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The Problem of the Terror Non-State

RESCUING INTERNATIONAL LAW FROM ISIS AND BOKO HARAM

Darin E.W. Johnson[†]

INTRODUCTION

Twenty-first century conflicts have brought the rise of the *terror non-state*—an entity that has disrupted the global community’s security and its paradigmatic legal frameworks. The terror non-state is typified by terrorist groups, such as the Islamic State of Iraq and Syria (ISIS) and Boko Haram, that have wrested control of large swaths of territory from sovereign governments, forming entities that flout the rule of law and subvert the human rights of those falling under their control.¹ These terrorist organizations, traditionally understood to be non-state actors under international law, have claimed the authority to govern their taken territory and in so doing have disrupted traditional distinctions between states and non-state actors in international

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¹ For a discussion of ISIS human rights abuses, see generally U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Iraq 2017 Human Rights Report (2017) [hereinafter Iraq Human Rights Report], <https://www.state.gov/documents/organization/277487.pdf> [<https://perma.cc/LK57-AB3V>]; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Syria 2017 Human Rights Report (2017) [hereinafter Syria Human Rights Report], <https://www.state.gov/documents/organization/277509.pdf> [<https://perma.cc/NR24-WZXW>]. For discussion of Boko Haram human rights abuses, see generally U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Nigeria 2017 Human Rights Report (2017) [hereinafter Nigeria Human Rights Report], <https://www.state.gov/documents/organization/277277.pdf> [<https://perma.cc/HGC7-9QBA>] [hereinafter collectively referred to as “2017 State Department Human Rights Reports for Nigeria, Iraq and Syria”].

law. Unlike other combatants in domestic civil conflicts, terror non-states have not sought legitimacy in the eyes of the global community. Instead they have flouted the international community by engaging in global and regional terror attacks, which has necessitated an international response.²

While the international community has achieved some military success in retaking territory from groups such as ISIS, the legal challenges presented by terror non-states remain, threatening to confound the international community's response well into the future.³ Terror non-states, such as ISIS and Boko Haram, will continue to rise in weak states and threaten the global community. Therefore, a thorough understanding of the challenges that terror non-states present to international legal frameworks—from the protection of human rights to the legality of military response—is crucial for the formulation of legitimate responses. Legal scholarship has not fully examined how terror non-states have disrupted the traditional dichotomy between states and non-state actors under international law. This article addresses that gap by using the cases of ISIS and Boko Haram to define the characteristics of a terror non-state and to discuss the ways in which terror non-states have challenged international law while engaging in widespread terror against local populations and the global community. The article frames its recommendations for the treatment of terror non-states under international law from a perspective that prioritizes the liberation and protection of vulnerable populations. From this perspective, the article recommends that the United Nations Security Council pass a resolution that mandates that terror non-states comply with international human rights obligations in the territories that they

² See Tim Lister, et al., *ISIS Goes Global: 143 Attacks in 29 Countries Have Killed 2,043*, CNN (Feb. 12, 2018, 11:24 AM ET), <https://www.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/index.html> [<https://perma.cc/3AVS-ZPWS>]; Mark Wilson, *Nigeria's Boko Haram Attacks in Numbers As Lethal As Ever*, BBC NEWS (Jan. 25, 2018), <https://www.bbc.com/news/world-africa-42735414> [<https://perma.cc/6GREY-2SUL>].

³ By late 2017, the international bombing campaign led by the United States aided Iraqi and Syrian forces in retaking ISIS' strongholds in Mosul, Iraq and in Raqqa, Syria. See Anne Barnard & Hwaida Saad, *Raqqa, ISIS 'Capital,' Is Captured, U.S.-Backed Forces Say*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/world/middleeast/isis-syria-raqqa.html> [<https://perma.cc/K8Y3-YR3T>]; J. Weston Phippen, *Iraqi Forces Take Mosul*, ATLANTIC (July 9, 2017), <https://www.theatlantic.com/news/archive/2017/07/iraqi-forces-take-mosul/533055/> [<https://perma.cc/5ZMZ-FAZ4>]. By early 2018, ISIS' territory was limited to its final stronghold in Hajin, Syria. See Rukmini Callimachi, *Fight to Retake Last ISIS Territory Begins*, N.Y. TIMES (Sept. 11, 2018), <https://www.nytimes.com/2018/09/11/world/middleeast/isis-syria.html> [<https://perma.cc/CV4F-TPQH>]. In March 2019, the U.S.-backed Syrian Democratic Forces announced that they had driven ISIS out of its last stronghold in Syria. Bethan McKernan, *ISIS Defeated, US-backed Syrian Democratic Forces Announce*, GUARDIAN (Mar. 23, 2019, 3:28 AM EDT), <https://www.theguardian.com/world/2019/mar/23/isis-defeated-us-backed-syrian-democratic-forces-announce> [<https://perma.cc/8K7U-ZWNY>].

control. The article also determines that terror non-states' destructive foreign attacks subject them to responsive foreign military intervention. The article further concludes that terror non-states' oppression of vulnerable populations eliminates any claim that they are entitled to immunity from domestic law during armed conflict. Finally, the article recommends that the United Nations establish an international tribunal for war crimes and human rights violations committed by ISIS, that Boko Haram leaders be referred to the International Criminal Court, and that the international community enhance its cooperation and support for the domestic prosecution of ISIS and Boko Haram.

This article proceeds in the following parts. Part I explains the critical lens through which this paper assesses terror non-states' impact on international law, which draws from Third World Approaches to International Law and the universal goals of international human rights law. Part II defines the characteristics of the terror non-state, distinguishes them from traditional non-state actors involved in civil conflicts, and explains how those distinctions present unique challenges for international legal frameworks. Part III discusses how ISIS and Boko Haram established terror non-states that severely abrogated the human rights of their victims under international law. Part IV discusses challenges that terror non-states present to the authorized use of force through foreign military intervention. Part V discusses the international humanitarian law framework that should apply to the conduct of hostilities with terror non-states. Part VI discusses the mechanisms of accountability available for ISIS and Boko Haram. Part VII offers a comprehensive summation of the recommended approaches to respond to ISIS, Boko Haram, and other terror non-states under international law and concludes.

I. A LIBERATION AND PROTECTION APPROACH FOR RESPONDING TO ISIS AND BOKO HARAM UNDER INTERNATIONAL LAW

This article assesses the impact that terror non-states have on the implementation of international law and recommends responses that reflect a *liberation and protection* approach. This article originates the concept of a liberation and protection approach that provides legal scholars and practitioners with a framework for assessing responses to terror non-states under international law. A liberation and protection approach places the liberation and protection of those most vulnerable to oppression and harm by terror non-states—the individuals subject to their

territorial control—at the forefront of its analysis. Their liberation and protection are the primary concerns of this paper. A liberation and protection approach finds common cause with the Third World Approaches to International Law (TWAIL) project, though it is not constrained by it. A liberation and protection approach also accords with the goals of the modern international human rights law movement, which seeks to protect the human rights of vulnerable populations.

TWAIL scholars and advocates posit that international law, as advanced by Western States, has created winners and losers among states.⁴ For example, Western European colonial powers created international rules of law that legalized the taking of territory and land from indigenous peoples.⁵ TWAIL scholars argue that this is an example of the way in which international law has been used as a tool of subordination by powerful states.⁶ TWAIL scholars articulate the ways in which this subordination continues in the modern international legal system by privileging certain powerful states, such as the permanent members of the United Nations Security Council who hold veto power in that body, above Third World or developing states that hold no such power.⁷ TWAIL scholars make similar observations about the influence of powerful states in international financial institutions, such as the World Bank and International Monetary Fund, and within international organizations, such as the World Trade Organization, suggesting that these states are able to advance lending criteria and trade policies in the institutions that preference the Global North against the Global South.⁸

My liberation and protection approach is distinct from TWAIL, in that it offers critiques of the international legal system that fall against the strong (dominating) states and weak (subordinated) states alike, in the interest of protecting the most vulnerable. Unlike TWAIL, this article is not primarily concerned with the power that dominant and subordinate states hold in regard to one another within the international legal system. Rather, it is focused primarily on the liberation and protection of vulnerable populations impacted by terror non-states. My liberation and protection lens requires assessment of the ways in which strong states assert their power against weak

⁴ See generally Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353 (1998).

⁵ See Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847, 851–55 (2011).

⁶ See Makau Mutua, *What is TWAIL*, 94 AM. SOC'Y INT'L L. PROC. 31, 31 (2000).

⁷ *Id.* at 34.

⁸ *Id.* at 35.

states and harm vulnerable populations, just as it advocates empowering institutions such as the International Criminal Court over the objection of Third World regimes who believe the court unfairly impinges upon their sovereignty in a way that it does not impinge upon powerful states.

Additionally, my liberation and protection approach is concerned with the liberation of vulnerable populations from oppressive terror non-states and oppressive sovereign regimes alike. My approach is aligned with the aspiration of the modern international human rights movement to free individuals from abuse and oppression globally. As a body of law, international human rights law progressively develops through treaty and corollary state practice those fundamental rights that state sovereigns owe to their citizens. International human rights law advocates have created a legal system that legally binds states, through their ratification of treaties, to ensure human rights are enforced domestically. International human rights law, by design, seeks to obligate states not to oppress their citizens and to protect their citizens from oppression by others. A liberation and protection approach advances the universal protection goals of international human rights law.

II. DISTINGUISHING TERROR NON-STATES FROM OTHER VIOLENT OPPOSITION GROUPS

Terror non-states are the most recent iteration of a phenomenon that has presented a long-standing challenge to the international legal system—how to legally situate and respond to entities that have taken power and territory by force, within an international legal system that is deferential to territorial control but in principle permits only peaceful transfers of territory.⁹ The terror non-state is similar yet distinct from prior non-state entities that have sought to take territory by force, including anti-colonial liberation movements in Africa; anti-government revolutionary groups in the Americas and Asia; political parties associated with armed groups engaged in terror in the Middle East; and regional governments that have sought independence in Europe, including through domestic terror.¹⁰ In addition to

⁹ The U.N. General Assembly declared that under the United Nations Charter, states may not recognize a “territorial acquisition resulting from the threat or use of force.” G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, pmb. (Oct. 24, 1970).

¹⁰ As discussed in this Part, such groups include anti-colonial liberation movements in Algeria and Mozambique; revolutionary groups such as the FARC in

seeking territory, these entities have often sought legitimacy and recognition in the eyes of the global community even as they waged battle in their home states.¹¹

Terror non-states have not sought legitimacy in the eyes of the global community but instead, have unleashed a campaign of terror on those states that protect the global order. Their indifference to global legitimacy, their terror attacks outside of their state, and their assertion of power over vulnerable populations that have not sought their leadership distinguish the modern terror non-state from other violent opposition groups. In order to understand the unique characteristics of the modern terror non-state, it is useful to assess the characteristics of other violent opposition groups, which I divide into four categories: (1) anticolonial liberation movements; (2) revolutionary guerrilla groups; (3) political parties associated with terror; and (4) violent secessionist groups.¹²

A. *Anti-Colonial Liberation Movements*

A number of the mid-twentieth century transitions from colonialism to independence in Africa involved the use of force against colonizing powers by national liberation movements. Although denounced by colonial powers as terrorists, liberation movements in countries, such as Algeria and Mozambique, sought legitimacy in the eyes of the global community through recognition by the Organization for African Unity (OAU) and the United Nations General Assembly as the legitimate representatives of the

Colombia and Tamil Tigers in Sri Lanka; Hamas in the Palestinian Territories; and Basque separatists in Northern Spain. *See infra* notes 13–25.

¹¹ Anti-colonial movements sought recognition as successor governments; revolutionary groups sought control of the government; Hamas sought recognition as a governing political party; and Basque separatists sought recognition of their territory as a sovereign entity. *See e.g.*, Frode Løvlie, *Explaining Hamas's Changing Electoral Strategy, 1996–2006*, 48 GOV'T & OPPOSITION 570, 571 (2013) (explaining how Hamas sought recognition as a governing political party); Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 INT'L & COMP. L.Q. 545, 554 n.32 (1999) (describing how Basque separatists sought recognition of their territory as a sovereign entity).

¹² Although I have characterized violent opposition groups as comprising four distinct categories, I acknowledge that there is some fluidity and overlap among these groups. For example, many colonial liberation movements have later become political parties after they have removed colonial ruling regimes, or the successors of colonial ruling regimes. *See, e.g.*, Marina Ottaway, *Liberation Movements and Transition to Democracy; The Case of the A.N.C.*, 29 J. MOD. AFR. STUD. 61, 63 (1991) (discussing transition of the African National Congress from liberation movement to political party). These groups, however, generally renounce violence when they transition into the political arena. *See* VERONIQUE DUDOUET, FROM WAR TO POLITICS: RESISTANCE/LIBERATION MOVEMENTS IN TRANSITION 38–43 (Berghof Res. Ctr. for Constructive Conflict Mgmt., Rep. No. 17, 2009) <https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Papers/Reports/br17e.pdf> [<https://perma.cc/HSZ8-EC2T>].

people.¹³ Because they were seen as the future governing powers in their countries, the General Assembly granted liberation movements recognized by the OAU, participation rights as observers in United Nations bodies, specialized agencies, and at international conferences for the negotiation of treaties.¹⁴ National liberation movements also achieved special status under an Additional Protocol to the Geneva Conventions, which provided them with certain immunities and protections in their conduct of hostilities—rights previously possessed only by states.¹⁵

B. *Revolutionary Guerilla Groups*

Like liberation movements, revolutionary groups from South America to South Asia have engaged in guerrilla warfare with their national governments. Rather than expelling previously departed colonial powers, these revolutionary groups have been motivated by a wide range of grievances against their national governments, including differing political and economic ideologies.¹⁶ In their campaign to take power, some of these groups have taken territory and became engaged in sustained guerilla conflict with their states. Two such groups—the Revolutionary Armed Forces of Columbia (FARC) and the Tamil Tigers in Sri Lanka—engaged in decades-long conflicts with their states, including various forms of domestic terror that resulted in tens of thousands of deaths.¹⁷ They differ from terror non-states

¹³ One of the purposes and objectives of the Organization for African Unity's Charter was to "eradicate all forms of colonialism from Africa." Org. of African Unity [OAU] Charter art. 2, ¶ 1(d); see also P. Mwet Munya, *The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, 19 B.C. THIRD WORLD L.J. 537, 542–45 (1999) ("The purposes and objectives of the OAU, as enumerated in Article II, are: . . . to eradicate all forms of colonialism from Africa."). The Organization for African Unity's recognition of liberation movements as the legitimate representatives of the people, including those in Namibia, Angola, Cape Verde, Guinea, and Mozambique, were subsequently endorsed by the UN General Assembly by resolution. See Konstantinos Mastorodimos, *National Liberation Movements: Still a Valid Concept (with Special Reference to International Humanitarian Law)?*, 17 OR. REV. INT'L L. 71, 78–81 (2015).

¹⁴ G.A. Res. 3280 (XXIX), ¶¶ 5–6 (Dec. 10, 1974).

¹⁵ See discussion *infra* Part VII; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1, ¶ 4, June 8, 1977, 1125 U.N.T.S. 3; Mastorodimos, *supra* note 13, at 88–102.

