

# The Conflict with Islamic State: A Critical Review of International Legal Issues

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## Introduction

Islamic State (IS) is a radical jihadist armed group that controls vast swathes of territory in eastern Syria and across northern and western Iraq. Its exponential rise in 2014 as well as its brutality and cruel practices - including mass killings, abduction of members of ethnic and religious minorities,<sup>1</sup> summary executions, acts of torture, sexual enslavement and beheadings of soldiers, journalists and humanitarian workers - which are often filmed and released online, have sparked fear and outcry in the international community. Its existence has also raised numerous issues under international law, some of which will be addressed in the present chapter. However, before doing so, we should attempt to answer three preliminary questions in order to better understand the complexities of the issue at hand.

*How did IS come to life?* The origins of IS can be traced back to 1999 when Jordanian Abu Mous'ab al Zarqawi, upon his return from Afghanistan, established *Jamaat Al Tawhid Wal Djiha*d in Iraq, an armed group composed of ultra-violent elements aimed primarily at countering the US occupation.<sup>2</sup> In 2004, al Zarqawi pledged allegiance to Osama Bin Laden. *Jamaat Al Tawhid Wal Djiha*d merged with *Al-Qaeda* and became *Al-Qaeda* in Iraq (AQI). Following al Zarqawi's death in June 2006 in American airstrikes, AQI merged with other Iraqi jihadist groups<sup>3</sup> and gave birth to Islamic State of Iraq (ISI), an umbrella organization governed by Abu Omar al Baghdadi. From then on, the organization's ranks started swelling rapidly. It first gained strong support from former members of Saddam Hussein's Baath regime and senior military officials of his long-disbanded army. All of them were looking for revenge against the American "invasion" and the new Shia government, led by Prime Minister Nouri al-Maliki. ISI then brought to its side desperate Iraqi Sunni populations, marginalized and alienated by al-Maliki's sectarian campaign favoring the country's larger Shia population. Maliki's authoritarianism and mistreatment of the Sunni community therefore paved the way for ISI to grow. In 2010, Abu Omar al Baghdadi died and was replaced by his messenger, Abu Bakr al Baghdadi, the current

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<sup>1</sup> These minorities include notably Turkmen, Christians, Yazidis, Shia Arabs and Sabaeans. See United Nations (UN) Human Rights Council (HRC), *Report of the UN High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*, 13 March 2015, A/HRC/28/18, § 16.

<sup>2</sup> This group quickly ascended into notoriety due to a series of high-profile operations, such as the 2003 attack on the UN compound which led to the death of Sergio Vieira de Mello, the assassination of Laurence Foley in Amman and the beheading of Nicholas Berg.

<sup>3</sup> These groups notably include *Jeish al-Fatiheen*, *Jund al-Sahaba*, *Katayeb Ansar al-Tawhid wal Sunnah* and *Jeish al-Taiifa al-Mansoura*.

leader of IS. The group's activities were extended to Syria in 2012 by taking advantage of the Syrian regime's dissolution and the region's instability in the aftermath of the 'Arab Spring'. In April 2013, al Baghdadi announced the creation of Islamic State of Iraq and the Levant (ISIL) operating over vast areas in Iraq and Syria. On 29 June 2014, ISIL proclaimed itself a 'Caliphate' and was simply renamed as 'Islamic State'.<sup>4</sup> On 1 July, al Baghdadi called on Muslims worldwide to obey him as the Caliph and to join the new Caliphate.

IS's controlled territory is of approximately 30'000 square meters<sup>5</sup> and includes key cities such as Falluja, Mosul, Al-Raqqa, Tikrit, as well as strategic economic sites such as dams, oil and gas fields and transit points at the Iraqi-Syrian border. To date, IS is considered to be the richest armed group in history. Most of its income comes from the smuggling of natural resources, tax extortion, ransom payments,<sup>6</sup> bank robberies<sup>7</sup> and, allegedly, donations from charity organizations and wealthy individuals from Saudi Arabia and other Gulf States. IS has reached extremely high political and military organization, managing to attract foreign fighters from over 50 States. These are estimated to be between 9'000 and 31'000, according to the late 2014 CIA finding.<sup>8</sup>

*Is IS a State or a non-State actor?* Although IS aspires to be a State and has put quasi-state structures in place such as its own taxation system, police (the *Al-Hisbah* morality police), ministries and courts, it does not meet at least two of the four cumulative statehood requirements provided by Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States – namely 'permanent population' and 'defined territory'.<sup>9</sup> Therefore, the authors of the present chapter consider IS to be a non-State actor.

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<sup>4</sup> IS is also often referred to as *Da'ish* or *Daesh*, which is the abbreviation of the group's name in Arabic (*al-Dawla al-Islamiya fi Iraq wa al-Sham*).

<sup>5</sup> IS's controlled territory is equivalent to the size of Belgium.

<sup>6</sup> For more related to this point, see Callimachi, R., 'Paying Ransoms, Europe Bankrolls Qaeda Terror', *New York Times*, 29 July 2014, [http://www.nytimes.com/2014/07/30/world/africa/ransoming-citizens-europe-becomes-al-qaedas-patron.html?\\_r=1](http://www.nytimes.com/2014/07/30/world/africa/ransoming-citizens-europe-becomes-al-qaedas-patron.html?_r=1).

<sup>7</sup> For instance, some US\$ 425 million were reportedly robbed at the Iraqi Central Bank in Mosul. McCoy, T., 'ISIS just stole \$425 million, Iraqi governor says, and became the world's richest terrorist group', *Washington Post*, 12 June 2014, <http://www.washingtonpost.com/news/morning-mix/wp/2014/06/12/isis-just-stole-425-million-and-became-the-worlds-richest-terrorist-group/>.

<sup>8</sup> Gartenstein-Ross, D., 'How Many Fighters does the Islamic State Really Have?', *War on the Rocks*, 9 February 2015, <http://warontherocks.com/2015/02/how-many-fighters-does-the-islamic-state-really-have/>.

<sup>9</sup> Whilst the territory controlled by IS is very large, the borders of this territory are rather vague and unstable. Furthermore, the fact that IS acquired this territory by violating international law puts its legitimacy into question. With regard to the 'permanent population' requirement, it is doubtful that the population under IS's control ties its fate to that of the group itself and that they share the same objectives. However, in view of IS's high level of organisation and global network, the two remaining requirements for statehood set out in Article 1 of the 1933 Montevideo Convention, namely "effective government" and "capacity to engage in relations with other States", seem to be met. For further analysis, see e.g. Shany, Y., Cohen, A., Mimran, T., 'Is the Islamic State Really a State?', *The Israel Democracy Institute*, 14 September 2014, <http://en.idi.org.il/analysis/Articles/isis-is-the-islamic-state-really-a-state/>.

*What are the main differences between IS and Al-Qaeda?* Although both armed groups share common features, and can be labeled as Islamic fundamentalist, one should highlight the most important differences between the two groups. In a thorough analysis, Mohamedou points out three key differences.<sup>10</sup> *Firstly*, IS's struggle is territorially-oriented as its main aim is building a State, whereas *Al-Qaeda's* objective is, above all, global jihad and implementation of *Sharia* law worldwide. *Secondly*, IS and *Al-Qaeda* have different targets. Whilst IS fights all those who do not approve its extreme Sunni interpretation of Islam, i.e. non-Muslims but also Shia Muslims and moderate Sunnis, *Al-Qaeda's* enemies are those who are against the expansion of Islam, particularly the American 'far enemy' (*al 'adou al ba'eed*). Furthermore, *Al-Qaeda* "consistently stressed political goals and unity among Islamists of all hues, including non-Arabs and non-Sunnis".<sup>11</sup> *Thirdly*, the two groups are organized differently. IS is built around a strong regional center of gravity and functions in a pyramidal way,<sup>12</sup> while *Al-Qaeda* consists of a transnational network comprised of a series of sleeper and active cells all over the world.

## **I. Jus ad bellum Considerations**

The territorial control exercised by IS in Iraq and Syria has raised concern not only in the latter two States, but in the entire international community. The Caliphate's threat to expand its borders, the conditions of those individuals living under its rule, along with the considerable amount of natural resources it controls have led the United States (US) and other countries to create two differently composed coalitions aimed at quashing IS, in Iraq and Syria respectively.<sup>13</sup>

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<sup>10</sup> Mohamedou, M-M. O., 'ISIS and the Deceptive Rebooting of Al-Qaeda', *GCSP Policy Paper 2014/5*, August 2014, <http://www.gcsp.ch/Regional-Development/Publications/GCSP-Publications/Policy-Papers/ISIS-and-the-Deceptive-Rebooting-of-Al-Qaeda>). See also Mohamedou, M-M. O., 'L'Etat islamique et l'ombre portée d'Al Qaeda', *Le Temps*, 25 September 2014, <http://www.gcsp.ch/Sidebar/News/Le-Temps-L-Etat-islamique-et-l-ombre-portee-d-Al-Qaida-Editorial-du-Dr.-Mohammad-Mahmoud-Ould-Mohamedou>. Along the same vein, see also Byman, D., Williams, J., 'The Foreign Policy Essay: AQ vs. IS and the Battle for the Soul of Jihad', *Lawfare*, 22 March 2015, <http://www.lawfareblog.com/2015/03/the-foreign-policy-essay-aq-vs-is-and-the-battle-for-the-soul-of-jihad/>.

<sup>11</sup> Mohamedou, M-M. O., 'ISIS...', *supra* note 10, at 2.

<sup>12</sup> However, it is worth noting here that several jihadist groups, located in other parts of the world, have pledged allegiance to IS. For instance, this is the case of *Abu Sajaaf* (Philippines), *Jund Al-Khilafa* (Algeria), *Ansar Bait Al-Maqdi* (Egypt) and *Boko Haram* (Nigeria). See Ourdan, R., Papin, D., Malécot, V., El Mokhtari, M., Clairouin, O., 'Al-Qaida, Etat islamique: comprendre la planète djihad', *Le Monde*, 20 November 2014, [http://www.lemonde.fr/international/video/2014/11/20/djihadisme-l-etat-islamique-est-il-en-train-de-replacer-al-qaida\\_4526287\\_3210.html](http://www.lemonde.fr/international/video/2014/11/20/djihadisme-l-etat-islamique-est-il-en-train-de-replacer-al-qaida_4526287_3210.html).

<sup>13</sup> US Department of State, webpage, *Special Presidential Envoy for the Global Coalition to Counter ISIL*, <http://www.state.gov/s/seci/index.htm>. In 2014, members of coalition conducting military operations in Iraq include Australia, Belgium, Canada, Denmark, France, Netherlands and the United Kingdom. Members of the coalition conducting military operations in Syria include the United States, Bahrain, Jordan, Saudi Arabia and the United Arab Emirates. See US Department of Defense (DoD), 'Airstrikes Continue Against ISIL in Syria, Iraq', 31 December 2014, <http://www.defense.gov/news/newsArticle.aspx?id=123898>. The United States' operation, led by a Combined Joint Task Force, has been named 'Operation Inherent Resolve.'

Since in international law the concept of just war (*bellum justum*) has long been replaced by the concept of lawful war (*bellum legale*),<sup>14</sup> the moral justifications of an armed intervention against IS are to be framed in the context of the existing rules on the use of armed force (*jus ad bellum*). These rules are enshrined primarily in the United Nations (UN) Charter which, in Article 2(4), affirms that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>15</sup> The prohibition, which is deemed to have attained customary status<sup>16</sup> and to constitute a peremptory norm of international law,<sup>17</sup> knows two classical exceptions: actions undertaken in self-defence as disciplined by Article 51 of the UN Charter; military actions authorized by the UN Security Council (SC) in the framework of the UN collective security system as embodied in Chapter VII of the UN Charter. A third possible exception, relevant to the situation in Iraq and Syria, is represented by military interventions on foreign territory upon invitation or with the consent of the sovereign State. This paper will show that the legality of such interventions is controversial when carried out in the context of an internal armed conflict.

