

Is ISIS a State? The Status of Statehood in the Age of Terror

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ABSTRACT

This Essay considers the definitional challenge posed by the Islamic State’s State-like attributes and suggests a new approach to recognizing sovereignty within the meaning of international law. The dual factors I set forth—respect and observance of fundamental human rights in territory controlled by the candidate State and acceptance of the sovereign co-existence of other States—are intended to reframe traditional analyses of the Montevideo Convention. This piece draws upon recent scholarship, judicial decisions, and diplomatic practices surrounding recognition of would-be States to identify a form of human rights minimalism and acknowledgment of the international order that may usefully inform debates concerning potential future sovereigns.

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INTRODUCTION

In August 2014, the group known as ISIS (the Islamic State in Iraq and al-Sham, ISIL, or Daesh¹) conquered the Yazidi homeland in Northern Iraq.² ISIS quickly subjected civilian Yazidi women and girls to a theologically infused form of sexual slavery.³ The following year, *New York Times* reporter Rukmini Callimachi interviewed Yazidi escapees who related that ISIS fighters raped women who were bought and sold in a sexual slavery market.⁴ The accounts of ritualized sexual violence at the hands of ISIS militants⁵ followed news of beheadings, mass killings, the intentional destruction of antiquities in Palmyra, and the grizzly immolation of a captured Jordanian pilot—all grotesque, deliberate, performative acts designed to attract maximum attention.⁶

At the same time, the Islamic State is an administrative authority, taxing local businesses and spending financial resources to govern territory and provide quotidian social services to the quiescent local population.⁷ Charles Lister writes that one of the Islamic State's first steps upon assuming control of a town or city

1. Daesh is the Arabic acronym for ISIS; ISIL is the acronym for the Islamic State in Iraq and the Levant. For an analysis of why many critics of the Islamic State call the organization Daesh, see generally Zeba Khan, Words matter in “ISIS” war, so use “Daesh,” *Bos. Globe* (Oct. 9, 2014), <https://www.bostonglobe.com/opinion/2014/10/09/words-matter-isis-war-use-daesh/V85GYEuasEEJgrUun0dMUP/story.html>; Uri Friedman, *Does it Really Matter what People Call the So-Called Islamic State?*, *THE ATLANTIC* (June 1, 2016), <http://www.theatlantic.com/international/archive/2016/06/wole-soyinka-isis-boko-haram/484310/>.

2. Cathy Otten, *Slaves of Isis: the long walk of the Yazidi Women*, *THE GUARDIAN* (July 25, 2017), <https://www.theguardian.com/world/2017/jul/25/slaves-of-isis-the-long-walk-of-the-yazidi-women> (on August 3rd, 2014, ISIS attacked Sinjar, resulting in over 100,000 Sinjar residents fleeing into Mount Sinjar, and thousands of Yazidis were summarily executed by ISIS fighters); see also Off. of the U.N. High Comm’r for H.R. (2016), *A Call for Accountability and Protection: Yazidi Survivors of Atrocities Committed by Isil* (2016).

3. WILLIAM MCCANTS, *THE ISIS APOCALYPSE: THE HISTORY, STRATEGY, AND DOOMSDAY VISION OF THE ISLAMIC STATE* 111–13 (2015); Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, *N.Y. TIMES* (Aug. 14, 2015), <https://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html>.

4. Callimachi, *supra* note 3. Also Catherine Porter, *Canada Struggles as it Opens its Arms to Victims of ISIS*, *N.Y. TIMES* (Mar. 16, 2018), <https://www.nytimes.com/2018/03/16/world/canada/canada-refugees-yazidi.html?mtrref=www.google.com> (over 1,200 victims of the Islamic State have fled to Canada where government’s refugee services are providing treatment for the survivor’s severe trauma).

5. *Id.*

6. See JOBY WARRICK, *BLACK FLAGS* 287–91, 308–10 (2015);

Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, *NAT’L GEOGRAPHIC* (Sept. 1, 2015), <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/>.

7. CHARLES R. LISTER, *THE ISLAMIC STATE: A BRIEF INTRODUCTION* 47–48 (2015).

is to take control of industries and municipal services and facilities so as to ensure what it considers a more efficient and egalitarian provision of services. Consistently, this has meant assuming authority over electricity, water, and gas supplies, local factories, and even bakeries—all of which lend [ISIS] total control over the core needs of a civilian population. . . In Raqqa, [ISIS] even operates a consumer-protection office, which has closed shops for selling poor-quality products.⁸

The duality that is the Islamic State confounds traditional categories used to understand statehood, global society, and international law. The organization responsible for the coordinated killing of 130 people in Paris on November 13, 2015, is a terrorist network characterized by an escalating spate of attacks in States far beyond Iraq and Syria.⁹ ISIS is also a territorial governor and possesses multiple attributes of a sovereign entity.¹⁰ At its peak, as many as eight million people lived under the Islamic State's control, and millions more were influenced by its actions.¹¹ Until recently, ISIS held significant swaths of

8. *Id.*

9. Rukmini Callimachi, *How ISIS Built the Machinery of Terror Under Europe's Gaze*, N.Y. TIMES (Mar. 29, 2016), <https://www.nytimes.com/2016/03/29/world/europe/isis-attacks-paris-brussels.html>. ISIS has massacred workers in Egypt, and it has sponsored attacks in Indonesia, Turkey, the United States, Australia, Canada, Saudi Arabia, Belgium and elsewhere, fast becoming *hostis humani generis* (the enemy of mankind). In carrying out these deadly attacks, ISIS has violated norms of international law which courts have found include the prohibition against terrorism and torture. See *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (extending a doctrine traditionally applied to pirates and slaver traders to modern day torturers); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, (Dec. 10, 1998) (convicting a torturer before the ICTY and characterizing the crime as a preemptory norm, part of customary international law and a *jus cogens* offense).

10. See Marti Nadal Pibernat, *Can ISIS Be Considered a State?* (2015) (unpublished manuscript), https://www.academia.edu/25055342/Can_ISIS_Be_Considered_a_State; Doug Irving, *Life During Wartime: What Satellite Images Reveal About ISIS's Attempts to Govern in Syria and Iraq*, RAND REVIEW, Jan.–Feb. 2018, at 12, 12–15, https://www.rand.org/content/dam/rand/pubs/corporate_pubs/CP000/CP22-2018-01/RAND_CP22-2018-01.pdf. The terrorist organization ISIS, best known for its brutality, is also known throughout Iraq for its efficient bureaucracy. Rukmini Callimach, *The ISIS Files*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-mosul-iraq.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=span-ab-top-region®ion=top-news&WT.nav=top-news>. In the midst of the daily executions, fines, and torture, ISIS ran an efficient administration that collected taxes, picked up garbage—more efficiently than the previous Iraqi government—and built a state-like territory, amassing over 800 million dollars in annual tax revenue. *Id.*