¹⁶ For example, the Colombian civil war between the FARC and the Colombian government began as a clash between the Liberal and Conservative parties. See Lily Rothman, *What to Know About the Origins of the FARC*, TIME (Sept. 26, 2016), <http://time.com/4507568/colombia-farc-history/> [<https://perma.cc/QW8F-9PUL>].

¹⁷ See Nick Miroff, *The Staggering Toll of Colombia's War with FARC Rebels, Explained in Numbers*, WASH. POST (Aug. 24, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/08/24/the-staggering-toll-of-colombias-war-with-farc-rebels-explained-in-numbers/> [<https://perma.cc/YQZ6-7WXZ>]. The Tamil Tigers sought independent areas in Sri Lanka for the minority ethnic Tamil community. See Preeti Bhattacharji,

because their campaigns of terror have been primarily limited to their domestic opponents.

C. *Political Parties Associated with Terror*

Groups like Hamas could be considered precursors to terror non-states, in that they have sought results through campaigns of terror, yet they have also become political parties that have taken on governance responsibilities. Like terror non-states, Hamas controls territory in the Gaza Strip; however, unlike a terror non-state, Hamas holds territory in part due to a domestically legitimate process—the 2007 Palestinian parliamentary elections—which resulted in Hamas' electoral victory.¹⁸ Since that time, Hamas has intermittently clashed and reconciled with Palestine's other governing party, Fatah, over control of the Gaza Strip in the Palestinian Territories.¹⁹ Like terror non-states that attack countries outside their territory, Hamas has been involved with external terror attacks against Israel.²⁰

D. *Violent Secessionist Groups*

Finally, secessionist groups all over the world have advocated for territorial independence, sometimes resorting to violent campaigns against their sovereign governments. The Spanish government has faced a violent secessionist movement from Basque separatists in northern Spain; the United Kingdom faced a violent secessionist movement in Northern Ireland for decades, and Russia continues to face attacks from violent Chechen separatists.²¹ Many separatist groups advocate for

Liberation Tigers of Tamil Eelam, COUNCIL ON FOREIGN REL. (May 20, 2009), <https://www.cfr.org/backgrounder/liberation-tigers-tamil-eelam-aka-tamil-tigers-sri-lanka-separatists> [https://perma.cc/S9BX-NJJ7].

¹⁸ See Zena Tahhan, *Hamas and Fattah: How Are the Two Groups Different*, AL JAZEERA (Oct. 12, 2017), <https://www.aljazeera.com/indepth/features/2017/10/hamas-fatah-goal-approaches-171012064342008.html> [https://perma.cc/D34M-RAR].

¹⁹ See Zack Beauchamp, *Everything You Need to Know About Israel-Palestine*, VOX (May 14, 2018, 10:20 AM), <https://www.vox.com/cards/israel-palestine/hamas> [https://perma.cc/HD9E-R94D].

²⁰ See HUMAN RIGHTS WATCH, ERASED IN A MOMENT: SUICIDE BOMBING ATTACKS AGAINST ISRAELI CITIZENS 66 (2002), <https://www.hrw.org/sites/default/files/reports/ISRAELPA1002.pdf> [https://perma.cc/EQ5F-HSKU].

²¹ See TERESA WHITFIELD, *THE BASQUE CONFLICT AND ETA: THE DIFFICULTIES OF AN ENDING* 2–8 (U.S. Inst. of Peace, Special Rep. 384, 2015), <https://www.usip.org/sites/default/files/SR384-The-Basque-Conflict-and-ETA-The-Difficulties-of-An-Ending.pdf> [https://perma.cc/KG3M-B4EC]; KRISTIN ARCHICK, CONG. RESEARCH SERV., RS21333, *NORTHERN IRELAND: CURRENT ISSUES AND ONGOING CHALLENGES IN THE PEACE PROCESS* 1 (2018), <https://fas.org/sgp/crs/row/RS21333.pdf> [https://perma.cc/E3F8-7X64]; Elisabeth Smick, *The Chechen Separatist Movement*, COUNCIL ON FOREIGN REL. (July 18, 2006),

greater autonomy or independence from their national governments, but violent secessionist groups are distinguished by their terror campaigns. For example, in December 2007, Basque secessionists bombed the Madrid airport, killing two more civilians in its over forty year terror campaign against the Spanish national government that has resulted in more than 800 deaths;²² the Irish Republican Army engaged in a decades-long bombing campaign throughout England;²³ and Chechen separatists staged numerous attacks, including the Beslan school attack in 2004 that resulted in 331 hostage deaths, the majority of whom were children.²⁴ Violent separatist groups share a capacity for widespread violent terror attacks, however their attacks are typically directed inward at national governments and domestic civilians. Unlike terror non-states, they do not generally control territory by armed force, though affiliated political parties may exercise some degree of regional control by virtue of arrangements with the national government.²⁵ Full territorial control and governance are aspirational. As discussed below, terror non-states already control territory and assert their authority to govern citizens subject to their control.

E. *Terror Non-State*

The second decade of the twenty-first century has seen the rise of terrorist organizations that have successfully taken control of large swaths of territory in the Middle East and Africa. While terrorist groups such as Al Qaeda aspired to form a caliphate,²⁶

<https://www.cfr.org/backgrounder/chechen-separatist-movement> [<https://perma.cc/S9PG-BYJC>].

²² John Ward Anderson, *Spain's Peace Process in Tatters After Basque Separatist Bombing*, WASH. POST (Feb. 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/17/AR2007021701327.html> [<https://perma.cc/4UMY-UQVW>].

²³ See Josh Lowe, *London Isn't Burning: How Britain's History with the IRA Made it Resilient in the Face of Attack*, NEWSWEEK (Mar. 24, 2017), <http://www.newsweek.com/london-attack-ira-terror-threat-severe-bomb-terrorism-573629> [<https://perma.cc/68JQ-ANWN>]; see also ARCHICK, *supra* note 21, at 1.

²⁴ Peter Finn, *Blast Kills Leader of Separatists in Chechnya*, WASH. POST (July 11, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/10/AR2006071000307.html> [<https://perma.cc/BM9J-GDN2>].

²⁵ For example, Sinn Fein, an Irish political party associated with the Irish Republican Army, an armed group that engaged in a thirty-year guerilla campaign for Northern Ireland's independence from the United Kingdom, was one of the signatories of the Good Friday Peace Accord which ended the civil conflict—and granted Sinn Fein political status in the U.K. Parliament. Joe Tambini, *What Is Sinn Fein? What Does Sinn Fein Mean and What Is the Good Friday Agreement?*, EXPRESS (June 26, 2017), <https://www.express.co.uk/news/politics/817923/sinn-fein-meaning-good-friday-agreement-dup-gerry-adams-ira-links-history> [<https://perma.cc/B5UM-8GYT>]; *Good Friday Agreement*, BBC, http://www.bbc.co.uk/history/events/good_friday_agreement [<https://perma.cc/PMQ2-BW3S>].

²⁶ “Al Qaeda in theory supports a caliphate, but . . . envisioned this as a long-term goal. . . . Al Qaeda has never shown much interest in taking or holding territory in

ISIS succeeded in actualizing that shared goal by taking physical territory from the governments of Syria and Iraq,²⁷ just as Boko Haram took physical territory from the government of Nigeria.²⁸ ISIS and Boko Haram straddle two different categories under international law, as they possess characteristics of both non-state actors and states. Like most terrorist groups or organizations, they can easily be categorized as non-state actors under international law, as they are organizations, not states.²⁹ Unlike many terror groups, however, ISIS and Boko Haram have taken territory and sought to govern those falling under their control. Nonetheless, they have failed to meet the traditional definition of statehood as defined in the Montevideo Convention, one of the only treaties to specifically define the characteristics of a state.³⁰ Although the Montevideo Convention was drafted, signed, and ratified only by Western Hemisphere states in the Organization of American States, it is frequently cited by international scholars as indicative of the criteria for statehood, namely, possessing: (1) defined territory, (2) a permanent population, (3) government, and (4) the capacity to enter into diplomatic relations.³¹ ISIS and Boko Haram

order to set up an Islamic state and govern, despite the fact that doing so is one of its stated goals; on the contrary, the only reason it has ever shown interest in territory is as a safe haven and as a place to set up training camps.” Daniel L. Byman & Jennifer R. Williams, *ISIS vs. Al Qaeda: Jihadism’s Global Civil War*, BROOKINGS CTR. FOR MIDDLE EAST POL’Y (Feb. 24, 2015), <https://www.brookings.edu/articles/isis-vs-al-qaeda-jihadisms-global-civil-war/> [<https://perma.cc/L3HA-26LF>].

²⁷ “ISIS’s primary strategic target is the consolidation and expansion of the lands and authority of the Islamic State in Iraq and Syria and other neighboring Muslim countries. ISIS wants to destroy the colonial borders in the . . . Levant, which were drawn by the European powers at the end of World War One. In doing so, the group seeks to replace the ‘apostate’ regimes with an Islamic state, a caliphate.” FAWAZ A. GERGES, *ISIS A HISTORY* 7 (Princeton Univ. Press ed., 2016).

²⁸ “Over several years Boko Haram established significant territory in the northeast of Nigeria. At its peak in 2014, the group controlled approximately 20,000 square miles, a territory roughly the size of Belgium, while controlling a population of more than 1.7 million people.” Intel Brief, *Boko Haram Evolves But Remains a Substantial Threat in Nigeria*, CIPHER BRIEF (Nov. 14, 2018), https://www.thecipherbrief.com/column_article/boko-haram-evolves-but-remains-a-substantial-threat-in-nigeria [<https://perma.cc/9LQJ-MUX6>].

²⁹ “Even though the term ‘non-state actor’ can be defined quite simply as any entity that is not a state, it deserves some explanation. In some contexts, the term is used to refer to benign civil society groups working for human rights. . . . In other contexts, however, the term is understood to refer to some very ‘uncivil’ groups determined to acquire weapons of mass destruction and target them against a civilian population. . . . Depending on the context, international law provides that states are either obliged to punish non-state actors or, alternatively, obliged to cooperate with them.” Andrew Clapham, *Non-State Actors*, in *INTERNATIONAL HUMAN RIGHTS LAW* 531, 531 (Oxford Univ. Press, Moeckli et al., eds., 2d ed. 2014).

³⁰ Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

³¹ *Id.*; see also Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 414–16 (1998) (noting that the Montevideo Convention is frequently cited by international law scholars as reflecting the primary criteria for statehood).

do not control defined territory because their borders shift with their success or failure on the battlefield, as does the makeup of their impermanent forced population.³² While ISIS and Boko Haram may claim that they are legitimate governments, they do not have the consent of the governed. Customary international law, as reflected in the Montevideo Convention, prohibits the use of military force to acquire territory or to compel the recognition of statehood.³³

Despite their failure to establish entities that meet the legal definition of a state, ISIS and Boko Haram have asserted their authority by violent force to govern thousands of Syrians, Iraqis, and Nigerians within the territory that they have taken.³⁴ They have subjected these individuals to brutal and ruthless treatment and have violated every human right imaginable.³⁵ Further, they have engaged in terror campaigns domestically and abroad to spread their message of hate, gain allies, and to seek to intimidate states that have opposed them militarily.³⁶ The violent taking of territory, the assertion of governance authority over thousands of forced subjects, the violation of human rights on a massive scale, and the waging of violent terror campaigns against internal and external states are attributes of the terror non-state. These attributes make the terror non-state a challenging entity to address under international law. The impact that terror non-states have upon human rights enforcement, authorized military intervention, the conduct of war, and international criminal responsibility are explored in the Parts that follow.

³² See discussion *infra* Part IV.

³³ Montevideo Convention, *supra* note 30, at art. 11; see also U.N. Charter art. 2, ¶ 4 (prohibiting the use of force against the territorial integrity of a state). The International Court of Justice has held that the principles of the U.N. Charter relating to the threat or use of force are part of customary international law with the character of *jus cogens*. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 190 (June 27). Further, the U.N. General Assembly has declared that “[t]he territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal [subsequent to the UN Charter regime].” G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations ¶ 1 (Oct. 24, 1970).

³⁴ See U.N. Secretary-General, Remarks to Security Council High-Level Summit on Foreign Terrorist Fighters (Sept. 24, 2014), <http://www.un.org/sg/STATEMENTS/index.asp?nid=8040> [<https://perma.cc/G4WH-NVTU>] (“Muslim leaders around the world have said, groups like ISIL—or Da’ish—have nothing to do with Islam, and they certainly do not represent a state. They should more fittingly be called the ‘Un-Islamic Non-State.’”); see also Frédéric Gilles Sourgens, *The End of Law: The ISIL Case Study for a Comprehensive Theory of Lawlessness*, 39 *FORDHAM INT’L L.J.* 355, 379 (2015).

³⁵ See, e.g., 2017 State Department Human Rights Reports for Nigeria, Iraq and Syria, *supra* note 1.

³⁶ See, e.g., Lister et al., *supra* note 2; Wilson, *supra* note 2.

III. THE SYSTEMIC HUMAN RIGHTS VIOLATIONS OF TERROR NON-STATES

Terror non-states do not respect the legal obligations that sovereign states have undertaken to protect human rights in their territory, and they are flagrant violators of those same human rights. This section details the terror non-states that ISIS and Boko Haram have formed and the massive human rights violations that they have committed.

A. *ISIS*

The Islamic State of Iraq and Syria (ISIS), also known as the Islamic State of Iraq and the Levant (ISIL), owes its existence to many factors including the U.S. invasion of Iraq in 2003 and the subsequent dissolution of the Iraqi army and Baathist loyalists from the Iraq government.³⁷ Many of the former Baathists and Sunni members of the Iraqi army and government became part of the radicalized insurgency against the U.S. occupation and the subsequent Shia-led elected Iraqi government.³⁸ These insurgents broke away from Al Qaeda, continued their insurgency against the Iraqi government, and exploited a vacuum in control in Syria, due to its post Arab Spring civil war, to help ISIS form a declared caliphate across Syria and Iraq.³⁹ In the course of taking territory in Iraq and Syria, ISIS defeated both Iraqi and Syrian forces, drawing from experience that its leader, Abu Bakr al-Baghdadi, and his followers had gained during years of civil warfare with the Shiite Iraqi government, resources that ISIS took through the taking of oil refineries and dams, and through a growing operation of terrorist financing from bribery, extortion, ransom, and kidnappings.⁴⁰

ISIS' takeover of a wide swath of territory in Iraq and Syria was formally recognized as a threat to the international community in November 2015, when the United Nations Security Council unanimously passed Resolution 2249 calling upon member states to "take all necessary measures . . . to eradicate

³⁷ See Johan D. van der Vyver, *The ISIS Crisis and the Development of International Humanitarian Law*, 30 EMORY INT'L L. REV. 531, 535 (2016); see also GERGES, *supra* note 27, at 154–55; Sourgens, *supra* note 34, at 376.

³⁸ GERGES, *supra* note 27, at 154–55.

³⁹ See *id.* at 170–76.