Any actions undertaken directly by the Syrian and Iraqi armed forces on their own territories are obviously not a matter for *jus ad bellum*, which concerns the use of force in the international relations between two or more States. Such an ‘international’ force is instead being used by the two US-led coalitions, which started conducting airstrikes against IS-held areas on Iraqi sovereign soil in August 2014,<sup>18</sup> and on Syrian sovereign soil in September 2014.<sup>19</sup> In this analysis the legality of the foreign intervention in Iraq will be considered separately from the legality of the foreign intervention in Syria, based on a number of inter-related reasons. *Firstly*, the political and factual situation in the two States in 2014 was extremely different, as Syria was amidst another civil strife, other than that opposing the government to IS. *Secondly*, considering the different ongoing relations with their respective governments, intervening States have been keen to distinguish the legal justifications of their actions in Iraq and Syria.<sup>20</sup> *Thirdly*, some States have limited their involvement to only one of the two countries.<sup>21</sup> *Fourthly*, the legality

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<sup>14</sup> The terminology was used in Kunz, J., 1951. ‘*Bellum Justum and Bellum Legale*’, *American Journal of International Law* 45: 528.

<sup>15</sup> Charter of the United Nations, 24 October 1945, 1 *UN Treaty Series* XVI, Article 2(4).

<sup>16</sup> Distefano, G., 2014. ‘Use of Force’. In Clapham, A., Gaeta, P. (eds.), *Oxford Handbook on International Law in Armed Conflict*, Oxford: Oxford University Press (OUP), 2014, 545-573, 546.

<sup>17</sup> UN International Law Commission (ILC), ‘Draft Articles on the Law of Treaties with commentaries’, in *Yearbook of the International Law Commission*, 1966, vol. II, at 248, § 3. In this sense, see also Abass, A., 2004. ‘Consent Precluding State Responsibility: A Critical Analysis’, *International and Comparative Law Quarterly* 53: 211, at 223.

<sup>18</sup> US DoD, ‘Statement by Pentagon Press Secretary Rear Admiral John Kirby on Airstrikes in Iraq’, 8 August 2014, at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=16878>.

<sup>19</sup> US DoD, ‘U.S. Begins Airstrikes Against ISIL in Syria’, 22 September 2014, <http://www.defense.gov/news/newsArticle.aspx?id=123233>.

<sup>20</sup> Kress, C., ‘The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against ‘IS’ in Syria’, *Just Security*, 17 February 2015, <http://justsecurity.org/2015/02/17/clauss-krebs-force-isil-syria/>.

<sup>21</sup> France, for example, is only taking part to operations being conducted on Iraqi soil. See US DoD, *supra* note 13.

assessment over military operations in Iraq is different to the legality assessment of actions undertaken on Syrian territory. This leads to different outcomes in terms of legality.

### **A. The legality of the US-led coalition airstrikes against IS in Iraq**

The main legal explanation provided by foreign States conducting military operations in Iraq is that they are acting upon a request for assistance coming directly from the Iraqi government.<sup>22</sup> The so-called ‘intervention by invitation’ is frequently invoked in State practice as one of those cases in which the use of international force is lawful according to international law.<sup>23</sup> Such a case is not expressly spelled out in the UN Charter, but scholars have identified two possible legal avenues leading to the legality of interventions by invitation. According to a *first* strand of argument, the territorial State’s consent – Iraq’s consent in our case – would act as a circumstance precluding the wrongfulness of what would otherwise be a violation of its territorial integrity and sovereignty. Article 20 of the UN International Law Commission (ILC) Articles on State Responsibility (ASR), indeed, states that “[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.”<sup>24</sup> According to a *second* strand of argument, an intervention upon request would not actually constitute use of force against the territorial integrity or political independence of the inviting State, nor would it be in any other way inconsistent with the principles of the UN Charter. Hence, it would be perfectly compatible with the rule contained in Article 2(4) UN Charter.<sup>25</sup> If one were to apply this second theory to Iraq’s case, it would mean that the UN Charter’s prohibition on the use of force would not even apply to the international coalition’s operations. Whichever legal avenue one finds most convincing, it seems undeniable that, if expressed in a valid manner,<sup>26</sup> a request for military

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<sup>22</sup> Letter dated 25 June 2014 from the Permanent Representative of Iraq to the UN addressed to the Secretary-General, S/2014/440, 25 June 2014; Letter dated 20 September 2014 from the Permanent Representative of Iraq to the UN addressed to the President of Security Council, S/2014/691, 20 September 2014.

<sup>23</sup> As recognized in International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America, Merits), Judgment, ICJ Reports 1986, p. 14 ff., at § 246, and later implicitly confirmed in ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p. 168 ff., *inter alia* at §§ 105-106, 113, 149. The assumption is strengthened by the definition of aggression annexed to UN General Assembly (GA), Resolution 14 December 1974, A/RES/3314 (XXIX), which in Article 3(e) affirms that the continued presence of foreign troops on sovereign territory after withdrawal of consent constitutes an act of aggression; what means that consent can make lawful a behaviour which otherwise would constitute not only a violation of Article 2(4), but an act of aggression. On this point, see Corten, O., 2010. *The Law against War*, Oxford: Hart Publishing, 251-252.

<sup>24</sup> ILC, ‘Articles on the Responsibility of States for Internationally Wrongful Acts’ (ASR), in UN GA, Resolution 12 December 2001, A/RES/56/83, Article 20.

<sup>25</sup> See Dinstein, Y., 2009. *War, Aggression and Self-Defence* – 5<sup>th</sup> ed, Cambridge: Cambridge University Press, 119. Bannelier, K., Christakis, T., 2013. ‘Under the UN Security Council’s Watchful Eyes: Military Intervention by Invitation in the Malian Conflict’, *Leiden Journal of International Law* 26: 855, at 861; Abass, *supra* note 17, 224-225.

<sup>26</sup> Which means that it must not be vitiated by coercion, fraud or corruption, clearly established, really expressed, internationally attributable to the State and given *a priori*. See Ben Mansour, A., 2010. ‘Circumstances Precluding wrongfulness in the ILC Articles on State Responsibility’, in Crawford, J., Pellet, A., Olleson S. (eds.), *The Law of International Responsibility*, Oxford: OUP, 439-447, at 441-445.

assistance makes the subsequent use of force on the requesting State's territory compatible with the current discipline of *jus ad bellum*. Or at least this would be the general rule.

In the last 30 years, however, a considerable amount of scholars has argued that interventions by invitation are unlawful in at least one case, i.e. whenever the military intervention is aimed at helping a government to defeat the rebel side in an internal armed conflict.<sup>27</sup> Considering that Iraq – as it will be shown *infra* – is currently engaged in a non-international armed conflict against IS, one could argue that such a position makes an armed intervention on Iraq's side illegal under *jus ad bellum*. The theory would act as a shield for the principle of non-interference in other States' internal affairs – sanctioned by the 1970 Declaration on Friendly Relations<sup>28</sup> – and for the right to self-determination, which would broadly be defined here as a people's right to choose its own government (political independence *latu sensu*).<sup>29</sup> Once a considerable amount of people starts a civil rebellion in an attempt to change its political status, intervening from the outside on the government's side would mean meddling in that State's internal affairs as much as helping the rebels. It is no coincidence that this theory was born during the 'Cold War' era, as a response to the abuse of military interventions by invitation, which were sometimes used to maintain some anti-democratic regimes' power.<sup>30</sup> In 1975, the *Institut de Droit International* (IDI) took the stand that “[t]hird States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State.”<sup>31</sup> Later, in 2011, the IDI nuanced its approach, stating that “[m]ilitary assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object is to support an established government against its own population.”<sup>32</sup> The 2011 Resolution was meant to be applied only to situations of internal disturbances and riots below the threshold of a non-international armed conflict as defined in Additional Protocol II to the Geneva

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<sup>27</sup> In particular, see Doswald-Beck, L., 1985. 'The Legal Validity of Military Intervention by Invitation of the Government', in *British Yearbook of International Law* 56: 189; Christakis, T., Bannelier K., 2004. 'Volenti non fit injuria? Les effets du consentement à l'intervention militaire', *Annuaire français de droit international* 50: 102; Corten, *supra* note 23, 249-310; and Gray, C., 2008. *International Law and the Use of Force*, Oxford: OUP, 67-113. See also Akande, D., Vermeer, Z., 'The airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars', *EJIL: Talk!*, 2 February 2015, <http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>.

<sup>28</sup> UN GA, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the UN*, 24 October 1970, A/RES/2625(XXV).

<sup>29</sup> See Doswald-Beck, *supra* note 27, at 200-201; and Bannelier, Christakis, *supra* note 25, 861-862. A different, somehow narrower, view argues instead that customary international law provides for the exercise of the right to self-determination in only three cases: *externally*, against colonial dominations or alien occupations and *internally*, against racist regimes. See Cassese, A., 2005. *International Law* – 2<sup>nd</sup> edition, Oxford: OUP, at 62.

<sup>30</sup> See, for instance, the 1956 URSS' intervention in Hungary, condemned by the UN GA with Resolution 1131, 12 December 1956, A/RES/1131(XI). Other examples in Gray, *supra* note 27, 84-88.

<sup>31</sup> *Institut de Droit International* (IDI), *The Principle of Non-Intervention in Civil Wars*, Resolution 14 August 1975, Article 2(1). A similar position was taken in a United Kingdom Foreign Policy Document n. 148, 1984. 'Is intervention ever justified?', *British Yearbook of International Law* 57: 614, at 616.

<sup>32</sup> IDI, *Present Problems of the Use of Force in International Law*, Resolution 8 September 2011, Article 3(1).



Conventions.<sup>33</sup> This notwithstanding, it gives as a useful indication as to the rationale of a possible prohibition of intervention on the government's side.

The rule, as spelled out by the IDI and by scholars, would not prohibit intervention in all non-international armed conflicts. On the contrary, it would only apply to those in which the non-governmental side exercises its right to self-determination.<sup>34</sup> State practice on this issue is difficult to interpret for a variety of reasons. *Firstly*, intervening States have not been keen to use this legal justification for their military intervention on foreign territory when providing assistance to governments with a history of human rights violations.<sup>35</sup> *Secondly*, in some cases a claim of intervention by invitation in an armed conflict was coupled with a claim of action in collective self-defence, since both of these involve a request for military aid.<sup>36</sup> *Thirdly*, in some cases the inviting State has claimed that the request for military assistance would not have been used in an armed conflict, but in law enforcement operations.<sup>37</sup> *Fourthly*, sometimes the involved States have narrowed down the invitation to specific purposes, such as the protection of the invited State's nationals on the inviting State's territory, the performance of peacekeeping functions, the provision of humanitarian aid or the joint fight against terrorist groups.<sup>38</sup> *Fifthly*, sometimes foreign States have been invited to intervene in an armed conflict where the rebel side has already received external aid.<sup>39</sup>

Commentators have argued that such an extensive use of alternative or additional justifications – even when the actual intervention's goal is different – reinforces the conviction that a rule prohibiting military intervention on the government's side in an internal armed conflict has become customary.<sup>40</sup> Those additional justifications invoked by the involved States would be

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<sup>33</sup> Article 2(1): "This Resolution applies to situations of internal disturbances and tensions... below the threshold of non-international armed conflict in the sense of Article 1 of Protocol II Additional."