11. Christopher M. Blanchard & Carla E. Humud, *The Islamic State and U.S. Policy*, 18 NOVA SCI. PUBLISHERS, INC. 477–522 (2016); *In ISIL-controlled territory, 8 million civilians in 'state of fear'—U.N. expert*, U.N. NEWS CTR. (July 31, 2015), <http://www.un.org/apps/news/story.asp?NewsID=51542#.WNRaVJJzetw>. The terrorist organization ISIS, best known for its brutality, is also known throughout Iraq for its efficient bureaucracy. Rukmini Callimach, *The ISIS Files*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-mosul-iraq.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=span-ab-top-region®ion=top-news&WT.nav=top-news>. In the midst of the daily executions, fines, and torture, ISIS ran an efficient administration that collected taxes, picked up garbage—more efficiently than the previous Iraqi government—and built a state-like territory, amassing over 800 million

territory in Iraq and Syria, it had a military presence in Libya, it imposed a governing structure on the population under its control, and it maintained a conventional army featuring weapons and a command structure more commonly associated with regular, uniformed forces.¹² Joby Warrick, the Pulitzer Prize-winning author, observes that the Islamic State had even begun to engage in a form of diplomacy and statecraft.¹³ Warrick reports that in April 2013, Free Syrian Army supporters and international negotiators convening a meeting on how to administer a post-Assad Syria were stunned to find that one of the attendees introduced himself as a duly authorized representative of ISIS.¹⁴

Notwithstanding the Islamic State's name, most scholarship on the subject has avoided the question of whether ISIS was, is or could become a State in the international community.¹⁵ To confront this issue is to grapple with the forms of legal personality a controlling authority can possess and how outside powers understand an entity which is engaged in systemic human rights violations and that rejects foundational conventions of the post-Westphalian international order.¹⁶

International law offers an incomplete answer. The familiar standard drawn from the four-part 1933 Montevideo Convention on the Rights and Duties of States requires only that a would-be State enjoy: "(a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states."¹⁷ Unlike many other non-State terrorist organizations, ISIS has a plausible claim to satisfying the first three criteria. As a consequence, much rests on the fourth criterion: the ability to enter into relations with other States. Because that dynamic is premised on an act of bilateral or multilateral recognition, this Essay seeks to give normative content

dollars in annual tax revenue. *Id.*

12. LISTER, *supra* note 7, at 47.

13. See WARRICK, *supra* note 6, at 291.

14. *Id.*

15. By contrast, there is a wealth of scholarship on the legality of the use of force against ISIS as the latest group in a line of terrorist organizations. See Gabrielle LoGaglio, *Crisis With ISIS: Using ISIS's Development to Analyze "Associated Forces" Under the AUMF*, 5 NAT'L SEC. L. BRIEF 125 (2014) (arguing the United States can use force against ISIS under the same Authorization for Use of Military Force Congress passed to use force against the perpetrators of the September 11, 2001 attacks); Michael P. Sharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT'L L. 15 (2016) (arguing that the use of force against ISIS is justified under self-defense); Johan D. van der Vyver, *The ISIS Crisis and the Development of International Humanitarian Law*, 30 EMORY INT'L L. REV. 531 (2016) (arguing that the use of force against ISIS is not legally justified on a humanitarian or self-defense basis).

16. See William Thomas Worster, *Law, Politics and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L. J. 115 (2009). ISIS is both a de facto state and a non-state terrorist actor that has formalized its external arm and engaged in grotesque attacks against "soft" targets in Paris, Brussels, San Bernardino, and elsewhere. Rukmini Callimachi et al., *A View of ISIS's Evolution in New Details of Paris Attacks*, N.Y. TIMES (Mar. 19, 2016), <https://www.nytimes.com/2016/03/20/world/europe/a-view-of-isis-evolution-in-new-details-of-paris-attacks.html>.

17. Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

to a decision that is usually driven by political or diplomatic considerations.¹⁸ It does so by rooting State recognition in human rights values and international legal principles that offer a touchstone against which to measure the predictable opposition of existing States that stand to lose control over people or territory.¹⁹ The result is an attempt to identify salient differences between groups like ISIS, Boko Haram, and al-Shabaab, on the one hand, and Kurdistan, Palestine, and Somaliland on the other.

The first part of this Essay assesses the Montevideo Convention's strengths and limitations, including its peculiar and intransigent qualities, and examines why ISIS poses a challenge to current conceptions of statehood. The second part suggests two ideas—the protection of human security internally and respect for external sovereign co-existence—that aim to inform the international community's recognition of a potential sovereign.

I.

MONTEVIDEO'S LIMITATIONS

A. *A Minimal Standard*

For an international order that gives primacy to states, the rules for statehood are surprisingly thin. The Montevideo Convention is a product of its time and was intended to provide an empirical set of standards that would define statehood as an objective matter.²⁰ Through the establishment of the four criteria, “the existence of a state and of its entitlements [would] transcend any difference in interests and values in the international system.”²¹ The underlying rationale for the Montevideo Convention was that no single State or ideology

18. See Chris Borgen, *From Intervention to Recognition: Russia, Crimes, and Arguments over Recognizing Secessionist Entities*, OPINION JURIS (Mar. 18, 2014), <http://opiniojuris.org/2014/03/18/intervention-recognition-russia-crimea-arguments-recognizing-secessionist-entities/> (“States tend to view the decision to recognize or not recognize an entity as a state as a political decision, albeit one that exists within an international legal framework.”).

19. China's refusal to recognize Taiwan, Israel's opposition to a fully sovereign Palestine, or Turkey's hostility toward an independent Kurdistan (even one created entirely within Iraq's current borders) represent recent examples of entrenched political opposition to emerging states. See G.A. Res. 25/2625 (Oct. 24, 1970), <http://www.un-documents.net/a25r2625.htm> (enshrining as a principle that each state has a duty not to intervene in an internal political affair of another state); Diego Cupolo, *It's Never a Good Time for the Iraqi Kurds to Become Independent*, THE ATLANTIC (Sept. 24, 2017), <https://www.theatlantic.com/international/archive/2017/09/turkey-kurds-barzani-iraq-referendum/540909/> (“Turkey's hostility towards Kurdish autonomy dates back to 1923.”); RASHID KHALIDI, THE IRON CAGE: THE STORY OF THE PALESTINIAN STRUGGLE FOR STATEHOOD 182–212 (2009) (analyzing Palestine's quest for statehood and Israeli opposition to those efforts); Shelley Rigger, *Is Taiwan Independence Passé? Public Opinion, Party Platforms, and National Identity in Taiwan*, in THE ROC ON THE THRESHOLD OF THE 21ST CENTURY: A PARADIGM REEXAMINED 48 (Chien-min Chao & Cal Clark eds., 1999) (assessing China's adherence to the “One China” proposition).

20. Brad R. Roth, *New Developments in Public International Law: Statehood, Self-Determination, and Secession*, 6 NAT'L TAIWAN U. L. REV. 639, 645 (2011).