⁴⁰ See PATRICK COCKBURN, *THE AGE OF JIHAD: ISLAMIC STATE AND THE GREAT WAR FOR THE MIDDLE EAST* 333–35, 353 (2016); Ashley Fantz, *How ISIS Makes (and Takes) Money*, CNN (Feb. 19, 2015, 10:44 PM ET); <https://www.cnn.com/2015/02/19/world/how-isis-makes-money/index.html> [<https://perma.cc/GBL5-2TVJ>]; see also Sourgens, *supra* note 34, at 376–79; van der Vyver, *supra* note 37, at 532–33.

the safe haven they [ISIS] have established over significant parts of Iraq and Syria.”⁴¹ “Terrorist safe havens” are “ungoverned, under-governed, or ill-governed physical areas where terrorists are able to organize, plan, raise funds, communicate, recruit, train, transit, and operate in relative security because of inadequate governance capacity, political will, or both.”⁴²

The designation of the territory taken by ISIS as a terrorist safe haven reflects the international community’s legitimate concern that ISIS would use its territory to plan terrorist attacks not just against the governments of Iraq and Syria, but also against any state perceived as a threat or challenge to its ideology.⁴³

The term terrorist safe haven does not fully capture the nature of the stronghold that ISIS built in Iraq and Syria. ISIS did not simply take control of an ungoverned, sparsely populated, safe space from which to plan attacks. Instead, it violently took control of heavily populated areas and major cities such as Mosul, the second largest city in Iraq, and Al Raqqa, the sixth largest city in Syria, whose sizable populations had been subject to long-standing, though dysfunctional and corrupt, institutions of governance under Iraqi and Syrian law.⁴⁴ ISIS’ motivation was to replace these local systems of governance with its own laws and institutions, as part of its creation of a caliphate. In a typical safe haven, a sovereign state provides tacit or de facto consent to the presence of a terrorist group which has no desire to govern.⁴⁵ The term terror non-state more fully reflects the reality of the stronghold established by ISIS: where it sought not merely to operate with government sanction, but instead violently took territory and claimed authority to govern. ISIS maintained control through a combination of

⁴¹ S.C. Res. 2249, ¶ 5 (Nov. 20, 2015); see also Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT’L L. STUD. 1, 23 (2015); van der Vyver, *supra* note 37, at 536–37.

⁴² U.S. Dep’t of State, Bureau of Counterterrorism and Countering Violent Extremism, COUNTRY REPORTS ON TERRORISM 2015 at 307 (2016), <https://www.state.gov/documents/organization/258249.pdf> [<https://perma.cc/LB3Z-BNAK>].

⁴³ Louise Arimatsu & Michael Schmitt, *The Legal Basis for War Against ISIS Remains Contentious*, GUARDIAN (Oct. 6, 2014, 4:00 AM EDT), <http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state> [<https://perma.cc/TXF3-7XTS>].

⁴⁴ See GERGES, *supra* note 27, at 171–75; Rukmini Callimachi, *The ISIS Files: When Terrorists Run City Hall*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-mosul-iraq.html> [<https://perma.cc/9KX6-HGXD>]; Laura King, *What Was Life Like in Syria’s Raqqa, the Fallen Capital of Islamic State’s Caliphate?* L.A. TIMES (Oct. 17, 2017, 2:15 PM), <http://www.latimes.com/world/middleeast/la-fg-syria-raqqah-backgrounder-20171017-story.html> [<https://perma.cc/95M9-M8GB>].

⁴⁵ Gil Avriel, *Terrorism 2.0: The Rise of the Civilitary Battlefield*, 7 HARV. NAT’L SEC. J. 199, 214 (2016).

“brutality and bureaucracy,” as it mastered not only terror but also government administration, in some instances through subverting existing government institutions.⁴⁶ Nonetheless, in the eyes of the global community, ISIS remained a terrorist non-state actor, rather than a legitimate state. Therefore, terror non-state is an accurate descriptor of the entity that ISIS formed. Both in size and aspiration, terror non-states are more than just safe havens, they are spaces in which terrorist groups assert authority over the governed and seek to supplant the state.⁴⁷

In violently supplanting the state and nullifying citizens’ sovereign rights, terror non-states reject human rights and subvert the rule of law. ISIS has subverted the rule of law in Iraq and Syria, by denying the citizens falling under its control recourse to their sovereign institutions.⁴⁸ On June 29, 2014, ISIS achieved its aspiration and announced the creation of a caliphate, a political entity in which ISIS’ interpretation of Islamic law is enforced.⁴⁹ The territory that it took in Iraq and Syria became a space for ISIS leaders to assert their governance philosophy over a wide territorial region and over a significant population.⁵⁰ ISIS asserted its authority over its forced population through cruel internal security measures that enforced its harsh vision of religious law.⁵¹ The enforcement measures were their harsh interpretation of 1,400 year old rules stemming from the time of their prophet, whose caliphate they sought to emulate.⁵² At its high point, ISIS is estimated to have controlled close to one-third of Syria and one-third of Iraq—an

⁴⁶ Callimachi, *supra* note 44.

⁴⁷ The term terrorist “safe haven” fails to fully “capture[] . . . the magnitude [] or the severity” of modern-day terrorist strong holds in the Middle East and Africa. Avriel, *supra* note 45, at 211–14, 216. Avriel has his own nomenclature for this phenomenon. He refers to the strongholds as “terroristates.” *Id.* at 216. I believe that the term “terrorist non-state” more fully reflects the international legal status of the terrorist groups forming these strongholds.

⁴⁸ See, e.g., Callimachi, *supra* note 44 (discussing how ISIS took control of certain government agencies in Baghdad, closed others, and operated existing agencies and new administrative entities under its interpretation of Islamic law).

⁴⁹ See Matt Bradley, *ISIS Declares New Islamist Caliphate: Militant Group Declares Statehood, Demands Allegiance From Other Organizations*, WALL ST. J. (June 29, 2014, 2:07 PM ET), <http://www.wsj.com/articles/isis-declares-new-islamist-caliphate-1404065263> [<https://perma.cc/L8V9-8WK3>].

⁵⁰ See Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), <https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> [<https://perma.cc/J6EF-K992>].

⁵¹ See Andrew F. March and Mara Revkin, *Caliphate of Law*, FOREIGN AFF. (Apr. 15, 2015), <https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law> [<https://perma.cc/3ANE-6NMC>].

⁵² See *id.*

area the size of Britain—and to have exerted control over ten to twelve million people.⁵³

ISIS governs its forced subjects under a legal and regulatory framework much different than the constitutional and code-based regimes in place in Iraq and Syria. ISIS governs under a legal and statecraft framework based upon its interpretation of Islamic materials.⁵⁴ ISIS has avoided codifying laws and constitutions to avoid the construct of modern nation-states and instead has opted for the enforcement of Islamic law by judges in *sharia* courts.⁵⁵

[T]he ISIS judiciary is organized into three main branches: a division for complaints (*mazalim*), including grievances against ISIS public officials and combatants; Islamic courts . . . which deal[] with violations of ISIS laws and government matters; and the Diwan al-Hisba [division] which adjudicates crimes or misconduct referred by the morality police.⁵⁶

ISIS also believes that the caliph has the authority to issue rules and regulations under an Islamic theory of governance, *siyasa shar'iyya*, which translates to “religiously legitimate governance.”⁵⁷ For regulatory issues not addressed in Islamic criminal and civil law enforced through *sharia* courts, ISIS has established a regulatory governance system. The caliph and governors, military commanders, and market inspectors under him issue binding decisions on everything from traffic fines and taxes to military discipline, education, and property expropriation.⁵⁸ Two different police units were responsible for enforcing criminal and moral law.⁵⁹ The “Islamic police” were responsible for law enforcement and public safety, while the *hisba* police were responsible for enforcing morals, promoting virtue and preventing vice.⁶⁰ Some of the responsibilities of the *hisba* police included “responding to reports of drug or alcohol use, and destroying banned [items]” such as “musical instruments, cigarettes [and] polytheistic idols.”⁶¹

ISIS’ violent takeover of territory in Iraq and Syria abrogated human rights and the rule of law in several respects.

⁵³ Patrick Cockburn, *War With ISIS: Islamic Militants Have an Army of 200,000 Claims Senior Kurdish Leader*, INDEPENDENT (Nov. 16, 2014, 1:00 AM), <http://www.independent.co.uk/news/world/middle-east/war-with-isis-islamic-militants-have-army-of-200-000-claims-kurdish-leader-9863418.html> [<https://perma.cc/NCE5-WHHS>].

⁵⁴ See March & Revkin, *supra* note 51.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ *Id.* (internal quotation marks omitted).

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.*

It imposed a system of governance over the objection of its subjects, denied citizens access to their sovereign rights and institutions, and it flouted international human rights law by committing some of the worst forms of human rights abuse imaginable.⁶² ISIS violently subjected Iraqis and Syrians to its control without their consent. ISIS has not honored nor respected the sovereign rights of its subjects, nor the institutions under which they were previously governed.⁶³ Governance under the Iraqi and Syrian governments was not without privation. Assad regime abuses against Syrian citizens and Iraqi government dysfunction created the security vacuum that ISIS exploited in both countries.⁶⁴ Nonetheless, the human rights violations under ISIS arguably outstripped those that existed in post-Sadaam Iraq or pre-civil war Syria.⁶⁵ ISIS used public beheadings, mass executions, slave markets, widespread sexual slavery, and other gruesome techniques to enforce their rigid views, such as the immolation of a Jordanian pilot.⁶⁶ ISIS rulings determined that Yazidis as a group could be executed, as Yazidism was deemed a polytheistic religion, and also determined that Yazidi and other captured women could permissibly be held as sexual slaves by law.⁶⁷ These extensive human rights violations fly in the face of every modern understanding of the human rights to which all human beings are entitled, including the right to life and freedom of religion, as well as universal prohibitions against slavery, torture, and sexual exploitation.⁶⁸ ISIS officials themselves are not immune from abuse; ISIS judges have disappeared for protesting the torture of prisoners and have been executed on charges of treason and collaboration with foreign governments.⁶⁹

⁶² See Sourgens, *supra* note 34, at 379–82.

⁶³ ISIS has dismantled existing institutions and ignored pre-existing legal frameworks. *See id.* at 379.

⁶⁴ Jason Hanna, *Here's How ISIS Was Really Founded*, CNN (Aug. 13, 2016, 2:05 PM ET), <https://www.cnn.com/2016/08/12/middleeast/here-is-how-isis-began/index.html> [<https://perma.cc/L28D-F59F>].

⁶⁵ This article does not suggest that the Assad regime's pre-civil conflict activity or ongoing actions do not comprise severe human rights violations themselves. In fact, the Assad regime's behavior over the course of the civil war undoubtedly constitutes substantial, ongoing human rights violations. *See VIOLATIONS DOCUMENTATION CTR. IN SYRIA, SPECIAL REPORT ON COUNTER-TERRORISM LAW NO. 19 AND THE COUNTER-TERRORISM COURT IN SYRIA: COUNTER-TERRORISM COURT: A TOOL FOR WAR CRIMES* (2015), <http://www.vdc-sy.info/pdf/reports/1430186775-English.pdf> [<https://perma.cc/ZB8N-GVPM>].

⁶⁶ *See* March & Revkin, *supra* note 51; *see also* van der Vyver, *supra* note 37, at 536.

⁶⁷ *See* March & Revkin, *supra* note 51; *see also* COCKBURN, *supra* note 40, at 388–89.

⁶⁸ *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 2200A (XXI) International Covenant on Civil and Political Rights (Dec. 16, 1966); G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

⁶⁹ *See* March & Revkin, *supra* note 51.

B. *Boko Haram*

Like ISIS, Boko Haram has established a terror non-state. Boko Haram, which means “Western Civilization Is Forbidden,” is a terror group that emerged in Nigeria in the early 2000s, whose aim is to establish an Islamic state governed by its interpretation of Sharia Law in Nigeria.⁷⁰ Boko Haram has staged attacks against the government and civilians primarily in the poor, predominately Muslim northeastern part of Nigeria, motivated by concerns that the moderate Muslim government was not being run consistently with its view of an Islamic State.⁷¹ In 2014, Boko Haram surpassed ISIS as “the world’s deadliest terrorist group” with 7,500 deaths that year.⁷² From 2009 to 2015, Boko Haram was responsible for an estimated fifteen thousand deaths.⁷³ Boko Haram’s brutal killing of fifty college students as they slept in their dormitory beds received global media coverage.⁷⁴ Similarly, Boko Haram’s abduction of nearly three hundred schoolgirls from Chibok, Nigeria, in 2014 drew international attention, sparking the #BringBackOurGirls social media movement and intervention from the Obama Administration.⁷⁵ In May 2017, negotiations led by Switzerland and the International Committee for the Red Cross resulted in the release of eighty-two school girls; however, hundreds of girls—including the remaining Chibok girls and over five hundred girls kidnapped from Damask, Borno—remained in Boko Haram’s custody as of late 2017.⁷⁶

By early 2014, Boko Haram expanded from terrorist attacks and began to take territory in Northern Nigeria. By early 2015, Boko Haram held control over roughly 20,000 square

⁷⁰ See INDEPENDENT ADVISORY GROUP ON COUNTRY INFORMATION, HOME OFFICE, COUNTRY INFORMATION AND GUIDANCE NIGERIA: FEAR OF BOKO HARAM, 2015-6, at 5, 10 (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/566195/CIG_NIG_Fear_of_Boko_Haram.pdf [<https://perma.cc/VG6Q-22EW>]. “Books are banned” would be a literal translation of Boko Haram. Boko means “book” in the Hausa language. David Blair, *Boko Haram Is Now a Mini-Islamic State, with Its Own Territory*, TELEGRAPH (Jan. 10 2015, 6:55 PM GMT), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/11337722/Boko-Haram-is-now-a-mini-Islamic-State-with-its-own-territory.html> [<https://perma.cc/JT6K-XGLR>].

⁷¹ LAUREN PLOCH BLANCHARD, CONG. RESEARCH SERV., R43558, NIGERIA’S BOKO HARAM: FREQUENTLY ASKED QUESTIONS 3 (2016).

⁷² *Id.* at 5.

⁷³ *Id.*

⁷⁴ See e.g., *Nigeria Attack: Students Shot Dead As They Slept*, BBC NEWS (Sept. 29, 2013), <http://www.bbc.com/news/world-africa-24322683> [<https://perma.cc/7MR6-G5PK>].

⁷⁵ See BLANCHARD *supra* note 71, at 7–8; see also HELON HABILA, THE CHIBOK GIRLS: THE BOKO HARAM KIDNAPPINGS AND ISLAMIST MILITANCY IN NIGERIA 96 (Columbia Glob. Reports 2016).

⁷⁶ *World Report 2018: Nigeria*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2018/country-chapters/nigeria> [<https://perma.cc/CTU4-6V2Y>].

miles, “an area the size of Belgium,” and over 1.7 million people.⁷⁷ By March 2015, Boko Haram’s self-proclaimed leader, Abubakr Shekau, pledged his fealty to ISIS and declared his territory an Islamic state, under the ISIS caliphate.⁷⁸ Boko Haram largely funds itself through theft, extortion, and slave raids, including the Chibok girls, whom Shekau admits were sold into slavery.⁷⁹ Boko Haram is a criminal enterprise as well as a jihadist terror group—it engages in widespread terror attacks in Nigeria, and across the border to neighboring states, utilizing improvised explosive devices and suicide bombers, including women and children.⁸⁰ Boko Haram has engaged in attacks within Nigeria and across the Nigerian border in Cameroon, Chad, and Niger.⁸¹ Forty-one percent of Boko Haram-related attacks in 2014 were carried out by female suicide bombers, many of whom were coerced, and unsuspecting children under the age of eighteen.⁸²

Shekau controls Boko Haram through his leadership of a shura council, a consultative body of senior Boko Haram officials.⁸³ In March 2015, Shekau pledged his allegiance to ISIS leader Abu Bakr al-Baghdadi and that support is seen as part of Boko Haram’s motivation to take territory and declare itself part of the ISIS caliphate.⁸⁴ Boko Haram’s pledge of allegiance to ISIS was seen as a precursor to Boko Haram’s establishment of sharia courts and a system of governance modeled after ISIS’ system in Iraq and Syria.⁸⁵ In 2017, Shekau stated his intention to implement sharia law in Nigeria, Benin, Chad, Cameroon, Niger and Mali, establishing a West African caliphate.⁸⁶

Boko Haram, like ISIS, violates the rule of law and human rights, and in many ways Boko Haram’s values are antithetical to

⁷⁷ See Blair, *supra* note 70 (“Boko Haram controls about 20,000 square miles of territory—an area the size of Belgium.”); see also Intel Brief, *supra* note 28.