<sup>34</sup> In this sense Van Steenberghe, R., 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer', *EJIL: Talk!*, 12 February 2015, <http://www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/>, citing the 1975 IDI resolution's *travaux préparatoires*.

<sup>35</sup> For instance, France and Belgium claimed that their action was limited to the evacuation of nationals and to the re-establishment of security when, in 1978, they intervened against rebels in Mobutu's Zaire. For more on this and other examples, see Gray, *supra* note 27, 88-89. This is probably what also recently happened in Syria, when the United States carefully avoided any statement affirming that they were intervening on Syrian territory with Assad's government's consent. Cf. Kress, *supra* note 20.

<sup>36</sup> As claimed by USA when they decided to aid South Vietnam against a Chinese-backed invasion by North Vietnam in 1961. See Gray, *supra* note 27, at 82.

<sup>37</sup> The USA put forward this argument when justifying their intervention in Colombia, linking it to the fight against drugs trade. See Gray, *supra* note 27, at 87.

<sup>38</sup> France has often used the argument of protection of its nationals to justify a military intervention in internal conflicts, e.g. when intervening in Central African Republic in 1996. See Gray, *supra* note 27, 88-89. Cf. also Van Steenberghe, *supra* note 34; Corten, *supra* note 23, at 294-296; Dinstein, *supra* note 25, at 120.

<sup>39</sup> Doswald-Beck, *supra* note 27, at 251; Corten, *supra* note 23, at 301-309.

<sup>40</sup> Doswald-Beck, *supra* note 27, at 251-252.

nothing more than admissible exceptions to the prohibition.<sup>41</sup> Does this mean that States taking part in the ‘Inherent Resolve’ operation in Iraq are violating international law? Not necessarily.

*Firstly*, one needs to question the intrinsic logical consistence of this prohibition. The rule’s beneficiary (and the violation’s potential victim) would indeed be the same inviting State, whose will is expressed by the government in power. Even admitting the breach of the rule in question, it would be interesting to explore who would be in a position to invoke such a violation. Corten notes that the rule’s beneficiary would be the international community as a whole, the prohibition on the use of force being a *jus cogens* norm and engendering an *erga omnes* obligation.<sup>42</sup> This does not solve the issue that there have been rare occasions of States invoking the international responsibility of another State which allegedly intervened in a civil war context on the government’s side. We may recall only the international community’s condemnation of the Soviet Union’s intervention in Hungary and of the Iraqi intervention in Kuwait.<sup>43</sup>

Most recent practice actually goes in the opposite direction. The International Court of Justice sanctioned the illegality of Uganda’s intervention in the Democratic Republic of Congo (DRC) only after the latter’s consent to the presence of Ugandan troops on the DRC’s territory had been withdrawn.<sup>44</sup> No one protested against France’s intervention alongside the Malian governmental forces in its struggle against the rebels.<sup>45</sup> If the prohibition of interventions in internal conflicts did not become a rule of customary international law, then the States helping Iraq against IS would not be committing any violations of *jus ad bellum*.

*Secondly*, even if one were to accept that prohibiting military interventions in internal armed conflicts has become a rule of customary international law, it would seem reasonable to argue that such prohibition would not actually make the operations against IS unlawful. Indeed, IS is not exercising the Iraqi people’s right to self-determination,<sup>46</sup> and therefore the armed conflict

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<sup>41</sup> Cf. for example, IDI Resolution 1975, *supra* note 31, Article 3. Bannelier and Christakis particularly insisted on the joint fight against terrorism as one of the admissible exceptions. See *supra* note 25, at 867.

<sup>42</sup> Corten, *supra* note 23, at 250. Doswald-Beck, *supra* note 27, at 242-243, adds that in this case the rule’s primary beneficiary would not be the inviting government, but the State as a whole - as an abstract entity - since its right to choose its own political system would be violated in a manner inconsistent with the principles of the UN Charter. In this sense also Corten, *supra* note 23, at 288-289.

<sup>43</sup> See *supra*, note 30.

<sup>44</sup> See ICJ, *Armed Activities*, *supra* note 23.

<sup>45</sup> Bannelier, Christakis, *supra* note 25, at 858.

<sup>46</sup> Whilst to identify the beneficiaries of the right to self-determination has always proved difficult, and its extension to non-colonial peoples remains controversial, it seems pretty clear that the exercise of the right requires “a free and genuine expression of the will of the peoples concerned.” See ICJ, *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 12 ff., § 55. The way in which IS came to power and its behaviour, on the contrary, cast a serious doubt on whether the group is actually expressing the will of the Iraqi (and Syrian) people. Moreover, unlike in the IS case, self-determination is usually intended to be applicable only “within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.” See Supreme Court of Canada, *Reference re Secession of Quebec*, 20 August 1998, [1998] 2 S.C.R. 217, § 122. Finally, like other human rights, the right to self-determination is subject to limitations. Reading in conjunction with Article 5(1) of the ICCPR and of the ICESCR – both of which enshrining the right of self-determination in Article 1(1) – one could infer that the right to self-determination cannot be exercised at the expenses of other rights recognized in the Covenants. For further



between Iraq, the international coalition and IS is not one of those for which a foreign military intervention is prohibited. Furthermore, IS has carried out several acts of terrorism, and is listed as a terrorist organization in many countries.<sup>47</sup> One could also argue that IS itself is receiving a great deal of foreign assistance, in the form of foreign fighters, weapons and other resources.<sup>48</sup> This would make at least one of the admitted exceptions to the purported prohibition of interventions by invitation applicable, therefore making the US-led coalition's intervention on the government's side lawful.

Hence, whilst the debate may be interesting for clarity's sake, both theoretical approaches to the legality of interventions by invitation in internal conflicts do lead to the same conclusion in practice, in that Iraq's invitation made the US-led coalition military intervention compatible with the currently applicable rules of *jus ad bellum*.

## **B. The legality of the US-led coalition airstrikes against IS in Syria**

As IS operates transnationally in Iraq and Syria, the US decided to intervene through military action on both territories. From a strategic point of view, this decision should be praised, the end of IS would never occur if only targeted on half of the territory it controls. However, strategic military decisions do not always comply with international law. Whilst the foreign military intervention in Iraq appears to be lawful, such is not the case for the US-led coalition airstrikes carried out in Syria.

### **1. Collective Self-defense**

As provided by Article 51 UN Charter, all States have an "inherent right" of self-defense. Considered by some scholars as the "centre of gravity in the United Nations",<sup>49</sup> this right is not absolute as its exercise is subjected to the fulfillment of five conditions, of which three are enshrined in the provision aforementioned ("armed attack",<sup>50</sup> "until the Security Council has taken measures necessary to maintain international peace and security" and "shall be immediately reported to the Security Council"<sup>51</sup>) and two are to be found in customary international law

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references, see McCorquodale, R., 2010. 'Group Rights', in Moeckli, D., Shah, S., Sivakumaran, S. (eds.), *International Human Rights Law*, Oxford: OUP, 333-355, at 336- 338 and 345.

<sup>47</sup> The UN Committee established pursuant to Security Council resolution 1267 (1999) listed it on 18 October 2004, as 'Al-Qaida in Iraq', under the reference number 'QDe.115'. On 2 June 2014 the name 'Islamic State in Iraq and the Levant' was added (<http://www.un.org/press/en/2014/sc11424.doc.htm>). The United States similarly listed it as a Foreign Terrorist Organization on 17 December 2004 (<http://www.state.gov/j/ct/rls/other/des/123085.htm>).

<sup>48</sup> See *supra*, 'Introduction', and *infra*, Part II, 'State responsibility'.

<sup>49</sup> Feinberg, N., 1979. *Studies in International Law with special reference to the Arab-Israel conflict*, Jerusalem: Magnes Press, at 70.

<sup>50</sup> The customary nature of the "armed attack" condition was acknowledged in ICJ, *Nicaragua*, *supra* note 23, §§ 193-195 and 210-211; ICJ, *Oil Platforms (Iran v. United States of America)*, Judgment, ICJ Reports 2003, § 51.

<sup>51</sup> The non-customary nature of this condition was acknowledged in ICJ, *Nicaragua*, *supra* note 23, § 200.

(proportionality and necessity).<sup>52</sup> The exercise of self-defense may be individual – when the victim State of an armed attack “reacts alone in order to push back the aggressor”<sup>53</sup> – or collective – when the victim State requests the help of third States to defend itself against the armed attack. In the latter case, two additional requirements are to be met: firstly, “it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked”;<sup>54</sup> secondly, “[c]ollective self-defense may be exercised only at the request of the target State”.<sup>55</sup>

States that are part of the US-led coalition justify their military strikes against IS in Syria as a lawful exercise of collective self-defense of Iraq.<sup>56</sup> In other words, the US and its allies would allegedly use force in Syria at the request of Iraq to defend the latter against an armed attack perpetrated by IS, a non-State armed group located in the Syrian territory. In this regard, the letter dated 23 September 2014 from the Permanent Representative of the US to the UN, Samantha Power, addressed to the Secretary-General is noteworthy:

“Iraq has made clear that it is facing a serious threat of continuing attacks from the Islamic State in Iraq and the Levant (ISIL) *coming out of safe havens in Syria*. These safe havens are used by ISIL for training, planning, financing, and carrying out attacks across Iraqi borders and against Iraq’s people. For these reasons, *the Government of Iraq has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria* in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders.”<sup>57</sup>

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<sup>52</sup> ICJ, *Nicaragua*, *supra* note 23, § 176: “The Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well-established in customary international law”; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, p. 226, § 41; ICJ, *Oil Platforms*, *supra* note 50, § 43; IDI, *Present Problems of the Use of Armed Force in International Law*, Resolution 27 October 2007, § 2.

<sup>53</sup> Distefano, *supra* note 16, at 552.

<sup>54</sup> ICJ, *Nicaragua*, *supra* note 23, § 195. See further in the same paragraph: “There is no rule of customary international law permitting another State to exercise the right of collective self-defense on the basis of its own assessment of the situation. Where collective self-defense is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack”.

<sup>55</sup> ICJ, *Nicaragua*, *supra* note 23, § 199 and 232. See also IDI, *supra* note 52, § 8.

<sup>56</sup> It is worth noting here that regarding the airstrikes against the armed group Khorasan in Syria, the legal justification invoked by the US is distinct. Since the latter considers the former as an “al-Qaeda element” which pose a “threat” to the US (*Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the UN addressed to the Secretary-General, S/2014/695*), the argument appears to be *individual* self-defense.

<sup>57</sup> *Ibidem*. The US insists on the fact that IS plans and launches its operation from Syria. However, one could argue that the threat posed to Iraq by IS arises solely from its Iraqi branch, located in Iraq. Structurally, IS is indeed divided into two territorial branches. Furthermore, from a historical perspective, IS was born in Iraq and then extended its activities to Syria by taking advantage of the delinquency of the Syrian regime. Nevertheless, let’s note that in 2014 Ar-Raqqah (Syria) became the *de facto* headquarters of IS.

Let's now assess whether the self-defense conditions mentioned above are met *in casu*.