21. *Id.*

could control the international order by failing to acknowledge an aspiring entity's statehood.²² If an entity seeking statehood fulfilled the doctrinal framework, it became a State. Realism was the order of the day, a point underscored by the fact that the U.S. recognized the Soviet Union as a State just one month before the Montevideo Conference.²³

The deliberate deracination of statehood per the Montevideo Convention rewards units that meet the four criteria while simultaneously rejecting ambiguities associated with the claims of entities displaying some, but not all of the elements. The convention was signed in Uruguay, a largely stable and unthreatening State that was itself a product of a well-settled colonial history.²⁴ At the conference, Latin American nations sought and obtained a declaration supporting the principles of non-intervention, formal equality among and between states, and an unconditional and irrevocable doctrine of recognition.²⁵ Unsurprisingly, the accord was silent on the rights of autonomous regions within confederated states, and the Convention offered no guidance to an entity displaying both State and non-State attributes, much less a requirement that such units respect or observe human rights norms.

Montevideo did not, because it could not, address the aspirational qualities of future states envisioned by the Convention. So varied were the participants to the original agreement—robust democracies, repressive autocracies, staid principalities, and cultish monarchies—that the Montevideo Convention soon ossified into a minimal and easy to obtain test.²⁶ The great ideological debates for and against independence and self-determination occurred largely outside the formula for statehood; within the four-part matrix, Montevideo privileges order, comity, and predictability.

Almost immediately, the Montevideo standard invited a boon in the number of recognized States. From fewer than seventy-five states at the Convention's entry into force in 1933 to almost two hundred today, the increase in sovereign States and post-WWII, membership in the United Nations has been steady.²⁷ Even as the decolonization movement of the 1950s took root in Africa,

22. Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. OF TRANSNAT'L L. 403, 414–19 (1999).

23. See J. H. Wilson, *American Business and the Recognition of the Soviet Union*, 52 SOC. SCI. Q. 349, 367 (1971); Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. 881.

24. See ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842–933*, 351 (2015).

25. *Id.* at 351.

26. See *Seventh International Conference of American States, Montevideo, Uruguay, December 3–26, 1933*, 28 AM. J. OF INT'L. L. 52 (1934) (“The signatories were Honduras, The United States of America, El Salvador, The Dominican Republic, Haiti, Argentina, Venezuela, Uruguay, Mexico, Panama, Bolivia, Guatemala, Brazil, Ecuador, Nicaragua, Colombia, Chile, Peru, and Cuba.”).

27. See *growth in United Nations Membership, 1945–present*, UNITED NATIONS, <http://www.un.org/en/sections/member-states/growth-united-nationsmembership-1945-present/index.html> (last visited Mar. 6, 2018).

Asia, and the Caribbean (alongside theoretical and political developments in self-determination), the core definition of sovereignty remained unchanged.²⁸ For independence movements the world over, the ultimate goal was, and is, statehood—defined as the right to govern without interference on territory that is unquestionably theirs.²⁹ Achieving that objective carries with it tangible benefits: membership in international organizations, the ability to receive and control the terms of economic assistance from international financial institutions, legal immunity for heads of State, and the ability to exclude other authorities from claims over territory, populations, and resources—in short, a seat at the table and plenipotentiary standing to assert uncontested sovereignty with all that the idea connotes.³⁰

Statehood also offers an enduring prize because once created, States, even failed States, rarely disappear.³¹ The legal construct that is Somalia offers a case in point.³² At times in the not-too-distant past, Somalia featured a permanent population, defined territory, a government, and the capacity to enter into relations with other States.³³ Yet “Somalia” as a singular entity owes more to the perceptions of the international community than to internal political realities.³⁴ A deeper analysis reveals that Somalia, like other dysfunctional States, is a temporally contingent formation but its fixed status persists.³⁵ Instead of reevaluating the sovereign designation, the international community’s response to Somalia and other failed States has been a paternalistic desire to “save” the failing entity through “trusteeship arrangements” or direct military intervention—anything but allow the State to wither.³⁶

The notion that a State will exist in perpetuity begs the question of how States become States in the first place. International law scholars have long recognized that the Montevideo Convention is an inadequate benchmark and

28. See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 185–202 (1999).

29. See S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

30. KRASNER, *supra* note 28, at 14–20.

31. See Jeffrey Gittleman, *War Consumes South Sudan, A Young Nation Cracking Apart*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/world/africa/war-south-sudan.html>. The exception that proves the rule is amalgamation (North and South Yemen, East and West Germany). See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 52 (1979).

32. See Brian J. Hesse, *Introduction: The Myth of “Somalia,”* 28 J. CONTEMP. AFR. STUD. 247 (2010).

33. *Id.*

34. *Id.*

35. See Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 1159 (2005).

36. See Ruth Gordon, *Saving Failed States: Sometimes A Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903 (1997); Matthew Olmsted, *Are Things Falling Apart? Rethinking the Purpose and Function of International Law*, 27 LOY. L.A. INT’L & COMP. L. REV. 401, 404 (2005). For an illustration of the burgeoning literature describing the international legal order’s inability to deal with state failure, see CHIARA GIOREGETTI, *A PRINCIPLED APPROACH TO STATE FAILURE: INTERNATIONAL COMMUNITY ACTION IN EMERGENCY SITUATIONS* (2010).

that additional requisites are needed before sovereignty is achieved.³⁷ First among these plus factors is the “Effective Control Doctrine,” the de facto ability of self-declared leaders to control order.³⁸ Although some commentators point to cases of nations “earning” their sovereignty despite lacking complete authority, such as Kosovo and South Sudan, the doctrine appears to reward internal security above all else.³⁹ According to the Effective Control Doctrine, a self-governing sovereign ought to be capable of establishing functioning institutions, managing a restive population, and resisting the influence of terrorist organizations, narco-traffickers, pirates, or other transnational criminal enterprises that pose a threat to governmental control.⁴⁰

“Constituent authority,” or “the things that a given people in a given time and place understand as competent to make a binding constitution,” offers a second post-Montevideo element integral to the notion of a true sovereign.⁴¹ First articulated by Richard Kay, the theory of constituent authority posits that the consent of the governed is a relational process; it results from the interaction of current values and the present-day perception of historical events.⁴² Benedict Anderson famously observed that nations, as distinct from legal States, are the product of imagined communities, socially constructed entities through which people perceive themselves to be part of an inclusive group.⁴³ To speak for an imagined community, the sovereign must respect the ties that bind inhabitants to a given place and, in turn, reinforce the connection between the people and its leadership.

In the same vein, James Crawford’s work provides additional post-Montevideo criteria, including a rule that the entity not be created in violation of the right of self-determination or solely as a result of the unlawful use of force.⁴⁴

37. Grant, *supra* note 22, at 403.

38. Brad R. Roth, *Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT’L L. 393, 394 (2010) (assessing the paradox between “might makes right” and the international community’s insistence that the assertion of raw power cannot be the sole basis of a legitimate government).

39. Paul R. Williams, *Earned Sovereignty: The Future of Sovereignty-Based Conflict Resolution*, 40 DENV. J. INT’L L. & POL’Y 128, 137–42 (2011).

40. CRAWFORD, *supra* note 31, at 46 (1979) (“[I]nternational law lays down no specific requirements as to the nature and extent of this control, except it seems, that it include some degree of maintenance of law and order.”) Samantha Power’s account of U.N. official Sergio Vieira de Mello’s experience in East Timor provides additional detail. “Airports and ports had to be opened, clean water procured, health care provided, schools resuscitated, a currency created, relations with Indonesia normalized, a constitution drafted, an official language chosen, and tax, customs, and banking systems devised.” SAMANTHA POWER, *SERGIO: ONE MAN’S FIGHT TO SAVE THE WORLD* 304 (2008).

41. Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 715–16 (2011).

42. *Id.* at 718.

43. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6–7 (2006).

44. CRAWFORD, *supra* note 31, at 40. It follows that Northern Cyprus is not an independent state, despite Turkey’s occasional insistence that it is before international tribunals. *Loizidou v. Turkey*, 40/1993/435/514 Eur. Ct. H.R. 10 (1995) (The European Court of Human ordered Turkey to pay substantial damages to a Greek Cypriot woman who had been forcibly displaced from her home

Specifically, Crawford observes that modern conceptions of statehood include a definition of independence, an appreciation of territorial integrity, engagement with international institutions, and avoidance of invitations to intervention or merger with other States.⁴⁵ In 2010, however, the International Court of Justice—the one body that could have provided greater clarity—passed on the opportunity to elevate any of the additional elements to essential components of the test for statehood when it issued its advisory opinion on Kosovo’s declaration of independence.⁴⁶ Rather than formulate a revised rule, the Court confined its decision to the question presented and the lines remain blurred between the application of the traditional criteria and any emerging framework.⁴⁷ At present, the four Montevideo criteria are “commonly accepted to be customary international law,” while observance of additional factors varies widely.⁴⁸

Curiously absent from any of these analyses has been respect for or promotion of international human rights laws and norms within the borders of potential States. Even as international human rights values have become, in Michael Ignatieff’s words, “the major article of faith of a secular culture that fears it believes in nothing else,” the legal work of state-making avoids any judgment about the conduct of the aspiring sovereign.⁴⁹ Indeed, the idiom of classic international law is relational, focused as it is on the horizontal equality of States rather than the vertical, internal oppression occurring in potential sovereigns.⁵⁰ If human rights considerations have played any role in the creation of new States, those ideas have been expressed in the guilt of the international community for failing to stop atrocity crimes in political entities that would become Bangladesh, Eritrea, East Timor, and South Sudan, and the conception that some geographic entities are entitled to secession as a remedy for past wrongs.⁵¹

during Turkey’s invasion of Northern Cyprus. The ECHR found Turkey’s Armed Forces’ continued control and occupation of North Cyprus sufficiently constituted a continued violation of human rights against the woman as she was effectively prevented from returning to her property).

45. CRAWFORD, *supra* note 31, at 47–48; *see also* Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT’L L. & POL’Y 209, 234–35 (2011).

46. Marc Weller, *Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?*, 24 LEIDEN J. INT’L L. 127, 132 (2011).

47. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 438 (July 22); *see* Cedric Ryngaert & Sven Sobrie, *The Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 LEIDEN J. INT’L L. 467, 477–78 (2011). The international community’s recognition of Croatia as a state when the entity was bereft of an organized government and its concomitant refusal to recognize Somaliland, although it appears to possess the four factors, further undermines the enduring validity of the Montevideo criteria as the sole standard. *See* Roth, *supra* note 20, at 647.

48. Ryngaert & Sobrie, *supra* note 47, at 470.

49. MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 53 (2001).

50. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 564–80 (3d ed. 1979).

51. Israel is the paradigmatic case of the international community supporting a political community’s sovereign aspirations following atrocities and non-intervention, although Israel was not

B. The Challenge Posed by ISIS

The Islamic State—as well as Boko Haram and al-Shabaab (all entities that hold or have held vast territories and significant populations)—turns the concept of remedial secession on its head because in such cases the would-be sovereign is the victimizer, not the victim. Once known as “rogue States,” these entities are characterized by contempt for international norms, persecution of their own population, and the export of disorder.⁵²

Unlike its predecessor terrorist organizations, the Islamic State has employed organizing principles that appear to satisfy the first three elements of the four-pronged Montevideo test. Yuval Shany, Amichal Cohen, and Tal Mimran write that, “the requirement of a permanent population stems from the fact that a State is a means of realizing the shared aspirations of groups that have united due to cultural, religious, historical, or other characteristics they have in common.”⁵³ Importantly, it is not necessary that the denizens feel a connection to the State. As in Syria, the State may even render much of its population refugees outside the territory.⁵⁴ Nor, as the low-population States of Belize, Luxembourg, and Lichtenstein demonstrate,⁵⁵ is there a minimum number of nationals necessary for a State to be recognized as a sovereign, assuming neighboring States acknowledge a bona fide border. All that is required is that the people of the place are not transitory.⁵⁶

Many of the people trapped in ISIS-controlled territory would leave if they could and they are uninterested in realizing their “shared aspirations” within the confines of the Islamic State.⁵⁷ Yet the change in rulers and governing ideology is immaterial to the question of their permanence—the population is of the territory and currently answers to ISIS.

carved out of German territory. The concept of “remedial secession” addresses the phenomenon of a state that is “owed” sovereignty to redress past maltreatment. *See generally* Joel Day, *The Remedial Right of Secession in International Law*, POTENTIA, Fall 2012, at 19, <http://www.cips-cepi.ca/wp-content/uploads/2015/03/Potentia2012.revised.edited.compressed.pdf>; *accord* Charlotte Mueller, *Secession and Self-Determination—Remedial Right Only Theory Scrutinised*, 7 POLIS J. 283 (2012).

52. Thomas H. Henrickson, *The Rise and Decline of Rogue States*, 54 J. INT’L AFF. 349 (2001) (discussing the behaviors and roles of modern and historical rogue states including the Gauls, Germanic Visigoths, Vandals, and Carthaginians).

53. Yuval Shany, Amichal Cohen & Tal Mimran, *ISIS: Is the Islamic State Really a State?*, ISR. DEMOCRACY INST. (Sept. 14, 2014), <http://en.idi.org.il/analysis/articles/>.

54. *About the Crisis*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF., <http://www.unocha.org/syrian-arab-republic/syria-country-profile/about-crisis> (last visited Mar. 15, 2018) (“Over half of the [Syrian] population has been forced from their homes.”).

55. Bernard Yack, *Popular Sovereignty and Nationalism*, 29 POLITICAL THEORY 517, 517–36 (2001).

56. CRAWFORD, *supra* note 31, at 40.

57. Sinan Salaheddin, *ISIS is making civilians put up \$20,000 in collateral just to leave the ‘caliphate’ for 2 weeks*, BUS. INSIDER (Mar. 13, 2015), <http://www.businessinsider.com/heres-how-isis-is-preventing-civilians-from-leaving-its-harsh-caliphate-2015-3> (Civilians trapped by ISIS report being forced to put up title to cars and homes before being allowed to leave, while other feel as though leaving will constitute death).