⁷⁸ See Sarah Almukhtar, *How Boko Haram Courted and Joined the Islamic State*, N.Y. TIMES (June 10, 2015), <https://www.nytimes.com/interactive/2015/06/11/world/africa/boko-haram-isis-propaganda-video-nigeria.html> [<https://perma.cc/VD8Q-XZFT>]; BLANCHARD, *supra* note 71, at 6.

⁷⁹ BLANCHARD, *supra* note 71, at 7–8, 17.

⁸⁰ *Id.* at 3–4.

⁸¹ Cristina Silva, *Boko Haram Vows to Impose Sharia Law in Nigeria, Benin, Cameroon, Chad, Niger and Mali*, NEWSWEEK (Mar. 20, 2017, 12:39 PM), <http://www.newsweek.com/boko-haram-vows-impose-sharia-law-nigeria-benin-cameroon-chad-niger-and-571054> [<https://perma.cc/A28X-6G5X>].

⁸² BLANCHARD, *supra* note 71, at 9.

⁸³ BLANCHARD, *supra* note 71, at 4.

⁸⁴ Nima Elbagir, Paul Cruickshank, & Mohammed Tawfeeq, *Boko Haram Purportedly Pledges Allegiance to ISIS*, CNN (Mar. 9, 2015, 10:39 AM ET), <http://www.cnn.com/2015/03/07/africa/nigeria-boko-haram-isis/> [<https://perma.cc/P947-PZ8Y>].

⁸⁵ See March & Revkin, *supra* note 51.

⁸⁶ Silva, *supra* note 81.

modern understandings of the rule of law and human rights. Modern conceptions of the rule of law and human rights have evolved from global experiences of genocide, war, deprivation, and wide scale oppression.⁸⁷ However, the conception of governance and law that Boko Haram and ISIS force on their subjects is a strict (and widely disputed) conception of Islamic law that enables violations of human rights that the global community has uniformly denounced. For example, like ISIS, Boko Haram believes that the kidnapping and sexual exploitation of women and girls is permitted under their interpretation of Islamic law, along with the slaughter of women, children, and civilians that do not subscribe to their belief systems, which include people of other religious backgrounds and Muslim alike.⁸⁸ Despite the widespread attention that followed the Chibok girls' kidnapping, Boko Haram's targeting of children has continued. UNICEF, the UN Children's Fund, reported that in 2017 "[eighty-three] children were used as suicide bombers [by Boko Haram]; [fifty-five] girls and [twenty-seven] boys, one was a baby strapped to a girl."⁸⁹

According to Human Rights Watch, "[o]ver 180 civilians have been killed in suicide bomb attacks since late 2016, mostly in Maiduguri, the Borno state capital."⁹⁰ During 2017, Boko Haram engaged in suicide attacks at universities, markets and displacement camps, killing at least three hundred civilians and

⁸⁷ For example, the modern United Nations and human rights system arose out of the global community's response to World War II Nazi war abuses and its extermination campaign against the Jewish community. Human rights leaders and advocates from around the world used the creation of the United Nations as an opportunity to define a human rights system that would limit sovereign states' ability to engage in wide-scale oppression of their citizens. See, e.g., Darin E.W. Johnson, *How U.S. Civil Rights Leaders' Human Rights Agenda Shaped the United Nations*, 1 HOW. HUM. & C.R. L. REV. 33, 34 (2017).

⁸⁸ See AMNESTY INTERNATIONAL, OUR JOB IS TO SHOOT, SLAUGHTER AND KILL: BOKO HARAM'S REIGN OF TERROR IN NORTH-EAST NIGERIA 5 (2015) <https://www.amnesty.org/en/documents/afr44/1360/2015/en/> [<https://perma.cc/FP9V-Q5XK>] ("Some specific individuals or categories of civilians were deliberately targeted. Boko Haram fighters killed politicians, civil servants, teachers, health workers and traditional leaders because of their relationship with secular authority. Boko Haram called them 'unbelievers.' Christians living in the north-east were included in this category, but so were Islamic religious figures, from the leaders of sects to local Imams, if they publicly opposed Boko Haram or failed to follow the group's teachings. At times, Boko Haram gave such individuals the option of converting, whether Christian or Muslim, instead of being killed."); see also HUMAN RIGHTS WATCH, "THOSE TERRIBLE WEEKS IN THEIR CAMP": BOKO HARAM VIOLENCE AGAINST WOMEN AND GIRLS IN NORTHEAST NIGERIA 2 (2014), http://features.hrw.org/features/HRW_2014_report/Those_Terrible_Weeks_in_Their_Camp/assets/nigeria1014web.pdf [<https://perma.cc/XEY5-DEX2>] ("The women and girls told Human Rights Watch that for refusing to convert to Islam, they and many others they saw in the camps were subjected to physical and psychological abuse; forced labor; forced participation in military operations, including carrying ammunition or luring men into ambush; forced marriage to their captors; and sexual abuse, including rape.").

⁸⁹ *World Report 2018: Nigeria*, *supra* note 76.

⁹⁰ *Id.*

bringing the total eight-year civilian death toll to over twenty thousand.⁹¹ Boko Haram has also targeted Christians, beheading Christian men who refused to convert to Islam and forcing their wives to convert and marry Boko Haram soldiers.⁹² These practices are clear violations of international human rights law, and as discussed in Part VII, ISIS and Boko Haram must be held accountable for them.

C. *Human Rights Law and Terror Non-States*

This section will discuss the body of law known as international human rights law and the ways in which terror non-states systematically violate human rights. Human rights law as a body captures a broad range of civil and political rights, such as the right to trial, freedom of expression, and freedom of religion, as well as a number of economic, social and cultural rights, such as the right to work, right to education, and right to health.⁹³ The enforcement of human rights law against non-state actors such as ISIS exposes a gap in the current framework. International human rights law evolved as a system of law that codifies and protects the rights of individuals against states. Sovereign states signal their willingness to ensure that human rights are protected through their ratification of the United Nations Charter—a binding treaty that calls upon states to “respect[]” and “promot[e]” human rights.⁹⁴ Sovereign states also signal their commitment to protect human rights through their ratification of human rights treaties, such as the International Covenant on Civil and Political Rights, the UN Convention Against Torture, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child, which have near universal ratification.⁹⁵ Parties to these treaties commit to codify

⁹¹ *Id.*

⁹² Jack Moore, *Nigeria: Boko Haram Declares Sharia Law, Beheads Christian Men and Forces Women into Islam in Gwoza*, INT’L BUS. TIMES (Aug. 29, 2014, 16:51 BST), <http://www.ibtimes.co.uk/nigeria-boko-haram-declares-sharia-law-beheads-christian-men-forces-women-into-islam-gwoza-1463185> [<https://perma.cc/934A-YJHL>].

⁹³ See G.A. Res. 2200A, *supra* note 68, at arts. 9 ¶ 3, 18 ¶ 1, 19 ¶ 2; G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, arts. 6 ¶ 1, 12 ¶ 1, 13 ¶ 1 (Dec. 16, 1966).

⁹⁴ U.N. Charter, arts. 1, ¶ 3, 55; van der Vyver, *supra* note 37, at 550.

⁹⁵ For a listing of all human rights treaties’ ratification status, see *Status of Ratification Interactive-Dashboard*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <http://indicators.ohchr.org/> [<https://perma.cc/D25C-CW9J>].

the rights in their domestic law, enforce the rights, and provide a judicial remedy if the rights are violated.⁹⁶

Sovereign states are responsible for ensuring that international human rights laws are protected within their territory. Their ability to enforce these rights, however, is frustrated in circumstances where terror non-states take their territory. Iraq and Syria are both parties to several human rights treaties, including the International Covenant on Civil and Political Rights, the Convention Against Torture, the Convention on the Elimination of Discrimination Against Women, and the Convention on the Rights of the Child—however, state sovereigns are unable to enforce these treaty obligations where ISIS has taken up control.⁹⁷ Human rights belong to the people, and successor governments are obligated to protect those human rights even if the treaties were adopted by a predecessor regime.⁹⁸ Terror non-states present a unique challenge to the enforcement of human rights law because they are not legitimate successor governments and therefore do not have obligations to enforce treaty law, but they have asserted the authority to govern thousands of citizens falling under their control.⁹⁹ Further, a sovereign state's loss of territory to a terror non-state renders impracticable its ability to enforce the protection of human rights.

⁹⁶ See, e.g., G.A. Res 2200A, *supra* note 68, at art. 2 (pursuant to which State-Parties commit “to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized” in the treaty; “to ensure . . . an effective remedy” for violations before “competent judicial, administrative, or legislative authorities”; and “[t]o ensure that the competent authorities shall enforce such remedies”).

⁹⁷ It should be noted that even before ISIS took control of territory in Syria, the Assad regime was guilty of massive human rights violations against the Syrian people, which increased with his attacks against the peaceful Arab spring protesters and the Syrian opposition movement. See VIOLATIONS DOCUMENTATION CTR. IN SYRIA, *supra* note 65, at 1–3. For the full list of human rights treaties to which Iraq and Syria are party, see U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> [<https://perma.cc/D933-MJH5>].

⁹⁸ See, e.g., U.N. Human Rights Comm., General Comment on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights, [para. 4], U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997) [hereinafter U.N. Human Rights Comm. General Comment], https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.8%2FRev.1&Lang=en [<https://perma.cc/P3V7-JB9K>] (“The rights enshrined in the Covenant belong to the people living in the territory of the State Party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.”).

⁹⁹ van der Vyver, *supra* note 37, at 553.

Terror non-states undoubtedly are subject to customary international law and cannot violate the *jus cogens* (universal) human rights of their subjects such as the freedom from slavery, torture, and genocide.¹⁰⁰ Given the wide-ranging nature of terror non-states' governance, however, I would posit that the international community adopt a norm that terror non-states that take territory and claim the authority to govern have a legal obligation to observe *jus cogens* human rights and all treaty-based human rights to which citizens are entitled—and that terror non-state officials will be held criminally accountable for the violation of those rights.¹⁰¹ Further, I recommend that the UN Security Council pass a resolution determining that all non-state actors, such as ISIS and Boko Haram, that take territorial control from sovereign states are obligated to protect the human rights—treaty-based and customary—of all subject citizens during the period of their control.¹⁰² The enforcement of international human rights law against terror non-states and accountability are discussed in Part VII. Terror non-states can also be held to account by military force. The next Part discusses the justifications under international law for military intervention against terror non-states.

IV. INTERVENING AGAINST TERROR NON-STATES

The legal justification for an international military response against terror non-states is complicated by their status

¹⁰⁰ *Jus Cogens* is “a peremptory norm of general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344. “[P]eremptory norms that are . . . recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.” *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. INT’L L. COMM’N 85, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*].

¹⁰¹ Discussed *infra* Part VII.

¹⁰² Some members of the NGO Human Rights community agree with this proposition. See Matt Edbrooke, *Enforcing a ‘Universal’ Declaration: UN Efforts to Hold Non-State Actors Accountable for Human Rights*, OXFORD HUMAN RIGHTS HUB (July 20, 2015), <http://ohrh.law.ox.ac.uk/enforcing-a-universal-declaration-un-efforts-to-hold-non-state-actors-accountable-for-human-rights/> [<https://perma.cc/59EP-T2ZD>] (“[T]he state-based manner in which human rights are protected in the UN system is found wanting in the modern world. Whilst focusing on the state allows one to show which actor is responsible at the UN level for any violation of human rights, it often fails to directly hold the actor committing the human rights violation to account, when the applicable state cannot itself do so. This is particularly problematic when the non-state actor meets a standard of ‘effective control’ over citizens or territory, making it the *de facto* guarantor of human rights. The absence of domestic or international human rights mechanisms to hold *de facto* human rights guarantors to account presents an enforcement gap in the UN human rights system that requires addressing.”).

as non-state actors. The law governing armed military intervention, known as *jus ad bellum*, or the “right to war,” is a subset of international law. The modern framework for *jus ad bellum* is laid out in the Charter of the United Nations. The Charter provides that a state may use force against another state in self-defense or when authorized by the Security Council in response to a threat to international peace and security.¹⁰³ However, Article 2(4) of the UN Charter also provides that a member state’s territory is inviolable and shall not be infringed unless authorized by the Security Council¹⁰⁴ or in self-defense.¹⁰⁵ The collective security model reflected in the UN Charter was devised to deter state to state aggression of the kind experienced in the two world wars at the start of the twentieth century.¹⁰⁶ The state-centric framework of the UN Charter, however, does not explicitly address the particularities of a foreign state’s military response to attacks from a non-state actor.

Illustrations are instructive in outlining the intricacies of territorial sovereignty, self-defense, state attribution, and intervention against non-state actors. In a traditional state-state conflict, the territorial sovereignty of State A gives way to the right to self-defense of State B if State B can justify its actions based on the conduct of State A. However, the calculus changes if Non-State Actor C in State A attacks State B, and State A objects to State B’s military response within its territory. State B does not necessarily have the right to contravene the territory of State A due to the actions of Non-State Actor C. State A can invite State B to militarily intervene against Non State Actor C, thus consenting to State B’s actions and avoiding a violation of its territorial sovereignty (this is the Iraq/ISIL/U.S. scenario discussed below).¹⁰⁷ But if State A does not consent to State B’s intervention against Non-State Actor C, the calculation becomes more complicated. If State B can show that State A exercises “effective control”¹⁰⁸ over

¹⁰³ See U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.”). Article 42 states that the Security Council “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” U.N. Charter art. 42; see also van der Vyver, *supra* note 37, at 545.

¹⁰⁴ U.N. Charter arts. 2, ¶ 4, 42.

¹⁰⁵ *Id.* at art. 51.

¹⁰⁶ *Id.* at pmb. (“[T]o save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”); see also Peace and Security, UNITED NATIONS, <http://www.un.org/en/sections/issues-depth/peace-and-security> [<https://perma.cc/9YCT-LMLP>].

¹⁰⁷ van der Vyver, *supra* note 37, at 553–54.