On 20 September 2014, in a letter addressed to the President of the SC, the Minister for Foreign Affairs of the Republic of Iraq asserted indeed that “[the Government of Iraq] ha[s] *requested* the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent”.<sup>58</sup> Therefore, the US and their allies are intervening in Syria upon explicit request of Iraq, the target State. Moreover, besides “armed attack”, one can undoubtedly state that the other four general conditions required for the exercise of self-defense are met. The SC has been informed in this letter of Iraq’s intent to resort to self-defense against IS in Syria and, so far, has not taken any Chapter VII measures necessary to “maintain international peace and security” in the region. Regarding the proportionality requirement, it seems to be met since the coalition only strikes strategic targets such as IS bases, training camps and controlled transit points at the Iraqi-Syria border. As for the necessity requirement, such operations appear to be necessary in view of the rapid advances and exponential growth of IS in Iraq. Whether Iraq is victim of an “armed attack” in the sense of Article 51 UN Charter is, however, much more controversial. The fact that in the letter of 20 September Iraq does not consider the operations carried out by IS in Iraq as constitutive of an “armed attack” but prefers to qualify them as “a threat to the security of our people and territory” or “terrorist attacks” shows how contentious the fulfillment of this condition is.

The customary definition of “armed attack” is found in General Assembly Resolution 3314 (XXIX) of 14 December 1974.<sup>59</sup> For an attack to qualify as an “armed attack”, there are two requirements to be met. Firstly, it must be of “sufficient gravity” (Article 2), i.e. it must be of a certain severity and magnitude.<sup>60</sup> Secondly, and more importantly, it must be perpetrated by a State (Article 1), either directly or indirectly. In other words, an “armed attack” must always be attributed to the State whose territory is the prospective target of an exercise of self-defense. Hence, if there is no involvement of such a State,<sup>61</sup> the attack does not amount to an “armed attack” in the sense of Article 51 – even if the gravity threshold is reached – and therefore the victim State cannot invoke self-defense. As rightly pointed out by Judge Higgins in her Separate Opinion in the International Court of Justice (ICJ)’s *Wall* advisory opinion, the State attribution

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<sup>58</sup> *Letter dated 20 September 2014...*, *supra* note 22 (emphasis added).

<sup>59</sup> More precisely, Resolution 3314 provides the definition of “aggression”. However, for the purposes of the application of Article 51, “armed attack” must be considered as equivalent to “aggression”. See Distefano, *supra* note 16, at 553.

<sup>60</sup> See also ICJ, *Nicaragua*, *supra* note 23, § 191; IDI, *supra* note 52, § 5. On the basis of the “accumulation of events doctrine”, a series of small-scale attacks can be weighed cumulatively and be considered as a whole as an “armed attack”. The ICJ endorsed such an interpretation of the gravity threshold requirement. See ICJ, *Nicaragua*, *supra* note 23, § 231; ICJ, *Oil Platforms*, *supra* note 50, § 64; ICJ, *Armed activities*, *supra* note 23, § 146.

<sup>61</sup> The question of what degree of State involvement is necessary to allow the victim State to use force in self-defence against the territory of the host State has led to numerous discussions, which go beyond the scope of the present chapter. For further details, see Gray, C., 2008. *International Law and the Use of Force* - 3<sup>rd</sup> ed., Oxford: OUP, 132-140; Brent, M., 2009. ‘Responding to Attacks by Non-State Actors: The Attribution Requirement in Self-Defence’, *Australian International Law Journal* 16: 133; Tams, C., ‘The Use of Force against Terrorists’, *European Journal of International Law* (EJIL) 20(2): 359.

requirement is not mentioned in Article 51.<sup>62</sup> Yet, it “has been the generally accepted interpretation for more than 50 years”, as noted by Judge Kooijmans in the same case.<sup>63</sup> Claims supporting a broad interpretation of “armed attack” according to which States could use force against non-State actors whose conduct could not be attributed to States have been “almost systematically”<sup>64</sup> rejected by the international community, in particular between the 1960s and the 1990s. For instance, the SC condemned in the strongest terms Israel’s 1985 raid on the Palestinian Liberation Organisation’s Headquarters in Tunisia<sup>65</sup> as well as the 1980s’ South African incursions into neighboring States.<sup>66</sup> The General Assembly condemned the 1986 US “aerial and naval military attacks” on terrorist training facilities in Libya, among other targets.<sup>67</sup> As for the ICJ, it always required the non-State actor attack to be imputed to the territorial State.<sup>68</sup> However, it is worth noting that in the 2005 case *Armed Activities on the Territory of Congo*, by refusing to answer the question of the Parties “as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces”,<sup>69</sup> the Court did not entirely close the door to the recognition of a right to self-defense against non-State actors absent of State imputability. Going back to the cross-border operations carried out by IS in Iraq, whilst they are of such gravity as to amount to an armed attack,<sup>70</sup> it is clear that they cannot be attributed to the Syrian State, the latter being in fact involved in a non-international armed conflict against the former.<sup>71</sup> Therefore, it seems at first glance that these operations cannot qualify as an “armed attack” and that, subsequently, the US-led coalition cannot rely upon the collective self-defense of Iraq argument to legally justify their air strikes against IS targets in Syria.

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<sup>62</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, ICJ Reports 2004, p. 136, Separate Opinion of Judge Higgins, § 33: “There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defense is available only when an armed attack is made by a State. *That* qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua* (...)”. See also in the same case the Separate Opinion of Judge Kooijmans, § 35.

<sup>63</sup> *Ibid.*

<sup>64</sup> Tams, *supra* note 61, 367.

<sup>65</sup> E.g. UN Security Council (SC), Resolution 573 (1985), 4 October 1985, S/RES/573.

<sup>66</sup> E.g. UN SC, Resolution 527 (1982), 15 December 1982, S/RES/527; Resolution 546 (1984), 6 January 1984, S/RES/546; Resolution 568 (1985), 26 July 1985, S/RES/568.

<sup>67</sup> UN GA, Resolution 41/38, 20 November 1986, A/RES/41/38.

<sup>68</sup> See ICJ, *Nicaragua*, *supra* note 23, § 195; ICJ, *Wall*, *supra* note 62, § 139; ICJ, *Armed activities*, *supra* note 23, § 146.

<sup>69</sup> ICJ, *Armed activities*, *supra* note 23, §147.

<sup>70</sup> In this regard, see the Statement by the UN SC President on 19 September 2014: “The Security Council strongly condemns attacks by terrorist organizations, including the terrorist organization operating under the name ‘Islamic State in Iraq and the Levant’ (ISIL) and associated armed groups, in Iraq, Syria, and Lebanon and emphasizes that this *large-scale offensive* poses a major threat to the region.” ([http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PRST/2014/20](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2014/20), emphasis added). This confirms that the attack is of sufficient intensity and breadth to qualify as an armed attack from a *ratione materiae* perspective.

<sup>71</sup> Weller, M., 2015. ‘Striking ISIL: Aspects of the Law on the Use of Force’, *ASIL Insights* 19(5): “Instead of being directed by Syria, ISIL has displaced Syrian authorities in Syria (...)”

However, such an “inter-state reading of self-defense”<sup>72</sup> appears to be put into question since 9/11. Indeed, for the past fifteen years, there seems to be a growing acceptance of the idea that an attack perpetrated by a non-State actor which cannot be attributed to a State may be qualified as “armed attack” in the sense of Article 51 and can justify the invocation of self-defense by the victim State. As Tams rightly states, “the international community today is much less likely to deny, as a matter of principle, that states can invoke self-defense against terrorist attacks not imputable to another State”.<sup>73</sup> A quick look at the international practice shows that States have indeed recently preferred to criticize extraterritorial uses of force against non-State actors on the basis of proportionality rather than on the lack of State imputability.<sup>74</sup> Therefore, States are progressively reconsidering their positions regarding the need for State involvement for attacks by non-State actors to trigger the right to self-defense: “[t]he vigorous and principled condemnation of the 1970s and 1980s is [being replaced] by concerns that (...) actions should remain proportionate”.<sup>75</sup> Many scholars also plead for an extension of Article 51 to non-State armed attacks. To give but some examples, the IDI declared in 2007 that “[i]n the event of an armed attack against a State by non-State actors, Article 51 of the Charter supplemented by customary international law applies as a matter of principle”.<sup>76</sup> Similarly, Judge Kooijmans wrote in his Separate Opinion in the ICJ case *Armed Activities on the Territory of Congo* that “if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its inherent right of self-defense”.<sup>77</sup> Therefore, there is a trend toward the recognition of a right to self-defense in cases of non-State armed attacks. Following that path, one could potentially argue that the foreign intervention in Syria is lawful, even absent of State imputability, although the definitive endorsement by customary international law of such a broad interpretation of Article 51 remains controversial.

Another complication arises from the specific terms used by the US to justify operations on Syrian soil. The US claims that self-defense applies because 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

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<sup>72</sup> Tams, *supra* note 61, 383.

<sup>73</sup> *Ibid.*, 381. See also 359: “(...) the international community during the last two decades has increasingly recognized the right of states to use unilateral force against terrorists”.

<sup>74</sup> For an in-depth and comprehensive review of the State practice, see Tams, *supra* note 61, 378-381; Ruys, T., 2010. *Armed Attacks and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge: CUP, 447-472.

<sup>75</sup> Tams, *supra* note 61, 381.

<sup>76</sup> IDI, *supra* note 52, § 10.

<sup>77</sup> ICJ, *Armed activities*, *supra* note 23, ‘Separate Opinion of Judge Kooijmans’, § 29. See also § 30: “If armed attacks are carried out by irregular bands from such territory against a neighboring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defense merely because there is no attacker State, and the Charter does not so require.”

itself”.<sup>78</sup> Whilst the willingness of the Syrian government to quell IS could be argued,<sup>79</sup> its inability has been undoubtedly demonstrated. Besides the US, only the UN Secretary-General himself, quite surprisingly, seemed to have offered an implicit endorsement of the “unable or unwilling test” when he noted that the US strikes took place in “areas no longer under the effective control of the government”.<sup>80</sup> Neither the States that are part of the coalition in Syria, nor those which are not part of it but consider it lawful under international law explicitly supported this doctrine.<sup>81</sup> Furthermore, some other States, yet intervening in Iraq, expressed reservations about the legality of the intervention in Syria.<sup>82</sup> More generally, the controversy lies in the fact that although the “unable or unwilling test” as a lawful ground for self-defense against “independent” non-State actors is well established in the US practice<sup>83</sup> and receives some support in the literature,<sup>84</sup> it remains very controversial under international law because of the clear lack of consistent State practice.<sup>85</sup> The reaction of States to the airstrikes in Syria emphasizes this last point. Even Deeks, one of the most prominent defenders of the unable or unwilling doctrine, asserts that she “found no cases in which States clearly assert that they follow the test out of a sense of legal obligation”.<sup>86</sup> Therefore, the authors of the present chapter argue that the “unable or unwilling doctrine”, though emerging (*de lege ferenda*), is not crystalized yet (*de lege lata*).<sup>87</sup>

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<sup>78</sup> Letter dated 23 September 2014..., *supra* note 56 (emphasis added).

<sup>79</sup> Prior to the launch of the foreign intervention in Syria, the Syrian government invited the US to carry out airstrikes against IS in the form of a coordinated action. See Baghdadi, G., ‘Syria welcomes U.S. strikes against ISIS there, with conditions’, *CBS News*, 25 August 2014, <http://www.cbsnews.com/news/syria-welcomes-u-s-strikes-against-isis-there-with-conditions/>. However, one could counter argue that Assad deliberately allowed IS to grow in importance in order to rally the international community to his side.

<sup>80</sup> Remarks at the Climate Summit press conference (including comments on Syria), 23 September 2014, [http://www.un.org/apps/news/infocus/speeches/statments\\_full.asp?statID=2356#.VIrmZNFyZ9A](http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=2356#.VIrmZNFyZ9A).