The second prong of the test, the interpretation of “defined territory” under international law, requires only that the entity must exercise effective control over a particular piece of land.⁵⁸ The United Nations recognizes very small territories, including Monaco and Singapore, as sovereign member States, as are non-contiguous entities such as Angola, Argentina, and Russia.⁵⁹ Moreover, the borders of a State need not be permanent, although sovereign claims are helped when there is no other claimant to the territory in question.⁶⁰ Philip Jessup, arguing for Israel’s admission to the United Nations on behalf of the United States, discussed the requirement of territory as follows:

One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. . . [O]ne cannot contemplate a State as a kind of disembodied spirit. . . [T]here must be some portion of the earth’s surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement.⁶¹

In June 2014, ISIS seized the city of Mosul in Iraq, consolidating its military control of lands larger than comparable to the total area of United Kingdom.⁶² ISIS’s conquest of territory in Iraq and Syria (and its presence in Libya) has occurred in places that are emphatically part of existing, recognized States. Although the Iraqi government, the Syrian government, the Syrian opposition, and Kurdish forces have since reclaimed much of the territory under ISIS’s control, the Islamic State was or has been the sole authority of significant geographic holdings for years on end.⁶³

The third criterion under the Montevideo Convention is an effective government. International law demands no particular form of governance—fully recognized States need not be democratic, pluralistic, representative, or secular

58. CRAWFORD, *supra* note 31, at 40; James Leslie Brierly, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 137 (6th ed. 1963) (“Whether or not a new state has actually begun to exist is a pure question fact.”).

59. MILENA STERIO, THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW: “SELFISTANS,” SECESSION, AND THE RULE OF THE GREAT POWERS 46, 179 (2013).

60. Countries’ exerted efforts to deny recognition of Statehood to utopian and libertarian republics established on largely disclaimed land suggests an exception that proves the defined territory rule. See Gideon Lewis-Kraus, *Welcome to Liberland, the World’s Newest Country (Maybe)*, N.Y. TIMES (Aug. 25, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-making-of-a-president.html>.

61. U.N. SCOR, 3d Sess., 383d mtg. at 41, U.N. Doc. S/PV.383 (Dec. 2, 1948).

62. Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (Mar. 2015), <https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>.

63. Iraq’s second largest city, Mosul, was declared “liberated” on July 10, 2017. This liberation occurred nine months after the US-led multinational coalition launched their air and group support offensive against ISIS. *Islamic State and the crisis in Iraq and Syria in maps*, BBC NEWS (Oct. 11, 2017), <http://www.bbc.com/news/world-middle-east-27838034>. Likewise, the Syrian Democratic Forces recaptured ISIS’s self-proclaimed capital, Raqqa on October 17, 2017. Anne Barnard & Hwiada 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>.

in nature—effectiveness means simply that a controlling structure exists. The motivation behind this third criterion is to ensure that States establish a governing structure that behaves like a sovereign by policing borders, collecting taxes, and maintaining a legal system, among other indicia of statehood.⁶⁴

Whatever else the Islamic State represents, it is the only governing authority on the territory it controls. While ISIS uses extreme violence to stamp its exclusive power over the civilian population residing on large ribbons of land in Iraq and Syria and to deny access to other rulers, it also exercises government-like authority over varied facets of life, including tax collection, revenue-generating oil exports, the regulation of local businesses, payment of salaries to fighters and a near total control of family life and personal status.⁶⁵ By ruling as it does, ISIS is engaged in what James Scott termed (in a different context), “sedentarization. . . a state’s attempt to make a society legible, to arrange the population in ways that simplif[y] the classic state functions of taxation, conscription, and prevention of rebellion.”⁶⁶

ISIS’s declaration of itself as a caliphate, a fact that flows from the organization’s putative leader Abu Bakr al-Baghdadi’s assertion that he is a modern-day Caliph, may strengthen its claim to effective governance insofar as it forestalls any other authority engaged in the organization of civic or religious life.⁶⁷ To govern the caliphate, the Islamic State established “nine councils, including the Leadership Council, the Shore Council, the Military Council, the Legal Council, the Fighters’ Assistance Council, the Financial Council, the Intelligence Council, the Security Council, and the Media Council” all of which reinforce fealty to the organization and control the population.⁶⁸ For the cooperative population, ISIS endeavors to provide some social services.⁶⁹ For

64. CRAWFORD, *supra* note 31, at 45–46.

65. See MCCANTS, *supra* note 3, at 152–53; LISTER, *supra* note 7, at 47–48 (“IS frequently subsidizes the prices of staple products, particularly bread, and has been known to cap rent prices . . . Civilian bus services are frequently established and normally offered for free. Electricity lines, roads, sidewalks, and other critical infrastructure are repaired; postal services are created; free healthcare and vaccinations are provided for children; soup kitchens are established for the poor; construction projects are offered loans; and Islam-oriented schools are opened for boys and girls.”)

66. JAMES C. SCOTT, *SEEING LIKE A STATE 2* (1998).

67. Virtually all scholars of Islamic law reject al-Baghdadi’s interpretation of a true Caliphate. See David S. Sorenson, *Priming Strategic Communications: Countering the Appeal of ISIS*, 44 *PARAMETERS* 25, 25–26 (2014) (“The real vulnerability of ISIS is not its brutality, which seems to draw followers, but rather its claim to be a true Islamic group, when its operations significantly violate fundamental Islamic tenets. The writings of the very Islamic theorists who are considered foundations of jihadi Sunni Islam contradict ISIS’ claims concerning the religious legitimacy of their actions, and the most legitimate source of Islam, the Qur’an, specifically forbids many of ISIS’ actions. Remove its claim of religious legitimization of murder and destruction, and ISIS becomes only a criminal enterprise. As ISIS uses Islam to recruit and motivate members, its embrace of Islam may ultimately expose it as a naked emperor, who has distorted the core of Islam to the point where ISIS members may be guilty of the very crime it attaches to its Muslim victims—apostasy.”)

68. See Hope Lozano Bielat, *Islamic State and the Hypocrisy of Sovereignty*, E-INT’L REL. (Mar. 20, 2015).

69. See MCCANTS, *supra* note 3, at 136.

the remainder, ISIS's rule is characterized by daily terror and a manifest determination to eliminate any potential challengers.⁷⁰

If ISIS plausibly meets the first three Montevideo criteria, the fourth factor, the ability to enter into relations with other States, assumes additional significance. The capacity to engage in relations with other States traditionally pertained to the entity's technical ability to conduct foreign affairs. Satisfying this prong of the test did not imply that other States agreed to maintain diplomatic, economic or other relations with it, but rather that they *could* do so.⁷¹

International opinion has consistently condemned ISIS without referring to it as a State, and no country has yet raised the possibility of recognizing the Islamic State as a sovereign equal.⁷² Additionally, ISIS has not sought formal membership in the United Nations nor in any other international organization. Should Syria or Iraq fracture along sectarian or ethnic lines, however, it is possible to imagine a future version of the Islamic State seeking the status of statehood. When the former Yugoslavia disintegrated, the international community established the Badinter Commission to determine which of the rump entities qualified as sovereign nations.⁷³

Such cases trigger the longstanding debate on the *effect* of recognition. Under one theory, recognition by other States is simply a declaration of statehood, and the entity has already achieved the status by fulfilling the fixed legal criteria.⁷⁴ The contrary position, known as the constitutive view, suggests that recognition is one of the elements of statehood, and that regardless of its satisfaction of the objective criteria, a claimant to statehood is not itself a State until others have recognized it.⁷⁵

70. LISTER, *supra* note 7, at 49 ("Executions—sometimes by crucifixion and stoning—and the amputation of limbs as punishment for murder, adultery, and robbery have demonstrated a shocking level of brutality.").