¹⁰⁸ The “effective control” test was developed in the International Court of Justice’s *Nicaragua* case to ascertain when a state can be held responsible for the actions of a non-state

the actions of Non-State Actor C, then State B can act in self-defense against Non-State Actor C and State A without violating international law. This is analogous to the scenario that unfolded after 9/11. The United States intervened militarily in self-defense against Al Qaeda and set out to remove Afghanistan's ruling Taliban regime, which, in the view of the United States, bore responsibility for Al Qaeda's actions.¹⁰⁹ In such a scenario, the conduct of the non-state actor is attributed to the host state and a foreign state may act in self-defense against both.¹¹⁰

Terror non-states such as ISIS and Boko Haram, however, seek the overthrow of their host state governments and it would be illogical to attribute their conduct to the regimes with which they are at war. The International Court of Justice (ICJ) has ruled that the use of force against a state for the non-attributable conduct of a non-state actor within its territory is not authorized under international law.¹¹¹ In the *Armed Activities Case on the Territory of Congo*, the ICJ determined that Uganda was not legally justified in taking military action in the Democratic Republic of the Congo's territory against insurgents whose actions were not attributable to the Democratic Republic of Congo's government.¹¹² In the absence of host state consent, an intervening state must formulate a legal justification for the violation of the host state's territorial

actor. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. REP. 14, ¶ 115 (June 27). (The United States was determined not to have effective control over Nicaraguan armed groups to which it supplied weapons because it did not control their conduct.); see also Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *supra* note 100, at art. 8 cmt. 1; van der Vyver, *supra* note 37, at 553–54.

¹⁰⁹ See *Authorization for Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224–25 (2001).

¹¹⁰ An analogous scenario would arise when a state contravenes another state's territory to act in self-defense against a non-state actor that it is harboring, such as the U.S. military raid against Osama Bin Laden in Pakistan. There is significant debate as to whether the government of Pakistan knowingly harbored Bin Laden, but it is clear from the diplomatic fallout after the raid that Pakistan did not consent to the raid, as it was unaware that it had taken place until after it was complete. The U.S. government maintains that its brief intrusion into Pakistan's territory was authorized by its right to self-defense and to militarily respond against the master mind behind 9/11. It is difficult to argue that other states would not behave similarly under similar circumstances. Husain Haqqani, *What Pakistan Knew About the Bin Laden Raid*, FOREIGN POL'Y, (May 13, 2015; 2:25 PM) <http://foreignpolicy.com/2015/05/13/what-pakistan-knew-about-the-bin-laden-raid-seymour-hersh/> [https://perma.cc/JN9S-LQ35].

¹¹¹ Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT'L L. 15, 36–37 (2016) (noting that “[t]he rationale behind the attribution requirement is that a state cannot be held responsible for the acts of all whose activities originate in its territory” and citing the ICJ rulings in the *Oil Platforms*, *Nicaragua*, *Wall Advisory Opinion*, and *Congo* cases).

¹¹² *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶¶ 141–47, 165 (Dec. 19, 2005); see also Jörg Kammerhofer, *The Armed Activities Case and Non-State Actors in Self-Defence Law*, 20 LEIDEN J. INT'L L. 89, 96 (2007).

sovereignty in order to attack a non-state actor operating within the host state.¹¹³ This scenario unfolded when the United States sought to intervene militarily against ISIS in the territory of Syria over the Syrian government's objection.¹¹⁴

When ISIS overtook Mosul, Iraq's second largest city in 2014, it secured hundreds of millions of dollars from banks, as well as tanks and military equipment (much of it U.S.-issued), from the Iraqi army which left Mosul without a fight.¹¹⁵ ISIS used its new found wealth and equipment to take territory in Iraq and Syria.¹¹⁶ In the midst of the ISIS rampage through Iraq, several humanitarian crises unfolded. One of these crises was ISIS' targeted killing of Yazidi Christians in Northern Iraq, where ISIS soldiers killed thousands of Yazidi men and sold thousands of Yazidi women and children into sexual slavery.¹¹⁷ ISIS trapped 30,000 Yazidis on Mount Sinjar with no point of egress, and no capacity to obtain additional food or water.¹¹⁸ As their supplies dwindled, President Obama ordered airstrikes against ISIS to prevent a humanitarian disaster, stating that "[w]hen we have the unique capacity to avert a massacre, the United States cannot turn a blind eye."¹¹⁹ The United States undertook this airstrike for humanitarian purposes without Iraqi government invitation.¹²⁰ Several days after the airstrike, however, Iraqi Prime Minister Maliki left office and the new Prime Minister Haider Al-Abadi invited the United States to conduct an extensive military airstrike campaign against ISIS

¹¹³ See van der Vyver, *supra* note 37, at 557–58.

¹¹⁴ See *id.*; see also discussion *infra* Part V.

¹¹⁵ Martin Chulov, *ISIS Insurgents Seize Control of Iraqi City of Mosul*, GUARDIAN (June 10, 2014, 15:51 EDT), <http://www.theguardian.com/world/2014/jun/10/iraq-sunni-insurgents-islamic-militants-seize-control-mosul>. [<https://perma.cc/Q2QE-RJPU>]; Agence France-Presse, *ISIS Captured 2,300 Humvee Armoured Vehicles from Iraq Forces*, GUARDIAN (May 31, 2015), <https://www.theguardian.com/world/2015/jun/01/isis-captured-2300-humvee-armoured-vehicles-from-iraqi-forces-in-mosul> [<https://perma.cc/D648-2EMZ>]; Fantz, *supra* note 40.

¹¹⁶ See Chulov, *supra* note 115.

¹¹⁷ See Steve Hopkins, *Full Horror of the Yazidis Who Didn't Escape Mount Sinjar: UN Confirms 5,000 Men Were Executed and 7,000 Women Are Now Kept as Sex Slaves*, DAILY MAIL (Oct. 14, 2014, 7:09 PM EDT), <http://www.dailymail.co.uk/news/article-2792552/full-horror-yazidis-didn-t-escape-mount-sinjar-confirms-5-000-men-executed-7-000-women-keptsex-slaves.html> [<https://perma.cc/67VE-DU6U>].

¹¹⁸ Helene Cooper & Michael D. Shear, *Militants Siege on Mountain in Iraq is Over, Pentagon Says*, N.Y. TIMES (Aug. 13, 2014), http://www.nytimes.com/2014/08/14/world/middleeast/iraq-yazidi-refugees.html?_r=0 [<https://perma.cc/MD94-97L7>]; see also Scharf, *supra* note 111, at 22.

¹¹⁹ Helene Cooper et al., *Obama Allows Limited Airstrikes on ISIS*, N.Y. TIMES (Aug. 7, 2014), <http://www.nytimes.com/2014/08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html> [<https://perma.cc/NSL8-CDRE>].

¹²⁰ See Scharf, *supra* note 111, at 22.

in Iraq, called operation *Inherent Resolve*.¹²¹ The campaign began in August 2014 and France and Britain joined the campaign within a matter of weeks.¹²²

While the legal justification for the U.S. military campaign against ISIS in Iraq was consent-based, no such consent existed in Syria. The Assad regime, which had engaged in a civil war against its citizens since 2011, expressly opposed any U.S. military intervention, even against ISIS and not the Syrian government, as a violation of its sovereignty.¹²³ U.S. efforts to obtain a Security Council resolution to enable intervention in Syria had been thwarted by Russia, a patron of Syria for years.¹²⁴ By 2014, ISIS had taken advantage of the Syrian civil war and the security vacuum to expand its territory in Syria.¹²⁵ Without a Security Council Resolution or a Syrian invitation, U.S. military action against ISIS required an alternate justification. A self-defense theory or humanitarian intervention appeared to be the only available options. The United States began airstrikes against ISIS in Syria under a theory of self-defense on behalf of Iraq.¹²⁶ Because the air campaign in Iraq had been undertaken to defend the Iraqi government against ISIS, the United States argued that it would need to pursue ISIS into its new stronghold in Syria in order to defend the Iraqi people. The September 23, 2014 letter from Samantha Power, United States Ambassador to the United Nations, laid out this legal justification for action:

Iraq has made clear that it is facing a serious threat of continuing attacks from ISIL coming out of safe havens in Syria. These safe

¹²¹ See CLAIRE MILLS ET AL., *ISIS/DAESH: THE MILITARY RESPONSE IN IRAQ AND SYRIA 6* (HC Library, Briefing Paper No. 06995 2015), <http://club.bruxelles2.eu/wp-content/uploads/2015/12/OperMilitDaechIrakSyrieRap@UK151203.pdf> [<https://perma.cc/DY5P-NWAK>]; see also Scharf, *supra* note 111, at 22.

¹²² See BEN SMITH, *ISIS AND THE SECTARIAN CONFLICT IN THE MIDDLE EAST 51, 52* HC Library, Research Paper 15/16, 2015), <http://researchbriefings.files.parliament.uk/documents/RP15-16/RP15-16.pdf> [<https://perma.cc/8DKW-QR2Z>]; see also van der Vyver, *supra* note 37, at 554; Scharf, *supra* note 111, at 22.

¹²³ See Ian Black & Dan Roberts, *ISIS Air Strikes: Obama's Plan Condemned by Syria, Russia and Iran*, *GUARDIAN* (Sept. 12, 2014, 2:42 PM EDT), <https://www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan> [<https://perma.cc/22Y9-DYJ4>]; Scharf, *supra* note 111, at 17; *Syrian Foreign Minister Warns Against Airstrikes*, *ASSOCIATED PRESS* (Aug. 25, 2014), <https://www.thenational.ae/world/syrian-foreign-minister-warns-against-airstrikes-1.473417> [<https://perma.cc/3E6S-QGWE>].

¹²⁴ See Colum Lynch, *Why Putin Is So Committed to Keeping Assad in Power*, *FOREIGN POL'Y* (Oct. 7, 2015, 2:34 PM), <https://foreignpolicy.com/2015/10/07/putins-russia-is-wedded-to-bashar-al-assad-syria-moscow/> [<https://perma.cc/QFE6-HZZD>]; see also Alberto Alvarez-Jimenez, *From Al-Qaida in 2001 to ISIL in 2015: The Security Council's Decisions on Terrorism and Their Impact on the Right to Self-Defense Against Autonomous Non-State Actors*, 26 *MINN. J. INT'L L.* 345, 402 (2017).

¹²⁵ GERGES, *supra* note 27, at 175–77.

¹²⁶ See *infra* note 127 and accompanying text.

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.

ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 if [sic] the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders.¹²⁷

This self-defense theory enabled the United States to engage in a military campaign against a non-state actor, in a state not attributed with the non-state actor's conduct, over the express opposition of that state to violation of its territory. Michael Scharf has referred to the United States' airstrikes in Syria as the final of many state actions, including the U.S. response to the September 11, 2001 terrorist attacks and the international community's response to ISIS' October 2015 bombing of a Russian airliner and November 2015 attack on a Paris stadium, that crystallized the unable or unwilling standard into a new rule.¹²⁸ Scharf asserts that these state actions have created a new rule of customary international law where a state no longer has to effectively control the conduct of a non-state actor on its territory before legally becoming subject to an unconsented military intervention.¹²⁹ Instead, the state merely has to be "unable or unwilling" to control the behavior of the non-state actor.¹³⁰ The Security Council effectively endorsed this rule with its passage of Resolution 2249, which declared

¹²⁷ Marty Lederman, *The War Powers Resolution and Article 51 Letters Concerning Use of Force in Syria Against ISIL and the Khorasan Group*, JUST SECURITY (Sept. 23, 2014), <https://www.justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group/> [<https://perma.cc/D6KA-58P2>] (referring to Samantha Powers letter to Secretary General of the U.N. Ban Ki-Moon); see also van der Vyver, *supra* note 37, at 558.

¹²⁸ See Scharf, *supra* note 111, at 64–66.

¹²⁹ *Id.* at 66–67.

¹³⁰ *Id.* at 47–48, 64–66 (discussing how the Obama doctrine adopted the "unable and unwilling" formulation of the Bush Administration to justify its drone targeting program); see also Hakimi, *supra* note 41, at 8.

ISIS “a global and unprecedented threat to international peace and security” and called upon states to take “all necessary measures” to “eradicate the safe haven” of ISIS in Syria.¹³¹ The resolution did not explicitly authorize military action under Chapter VII of the UN Charter against ISIS but the French Security Council Representative who authored the resolution explained that collective action could now be based on the self-defense provision of the UN Charter Article 51, which provides that “[n]othing in the . . . Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”¹³²

Some scholars have argued that a new standard for interpreting self-defense under Article 51 of the UN Charter is emerging, where states that are “unwilling or unable” to prevent non state-actors in their territory from aggressing against other states, are subject to self-defensive intervention from the states that have been attacked.¹³³ A TWAIL-inspired critique levied against this theory of self-defense is that the new standard is inconsistent with historic understandings of self-defense under Article 51 and reflects American and Western attempts to flout the constraints of Article 51 at the expense of the sovereignty of states of the “Global South.”¹³⁴ Even if this critique is accurate that this self-defense theory is more frequently used by powerful states against weak states, from a liberation and protection perspective, the more important consideration is whether this theory of self-defense is necessary to protect vulnerable populations. In the case of Syria, the answer is undoubtedly yes; the Syrian government under Asaad was loath to allow any foreign incursion into its territory—even to defeat one of its enemies. Nonetheless, an oppressive dictator such as Asaad, who is both unwilling and unable to prevent ISIS attacks on foreign states, should not be able to prevent strikes by those states in self-defense against ISIS, particularly if those strikes

¹³¹ S.C. Res. 2249, *supra* note 41, at ¶¶ 1, 5.

¹³² See Press Release, Security Council, Security Council “Unequivocally” Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses “Unprecedented” Threat, U.N. Press Release SC/12132, (Nov. 20, 2015) [hereinafter U.N. Press Release SC/12132], <http://www.un.org/press/en/2015/sc12132.doc.htm> [<https://perma.cc/9DB8-TP46>]; see also van der Vyver, *supra* note 37, at 545 (discussing art. 51 of the U.N. Charter).

¹³³ See Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483, 486 (2012).

¹³⁴ See Ntina Tzouvala, *TWAIL and the “Unwilling or Unable” Doctrine: Continuities and Ruptures*, 109 AM. J. INT’L L. UNBOUND 266, 266 (2016).

are conducted in a manner that liberates rather than worsens the situation of vulnerable populations.¹³⁵

The complex implications of a legal norm of self-defense that would allow external states to take military action against terror non-states over the objection of the host state can be seen in the case of Boko Haram.¹³⁶ In addition to engaging in terror attacks against the Nigerian people, Boko Haram has also staged terror attacks against Nigerian border-states in the Lake Chad region, including Chad, Cameroon, and Niger. Cameroon has faced the most attacks—more than eighty suicide bombings in 2015, resulting in at least 1,200 deaths.¹³⁷ In 2014, the African Union (AU), a regional organization consisting of fifty-five African States,¹³⁸ authorized a Multinational Joint Task Force (MNJTF) under the umbrella of the Lake Chad Basin Commission (Nigeria, Chad, Cameroon, and Niger) along with Benin, to confront Boko Haram.¹³⁹ The AU Peace and Security Council authorized the MNJTF to “conduct military operations to prevent the expansion of Boko Haram and other terrorist groups, and to eliminate their presence.”¹⁴⁰ Chapter VIII of the UN Charter provides that “[t]he Security Council shall, where appropriate, utilize . . . regional arrangements or agencies for enforcement action under its authority,” but that “no enforcement action shall be taken . . . by regional agencies without the authorization of the Security Council.”¹⁴¹ The Charter permits regional arrangements for “matters relating to the maintenance of international peace and security as are appropriate for regional action,” but requires that any action of a regional agency be “consistent with the Purposes and Principles of the United Nations.”¹⁴² In short, although regional agencies may

¹³⁵ Airstrikes result in civilian casualties. *All Feasible Precautions? Civilian Casualties in the Anti-ISIS Coalition Airstrikes in Syria*, HUM. RTS. WATCH (Sept. 24, 2017), <https://www.hrw.org/report/2017/09/24/all-feasible-precautions/civilian-casualties-anti-isis-coalition-airstrikes-syria> [<https://perma.cc/ZD69-BCXP>]. Any air campaign that aims to liberate vulnerable populations must be carried out in a manner that minimizes such casualties.