<sup>81</sup> E.g. France (<http://www.reuters.com/Article/2014/09/22/us-france-fabius-airstrikes-idUSKCN0HH28920140922>), Germany (<http://www.reuters.com/Article/2014/09/26/us-mideast-crisis-germany-idUSKCN0HL1BU20140926>).

<sup>82</sup> E.g. the Netherlands (<http://www.nltimes.nl/2014/09/24/parliament-commits-troops-isis-fight/>) or Australia (<https://www.pm.gov.au/media/2014-09-16/interview-fran-kelly-abc-radio-national>).

<sup>83</sup> For instance, the “unable or unwilling test” was also invoked by the US authorities to justify the operation in Pakistan which led to the death of Osama Bin Laden.

<sup>84</sup> See Deeks, A., 2012. ‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defense’, *Virginia Journal of International Law* 52(3): 483; Lubell, N., 2010. *Extraterritorial Use of Force against Non-State Actors*, Oxford: OUP, at 42; Dinstein, *supra* note 25, 245; Stahn, C., 2003. ‘Terrorist Acts as ‘Armed Attack’: The Right to Self-Defense, Article 51 of the UN Charter, and International Terrorism’, *The Fletcher Forum of World Affairs* 27(2): 35, at 47. The ‘unwilling or unable’ test is sometimes addressed and approved as part of the necessity requirement, see Henriksen, A., 2014. ‘*Jus ad bellum* and American Targeted Use of Force to Fight Terrorism Around the World’, *Journal of Conflict and Security Law* 19(2): 211, at 228; UN HRC, *Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Christof Heyns*, 13 September 2013, A/68/382, § 91; Schmitt, M. N., 2011. ‘Drone Attacks under the *Jus ad Bellum* and *Jus in Bello*: Clearing the ‘Fog of Law’’, *Yearbook of International Humanitarian Law* 13: 311, at 316.

<sup>85</sup> In this sense, see Heller, K. J., ‘The Seemingly Inexorable March of ‘Unwilling or Unable’ Through the Academy’, *Opinio Juris*, 6 March 2015, <http://opiniojuris.org/2015/03/06/the-seemingly-inexorable-march-of-unwilling-or-unable-through-the-academy/>; and ‘The Absence of Practice Supporting the ‘Unwilling or Unable’ Test’, *Opinio Juris*, 17 February 2015, <http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/>.

<sup>86</sup> Deeks, *supra* note 84, 503.

<sup>87</sup> See Ohlin, J.D., ‘The Unwilling or Unable Doctrine Comes to Life’, *Opinio Juris*, 23 September 2014, <http://opiniojuris.org/2014/09/23/unwilling-unable-doctrine-comes-life/>.

Therefore, for the time being, no one could rely upon it to make the American-led intervention in Syria lawful.

## 2. Intervention by invitation

The US never used the intervention by invitation argument in the context of Syria, the main reason being that, by doing so, they did not want to appear as implicitly approving Assad's "criminal regime".<sup>88</sup> However, the controversy raised above about the legality of the US-led coalition airstrikes in Syria on the basis of collective self-defense of Iraq "would evaporate if Syria took a path of consenting, of its own volition, to the US military action".<sup>89</sup> If the Syrian regime consented to the foreign intervention on its territory, the scenario would therefore be exactly the same as in Iraq. It would be an intervention by invitation, lawful under *jus ad bellum*.<sup>90</sup>

Before the airstrikes began, the Syrian government condemned, in the strongest words, any forthcoming foreign intervention to fight IS. Deputy Prime Minister Walid al Moallem was very clear saying that "[a]ny strike which is not coordinated with the government will be considered as *aggression*".<sup>91</sup> However, in the first days of the US-led airstrikes, several high-level officials released statements, which appear to give tacit approval to them.<sup>92</sup> Firstly, in an interview given to Reuters on 24 September 2014, the Syrian Minister for National Reconciliation stated the airstrikes were going in the "right direction".<sup>93</sup> Secondly, six days later, the Foreign Minister answered: "[t]his is the fact", in an interview to the Associated Press when he was "asked whether Syria considered itself now aligned with the West because both were fighting the same enemy".<sup>94</sup>

This sketch of Syrian consent was however crushed by Assad himself when he declared in the March/April 2015 issue of the magazine *Foreign Affairs* that the US attacks were "illegal" since

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<sup>88</sup> Kress, C., *supra* note 20.

<sup>89</sup> Goodman, R., 'Taking the Weigh off of International Law: Has Syria Consented to US Airstrikes', *Just Security*, 23 December 2014, <http://justsecurity.org/18665/weight-international-law-syria-consented-airstrikes/>. In the same vein, further in the Article: "That would take pressure off the international legal system, which has had to cope with a situation in which much of the world may support this particular exercise of US power as a matter of policy, but many, including US allies, have doubted the legality of the operations".

<sup>90</sup> See *supra*, Part I, Section A.

<sup>91</sup> Gutman, R., Youssef, N.A., Landay, J.S., 'U.S. says airstrikes on Syria are not imminent', *McClatchy DC*, 25 August 2014, <http://www.mcclatchydc.com/2014/08/25/237643/us-says-airstrikes-on-syria-are.html> (emphasis added).

<sup>92</sup> For a careful analysis of these statements, see Goodman, R., 'Taking the Weigh off of International Law: Has Syria Consented to US Airstrikes', *Just Security*, 23 December 2014, <http://justsecurity.org/18665/weight-international-law-syria-consented-airstrikes/>.

<sup>93</sup> 'Syrian minister says U.S-led strikes going in 'right direction'', *Reuters*, 24 September 2014, <http://www.reuters.com/Article/2014/09/24/us-syria-crisis-minister-idUSKCN0HJ15P20140924>.

<sup>94</sup> Karam, Z. 'Syrian Foreign Minister: The US Said 'We Are Not After The Syrian Army' Before Airstrikes', *Business Insider*, 30 September 2014, <http://www.businessinsider.com/syrian-foreign-minister-the-us-said-we-are-not-after-the-syrian-army-before-airstrikes-2014-9?IR=T#ixzz3MjKw64bF>.



they did not ask “permission” from the Syrian government. In the words of Assad, “if you want to make any kind of action in another country, you ask their permission”.<sup>95</sup> As Goodman rightly states, “it looks like we may be back to square one”,<sup>96</sup> the intervention by invitation could not be used as a valid ground to justify the foreign intervention against IS in Syria.

## II. State Responsibility

As explained in Part I, the activities of IS in Iraq and Syria have raised deep concern for their particular *modus operandi*. IS has established a rule of terror, characterized allegedly by serious violations of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) which, if confirmed, would also entail the individual criminal responsibility of their authors as war crimes, crimes against humanity, maybe even acts of genocide against ethnic and religious groups like the Yezidis.<sup>97</sup> The purpose of this part however is neither to discuss the individual accountability of IS members, nor the responsibility of the group as a subject of international law.<sup>98</sup>

Firstly, Part II aims at determining whether the international responsibility of the States on whose territory the Caliphate was proclaimed, namely Syria and Iraq, could be engaged. Secondly, for how horrible the IS’s actions have been, this armed group does not exist in a vacuum. The rise of IS has indeed arguably been facilitated by third States which, at a very minimum by virtue of their negligent behaviour in providing resources to other parties of the conflict in Syria, ultimately ended up helping IS to reinforce its position. This section will question, then, whether this provision of assistance – either willing or the result of negligence in assisting others - is such to engage those States’ international responsibility. Its purpose is to understand whether third States could potentially be held responsible for having controlled, facilitated or failed to prevent violations perpetrated by IS.

### A. Syria and Iraq (territorial States)

There is no doubt that Syria and Iraq are internationally responsible for any violation of international law – notably IHL and IHRL – committed by their organs, such as the security forces<sup>99</sup>, provided there is no circumstance precluding wrongfulness. However, two related

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<sup>95</sup> Tepperman, J., ‘Syria’s President Speaks’, *Foreign Affairs*, 25 January 2015, <https://www.foreignaffairs.com/interviews/2015-01-25/syrias-president-speaks>.

<sup>96</sup> Goodman, R., ‘Assad: Willing to Risk Direct Confrontation with U.S. over Moderate Rebels – and Stronger Opposition to US airstrikes’, *Just Security*, 27 January 2015, <http://justsecurity.org/19419/syria-assad-risk-direct-confrontation-moderate-rebels-opposition-airstrikes/>.

<sup>97</sup> On Iraq, see UN HRC, *Report 13 March 2015*, *supra* note 1. On the allegations of genocide against the Yezidi minority, see §§ 16-20. On Syria, see UN HRC, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, 5 February 2015, A/HRC/28/69.

<sup>98</sup> On human rights obligations of non-State actors, see War report 2014, Chapter \*\*.

<sup>99</sup> Several UN organs investigated alleged violations of international humanitarian law and international human rights law committed by Iraqi and Syrian security forces and associated forces in their fight against IS. See e.g. UN HRC,

questions about their responsibility under international law that remain controversial are discussed in the present section:

- Can Iraq and/or Syria be held internationally responsible for breaches of international law committed by IS in parts of their national territory over which they lack effective control? In more general terms, the issue at hand is the question of the territorial State's international responsibility for violations of international law committed by private persons.<sup>100</sup>
- Can Iraq and/or Syria be held internationally responsible for having failed to comply with their obligation to protect civilian populations under their jurisdiction?

### 1. Direct responsibility for violations of international law perpetrated by IS

As a general principle, States cannot be held internationally liable for violations of international law committed by private persons. More precisely, the wrongful conduct of a private actor is generally not attributable to the State and therefore the international responsibility of the latter cannot be engaged.<sup>101</sup> This principle has long been acknowledged in international judicial decisions<sup>102</sup> and by the ILC itself. Until 1998, it was even expressly mentioned in Article 11(1) ILC ASR, but was then deleted at the request of Special Rapporteur Crawford.<sup>103</sup> In the final version of the text, adopted in 2001, the principle is to be found in the Commentaries.<sup>104</sup>

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*Report 13 March 2015*, supra note 1, §§ 50-69; UN Assistance Mission for Iraq (UNAMI), *Report on the Protection of Civilians in the Non International Armed Conflict in Iraq: 5 June – 5 July 2014*, 14-16; UNAMI, *Report on the Protection of Civilians in the Non International Armed Conflict in Iraq: 6 July – 10 September 2014*, 18-21; UNAMI, *Report on the Protection of Civilians in the Non International Armed Conflict in Iraq: 11 September – 10 December 2014*, 17-22.

<sup>100</sup> 'Private persons' can be defined negatively as all persons who are not 'public persons', i.e. neither State organs nor entities empowered to exercise elements of governmental authority. Ago defines 'public persons' as "the persons or groups of persons [who] belong permanently, or even sometimes incidentally, to the machinery of the State or of separate public institutions, and act by virtue of their relationship" (Ago, R., 'Fourth Report on State Responsibility', in *Yearbook of the International Law Commission, 1972, Vol. II*, A/CN.4/SER.A/1972/Add.1, at 95).

<sup>101</sup> According to the 2001 ILC ASR (supra note 24), the international responsibility of a State is triggered if the three following cumulative conditions are met: 1) A conduct of an action or omission *attributable* to the State under international law (Chapter II) 2) A breach of an international obligation of the State (Chapter III) 3) The absence of circumstances precluding wrongfulness (Chapter V).

<sup>102</sup> To give but some examples, the arbitrator Algot Bagge stated in the case of the *Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels during the War* (1934): "[a State] has no direct responsibility under international law for the acts of private individuals" (UN, *Reports of International Arbitral Awards*, Vol. III, Sales No. 1949.V.2, 1501). Along the same vein, at the end of the 19<sup>th</sup> century, the US-Chile Claims Commission, established in 1892 in the *Lovett* case, had already indicated that "[a]ll the authorities on international law are a unit as regards the principle that an injury done by one of the subjects of a nation is not to be considered as done by the nation itself" (see Moore, J.B., 1900. 'History and Digest', Vol. III, at 2991).