71. *See id.*

72. *See* S.C. Res. 2170, ¶ 1 (Aug. 15, 2014) (condemning gross, widespread abuse by extremist groups in Iraq and Syria and their gross, widespread human rights abuses).

73. *See* Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178, 178 (1992), <http://ejil.org/pdfs/3/1/1175.pdf>. A rump state or entity is a politico-geographic entity which is a remnant of a previous, larger state that has subsequently been broken up. *See generally* Jerome Wilson, *Ethnic Groups and the Right to Self-Determination*, 11 CONN. J. INT'L L. 433 (1996); Stephen C. McCaffrey, *Developments in Public International Law*, 30 INT'L L. REV. 287 (1996).

74. Brierly, *supra* note 58, at 137; GERARD KREIJEN, STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA 15–18 (2004).

75. *See, e.g.*, JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW 63 (2013) (arguing that states do not emerge automatically from the application of legal criteria but instead through a political process in which a declaration of independence is accepted); Dapo Akande, *The Importance of Legal Criteria for Statehood: A Sur-Rejoinder to Jure Vidmar*, EJIL: TALK! (Aug. 10, 2013), <http://www.ejiltalk.org/the-importance-of-legal-criteria-for-statehood-a-sur-rejoinder-to-jure-vidmar/> (contending that the fourth Montevideo factor includes the recognition requirement of legal and factual independence); *see also* Martii Koskenniemi, *The Place of Law in Collective Security*, 17

Under the first theory, the determination of a State is intimately connected to the politics of recognition. International law is a dialectical enterprise such that putative or quasi-States ultimately require symbolic and operational recognition from their erstwhile equals. Because recognition involves a gesture from outside of the State, foreigners' assumptions matter in establishing the contours of legitimacy.⁷⁶ In recent months, Catalonia and Kurdistan have struggled to translate internal enthusiasm into external recognition.⁷⁷ Similarly, the refusal of influential states to recognize Taiwan and Kosovo as sovereigns fuels their uncertain statuses.⁷⁸ Robust external recognition, as well as great power consensus, is required for full membership in the United Nations (decided through a vote “by a two-thirds majority of the members present and voting, upon its application for membership”)—clear evidence that outside powers play a role at each stage in the sovereignty accrual process.⁷⁹

Since existing countries have no legal obligation to recognize an aspiring entity as a State, refusing to engage the would-be State is as political an act as choosing to establish diplomatic relations.⁸⁰ Recognition is best understood as a complex socio-economic and diplomatic process that occurs within a soft international legal framework.⁸¹ In this sphere, the phenomenon of persistent non-recognition is more commonly informed by *realpolitik* interests than by legal or normative considerations.⁸² It is therefore important to distinguish between opposition of those States that have a vested interest and opposition by

MICH. J. INT'L L. 455, 469 (1996) (arguing for a “resuscitated ‘constitutivist’ approach to the recognition of states”).

76. This is true whether or not one accepts the full constitutive theory of statehood which holds that “[t]hrough recognition only and exclusively a State becomes an International Person and a subject of International Law.” L.F.L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 135 (1906).

77. George Kyrus, *Catalonia and Kurdistan Find the Road to Statehood Filled with Obstacles*, THE CONVERSATION (Oct. 19, 2017), <http://theconversation.com/catalonia-and-kurdistan-find-the-road-to-statehood-filled-with-obstacles-85768>; Saim Saeed, *How the world reacted to Catalan independence declaration*, POLITICO (Oct. 27, 2017), <https://www.politico.eu/article/how-the-world-reacted-to-catalan-independence-declaration/>.

78. Existing states almost always object to any threat to territorial integrity. See generally Stephen Allen, *Recreating ‘One China’: Internal Self-Determination, Autonomy and the Future of Taiwan*, 4 ASIA-PAC J. ON HUM. RTS. & L. 21, 23 (2003) (stating that “both the ROC and PRC . . . were ideologically incapable of accepting the existence of the other regime or any compromise solution”). It is therefore worth distinguishing between recognition by less interested external actors and the predictable opposition of those states that stand to lose land or have a vested interest in the previous regime.

79. Under the U.N. Charter, the Security Council must recommend membership before the General Assembly can approve it. Gen. Assembly of the U.N., *Article XIV, Admission of New Members to the United Nations*, UNITED NATIONS, <http://www.un.org/en/ga/about/ropga/adms.shtml> (last visited Oct. 27, 2017).

80. Int'l Law Ass'n, *Recognition/Non-recognition in International Law*, 76 INT'L L. ASS'N REP. CONF. 424, 427 (2014).

81. See *Declaration on The Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 31 I.L.M. 1485, 1486–87 (1992).

82. The practice of premature recognition is a closely related concept. See Int'l Law Ass'n, *supra* note 80, at 432.

actors based on moral considerations, such as observance of human rights and acceptance of the sovereign co-existence of other States.

II.

HUMAN RIGHTS MINIMALISM WITHIN THE INTERNATIONAL ORDER: A TWO-PART PROPOSAL

A. *Respecting Human Security Domestically*

All states are simultaneously outward and inward-looking creatures. To the extent a State encompasses people, territory, and cultures, it reflects certain qualities of its inhabitants and represents those characteristics in its external relations.⁸³ The concept of sovereignty thus captures the duality of internal authority and the boundaries of that power.⁸⁴

ISIS's abhorrent human rights record renders it almost unrecognizable in international legal terms.⁸⁵ This is true not because the Montevideo Convention precludes a pariah State from becoming a full member of the international community, but because the scale of repression produced by the Islamic State suggests an entity unable or unwilling to adopt legitimating behaviors toward its own population. In much of Syria and Iraq today, ISIS threatens basic human security—an idea that provides a normative baseline necessary for the recognition of any candidate State seeking or invested with sovereign status. The term “human security” gained favor with the establishment of the U.N. Commission on Human Security (CHS) in 2000, a process co-chaired by Amartya Sen and Sadako Ogata.⁸⁶ The CHS issued its final report in 2003, in which it concluded that human security “means protecting people from critical and pervasive threats and situations, building on their strengths and aspirations.”⁸⁷ It also means creating systems that give people the building blocks of survival, dignity, and livelihood.⁸⁸

Human security is therefore focused on the rights of people in a given territory to live in safety and dignity, rather than on State-centric security imperatives.⁸⁹ According to Anne-Marie Slaughter:

83. KREIJEN, *supra* note 74, at 15–18.

84. *Id.*

85. Hannah Arendt and Carlos Nino both used the term “radical evil” to describe the commission of well-planned and systematic crimes against humanity. *See, e.g.*, HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 591–92 (1966); CARLOS NINO, *RADICAL EVIL ON TRIAL* vii–viii (1998).