¹³⁶ See Alvarez-Jimenez, *supra* note 124, at 415–16.

¹³⁷ See BLANCHARD, *supra* note 71, at 11.

¹³⁸ *Member State Profiles*, AFRICAN UNION <https://au.int/memberstates> [<https://perma.cc/5PNL-LFCF>].

¹³⁹ See Press Release, African Union, Peace and Security Council, Communiqué of the 484th Meeting at the Level of Head of State and Government (Jan. 29, 2015), <http://www.peaceau.org/en/article/communique-of-the-484th-meeting-of-the-psc-on-the-boko-haram-terrorist-group> [<https://perma.cc/BTN2-GHA9>]; see also Stephen Kingah & Eva Seiwert, *The Contested Emerging International Norm and Practice of A Responsibility to Protect: Where Are Regional Organizations?*, 42 N.C. J. INT'L L. 115, 139 (2016).

¹⁴⁰ See Press Release, African Union, Peace and Security Council, *supra* note 139; see also Kingah & Seiwert, *supra* note 139, at 139.

¹⁴¹ U.N. Charter art. 53, ¶ 1.

¹⁴² *Id.* at art. 52, ¶ 1.

engage in military intervention, they must do so only with the authorization of the UN Security Council or in self-defense, as laid out in the UN Charter.

Since the UN Security Council had not authorized the AU MNJTF to use force at the time of its establishment, foreign states participating in the MNJTF could only take military action in Nigeria's territory with Nigeria's consent or in self-defense. Many of the members of the Task Force had previously been involved in border disputes with Nigeria, and Nigeria was reluctant to allow foreign troops from these states to combat Boko Haram within Nigerian territory.¹⁴³ Chadian forces had entered Nigeria's territory without consent several times to battle Boko Haram in the months prior to the establishment of the MNJTF.¹⁴⁴ Although the Task Force was headquartered in Chad under the leadership of a Nigerian military commander, Nigeria remained reluctant to allow foreign military intervention on its territory.¹⁴⁵ Foreign military operations currently occur under a range of bilateral agreements in which the Nigerian government has consented to the presence of foreign troops and seeks to maintain control over them through its leadership of the MNJTF.¹⁴⁶ Should Nigeria revoke its consent to the foreign forces because of border or other concerns, a self-defense justification would be the only legally authorized option for Chad, Cameroon, and Niger to engage in defensive action. However, if Nigeria is taking effective military action against Boko Haram, foreign military intervention would be difficult to legitimize under the "unwilling or unable" standard reflected in UN Security Council Resolution 2249.¹⁴⁷

The Nigerian military response shows that it is willing and able to respond to Boko Haram's attacks in the country. Since Boko Haram's acts are not attributable to the government of Nigeria, an "attribution" justification of self-defense is off the table. If Nigeria's military campaign against Boko Haram does not prevent Boko Haram from engaging in attacks in neighboring countries under the new rule developed for ISIS, neighboring states may be justified in launching a limited and targeted campaign against Boko Haram, even over the Nigerian

¹⁴³ See Brandt Chu, *The Forgotten Chapter: The Legality of Peacekeeping, Peace Enforcement, and Military Intervention Under Chapter VIII of the UN Charter*, 20 GONZ. J. INT'L L. 1, 12 (2016); see also Lynn L. Taylor, *Boko Haram Terrorism: Reaching Across International Boundaries to Aid Nigeria in the Humanitarian Crisis*, 21 ILSA J. INT'L & COMP. L. 1, 16 (2014).

¹⁴⁴ Chu, *supra* note 143, at 12.

¹⁴⁵ See Kingah & Seiwert, *supra* note 139, at 139.

¹⁴⁶ Chu, *supra* note 143, at 13.

¹⁴⁷ See S.C. Res. 2249, *supra* note 41; see also discussion *supra* notes 130–134 and accompanying text.

government's objection. Such an approach would require a prior armed attack against the nation by Boko Haram and notification of that armed attack to the United Nations.¹⁴⁸ The campaign would be legitimated if the state is acting solely to protect vulnerable populations in their own territories negatively impacted by Boko Haram's conduct, rather than based on some other motive such as territorial incursion.¹⁴⁹ The international community may be loath to endorse such an approach, since it would authorize incursions regardless of the sovereign state's wishes. Ultimately, the international community's recognition of a right to intervene against a non-state is likely to include multiple considerations, including the scope of the attack against the victim state, whether the sovereign is explicitly or implicitly creating an environment that allows the terror non-state to operate, and whether the sovereign government is recognized as legitimate. Once a legal justification that authorizes intervention has been proffered, a new legal framework governs the conduct of the conflict.¹⁵⁰

V. BATTLING TERROR NON-STATES UNDER INTERNATIONAL LAW

When terror non-states become involved in armed conflict, complex questions arise regarding the applicable legal framework governing the conduct of hostilities between parties. *Jus in bello*, also known as international humanitarian law, governs the means and methods of warfare between parties.¹⁵¹ International humanitarian law is most significantly reflected in the 1949 Geneva Conventions, although other treaties and customary international law contribute to the body of law.¹⁵²

¹⁴⁸ U.N. Charter, art. 51, ¶ 1; *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. REP. 14, ¶ 195 (June 27, 1986).

¹⁴⁹ Given the history of border disputes between Nigeria and its neighbors, a regional military strategy, such as a MNJTF, is the better option and mitigates against cross-state military interventions that devolve into pronounced state-state conflicts. Nigeria's longstanding border disputes with Chad and Cameroon in the Lake Chad basin region where Boko Haram operates delayed this regional cooperation. *See* HENRIK ANGERBRANDT, NORDIC AFRICA INST., POL'Y NOTE NO. 3:2017, NIGERIA AND THE LAKE CHAD REGION BEYOND BOKO HARAM 5 (June 2017).

¹⁵⁰ *See* discussion *infra* Part V.

¹⁵¹ The terms international humanitarian law, law of armed conflict, and law of war are sometimes used interchangeably. This article uses the more specific term international humanitarian law to refer to *jus in bello*, the law governing the means and methods of war between parties. The law of armed conflict, also known as the law of war, technically comprises both *jus in bello* and *jus ad bellum*, the right to wage war (addressed *supra* in Section IV). *See The Law of Armed Conflict*, LEVIN INST., <http://www.globalization101.org/law-of-armed-conflict/> [<https://perma.cc/6NMQ-6DGS>].

¹⁵² *See The Law of Armed Conflict*, *supra* note 151. International humanitarian law includes *inter alia* the 1907 Hague Convention (IV) Respecting the Laws and Customs

Within international humanitarian law, two types of armed conflicts are understood to exist: international armed conflicts and non-international armed conflicts (or internal armed conflicts). Different rules govern the two types of conflicts. Historically, domestic conflicts between host states and resident non-state actors were understood to be governed by the laws of non-international armed conflict; whereas conflicts between states were governed by the laws of international armed conflict.¹⁵³ The status “non-state actor” has been applied to non-governmental groups, and their supporters, engaged in non-international (internal) conflicts with government combatants.¹⁵⁴ International law scholar M. Cherif Bassiouni divides these non-state actors into several categories:

- (1) Regularly constituted groups of combatants with a military command structure and a political structure;
- (2) Non-regularly constituted groups of combatants with or without a command structure and with or without a political hierarchical structure;
- (3) Spontaneously gathered groups who engage in combat or who engage in sporadic acts of collective violence with or without a command structure and with or without political leadership;
- (4) Mercenaries acting as an autonomous group or as part of other groups of combatants; and
- (5) Expatriate volunteers who engage for a period of time in combat or in support of combat operations, either as separate units or as part of duly constituted or ad hoc units.¹⁵⁵

Groups that are primarily organized for another purpose, such as political parties or criminal enterprises, can also be described as “non-state actors” if they are simultaneously engaged in violence and hostilities.¹⁵⁶

of War on Land, the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, the four 1949 Geneva Conventions; and the two 1977 Geneva Conventions Protocols; as well as customary norms relating to the law of armed conflict.

¹⁵³ The 1949 Geneva Conventions were drafted to govern traditional state to state international conflicts with uniformed forces, but Additional Protocol I was completed in 1977 to address the increasing number of internal/non-international armed conflicts, given the increase in internal conflicts/civil wars over the twentieth century. See *infra* notes 161–167 and accompanying text.

¹⁵⁴ See M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 715–16 (2008) (footnotes omitted).

¹⁵⁵ *Id.* at 715–16.

¹⁵⁶ See *id.* at 715–17; see also Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 255 (2010).

The challenge presented by terror non-states is that they blur the distinctions between historic non-state actors and states. Accordingly, determining whether terror non-states should be governed by the law of international armed conflict or the law of non-international armed conflict is challenging. Terror non-states like ISIS and Boko Haram are non-state actors with regularly constituted groups of combatants that fall under a military and political structure, like the archetypical non-state actor identified by Bassouini. However, terror non-states also conduct themselves like states—they control and govern territory, seek to take more territory from host and external states, and they engage in combat with external state militaries, much like traditional state-state international armed conflict. Determining which of these two bodies of law should apply to terror non-states presents complex questions. This is not a new question, and it came immediately to the forefront following 9/11, as commentators began to determine what international humanitarian law framework should be applied to Al Qaeda, a diffuse network of terror cells, located all over the world.¹⁵⁷ The recent development of terror non-states, like ISIS and Boko Haram, however, offers a new dimension to this question. More than non-state actors of the past, terror non-states blur the distinctions between states and non-state actors.¹⁵⁸

Determining whether international humanitarian law (be it the law of international armed conflict or the law of non-international armed conflict) applies is more than just an interesting academic exercise, as the applicability of international humanitarian law has real consequences for the combatants and civilians impacted by the conflict. During peacetime, a state's domestic law, not international humanitarian law, applies. Under domestic law, states are not allowed to target individuals for killing, nor may they "detain people indefinitely without first trying them in court."¹⁵⁹ Under the law of international armed conflict, "warring states may lawfully target enemy combatants and military objectives," and hold battlefield detainees "until the

¹⁵⁷ See, e.g., Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 3–4 (2004) ("Extra-state hostilities do not naturally fit into the traditional categories of international law. Thus, in the present state of affairs—for example, in a conflict like that between the United States and Al Qaeda—the usefulness of traditional dichotomies begins to break down, and a whole array of uncertainties arises. When extra-state hostilities erupt, does international law recognize this as an armed conflict, or is the legal status of the situation still one of peace? If there is an armed conflict under international law, what kind of armed conflict is it—inter-state or intra-state?" (footnote omitted)).

¹⁵⁸ Patrick B. Grant, *Islamic Law, International Law, and Non-International Armed Conflict in Syria*, 35 B.U. INT'L L.J. 1, 6 (2017).

¹⁵⁹ Schöndorf, *supra* note 157, at 4.

cessation of hostilities.”¹⁶⁰ The Geneva Conventions provide very specific guidelines about the protection of civilians and individuals *hors de combat* (injured), as well as the treatment of prisoners of war.¹⁶¹ Under the law of non-international armed conflict, the “armed forces of the state” may legally “target enemy combatants and military objectives,” without being prosecuted under domestic law for crimes such as murder or destruction of property, but the forces of non-state actors do not receive *carte blanche* immunity for their attacks—they can “be prosecuted by the state” for targeting “the state’s forces and assets.”¹⁶² Under the laws of non-international armed conflict, detained combatants are not granted prisoner of war status; however, Common Article 3 of the Geneva Conventions guarantees that detainees may not be tortured or treated inhumanely, and that they may not be sentenced without judgment by a duly constituted court affording “judicial guarantees . . . recognized . . . by civilized peoples.”¹⁶³ Additionally, during a non-international armed conflict, a state’s domestic criminal law is deemed to remain in effect.¹⁶⁴

The dichotomy between the laws of international armed conflict and non-international conflict is a consequence of the historic context in which non-state actors were first recognized by international humanitarian law. During the 1950s through the 1980s, the growth of national liberation movements and domestic armed opposition to colonial powers around the globe forced the international community to address the treatment of these non-state actors under international humanitarian law.¹⁶⁵ The compromise solution negotiated by participating member states and representatives of liberation movements was Geneva Conventions Additional Protocol I, which provided protections for non-state actor liberation movements and treated such conflicts as international armed conflicts.¹⁶⁶ Other non-state

¹⁶⁰ *Id.* at 4–5.

¹⁶¹ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva IV].

¹⁶² Schöndorf, *supra* note 157, at 5.

¹⁶³ See Geneva I, *supra* note 161, at art. 3; Geneva II, *supra* note 161, at art. 3; Geneva III, *supra* note 161 at art. 3; Geneva IV, *supra* note 161, at art. 3; see also Grant, *supra* note 158, at 7, Schöndorf, *supra* note 157, at 5.

¹⁶⁴ Schöndorf, *supra* note 157, at 5.

¹⁶⁵ Bassiouni, *supra* note 154, at 734; see also Grant, *supra* note 158, at 6.

¹⁶⁶ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June

actors such as dissident armed forces were treated as being part of non-international armed conflicts.¹⁶⁷ Bassiouni argues that national liberation groups received more favorable treatment under international law, such as prisoner of war status attendant with the laws of international armed conflict, on the expectation that these groups would eventually become the governing leadership of newly formed, post-colonial states, and that as such their actions during the conflict would not necessarily face retribution, or would be subject to amnesty under the new regime.¹⁶⁸ In essence, ensuring that the host state's domestic law continues to apply against these non-state actors, as required by a non-international armed conflict framework would be of little import once the host state had ceded power to the liberation movement.

No such expectation regarding successor state formation applies to terror non-states, and the domestic law of the host state is likely to remain in effect during and after the resolution of the conflict with the terror non-state. Further, terror non-states lack the legitimacy of fighting for the self-determination of vulnerable populations possessed by national liberation movements. National liberation movements were treated as representative liberators ensuring their subjects right to self-determination and freedom from oppressive colonial regimes.¹⁶⁹ Terror non-states can make no such legitimate claim, as their governance over their subjects has been by force. Terror non-states have become the governing oppressive regime and should not be rewarded under humanitarian law for their oppression of vulnerable populations. Nevertheless, their significant control of territory and engagement in hostilities with external states might suggest that the international community has an interest in the broader protections available to non-combatants (and combatants) under the law of international armed conflict.¹⁷⁰

8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Armed national liberation movements against "colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination" were treated as international armed conflicts under Protocol I. *Id.* at art. 1 ¶ 4.

¹⁶⁷ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (addressed non-international armed conflicts and covered all conflicts not covered in Protocol I "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups").

¹⁶⁸ Bassiouni, *supra* note 154, at 734–36.

¹⁶⁹ *Id.* at 735.

¹⁷⁰ For example, Bassiouni argues that the international community has been willing to give greater recognition to non-state actors that have controlled territory because of their relatively more powerful political position. *Id.* at 736.