<sup>103</sup> See De Frouville, O., 2010. 'Attribution of Conduct to the State: Private Individuals', in Crawford, J., Pellet, A., Olleson, S. (eds.), supra note 26, 257-280, at 262-263.

<sup>104</sup> ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', in *Yearbook of the International Law Commission, 2001, Vol. II, Part II*, A/56/10, at 38: "[...] the conduct of private persons is not as such attributable to the State". See also at 52: "[t]he general principle, drawn from State practice

The rationale of this rule was well summarized by the ICJ in the *Corfu channel* case.<sup>105</sup> The Court stated that:

“[...] it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof”.<sup>106</sup>

Exceptional circumstances may arise, however, where an attribution link is found between the private person engaged in the wrongful conduct and the State. In those cases, the State’s international responsibility may be engaged. The ILC recognizes five situations of this nature

- when the private person is considered a *de facto* organ of the State because it acts “on the instructions of, or under the direction or control of that State” (Article 8 ASR);
- when the conduct of the private person is carried out in absence or default of the official authorities (Article 9 ASR);
- when, following an insurrection, the private person becomes the new government of the State (Article 10(1) ASR);
- when the private person succeeds in establishing a new State (Article 10(2) ASR);
- when the conduct of the private person is acknowledged and adopted by the State as its own (Article 11 ASR).

In the case of IS, the only possible way its conduct could potentially be attributed to Syria and/or Iraq is provided in Article 10(1). If IS becomes the new government of Iraq, the State of Iraq would become retroactively responsible for all violations of international law perpetrated by IS since its creation. The same conclusion would apply to Syria: if IS removes the current Syrian government from power and takes office, Syria would become retroactively responsible for IS under international law. However, this scenario seems very unlikely. IS’s primary objective is not

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and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law”.

<sup>105</sup> ICJ, *Corfu Channel* (United Kingdom v. Albania), Merits, Judgment, 9 April 1949, ICJ Reports 1949, 4.

<sup>106</sup> *Ibid*, 18. Writing in 1758, Vattel had expressed a similar idea: “[...] as it is impossible for the best regulated State, or for the most vigilant and absolute sovereign, to model at his pleasure all the actions of his subjects, and to confine them on every occasion to the most exact obedience, it would be unjust to impute to the nation or the sovereign every fault committed by the citizens. We ought not then to say in general, that we have received an injury from a nation, because we have received it from one of its members” (Kaposy, B., Whatmore, R. (eds), 2008. *Emer de Vattel, The Law of Nations or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereign, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Indianapolis: Liberty Fund, Book II, Chapter VI, § 73). See also De Frouville, *supra* note 103, 261: “[...] It cannot be required of a State that it is in control of all the events which take place on its territory short of obliging it to become a totalitarian State”.

to overthrow Assad or al-Abadi but to create its own State somewhere between Mossul in Iraq and Raqqa in Syria.<sup>107</sup>

One could also attempt to trigger the responsibility of Syria and Iraq on the basis of Article 9. According to the ILC commentary:

“Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. [...] Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.”<sup>108</sup>

At first glance, these three conditions seem to be met. *Firstly*, in regions under its control, IS carries out elements of governmental authority such as police, justice and tax powers<sup>109</sup>. *Secondly*, neither Iraq nor Syria exercises authority in those regions. *Thirdly*, the ILC considers the existence of an “armed conflict” as to be a circumstance calling for the exercise of governmental authority.<sup>110</sup> However, it does not seem advisable to the authors of the present chapter to adopt such an interpretation of Article 9. Indeed, it would be absurd for a State to be responsible directly for the wrongful acts committed by those it is trying to defeat. Furthermore, this would go against the intentions of the ILC which held that “[t]he general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law”.<sup>111</sup> It is only “the conduct of an insurrectional movement which becomes the new government of a State [which] shall be considered an act of that State under international law”.<sup>112</sup> Moreover, ample support for this general principle is to be found in arbitral jurisprudence.<sup>113</sup>

## 2. Failure to comply with the obligation to protect

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<sup>107</sup> See *supra*, ‘Introduction’. It is worth pointing out that, on the basis of Article 10(2) ASR, if IS succeeds in its enterprise, the newly created State would be retroactively responsible for any breach of international law committed by the armed group.

<sup>108</sup> ILC, *supra* note 104, at 49.

<sup>109</sup> See *supra*, ‘Introduction’.

<sup>110</sup> ILC, *supra* note 104, at 49.

<sup>111</sup> ILC, *supra* note 104, at 50.

<sup>112</sup> Article 10(1) ASR.

<sup>113</sup> For instance, one could refer to the *Santiago* case (1904) in which it was stated that “[...] the very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appear that the government has failed to use promptly and with appropriate force its constituted authority, it can not reasonably be said that it should be responsible for a condition of affairs created without its volition” (UNRIIAA, Vol. X (Sales No. 60.V.4), 513).

As demonstrated above, it is unlikely that the acts of IS will ever be attributed to Iraq and/or Syria. Therefore, these two States' international responsibility would probably never be triggered *directly* for IS's violations of international law. By contrast, their responsibility could potentially be engaged for having failed to comply with their obligation to protect.

Under international law, States are bound by an obligation to protect, also called the obligation of due diligence. Long recognized in international jurisprudence<sup>114</sup> and by the ILC,<sup>115</sup> this obligation requires States to take all necessary measures to protect persons under their jurisdiction from harmful acts committed by private actors and to punish perpetrators of such acts.<sup>116</sup> Therefore, besides direct responsibility for acts of private persons, the territorial State's international responsibility may also be engaged, not for these acts directly, but "for the action, and more often for the omission, of its organs which are guilty of not having done everything within their power to prevent the individual's injurious action or to punish it suitably in the event it has nevertheless occurred."<sup>117</sup> In other words, regardless of whether the wrongful conduct of the private person is attributable to the State or not, the territorial State can be held independently "responsible for having violated not the international obligation with which the individual's action might be in contradiction but the general or special obligation imposing on its organs a duty to provide protection."<sup>118</sup> In practice, this is the most common scenario.<sup>119</sup> In such a situation, the act of the private person is just a pre-condition to the existence of State responsibility "acting externally as a catalyst on the wrongfulness of the conduct of the State."<sup>120</sup>

Under IHRL, the obligation to protect is part of the tripartite typology of State obligations, alongside the obligation to respect and the obligation to fulfil.<sup>121</sup> As stated by the UN Human Rights Committee in its General Comment 31:

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<sup>114</sup> See e.g. the *Tellini* case of 1923 (League of Nations, *Official Journal*, 4th Year, No. 11, November 1923, 1349).

<sup>115</sup> ILC, *supra* note 104, at 39: "[...] a state may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects".

<sup>116</sup> According to Ago, "[t]his type of theory derives from Grotius' idea that the collectivity participated in a crime committed by an individual if nothing was done to prevent the crime (*patientia*) or to punish or hand over the offender (*receptus*)". Ago, *supra* note 100, 121.

<sup>117</sup> *Ibid.*, 123.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, 99: "[...] it is generally acknowledged that the State assumes responsibility not for the action of the individual, but for the conduct, usually omissive, of some of its organs in connexion with the action of the individual". See also Pisillo Mazzeschi, R., 1992. 'The Due Diligence Rule and the Nature of the International Responsibility of States, *German Yearbook of International Law* 35: 9, at 25-26: "[...] what clearly prevails today in both legal literature and in international practice is the view that the acts of individuals *are not attributable to the State*, but they may represent only the external fact giving rise to a *different wrongful act*, consisting in the State organs' failure to prevent or punish such acts" (footnotes omitted).

<sup>120</sup> Ago, *supra* note 100, 97.

<sup>121</sup> On the three categories of human rights obligations, see generally Kälin, W., Künzli, J., 2009. *The Law of International Human Rights Protection*, Oxford: OUP, 96-113.

“[...] the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities [...]. There may be circumstances in which a failure to ensure Covenant rights [...] would give rise to violations by States Parties of those rights, as a result of States parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”<sup>122</sup>

At the regional human rights level, numerous cases address the issue of States’ compliance with the obligation to protect.<sup>123</sup> The *Ilaşcu* case of 2004 is of particular interest to the current discussion. The European Court of Human Rights (ECtHR) ruled that, even where a State loses effective control over its territory, this only suspends its obligations to respect and fulfil. By contrast, its obligation to protect continues to apply and may engage its responsibility in case of failure.<sup>124</sup> According to the Court, if the State wants to respect of this obligation, “[t]he State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention”.<sup>125</sup>

The ECtHR decision in the *Ilaşcu* case can be applied by analogy to Iraq and Syria. Though both States lost control over parts of their territory, it can be argued they remain bound by their obligation to protect.<sup>126</sup> Did they fail to comply with such an obligation? A proper answer to this question would require a thorough factual analysis, going beyond the scope of the present chapter. Nonetheless, it should be noted that, according to several UN organs, there are serious reasons to believe that Iraq and Syria failed to take all necessary measures to protect victims of IS in regions under IS’ effective control. For instance, in March 2015 Report on the Human Rights Situation in Iraq, the UN Office of the High Commissioner for Human Rights (OHCHR) recommended to the Government of Iraq to “investigate allegations that ISF [Iraqi Security

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<sup>122</sup> Human Rights Committee (HRCee), *General Comment No. 31 – Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 2004, § 8.

<sup>123</sup> See e.g. European Court of Human Rights (ECtHR), Grand Chamber, *Osman v. The United Kingdom*, Judgment, 28 October 1998; Inter-American Court of Human Rights (IACtHR), *Velasquez-Rodriguez v. Honduras*, Judgment, 29 July 1988.

<sup>124</sup> ECtHR, Grand Chamber, *Ilaşcu and others v. Moldova and Russia*, Judgment, 8 July 2004, § 333: “[...] such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court *only in the light of the Contracting State’s positive obligations towards persons within its territory*” (emphasis added).

<sup>125</sup> *Ibid.*

<sup>126</sup> This has been acknowledged repeatedly by the UN. See e.g. UN HRC, *Report 13 March 2015*, *supra* note 1, § 72: “Information gathered by the mission strongly suggests that international crimes may have been perpetrated and continue to be perpetrated in Iraq by ISIL. *The primary legal responsibility in addressing these international crimes lies with the State of Iraq whose duty it is to protect persons under its jurisdiction and ensure accountability*” (emphasis added). See also UNAMI, *Report ... 5 June – 5 July 2014*, *supra* note 99, p. 6: “IHL imposes direct responsibility on the State in whose territory and under whose jurisdiction violations take place. Iraq has the obligation to ensure that action is taken so that violations are prevented and not repeated, to punish perpetrators and to ensure an adequate remedy is provided to the victims”.

