept of armed attack” the UNSC resolutions speak a clear language in relation to ISIS, but not clear enough as to authorize force against it. Resolution 2249 is too ambiguous to by itself constitute a free-standing basis for armed force against ISIS. The only official legal basis for the use of armed force against ISIS against the will of Syria based on this resolution that I could find was one written by the German Foreign Office arguing such basis is to be found when reading Article 51 in “conjunction” with Resolution 2249.

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420 E.g. preventing nuclear terrorism, see International Convention for the Suppression of Acts of Nuclear Terrorism, UN document A/RES/59/290.
422 Res 2249 (2015) reaffirms the UNSC’s “respect for the sovereignty, territorial integrity, independence and unity of all States in accordance with purposes and principles” of the UN of the Charter while also declaring its determination to “combat by all means this unprecedented threat to international peace and security”. Unlike previous UNSC Resolutions that can be argued to authorize force, resolution 2249 omits Chapter VII of the UN Charter as well as the words “authorizes”, “decides”, “armed force”, “armed attack” or “self-defence”. At the same time, it defines ISIS as a “global and unprecedented threat to international peace and security” and a right of States – “even to those far from the conflict zone” to combat ISIS “by all means”.
423 “[T]he legal basis for this mission and the process of mandating in France’s right to self-defence, under the provisions of the UN Charter (Article 51), in conjunction with the call of the United Nations Security Council on all nations to take all necessary measures to fight the so-called IS in Syria” (emphasis, mine), statement by the German Federal Government Support in the fight against terrorism.
If ISIS was conceptualized as a State or as an international subject with a set of rights and duties, the scope of legal action taken against it would be at least defined. As ISIS cannot be conceptualized as a locus of political authority, the violence against ISIS as such takes place outside clear notions of international law. Using the “inherent” right to self-defence (Article 51 of the UN Charter) to use force on ISIS based on the fact that a State is unable to control its territory (the unwilling/unable-argument; see supra chapter 3.3) evokes peculiar notions of law. The legal basis seems to rest on the same argument that Clapham proposed, namely because of consolidated control of territory, NSAs can, and should, be conceptualized as having an international responsibility. The key word is control over territory. However, such views – sovereignty dependant on control over territory – contradicts, as I already have showed, the fundamental international legal principle that States enjoy “exclusive competence” over their territories. Or, as Marc Weller puts it: “It seems to be open season in Syria for now, until the intervening states can agree the terms of a cooperative arrangement to engage ISIL [...] designated as the common enemy.”

This shows one problematic aspect when arguing that territorial NSAs operates and consolidates their power on territory: that they for this reason can be conceptualized as justifiably targets for the use of force. This suave bending of international law for new purposes is not universal – it seems almost banal to point out that since 1945 interventions has never been carried out against a Western European or North American state – and not, I believe, what was intended when the concept of sovereignty was entrenched. Arguing that control of territory is equivalent to international responsibility and that loss of territory is a cause for the use of force constitute crises for the language of international law as such conceptualization refers to new notions of authority. Problem-solving theory seems to be unable to grasp such notions.

6.4 Final remarks

I presented an answer to my research question supra 6.1. What I want to finally add is that the emergence of ISIS evokes some pressing issues in regards to the language of international law. How to conceptualize international subjectivity in relation to an entity like ISIS that controls territory, people, resources? How to use force against it without disrupting the paradigm of equal sovereignty of States? Conceptualizing ISIS involves a suave operation between positions of exclusion and inclusion. How long will there be a state of exception?

A recent UN Report suggests “[t]he norms governing the use of force by non-State actors have not kept pace with those pertaining to States”. The report continues by saying that “[t]he United Nations must achieve the same degree of normative strength concerning non-State use of force as it has concerning State use of force.”\(^{425}\) What the UN report does not say is how this is possible without disrupting some crucial concepts of international law. ISIS is a good example. One the one hand, forcing ISIS into categories of international law is necessary as domestic law cannot deal with it. One the other hand, by forcing it into categories, it seems as if there is disruption of the very same categories, e.g. what is “right” authority and “right” use of force. ISIS seems to be a crisis of method that indicate that the current paradigm is unable to make sense of the situation and to serve as a reliable model for novel circumstances.

The UNSC and a handful of States will continue to take the lead and offer their services as a global police force for whatever reasons they see fit. However, dealing with ISIS cannot remain a state of exception. That is, if one does not consider this “exception” to already constitute the “normal” and already at work in the work of the paradigm. Concepts able to explain reality may provide a powerful voice in the face of raw, political power. This is important – if international law is to stay, if it ever was, relevant. But “talking truth to power” must be coupled with the knowledge that international law \(\text{already}\) is meshed with politics. The law is not the humanitarianism timidly opposing empire and warfare. It is also \(\text{that}\) locus of authority, \(\text{its}\) wars, \(\text{its}\) violence. This is why the exclusion of the other conditions what to be included, as the other is the condition for politics to exist in the first place. This has bearing on the question on how far one must go in order to “grasp” the phenomenon of ISIS. Does one want further conceptualization, with the risk of disrupting some crucial legal categories? In either way, conceptualizing ISIS seems to be a crisis indicating the weaknesses of the current paradigm of international law. Westphalian-inspired assumptions about power and authority are incapable to provide me with the understanding I wanted.

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