Terror non-states attacks on foreign states elevates their conflicts to an international status. On the other hand, the international community also has an interest in not legitimizing terror non-states as equals to states under international law, and in ensuring that terror non-states abide by the domestic law of their host states.¹⁷¹

Ultimately the appropriate framework should be sensitive to the interests of vulnerable populations impacted by terror non-states. Granting terror non-states immunity from domestic law for targeting military objectives in their host state or within foreign states would serve no purpose other than to remove host and external state mechanisms for accountability and deterrence. One might argue that under an international law of armed conflict framework, terror non-states would be required to honor prisoner of war protections for captured combatants. While this is true, the likelihood that terror groups that have flouted international legal restraints would follow these restraints is minimal, and under the Geneva Conventions Common Article 3, which appears in all four of the 1949 Geneva Conventions, parties are obligated to treat detainees humanely in cases of non-international armed conflict.¹⁷² Similarly, one

¹⁷¹ One potential option would be to apply a non-international armed conflict framework so long as the terror non-states only engage in combat with their host state militaries, and to switch to an international armed conflict framework at the point that they also become engaged in military hostilities with foreign states—however, this distinction fails to address the rationale for the dichotomy in substantive rights available to combatants under the two different frameworks, which does not seem predicated exclusively upon whether an external state is involved, but rather whether the non-state actor will become a “successor state” and should *ex ante* receive “state-like” treatment during the prosecution of the hostilities.

¹⁷² Common Article 3 provides that:

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

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

might argue that ISIS and Boko Haram would be incentivized to attack only military targets—as opposed to civilian targets—under an international armed conflict framework, as they would be immune from domestic prosecution for such attacks. Still, the likelihood that terror groups would be motivated by immunity from prosecution runs counter to their ideological behavior—the threat of domestic prosecution has not dissuaded suicide bombers nor violent extremists from engaging in mass casualty attacks or systemic human rights abuses, such as the kidnapping and enslavement of Chibok girls or Yazidi women.¹⁷³

Because terror non-states are substantively distinct from national liberation movements in that they oppress, rather than liberate vulnerable populations, a non-international law of armed conflict framework is best suited to ensure accountability for their behavior during and after the conflict. Under this framework, terror non-state combatants are expected to abide by humanitarian principles of proportionality and necessity in their targeting, and to treat detainees humanely, yet they do not receive immunity from domestic prosecution. As discussed in the next section, Iraqi, Nigerian and Syrian authorities, to varying degrees, have the capacity to engage in domestic prosecutions of terror non-state actors.

VI. HOLDING TERROR NON-STATES ACCOUNTABLE UNDER INTERNATIONAL LAW

ISIS and Boko Haram have engaged in the widespread torture, rape, and the unprovoked killing of civilians and non-combatants that violates the tenets of international humanitarian law, domestic criminal law, international criminal law and transnational criminal law. Terror non-states violate international humanitarian law during armed conflict, just as they violate domestic, international and transnational criminal law in their terror campaigns at home and abroad. Determining the applicable legal regimes that should be applied to terror non-states naturally leads to a discussion of accountability. Proper accountability

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

Geneva I, *supra* note 161, at art. 3; Geneva II, *supra* note 161, at art. 3; Geneva III, *supra* note 161 at art. 3; Geneva IV, *supra* note 161, at art. 3; *see also* Schöndorf, *supra* note 157, at 7; Grant, *supra* note 158, at 5.

¹⁷³ As discussed *supra* Part III.

requires both a legal framework and an appropriate venue for adjudication and enforcement.

Iraq, Syria, and Nigeria have differing domestic capacities for criminal enforcement through their courts and legal systems.¹⁷⁴ For example, the Assad regime has engaged in widespread human rights and humanitarian abuses against ISIS combatants, other armed revolutionaries, and civilians. The Syrian civil war has left Syria's institutions barely functioning in parts of the country, and Assad has used the courts to target civilians protesting his regime.¹⁷⁵ Any legitimate accountability mechanism for Syria will require an international forum that addresses the abuses of ISIS and the Assad regime. Additionally, the Nigerian and Iraqi militaries similarly have engaged in humanitarian abuses in the conduct of their wars against Boko Haram and ISIS. Accountability through domestic institutions and international mechanisms must also be available for these state actors.

ISIS and Boko Haram are subject to a range of criminal law frameworks, including domestic, international, and transnational criminal law. International criminal law is a subset of international law that prohibits serious atrocities and seeks to hold perpetrators of those atrocities accountable for their crimes. The crimes, recognized as falling within international criminal law categories such as "war crimes" and "crimes against humanity,"

¹⁷⁴ See generally Tanya Mehra, *Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part I: Prosecutions by Iraqi and Syrian Courts*, INT'L CTR. FOR COUNTERTERRORISM (Dec. 22, 2017), <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/> [<https://perma.cc/9Y7F-5Q9M>] ("It is estimated that around [three thousand] suspected members or supporters of IS are awaiting prosecution by Iraqi courts; the majority of whom will be prosecuted by a specialised criminal court of first instance in Qaraqosh on terrorism charges. The court hears up to [fifty] cases a day in brief sessions, mostly male fighters that were picked up as the military defeated IS strongholds in the north. The numbers of those potentially prosecuted under the Terrorism Law is so large that a law in the summer of 2016 offered amnesty to individuals who joined extremist groups and did not commit a serious offence."); see also *World Report 2018: Nigeria*, *supra* note 76 ("On October 9 [2017], authorities began closed-door trials in a Kainji Niger state military base of more than 2,300 Boko Haram suspects, some detained since the insurgency's inception in 2009. Concerns about due process and fair hearing heightened when, within four days of trial, 45 of the first batch of 565 defendants were convicted and sentenced to between three to [thirty-one] jail terms for undisclosed charges. The court threw out charges against [thirty-four] discharged 468, and referred twenty-five] defendants for trial in other courts. Prior to October, only [thirteen] Boko Haram suspects had faced trial, out of which nine were convicted for alleged involvement in crimes committed by the group.")

¹⁷⁵ See Mehra, *supra* note 174 ("Military field courts, which are also part of the Syrian judicial system, are tasked to prosecute members of the military for crimes committed during armed conflict under the military penal code; however, thousands of civilians have been prosecuted in mass trials and held at military prisons. Both the criminal proceedings before the Counter-Terrorism Court and military field courts have been heavily criticised."); see also VIOLATIONS DOCUMENTATION CTR. IN SYRIA, *supra* note 65, at 2, 4 (detailing Assad's use of Syrian institutions and the Counterterrorism Court to target and punish his opposition).

have been developed and enforced through international criminal tribunals, such as the International Military Tribunal in Nuremberg, Germany, and the International Military Tribunal for the Far East in Tokyo, Japan, which were established to try the senior political and military leadership of Nazi Germany and Japan following World War II.¹⁷⁶ Other international crimes, such as genocide and torture, are spelled out in treaties such as the Convention Against Torture and the Genocide Convention.¹⁷⁷ As with humanitarian law, there are gaps in the application of international criminal law to non-state actors. For example, the prohibitions in the Genocide Convention and Torture Convention expressly apply only to state actors who are signatories to those treaties, not to non-state actors, and “crimes against humanity,” though not codified in a treaty, have, by custom, only applied to states.¹⁷⁸ Further, the enforcement of international criminal law has historically required the establishment of an international tribunal with jurisdiction over the indicted parties.¹⁷⁹

One example of an international criminal tribunal is the International Criminal Court (ICC). The ICC was established by state parties in 2002 to create a permanent venue for the enforcement of international criminal law.¹⁸⁰ Nigeria has ratified the Rome Statute of the ICC, but Syria and Iraq have neither signed nor ratified the treaty.¹⁸¹ Prior to the establishment of the ICC, ad hoc international criminal tribunals were established

¹⁷⁶ The Nuremberg Tribunal, following World War II, established “war crimes,” “crimes against humanity,” and “crimes against the peace.” Charter of the International Military Tribunal, Nuremberg Trial Proceedings Vol. 1, art. 6, Aug. 8, 1945, 82 U.N.T.S. 279, 288. These crimes have also been reflected in the statutes of more recent international criminal tribunals such as the International Criminal Court, International Criminal Tribunal for Yugoslavia, and the International Criminal Tribunal for Rwanda. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT’L L. 551, 564–66 (2006).

¹⁷⁷ Convention Against Torture and Convention Against Genocide are part of the body of international human rights law as well. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. Torture and Genocide also constitute *jus cogens* or universal crimes under customary international law. Philippe Lieberman, Comment, *Expropriation, Torture, and Jus Cogens Under the Foreign Sovereign Immunities Act*: Siderman De Blake v. Republic of Argentina, 24 U. MIAMI INTER-AM. L. REV. 503, 514 (1993).

¹⁷⁸ See Bassiouni, *supra* note 154, at 719; see also Annalise Lekas, Comment, *#ISIS: The Largest Threat to World Peace Trending Now*, 30 EMORY INT’LL REV. 313, 348–49 (2015).

¹⁷⁹ See Charter of the International Military Tribunal (Nuremberg)—Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 82 U.N.T.S. 279, 284; see also Charter of the International Military Tribunal for the Far East (Jan. 19, 1946).

¹⁸⁰ See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹⁸¹ See *Status of the Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en [https://perma.cc/4W8P-2NV7].

for Yugoslavia and Rwanda to deal with the widespread killings that occurred during conflicts in both countries.¹⁸² Additionally, hybrid international-domestic criminal tribunals have been established to ensure that prosecutions of international and domestic law are carried out in jurisdictions where the offenses occurred with institutional actors from those jurisdictions, for example, the Khmer Rouge Tribunal in Cambodia and the Special Court for Sierra Leone.¹⁸³

Given that neither Iraq nor Syria are parties to the ICC Statute, a new international tribunal would need to be established for prosecution of offenses committed during the conflict, unless by special agreement Iraq and Syria agreed to ICC jurisdiction or became parties to the statute.¹⁸⁴ ISIS combatants and other groups that committed war crimes during the conflict in Iraq and Syria would be subject to the jurisdiction of this new international tribunal. The UN Security Council should approve an ad hoc International Criminal Tribunal for ISIS that would hold ISIS members accountable for any violations of international criminal law.¹⁸⁵ Such a tribunal would cover the widespread abuses committed by ISIS in Iraq and Syria. The tribunal would focus its efforts on the ISIS political and military leadership. I would recommend a regional tribunal, located in Iraq, to draw from resources and evidence contained in the region, and to allow for a sense of local and regional justice.¹⁸⁶ The court would be

¹⁸² The International Criminal Tribunal for Yugoslavia was established by UN Security Council Resolution 827 (1993), S.C. Res. 827 (May 25, 1993) [hereinafter ICTY], and the International Criminal Tribunal for Rwanda was established by UN Security Council Resolution 955 (1994), S.C. Res. 955 (Nov. 8, 1994) [hereinafter ICTR].

¹⁸³ The Special Court for Sierra Leone was established to implement both international and domestic criminal law prosecutions with the involvement of local actors and the international community. It is the product of an international agreement between the United Nations and the Sierra Leone government. See SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW 566–67 (3d ed., 2018). The Extraordinary Chambers in the Courts of Cambodia (ECCC), also known as the Khmer Rouge Tribunal, was created by Cambodian law. The United Nations finalized an agreement with the Cambodian government establishing UN participation in the body. See *id.* at 561–62.

¹⁸⁴ Rome Statute, *supra* note 180, at art. 4 ¶ 2.

¹⁸⁵ The statute would include international crimes such as “war crimes,” “crimes against humanity,” and “genocide”. Crimes against humanity would include crimes such as “rape,” “murder,” “imprisonment,” and “enslavement,” as defined in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Forced child soldiering and sexual slavery should be specified as forms of prosecutable enslavement. I would also include the crimes of “kidnapping” and “trafficking” given ISIS and Boko Haram’s widespread use of these practices to raise money and their linkage to sexual enslavement and child soldiering. See ICTY, *supra* note 182, art. 5; see also ICTR, *supra* note 182, art. 3 (defining “crimes against humanity”).

¹⁸⁶ Security challenges would exist relative to the establishment of such a court in Iraq, but I believe the international community’s interest in bringing ISIS to justice would motivate the necessary expenditures to provide adequate security to the court. The Iraqi High Tribunal securely carried out adjudications of Saddam Hussein and his

comprised of both local and international jurists.¹⁸⁷ Ideally, the tribunal would also cover Assad regime abuses, although it is likely that Russia would veto such an approach given its past record of protecting the Assad regime within the Security Council.¹⁸⁸ Accountability for the Assad regime would more likely be addressed through an accountability track within the ongoing UN Syria peace negotiations or through follow-on negotiations that would cover amnesty terms and the parameters for local and international adjudication of humanitarian and human rights abuses.¹⁸⁹ Boko Haram combatants and their opponents are already subject to ICC referral because Nigeria has ratified the ICC Statute.¹⁹⁰ The international community should engage in greater cooperation with Nigeria and regional governments to pursue ICC prosecutions of Boko Haram.

Foreign states should also broadly cooperate in the prosecution of ISIS soldiers engaged in terrorist attacks against

regime, with U.S. security and legal assistance. See *The Iraq Tribunal*, GLOBAL POL'Y FORUM, <https://www.globalpolicy.org/component/content/article/163-general/28693-the-iraq-tribunal.html> [<https://perma.cc/522J-ZYML>]; see also *Iraqi High Tribunal*, HYBRID JUSTICE, <https://hybridjustice.com/iraqi-high-tribunal/> [<https://perma.cc/M8W6-AAX8>]. I became the Legal Adviser at the U.S. Embassy in Baghdad the day after Saddam was executed, and there was widespread criticism of victor's justice regarding Saddam's sentencing and subsequent execution. Bruce Shapiro, *Rule of Noose*, NATION (Dec. 31, 2006), <https://www.thenation.com/article/rule-noose/> [<https://perma.cc/8FRY-5BB3>]. The international community could work closely with the Iraqi officials to avoid such results in the future—the Iraqi High Tribunal was an Iraqi institution, whereas with a hybrid tribunal approved by the U.N., the international community could have a greater say in the sentencing and procedures for the trials. See, e.g., *The Special Court for Sierra Leone Its History and Jurisprudence*, RESIDUAL SPECIAL COURT FOR SIERRA LEONE <http://www.rscsl.org/index.html> [<https://perma.cc/UGB3-QM9J>].

¹⁸⁷ Akin to the Khmer Rouge Tribunals established in Cambodia. *Frequently Asked Questions—How Judges Are Appointed*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (July 24, 2017, 15:38 PM) [hereinafter *How Judges Are Appointed*], <https://www.eccc.gov.kh/en/faq/how-are-judges-appointed> [<https://perma.cc/RZW6-PCHJ>].

¹⁸⁸ Russia has vetoed eight Security Council Resolutions from 2011–2017 attempting to hold the Assad regime to account for humanitarian abuses in the civil war. See Euan McKirdy, *8 Times Russia Blocked a UN Security Council Resolution on Syria*, CNN (Apr. 13, 2017, 5:28 AM ET) <https://www.cnn.com/2017/04/13/middleeast/russia-unscc-syria-resolutions/index.html> [<https://perma.cc/TVM6-QLCJ>]. Russia was, however, willing to authorize Security Council Resolution 2249 against ISIS, after its citizens were killed in the 2015 ISIS attack of a Russian jetliner over Egypt. See U.N. Press Release SC/12132, *supra* note 132; Neil MacFarquhar, *Russia Allies with France Against ISIS, Saying Jet That Crashed in Sinai Was Bombed*, N.Y. TIMES (Nov. 17, 2015), <https://www.nytimes.com/2015/11/18/world/europe/russia-plane-crash-bomb.html> [<https://perma.cc/L84B-HZWY>]. Similarly, Russia might be willing to authorize an international justice mechanism specific to ISIS, although it would likely resist any mechanism that would also hold the Assad regime accountable.