Forces] and armed groups acting under its control failed to protect communities persecuted by ISIL.”<sup>127</sup> With regard to Syria, the Independent International Commission of Inquiry published a report on 5 February 2015 in which it declared that “[t]he human cost of the ongoing conflict in the Syrian Arab Republic is immeasurable [and that] the Syrian State has manifestly failed to protect its citizens from mass atrocities.”<sup>128</sup> Last but not least, if responsibility had to be apportioned between Iraq and Syria, it could be argued that Iraq seems more willing to protect its own population. Firstly, unlike Syria, Iraq expressly requested foreign military assistance to fight IS. Secondly, Iraq always allowed international humanitarian operations inside its territory, whereas Syria constantly obstructed to such operations.<sup>129</sup>

## B. Third States

Broadening the scope of our analysis outside Iraq and Syria, it is noteworthy that there have been claims of links between other States and the various parties to the conflict in Syria, including IS. These links would include the provision of financial and military assistance, in the form of training, advice and provision of weapons.<sup>130</sup> This news, alleging that some States might have willingly and directly lent assistance to IS, is not the only reason for concern. Assistance to other parties to the conflict might have also indirectly helped IS to achieve its current status.<sup>131</sup> Therefore, it is important to understand whether States other than Iraq and Syria (third States) could be held responsible for their direct or indirect implication in the IS’s actions.

As we have already seen, there are various ways in which the responsibility of States can be engaged in view of their relationship with non-State armed groups like IS (or private actors in general). The applicability of these legal avenues depends mostly on the quality of the relationship between the entity providing assistance and the entity receiving it, on the level of control exercised by the State in question over members of the non-State actor, and on the type of assistance provided. With regard to third States, international responsibility could potentially arise in at least three cases: *firstly*, in a case where a third State exercised control over members

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<sup>127</sup> UN HRC, *Report 13 March 2015*, *supra* note 1, § 79.

<sup>128</sup> UN HRC, *Report 5 February 2015*, *supra* note 97, § 47.

<sup>129</sup> *Ibid.*, § 53: “Arbitrary restrictions and obstacles to the delivery of aid continue to be imposed by all sides to the conflict, with devastating consequences for civilians in areas that are hard to reach. Humanitarian aid has been instrumentalized for military gain. The bureaucratic hurdles imposed by the Government of the Syrian Arab Republic are a calculated obstruction of aid to civilians living in areas under non-State armed group control.”

<sup>130</sup> See Stephens, M., ‘Islamic State: Where does jihadist group get its support?’, *BBC*, 1 September 2014, at <http://www.bbc.com/news/world-middle-east-29004253>, and Rogin, J., ‘America's Allies Are Funding ISIS’, *The Daily Beast*, 6 June 2014, at <http://www.thedailybeast.com/Articles/2014/06/14/america-s-allies-are-funding-isis.html>. See also BBC News, ‘Islamic State: Where key countries stand’, 4 February 2015, at <http://www.bbc.com/news/world-middle-east-29074514>.

<sup>131</sup> UN HRC, *Report 5 February 2015*, *supra* note 97, § 120: “Despite all the precautions allegedly taken by the States steering the process, the support given to the so-called “moderates” has ultimately consolidated the dominance of extremist groups such as ISIS and Jabhat Al-Nusra, which managed to overrun the positions of moderates and to gain loyalties among their ranks.”



of the armed group IS, so that the latter's action could be directly attributed to that State; *secondly*, in a case where the State rendered aid and/or assistance to IS, thereby becoming complicit in its violations of international law; *thirdly*, in a case where the State failed to abide by its obligation of due diligence to ensure respect for certain rules or to prevent certain violations.

### **1. Direct responsibility for violations of international law perpetrated by IS**

In some cases, States are directly responsible for actions carried out by non-State actors. The question we need to ask ourselves is, then, whether any State which has provided assistance to IS can be held directly responsible for actions perpetrated by the latter.

As seen *supra*, the ASR list cases of attribution of conducts to a State in Articles 8 to 11, and some of these Articles are applicable to acts performed by private actors. Of note, Article 8 ASR attributes responsibility to a State when private individuals are “acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”<sup>132</sup> This test has been interpreted as requiring that State responsibility for non-State actors' actions can be attributed only for those violations whose perpetration was directed or enforced by the State, or performed in operations over which the State exercised ‘effective control’.<sup>133</sup> As interpreted by the ICJ, the test is in practice really hard to satisfy. This consideration, and a careful analysis of the existing practice on the matter, led the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber to propose a new approach in its 1995 *Tadić* judgment. The Appeals Chamber claimed, in particular, that customary international law establishes a different test for attribution when non-State actors are structured in a hierarchically organized group, as it is the case for IS.<sup>134</sup> In those cases, indeed, State responsibility will be engaged for all actions carried out by the group, as long as the State maintains an “overall control” over the group, “going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”<sup>135</sup> This overall control, unlike the ‘effective control’ test, would not require that the armed group is acting under specific instructions by the State.

An even broader test to attribute State responsibility for non-State actors' actions seems to have been proposed a few years later by the ECtHR, in the cited case *Ilaşcu*. In that case, Russia was deemed to be responsible for violations of IHRL perpetrated by the *de facto* authority governing Transnistria, a separatist region in Moldova. The reason for the attribution of responsibility to Russia was that the latter was exercising a “decisive influence” over the separatist government, whose creation and survival were only possible thanks to Russian military, political and

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<sup>132</sup> ILC, *supra* note 24, Article 8.

<sup>133</sup> ICJ, *Nicaragua*, *supra* note 23, § 115; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, ICJ Reports 2007, p. 43 ff., §§ 399-400.

<sup>134</sup> International Tribunal for the former Yugoslavia (ICTY), Appeals Chamber, *Tadić* (IT-94-1), Judgment, 15 July 1999, § 120.

<sup>135</sup> *Ibid.*, §§ 120-123 and 145.

economic support.<sup>136</sup> The “decisive influence” has received little further explanation since,<sup>137</sup> but it is not to be excluded that the ECtHR might return to it in future cases.

Although there are several allegations that IS received external assistance from third States, none of these actually claim that that the Caliphate’s actions were/are performed under the effective control, overall control or decisive influence of any State. Therefore, none of the aforementioned test to attribute direct State responsibility is, as things currently stand, applicable to the IS case. The hypothesis of direct attribution of IS actions to a third State will then not be explored further here, even though a change in circumstances might make it relevant again in the future.

## 2. State complicity in the violations of International Law perpetrated by IS

One should then ask whether third States could be held responsible for their involvement in the behaviour of private actors, when there is no relationship of control between them. One possibility would be to invoke the concept of ‘complicity’, language ordinarily used in criminal law, which has received some recognition and application also in the framework of State responsibility.<sup>138</sup> The idea of complicit responsibility in internationally wrongful acts committed by another State – even if under a different wording - is enshrined in Article 16 ASR, deemed to reflect customary international law.<sup>139</sup> According to the latter, a State is internationally responsible if it aids or assists another State in the commission of an internationally wrongful act, with knowledge of the circumstances of the act itself.<sup>140</sup> However, as evident, Article 16 ASR only concerns cases of assistance lent to States. What then of assistance provided to armed groups like IS? It is nowadays accepted, indeed, that also non-State actors have some international obligations, especially under IHL and under IHRL.<sup>141</sup> If they do have international obligations, it is logical to assume that they can commit internationally wrongful acts. But is it possible to held States responsible for having aided and/or assisted such acts?

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<sup>136</sup> ECtHR, *Ilaşcu*, *supra* note 124, § 392-393.

<sup>137</sup> ECtHR, Grand Chamber, *Catan and Others v. Moldova and Russia*, Judgment, 19 October 2012, § 111.

<sup>138</sup> ICJ, *Genocide*, *supra* note 133, §§ 419-421. See also ILC, *Draft Articles ... with commentaries*, *supra* note 104, 67; and Lanovoy, V., ‘Responsibility for Complicity in an Internationally Wrongful Act: Revisiting a Structural Norm’, paper presented at the SHARES Conference ‘*Foundations of Shared Responsibility in International Law*’, 17-18 November 2011, Amsterdam, available at <http://ssrn.com/abstract=2170406>, 4-5.

<sup>139</sup> See ICJ, *Genocide*, *supra* note 133, § 420. Of note, Article 41(2) ASR complements Article 16, establishing an obligation not to render aid or assistance in maintaining a situation created by the serious breach of a *jus cogens* rule by a State. For further reference, see Jørgensen, N.H., 2010. ‘The Obligation of Non-Assistance of the Responsible State’, in in Crawford, J., Pellet, A., Olleson, S. (eds.), *supra* note 26, 687-693.

<sup>140</sup> And if the assisting State was bound by the same rule breached by the State primarily responsible. This second requirement was not present in the original Draft Article 25 proposed by Special Rapporteur Ago, in Ago R., ‘Seventh Report on State Responsibility’, A/CN.4/307 and Add. 1 and 2, in *Yearbook of the International Law Commission* (1978), vol. II (1), 60. The amendment in the current version of the ILC Articles is criticized by Lanovoy, *supra* note 138, 28-32.

<sup>141</sup> See **War Report 2014, Chapter \*\***. For the seminal work on the issue, see Clapham, A., 2006. ‘Human Rights Obligations of Non-State Actors’, Oxford: OUP.

*De lege lata*, the answer seems to be negative. The ASR already establish when a State is responsible via its relationship with a private actor breaching rules of international law. In that case, however, the rules applicable are those contained in Articles 8 to 11 ASR, and any relationship falling out of those provisions would not be sufficient to hold the State responsible. And, recalling the classic ‘voluntarist’ approach to international law expressed by the Permanent Court of International Justice in *Lotus*, every behaviour that is not expressly prohibited in international law must be implicitly considered as allowed.<sup>142</sup>

*De lege ferenda*, one could argue that the norm on aid and assistance to violations of international law contained in Article 16 ASR is narrower than its customary international law counterpart should be.<sup>143</sup> If the purpose of this norm is to make violations of international law less likely by deterring acts of assistance to unlawful behaviours, it would be illogical to limit it to violations committed just by certain actors, as the system of international responsibility would then appear incomplete. And, indeed, Article 14 of the ILC Draft Articles on the Responsibility of International Organizations (DARIO) also proscribes acts of assistance to internationally wrongful acts, regardless of whether they are committed by a State or an international organization.

Of course, even if a general rule sanctioning complicity in non-State actors’ violations existed, not all kind of assistance would be enough to trigger it. We could assume that, in such a case, the same requirements contained in Article 16 ASR would still need to be satisfied. Namely, a State would only be responsible if it knew of the circumstances of the internationally wrongful act, and provided that the act performed by the non-State actor would be internationally wrongful if performed by the State itself.

In the case under scrutiny, there are two types of alleged aid or assistance provided to IS: *a*) direct provision of assistance, in the form of delivery of weapons, funding and/or allowing the State’s territory to be used by IS for oil smuggling and to provide medical treatment and training to the IS’s fighters; *b*) negligence in the provision of assistance to other parties to the conflict in Syria, which ended up supporting IS activities in both Iraq and Syria.

Given the strict objectivity (i.e. the absence of a requirement of fault or intent) of the law of State responsibility,<sup>144</sup> even this second type of behaviour<sup>145</sup> could entail the responsibility of the assisting State provided, obviously, that the assisting State had knowledge of the violations of international law which were being perpetrated by IS, and of the fact that the assistance provided to other actors would have likely ended up in the IS’s hands.<sup>145</sup> As to the level of assistance

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<sup>142</sup> Permanent Court of International Justice, *S.S. Lotus* (France v. Turkey), 1927 PCIJ Series A, No. 10, § 44.

<sup>143</sup> This opinion is also shared by Lanovoy, *supra* note 138, 15-16.

<sup>144</sup> Dailier, P., Forteau, M., Pellet, A., 2009. *Droit international public* – 8<sup>ème</sup> ed., LGDJ, Paris, 854.

<sup>145</sup> The ILC commentary to Article 16 ASR seems to implicitly affirm that a State is only responsible if it provided assistance with the intent to facilitate the perpetration of the internationally wrongful act. ILC, *Draft Articles ... with*

necessary to engage a State's complicit liability, there is no indication in Article 16, nor in its commentary. This could be interpreted as meaning that any kind of behaviour, in so far as it actually facilitated the IS's violations, would be enough to engage State responsibility.