86. Alice Edwards, *Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders*, 30 MICH. J. INT'L L. 763, 764 (2009).

87. *Id.*

88. *Id.*

89. Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT'L L. 619, 619 (2005).

we all seek to live our lives in dignity, free from fear and from want. We need not be guaranteed prosperity, but at least the health and education necessary to strive for it. . . [and] that our government will not try to murder us and will do its utmost to prevent our fellow citizens from doing so.⁹⁰

Alice Edwards notes that, “[h]uman security treats security, rights, and development as mutually reinforcing goals and is oriented as much toward the protection of individuals as toward their empowerment.”⁹¹ The human security agenda was buttressed by the work of the International Commission on Intervention & State Sovereignty (ICISS), the body that produced the Responsibility to Protect (RtoP) doctrine.⁹² Convened by the Canadian government in 2002, ICISS proposed a radical reconceptualization of sovereignty.⁹³ The final ICISS Report urged an understanding of sovereignty not primarily as a right to control what happens within a State’s borders, but rather as a responsibility the State bears to protect its population and those in other States.⁹⁴ Margaret DeGuzman concludes that, “[t]his reorientation led ICISS to include within the ambit of RtoP the whole range of States’ internal and external responsibilities, rather than simply their responsibilities related to military intervention.”⁹⁵

RtoP thus provides a framework for considering the many consequences of human rights violations, not an operational blueprint for international intervention.⁹⁶ Several scholars have nonetheless proposed RtoP as a tool for clarifying international obligations in the face of ethnic cleansing,⁹⁷ explaining

90. *Id.*

91. See Edwards, *supra* note 86, at 765 (“[Human Security] also challenges us to revisit notions of territory and sovereignty as far as they inhibit global action in the face of transnational threats to our shared security and humanity.”).

92. See Int’l Comm’n on Intervention & State Sovereignty, Rep. on its Fifty-Seventh Session, U.N. Doc. A/57/303 (Aug. 14, 2002) [hereinafter Responsibility to Protect] (describing the same responsibility); see also Christopher C. Joyner, *The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT’L L. 693, 716 (2007) (referring to the responsibility to protect as an emerging international legal norm); Slaughter, *supra* note 91, at 621 (The “responsibility to protect” encapsulates the idea that the international community has a right and a duty to intervene in states that cannot or will not protect the human rights of their people against “genocide and other large-scale killing,” ethnic cleansing or serious violations of international human rights).

93. Margaret M. DeGuzman, *When Are International Crimes Just Cause for War?*, 55 VA. J. INT’L L. 73, 78–79 (2014).

94. *Id.* at 79.

95. *Id.* at 80.

96. See generally Monica Hakimi, *Toward a Legal Theory of The Responsibility to Protect*, 39 YALE J. INT’L L. 249 (2014) (arguing that RtoP should not posit an all-encompassing duty that falls, at once, on the entire international community but should propose more discrete duties that attach to specific outside states).

97. David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT’L L. 111, 128–30 (2007).

the Security Council's response to civil war in Libya⁹⁸ and conceiving of refugee cost-sharing.⁹⁹

If RtoP stipulates minimal human security standards and duties for extant States, logic dictates that a similar rule should apply to those entities seeking sovereign recognition. In practice, a form of principled non-recognition has existed since the 1930s when the U.S. refused to acknowledge Manchukuo as a State.¹⁰⁰ The so-called Stimson Doctrine has since achieved increased validity through its enumeration in Article 41(2) of the Responsibilities of States for International Wrongful Acts.¹⁰¹ At base, the Stimson Doctrine identifies some State-building practices as beyond the pale and reflects what Cedric Ryngaert termed "the field of tension between statehood as a factual given and statehood as a moral engagement."¹⁰²

Republika Srpska, the majority Serbian ethnic entity within Bosnia-Herzegovina, has never been recognized as a sovereign State, in part because of its dismal human rights record during the wars following the break up of the former Yugoslavia.¹⁰³ Led by Radovan Karadžić and Ratko Mladić, Bosnian Serb forces of Republika Srpska committed grave atrocities, including the massacre at Srebrenica.¹⁰⁴ Although Republika Srpska secured significant autonomy, at no time did the United Nations or major actors within the international community entertain complete independence for the Serbian enclave and, in fact, the continued use of the name has become synonymous with "genocidal aggression."¹⁰⁵

The fate of Republika Srpska suggests that, for purposes of international recognition and legitimation, statehood carries with it a bundle of attributes associated with the political unit in question. Those characteristics include

98. See generally Spencer Zifcak, *The Responsibility to Protect After Libya and Syria*, 13 MELB. J. INT'L L. 59 (2012).

99. See generally E. Tendayi Achiume, *Syria, Cost-sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687 (2015).

100. Ryngaert & Sobrie, *supra* note 47, at 472.

101. G.A. Res. 56/83, annex, Articles on Responsibility of States for Internationally Wrongful Acts (Jan. 28, 2002) (stating that "[n]o State shall recognize as lawful a situation created by a serious breach [of an obligation arising under a peremptory norm of general international law], nor render aid or assistance in maintaining that situation").

102. Ryngaert & Sobrie, *supra* note 47, at 487.

103. In April 1992, the EU and U.S. "recognized the Republic of Bosnia-Herzegovina but ignored [Radovan] Karadzic's claim to an independent Republic of Srpska." THE BOSNIAN CONFLICT 91 (Alexander Cruden ed., 2012).

104. See Prosecutor v. Karadžić, Case No. IT-95-5, Judgment, ¶ 5849 (Mar. 26, 2016); David Pettigrew, *Justice in Bosnia After Mladic*, GREATER SURBITON (June 18, 2011), <https://greatersurbiton.wordpress.com/2011/06/18/justice-in-bosnia-after-mladic/>.

105. Paul C. Szasz, *The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia*, 19 FORDHAM INT'L L.J. 363, 365 (1995) (citing Conference on Yugoslavia Arbitration Commission Opinion Nos. 2, 3 and 4, January 11, 1992, 31 I.L.M. 1497, 1499, 1501 (1992)); RICHARD HOLBROOKE, TO END A WAR 130-31 (1998) ("Retention of the name Republika Srpska was 'a big problem for Sarajevo' and called 'a Nazi name' by Izetbegovic, who, with Sacirbey, finally relented.")

respect for life and the essential dignity of the human beings counted as members of the State. Max Weber's sociological definition of the State as the monopoly of the legitimate use of force within a territory is thus insufficient to confer legitimacy on a political community under international law.¹⁰⁶ The unit in question must also demonstrate effective control in a way that respects the basic humanity of the permanent population.¹⁰⁷

Additional evidence of a future sovereign's respect for minimal human rights observance is found in its declaratory commitments. For aspiring States, signaling a willingness to be bound by constitutional norms and international human rights agreements represents a necessary if insufficient condition for statehood.¹⁰⁸ Kurdistan, Palestine, and Somaliland have all adopted constitutions that promise respect for international human rights, and they have all been embraced by global bodies that are prepared to accept entities that are not yet recognized as States.¹⁰⁹ Such promises lead to the conclusion that the socialization of States begins pre-independence.¹¹⁰ Of course, an aspiring State may promise to uphold human rights principles and then repudiate those assurances once it becomes a recognized sovereign, but doing so carries reputational, economic, and strategic costs.¹¹¹

106. See Max Weber, *Politics as a Vocation*, (1919), in FROM MAX WEBER 77 (H.H. Gerth & C. Wright Mills eds., 1946).

107. Grant, *supra* note 23, at 403, 410–12.

108. See generally Erik Voeten, *Does Participation in International Organizations Increase Cooperation?*, 9 REV. INT'L ORGS. 285 (2014) (asserting the proposition that international institutions, even those without international enforcement mechanisms, impact state's behavior); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2625 (1997).