¹⁸⁹ See Lisa Roman & Alexander Bick, *It's Time for a New Syria Peace Process*, FOREIGN POL'Y: SHADOW GOV'T (Sept. 15, 2017, 2:47 PM), <http://foreignpolicy.com/2017/09/15/its-time-for-a-new-syria-peace-process/> [<https://perma.cc/HC7Z-WZSW>].

¹⁹⁰ *The States-Parties to the Rome Statute*, INT'L CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. [<https://perma.cc/9NQ6-BT9N>].

their territories through the sharing and exchange of information under transnational legal conventions. Transnational criminal law is a body of law that criminalizes cross-border crimes. Transnational criminal law has developed from “suppression conventions” intended to suppress illegal cross-border conduct through the mutual cooperation of convention parties.¹⁹¹ Suppression conventions include the UN Convention Against Transnational Organized Crime and the 1988 Vienna Convention Against the Illicit Trade in Narcotic Drugs and Psychotropic Substances.¹⁹² The 1997 Convention on the Suppression of Terrorist Bombings entered into force in 2001 and requires state parties to create domestic law that criminalizes the unlawful and intentional use of explosives in public places with the intent to kill or cause serious bodily harm.¹⁹³ State parties may assert jurisdiction over any such acts committed within their territory, abroad against their facilities or aircraft, against their nationals, and over any of their nationals involved in such acts.¹⁹⁴ The Convention requires information sharing, investigation, extradition and prosecution in relation to terrorist incidents.¹⁹⁵ The Convention also establishes universal jurisdiction in that it requires a state party to immediately prosecute anyone in their territory who is not extradited in relation to a terrorist crime, no matter where that crime was committed.¹⁹⁶ Both Iraq and Nigeria acceded to the Convention in 2013.¹⁹⁷ Syria is not a party to the Convention and is not expressly bound by its provisions.¹⁹⁸

The typical groups subject to transnational criminal law would be a non-state actor criminal enterprise or a terror group that a state addresses through domestic law enforcement and cross-state law enforcement cooperation. Scholars have debated whether transnational criminal law conventions would remain

¹⁹¹ See Dan E. Stigall & Christopher L. Blakesley, *Non-State Armed Groups and the Role of Transnational Criminal Law During Armed Conflicts*, 48 GEO. WASH. INT’L L. REV. 1, 9–10 (2015).

¹⁹² *Id.* at 10 (citing United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 209 U.N.T.S. 2225; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 95 U.N.T.S. 1582).

¹⁹³ International Convention for the Suppression of Terrorist Bombings, art. 2, Dec. 15, 1997, 2149 U.N.T.S. 256 (entered into force May 23, 2001).

¹⁹⁴ *Id.* at art. 6.

¹⁹⁵ *Id.* at art. 7.

¹⁹⁶ *Id.* at art. 8.

¹⁹⁷ See *Status of the International Convention for the Suppression of Terrorist Bombings*, UNITED NATIONS TREATY COLLECTION (Jan. 10, 2018), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&lang=en [<https://perma.cc/6BJF-9PGM>].

¹⁹⁸ *Id.*

in effect during periods of armed conflict.¹⁹⁹ Much like certain domestic laws give way to international humanitarian law during conflict, some have argued that transnational criminal law also gives way to the law of armed conflict.²⁰⁰ This distinction would again seem to draw on a dichotomous perspective regarding transnational crime: terror groups can either be criminals operating during peace time that are subject to domestic and transnational law, or they can be armed hostiles operating during a time of war subject to the law of armed conflict, but they may not be both.

This distinction between terror groups as criminals and as armed hostiles should be rejected because it does not reflect the reality of how terror non-states like ISIS and Boko Haram operate. Terror non-states, in fact, engage in armed hostilities with host state and external state forces, and engage in widespread terror attacks against states that may or may not be engaged in active hostilities with them. Even if the law of international armed conflict applies (supplanting domestic laws of murder and property destruction) within the area of active hostilities, there is a strong case to be made that transnational criminal law should still be deemed in effect in the area of hostilities and outside of that area. Protecting the authority of transnational criminal law during conflict ensures that states still victim to terrorist attacks can cooperate, share information, and prosecute terror non-state actors responsible for crimes against them, whether they intervene militarily against the terror non-states or not.

This analysis is similar to the debate as to whether international human rights law which applies during peace time, is also deemed to apply during a time of war. The historic U.S. view had been “no” based upon ICJ jurisprudence that deemed the law of armed conflict *lex specialis*, meaning that the context specific humanitarian law would govern rather than the more generally applicable human rights law in situations of armed conflict.²⁰¹ The U.S. view has evolved, however, and now relies upon case by case assessments regarding the applicability of

¹⁹⁹ See Stigall & Blakesley, *supra* note 191, at 2.

²⁰⁰ See, e.g., Stigall & Blakesley, *supra* note 191, at 3 (arguing that “the United Nations [Office on Drugs and Crime (UNODC)] articulates a problematic legal proposition” in its publication entitled *International Cooperation in Criminal Matters: Counterterrorism* which stated that “[t]he universal counter-terrorism conventions and protocols do not apply in situations of armed conflict”) (citing U.N. OFFICE ON DRUGS AND CRIME, INTERNATIONAL COOPERATION IN CRIMINAL MATTERS: COUNTERTERRORISM 28 (2012) (alteration in original), https://www.unodc.org/documents/terrorism/Publications/Training_Curriculum_Module3/Module3_EN.pdf [<https://perma.cc/SXS2-VVMP>]).

²⁰¹ *Id.* at 28–29.

human rights law in a specific fact setting.²⁰² If terror non-states engage in terror attacks abroad or domestically, those terror attacks cannot be excused as legitimate military attacks in proportion, necessity, or distinction, and states should be able to contemporaneously seek prosecution of those crimes in domestic courts within the host state and external states. Even though the United States and Iraq are engaged in armed conflict with ISIS in Iraq, both states should be able to contemporaneously prosecute ISIS followers engaged in terror attacks against U.S. and Iraqi civilians in U.S. and Iraqi courts under their domestic and transnational criminal law.

Similarly, Nigerian authorities and border states who are victims of Boko Haram terror attacks should be able to pursue prosecutions against Boko Haram during and after the conflict in their domestic courts. This ability to pursue domestic prosecution ensures more immediate relief and greater justice for victims and vulnerable populations, as international tribunals can take quite some time to establish and take effect. The liberation and protection of vulnerable populations harmed by terror non-states would also require that states such as the United States, with greater resources and technical assistance, provide support to the domestic courts within Iraq and Nigeria (and Syria after the civil war ends) to aid in the prosecution of ISIS and Boko Haram and any government agents guilty of crimes against vulnerable populations.

VII. RESCUING INTERNATIONAL LAW FROM TERROR NON-STATES

In order to address terror non-states' disruption of international law, international rules should be interpreted in a manner that most effectively protects and liberates vulnerable populations, even where historic distinctions between states and non-state actors have become blurred. For example, when terror non-states have asserted control over significant territory, terror non-states must be obligated to respect the full body of international human rights law that the sovereign states are obligated to protect. Terror non-states should assume these human rights obligations under international law, even though they are not formally recognized as states or governments. This obligation flows from the principle that international human rights belong to citizens and any human rights obligation that a predecessor government has undertaken binds a successor government within

²⁰² *Id.* at 29.

the same territory.²⁰³ To give this principle effect, I recommend that the UN Security Council pass a resolution determining that all non-state actors, such as ISIS and Boko Haram, that take territorial control from sovereign states, are obligated to protect the human rights—treaty-based and customary—of all subject citizens during the period of their control.²⁰⁴

Although terror non-states should not formally be recognized as states due to their violent taking of territory contrary to international law, existing state human rights obligations should be imposed upon them to increase the likelihood that vulnerable populations receive maximal human rights protection. As a practical matter, the terror non-state, not the sovereign state, is the entity in the best position to ensure those rights are not violated. Similarly, terror non-states should ensure that the sovereign rights of the people under their control are respected. This obligation would include ensuring that local institutions and courts continue to function and not forcing new systems of justice onto the population, particularly judicial systems that do not respect human rights norms. Terror non-state actors can and should be held accountable for any violations of human rights law during and after the conflict in domestic courts as well as before international tribunals.

Terror non-states should also be treated like states against whom external actors should have the right to intervene, without the requirement that the terror non-states' actions be attributable to the host state. Terror non-states' conduct will rarely be attributed to host states because they are in direct conflict with host states for territory. These host states, however, may object to foreign state intervention because of historic grievances or territorial concerns. Nonetheless, the quality and nature of terror non-states' aggression and attacks against external states should entitle the external state to intervene in self-defense that is limited, targeted and specific to deterring the terror non-states' actions—even over the objection of host states. Such interventions must also be targeted in a fashion that protects civilian populations that are

²⁰³ See, e.g., U.N. Human Rights Comm. General Comment *supra* note 98, at 4 (“The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by long-standing practice, that once people are accorded the protection of rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.”).

²⁰⁴ Despite the fact that they are not states, terror non-states should be treated as such for the purpose of enforcing human rights and other treaty and customary international law obligations, given their effective control over the population in their territory and their exclusive ability to ensure the protection of these rights. See discussion *supra* in Section III.C.

particularly vulnerable to collateral damage while under terror non-state control.²⁰⁵ The self-defense justification is strengthened if it can be demonstrated that host states are “unwilling or unable” to prevent the terror non-state attacks against external states. Such an approach would be an evolution in the international law of intervention but a necessary innovation to provide states with the necessary tools to defend themselves and their populations against increasingly active, powerful, and resourced terror non-states like ISIS and Boko Haram. Such an approach would also increase the likelihood that terror non-states oppression of vulnerable populations will come to an end.

Notwithstanding the fact that terror non-states should be treated like states for the purposes of intervention, they should be treated like traditional non-state actors in the prosecution of hostilities, under the rubric of non-international armed conflict. This means that terror non-states would not receive state-like protections as liberation groups have under Protocol I of the Geneva Conventions.²⁰⁶ This approach makes sense legally and practically. As incursion forces, terror non-states, such as ISIS and Boko Haram, cannot make the same substantive legal claim that they are freeing vulnerable populations from colonizing regimes—claims which undergirded the drafting of Protocol I.²⁰⁷ Further, terror non-states have not demonstrated respect for international humanitarian law in their conduct during hostilities—so awarding them immunity from domestic law would reward perverse behaviors. Notwithstanding the fact that external actors may become involved in hostilities with terror non-states, under a historic state-centric international armed conflict framework, terror non-states should remain subject to the domestic laws of the sovereign state. Their external intervention should not obviate their being held subject to domestic law. The application of a non-international armed conflict framework would make clear that terror non-states remain subject to domestic criminal law and transnational criminal law, which can be enforced during and after the conflict

²⁰⁵ For example, ISIS regularly contravenes international humanitarian law by using civilians as “human shields” against air strikes. See Ahmed Rasheed & Michael Georgy, *Islamic State Said to Use Human Shields As Coalition Advances on Mosul*, REUTERS (Oct. 18, 2016, 7:08 AM), <https://www.reuters.com/article/us-mideast-crisis-iraq/islamic-state-said-to-use-human-shields-as-coalition-advances-on-mosul-idUSKCN12I17X> [<https://perma.cc/V23N-U28W>]; see also Charles Dunlap, Jr., *No Good Options Against ISIS Barbarism? Human Shields in 21st Century Conflicts*, 110 AM. J. INT’L L. UNBOUND 311, 311–16 (2017).

²⁰⁶ Protocol I, *supra* note 166, at art. 1 ¶ 4.

²⁰⁷ This is not to say that terror non-states, such as ISIS and Boko Haram, will not claim that they are acting against oppressive regimes, however such claims are undermined by their own oppressive actions towards their victimized subjects.

in the domestic courts of sovereign and external states. This increases the likelihood of protection and accountability for vulnerable populations harmed by terror non-states.

Finally, the accountability of terror non-states should be pursued through domestic and international tribunals, depending upon the capacity of the legal system in each country. It is clear that non-state actors can be prosecuted for international crimes such as war crimes, crimes against humanity, and genocide. Under the terms of the Rome Statute of the ICC, any person present in the territory of a signatory state is subject to its international criminal law provisions.²⁰⁸ In the case of Nigeria, this makes Boko Haram internationally criminally responsible for its conduct inside and outside of Nigeria. Prosecutions against Boko Haram's leadership can be pursued within the ICC. Nigeria's domestic courts should also receive resource and capacity assistance from the international community for the prosecution of crimes against those members of Boko Haram that are not the group's leaders. Nigeria may also choose to develop an amnesty law and reconciliation measures for certain participants in Boko Haram abuses, such as kidnapped and coerced child soldiers. Similarly, states that were the subject of attacks by Boko Haram (Nigeria's Lake Chad neighbors and others) should also have the ability to develop criminal prosecutions against specific individuals that carried out attacks on their territory, relying upon international cooperation mechanisms formalized in transnational criminal law conventions. The international community should also expand assistance and capacity support for domestic prosecutions in these countries as well.

In the case of ISIS, as neither Syria nor Iraq is a party to the ICC, the UN Security Council should approve an ad hoc International Criminal Tribunal for ISIS that would hold ISIS members accountable for any violations of international criminal law.²⁰⁹ Such a tribunal would cover the widespread abuses committed by ISIS in Iraq and Syria. The tribunal would focus its efforts on the ISIS political and military leadership. I would recommend a regional tribunal, located in Iraq, to draw from resources and evidence contained in the region, and to allow for a sense of local and regional justice.²¹⁰ The court would be comprised of both local and international jurists.²¹¹ Ideally, the tribunal would also cover Assad regime abuses, although it is probable

²⁰⁸ Rome Statute, *supra* note 180, at arts. 1, 4 ¶ 2.

²⁰⁹ See sources cited *supra* note 185 and accompanying text.

²¹⁰ See sources cited *supra* note 186 and accompanying text.

²¹¹ See How Judges Are Appointed, *supra* note 187.

that Russia would veto such an approach given its past record of protecting the Assad regime within the Security Council.²¹² Accountability for the Assad regime would more likely be addressed through an accountability track within the ongoing UN Syria peace negotiations or through follow-on negotiations that would cover amnesty terms and the parameters for local and international adjudication of humanitarian and human rights abuses.²¹³ As with Boko Haram, foreign states would broadly cooperate in the prosecution of ISIS soldiers engaged in terrorist attacks against their territories through the sharing and exchange of information under transnational legal conventions, which would remain in effect during and after hostilities end.

CONCLUSION

Terror non-states, such as ISIS and Boko Haram, have not only caused violence and destruction globally, but have disrupted international legal frameworks developed to minimize conflict and abuse. By moderating the state/non-state actor dichotomy, the international community can enforce international law against terror non-states in a manner best suited to curb their worst abuses and to hold them to account for their actions.

²¹² See sources cited *supra* note 188 and accompanying text.

²¹³ See Roman & Bick, *supra* note 189.