Aside from the general prohibition of aid and assistance to violations of international law, the Genocide Convention expressly includes a prohibition of complicity in acts of genocide.<sup>146</sup> A remarkable and relevant difference with Article 16 ASR is, however, that the Genocide Convention proscribes aid or assistance to acts of genocide regardless of whether they are perpetrated by State agents or by other entities. Forbidden acts of assistance notably include the provision of means to enable or facilitate the commission of the crime.<sup>147</sup> Of course, exactly as Article 16 ASR, Article III(e) implies a State's responsibility only if assistance was provided in full knowledge of the facts of the genocide,<sup>148</sup> including knowledge of the special intent to commit genocide by the final perpetrators.<sup>149</sup> A State could then, potentially, be considered as complicit in the alleged genocide of the Yezidis, if it can be proven that it somehow facilitated the genocide, in full knowledge of the IS's intent.

Similarly, some international instruments prohibit providing specific forms of assistance to certain entities. Examples relevant to our analysis could be the SC Resolution 1373 (2001)<sup>150</sup> and the UN Convention against the Financing of Terrorism, both of which establish a duty to refrain from providing support – financial in the latter case – to entities involved in acts of terrorism.<sup>151</sup> Another example comes from the Arms Trade Treaty, recently entered into force, which establishes an obligation not to authorize weapons' transfer when knowing that they would be used in the commission of certain international crimes, including genocide, crimes against humanity and certain categories of war crimes.<sup>152</sup> The Arms Trade Treaty also establishes an obligation to deny authorization to weapons exports whenever there is an overriding risk that they will be used to facilitate or commit - *inter alia* - serious violations of IHL, serious violations of IHRL, acts of terrorism.<sup>153</sup> Article 11 demands that a State, before deciding whether to authorize a weapons transfer, should also assess the risk of 'diversion' of those weapons, i.e. the risk that

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*commentaries*, *supra* note 104, 66, § 5. This approach, however, looks to be in contradiction with the text of Article 16, and of the general objective approach to State responsibility. Special Rapporteur Ago, indeed, seemed to consider intent as implied in the deliberate provision of assistance despite the knowledge that this would have lead to an internationally wrongful act. See Ago, *supra* note 140, § 72.

<sup>146</sup> Convention on the Prevention and Punishment of the crime of Genocide, 9 December 1948, Article III(e). The ICJ considered this to be a special case of aid or assistance in an internationally wrongful act, i.e. the institute described in Article 16 ASR. Cf. ICJ, *Genocide*, *supra* note 133, § 420, and more in general §§ 419-432.

<sup>147</sup> *Ibid.*, § 419.

<sup>148</sup> *Ibid.*, § 432.

<sup>149</sup> *Ibid.*, § 421.

<sup>150</sup> UN SC, Resolution 1373 (2001), 28 September 2001, S/RES/1373, § 2.

<sup>151</sup> International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, *UN Treaty Series*, vol. 2178, 197, Article 2.

<sup>152</sup> Arms Trade Treaty, A/CONF.217/2013/L.3, adopted by the UN GA with Resolution 2 April 2013, A/RES/67/234B, Article 6(3) and Article 7.

<sup>153</sup> *Ibid.*, Article 7.

the weapons end up in the hands of a subject other than the original recipient.<sup>154</sup> In the situation under scrutiny, this would mean that States could have violated one or more of these provisions when authorizing weapons transfers to other entities operating in Syria, knowing or ignoring the risk that those weapons would have ended up in the hands of IS, and used to commit one or more of the mentioned violations of international law.

In all these instances, however, the State would be responsible directly for the violation of the mentioned legal instruments, and not as an accomplice in the IS's violations. And this despite the fact that a State's behaviour in such cases is not different from the behaviour prohibited in in Article 16 ASR or Article III(e) Genocide Convention.

### **3. Other provisions engaging States' responsibility for their implication in the IS violations**

IS's violations could give rise to States' international responsibility in a third case, i.e. when a State did not abide by its obligation to respect and/or ensure respect for a certain body of law, or by its obligation to prevent certain violations.

Bearing in mind the IHL violations allegedly perpetrated by IS, one should question whether any States could be held responsible pursuant to Article 1 common to the 1949 Geneva Conventions, or to the similar norm included in Article 1 of Additional Protocol I. These rules, indeed, bind States Party to respect and ensure respect for the obligations contained respectively in the Conventions and in the Additional Protocol. Rule 144 identified by the International Committee of the Red Cross (ICRC) Study on customary IHL also could be relevant here, establishing a duty for States not to encourage violations of IHL, and to exert their influence to stop ongoing violations.<sup>155</sup>

The duty to ensure respect for IHL is nowadays considered to be not just a simple entitlement, but a fully-fledged obligation owed to the international community as a whole to react against violations of IHL performed by other subjects of international law.<sup>156</sup> This obligation could even be considered a 'constitutional principle' of the international legal order.<sup>157</sup> The obligation also

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<sup>154</sup> *Ibid.*, Article 11.

<sup>155</sup> Henckaerts, J.M., Doswald-Beck L. (eds), 2009. *Customary International Humanitarian Law, Volume I: Rules*, Geneva: ICRC/CUP, Rule 144.

<sup>156</sup> Boisson De Chazournes, L., Condorelli, L., 2000. 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests', *International Review of the Red Cross* (IRRC) 82: 67, at 76. See also Palwankar U., 1994. 'Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law', *IRRC* 76: 9. Cf. ICTY, Trial Chamber, *Kupreškić et al.* (IT-95-16), Judgment, 14 January 2000, § 519; ICJ, *Nicaragua*, supra note 23, § 220; ICJ, *Wall*, supra note 62, § 158. *Contra*, Focarelli, C., 2010. 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?', *EJIL* 21: 125, claiming that the 'duty to ensure respect' should have been more correctly interpreted as referring not to other States' compliance with IHL, but the compliance with IHL of individuals under the duty-bearer's jurisdiction.

<sup>157</sup> Boisson De Chazournes, Condorelli, supra note 156, 85.

finds application in non-international armed conflicts with respect to common Article 3<sup>158</sup> and, arguably, with respect to all norms of customary international law applicable to non-international armed conflicts that logically descend from common Article 3.<sup>159</sup>

As far as their content, common Article 1 and its ‘sister rules’ impose on States a duty to undertake all reasonable and feasible steps to secure that the Conventions are respected and implemented in all circumstances in which they are applicable and by all actors - especially by parties to armed conflicts, and even by parties to those conflicts to which the State in question is not itself participating.<sup>160</sup> In this sense, common Article 1 also lays down an obligation (of means) to ensure compliance with IHL by non-State actors such as IS, or at least not to encourage their IHL violations.<sup>161</sup>

But what does this concretely mean? Finding support in the language of Rule 144 of the ICRC Customary Law Study, it could be argued that common Article 1 actually implies a duty to refrain from adopting behaviours that could encourage or facilitate or otherwise lead to a violation of the Convention.<sup>162</sup> Common Article 1, therefore, must inform the behaviour of all High Contracting Parties with regard to any existing armed conflict, binding them to do everything in their power to prevent and avoid violations of the relevant IHL rules, by whoever perpetrated. In practice, obviously, the concrete meaning of such an obligation will depend on the circumstances, and on the State’s actual ability to influence final perpetrators.<sup>163</sup> Nevertheless, one might assume that the obligation is breached when a State, knowingly or negligently, provided to parties to an armed conflict assistance that was used to perform IHL violations. This may well have been the case in Iraq and Syria.

Comparable considerations could be done with respect to the obligation to prevent acts of genocide, enshrined in Article I of the Genocide Convention. Article I established a direct obligation for any State Party to employ the means at its disposal to prevent acts of genocide,

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<sup>158</sup> ICJ, *Nicaragua*, *supra* note 23, § 220.

<sup>159</sup> Boisson De Chazournes, Condorelli, *supra* note 156, 69.

<sup>160</sup> In the words of the ICRC, “the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.” ICRC, *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, Geneva: ICRC, 1958, at 16. The same principle is quoted and confirmed in the ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: ICRC/Martinus Nijhoff Publishers, 1987, 35-36. See also ICJ, *Wall*, *supra* note 62, § 158.

<sup>161</sup> ICJ, *Nicaragua*, *supra* note 23, § 220. See also Brehm, M., 2008. ‘The Arms Trade and States’ Duty to Ensure Respect for Humanitarian and Human Rights Law’, *Journal of Conflict and Security Law* 12: 359, at 372.

<sup>162</sup> Boivin, A., 2005. ‘Complicity and beyond: International law and the transfer of small arms and light weapons’, *IRRC* 87: 467, at 479 seems suggesting this when dealing with the specific issue of arms transfers; cf. also Brehm, *supra* note 161, 377, who considers it as an obligation of conduct. Cf. also Maslen S., Giacca G., Bellal A., 2012. ‘Implications of International Law for a Future Arms Trade Treaty’, *UNIDIR Resources, Ideas for Peace and Security*, at 14.

<sup>163</sup> Brehm, *supra* note 160, 374.

even when perpetrated by entities that are not under that State's authority.<sup>164</sup> Similar obligations are set forth in other treaties relevant to the situation in Syria and Iraq, such as the Convention against Torture<sup>165</sup> and the Convention against Terrorist Bombing, and the subsequent analysis could be applied to such provisions as well.<sup>166</sup>

As with the duty to ensure respect for IHL, the duty to prevent acts of genocide is an obligation of means, not an obligation of result. Its actual content must be determined case-by-case, depending heavily on the means at disposal of the duty-bearer and on its capacity to effectively influence the final perpetrators. Despite this apparent looseness, the obligation resulting from Article I is quite demanding: it arises once a State learns of the risk of a genocide being committed,<sup>167</sup> and requires the adoption and implementation of suitable measures to prevent genocide.<sup>168</sup> Furthermore, it is not limited to acts of genocide being perpetrated on the territory and/or by individuals under the State's jurisdiction, but extends to cover any act of genocide wherever it is performed, in so far as a State is actually in a position to do something to prevent it.<sup>169</sup> States are bound to prevent acts of genocide regardless of whether the final perpetrator is a private individual, an armed group or a State organ.<sup>170</sup>

Having in mind the alleged genocide being perpetrated by IS against the Yezidis, one should question whether third States bear any responsibility for having failed to prevent it. Potentially, Article I of the Genocide Convention may be violated by the mere fact of having allowed IS to acquire resources that were later used to perform this alleged genocide.

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<sup>164</sup> ICJ, *Genocide*, *supra* note 133, § 162 and 165-166.

<sup>165</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *UN Treaty Series*, vol. 1465, 85, Article 2.

<sup>166</sup> International Convention for the Suppression of Terrorist Bombings, adopted in GA, Resolution 52/164, 15 December 1997, A/RES/52/164, Article 15.

<sup>167</sup> Cassese, A., 2007. 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide', *Journal of International Criminal Justice* 5(4): 875, at 885.

<sup>168</sup> ICJ, *Genocide*, *supra* note 133, § 432.

<sup>169</sup> *Ibid.*, § 430. Cf. also Milanović, M., 2007. 'State Responsibility for Genocide: A Follow-Up', *EJIL* 18: 669, at 685-686. See also Gattini, U., 2007. 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', *EJIL* 18: 695, at 700-701.

<sup>170</sup> Gaeta P., 2007. 'On What Conditions Can a State Be Held Responsible for Genocide?', *EJIL* 18: 631, at 640.