109. See generally Michael J. Kelly, *The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause*, 114 PENN ST. L. REV. 707 (2010); Andrew Arato, *Post-Sovereign Constitution-Making and its Pathology in Iraq*, 51 N.Y. L. SCH. L. REV. 535 (2006–07) (detailing Iraq's interim and final constitutions following the 2003 invasion); Lisa Davis, *Symposium: The Global Struggle for Women's Equality: Iraqi Women Confronting ISIL: Protecting Women's Rights in the Context of Conflict*, 22 SW. J. INT'L L. 27 (2016) (exploring the ways in which observance of women's rights differed between Iraq's constitution and reality); see also U.N. Office of the High Comm'r on Human Rights, *Status of Ratification Interactive Dashboard*, U.N. (2007), <http://indicators.ohchr.org/> (indicating that the State of Palestine ratified the International Covenant on Civil and Political Rights in 2014); *States Parties—Chronological list*, INT'L CRIM. CT. (2017), https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx (listing the State of Palestine as a party to the Rome Statute); *Somaliland*, FREEDOM HOUSE (2012), <https://freedomhouse.org/report/freedom-world/2012/somaliland> (noting that the Somaliland constitution guarantees the freedoms of expression and of the press).

110. See RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013) (demonstrating that the global human rights architecture can socialize states to honor and protect human rights).

111. See generally Oona Hathaway, *The Costs of Commitment*, 55 STAN. L. REV. 1821 (2003) (arguing that the cost of compliance with international human rights treaties varies according to a country's divergence from the requirements of a treaty and the likelihood that the country will change its practices to comply with its requirements).

Conversely, international law disfavors recognition of entities accused of the illegal use of force, the forcible annexation of territory, or grave, systematic, and independently-verified human rights abuses.¹¹² A group's violation of *erga omnes* or *jus cogens* obligations, particularly those resulting from the commission of war crimes, genocide, or crimes against humanity, renders the potential sovereign an international criminal enterprise and stigmatizes it in ways that preclude it from consideration as a future equal.¹¹³ (While widespread discrimination or systematic prejudice against minority populations by would-be actors is less clearly disqualifying, overt persecution or the failure to stop serious offenses caused by non-State actors is likely to trigger resistance to recognition by international stakeholders). Likewise, the insertion of dignity-based values into the recognition dynamic surely constitutes a double standard because the same existing States that behave in ways disrespecting human security are also loathe to admit the comparison in negotiations over the independence of new States.¹¹⁴

Much as RtoP has pierced the veil of absolute sovereignty, a demand that the candidate State observe minimal human rights standards prior to recognition joins a pre-existing normative tradition. The European Union, for example, has long conditioned admission to the organization and regional institutions on the acceptance of the European Convention on Human Rights.¹¹⁵ Any European State may seek to join the EU, but as Utz P. Toepke has posited, "the principles of pluralist democracy and respect for human rights form part of the common heritage of all Member States and adherence to them is therefore an essential requirement of membership."¹¹⁶

112. See Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449, 462 (1990). Notably, the birth of Israel, Eritrea, South Sudan and Kosovo were all surrounded by serious human rights abuses committed by independence forces although in each case those offenses paled in comparison to atrocities committed by opponents of sovereignty prior to recognition. On this point, Xanana Gusmao's instruction to Timorese rebels not to retaliate against Indonesian militias in 1999 represented a conscious effort to ensure that East Timor would not be accused of the crimes perpetrated by the Indonesian occupiers. See e.g., POWER, *supra* note 40, at 288.

113. See generally, *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, at 32 (Feb. 5) (holding that a State necessarily assumes an obligation for the treatment of foreign investments based on general international law if and when that State admits foreign investments or foreign nationals into its territory).

114. See Louis Henkin, *Lecture: That "S" Word: Sovereignty, Globalization, and Human Rights*, 68 FORDHAM L. REV. 1 (1999/2000) (speaking of non-state actors' responsibilities for human rights violations under international law); Neil Stammers, *Social Movements and the Social Construction of Human Rights*, 21 HUM. RTS. Q. 980, 981 (1999) ("[D]ominant discourses from both proponents and opponents of human rights are not analytically equipped to grasp the way in which ideas and practices in respect of human rights have been socially constructed in the context of social movement challenges to extant relations and structures of power.").

115. See also Consolidated Version of the Treaty on European Union art. 49, 2016, 202 O.J.C 43 (requiring acceptance of art. 2); see also, *Conditions for Membership*, EUR. COMM'N (2016), http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm (providing the criteria required before a state can join the European Union).

116. Utz P. Toepke, *The European Economic Community – A Profile*, 3 NW. J. INT'L L. & BUS.

Since its founding, ISIS has consistently rejected demands that it conform to the international community's notion of what it means to behave like a sovereign. If the Islamic State is engaged in State-building, its project has been defined by conquest, brutality, and a demand for theological obeisance among the population it controls, all wrapped in a peculiar form of managerial acumen.¹¹⁷ In the event a future version of the Islamic State seeks recognition as a sovereign State, that entity could continue to exercise control over many facets of public and private life—certainly, nothing in international law prohibits the maintenance of Sharia law.¹¹⁸ But ethnic cleansing, torture, sexual slavery, the violent persecution of religious minorities, and accompanying incitement or rhetorical support thereof is antithetical to a fulsome conception of sovereignty.¹¹⁹

B. Respect for Sovereign Co-existence

By fomenting human insecurity *outside* of its territorial control, ISIS has violated a second fundamental tenet of international life: respect for sovereign co-existence.¹²⁰ The Islamic State's actions demonstrate the denial of an international order premised on reciprocity and near-absolute authority within sovereign borders. The commission of mass atrocities around the world directed at soft targets (rather than military installations or symbols of government power) suggests adherence to ideas that are alien to global civic life organized through a system of nation States.¹²¹ In its attempt to create a war without

640, 643 (1981) (citing 12 E.C. Bull., no. 5, at 73 (1979)); see also *Memorandum on the Accession of the European Communities to the European Convention on Human Rights*, 12 BULL. OF THE EUR. COMMUNITIES 5 (1979); Cesare Pinelli, *Conditionality and Enlargement in Light of the EU Constitutional Developments*, 10 EUR. L.J. 354 (2004); Yassin Abdullah Kadi and Al Barakaat Int'l Found. v. Council of the Eur. Union and Comm'n of the European Communities, Judgment, C-402/05 P and C-415/05 P (2008) ("Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community.").

117. ISIS's attempts to provide certain public services, such as fixing potholes, running post offices, distributing food and vaccinating its subjects against polio although it has also been accused of taxing Syrian and Iraqi communities to pay the salaries of foreign fighters. MCCANTS, *supra* note 3, at 152.

118. ISIS has adopted Saudi Arabia's conservative brand of Sunni Islam, complete with hudud penalties, although ISIS has interpreted punishments even more severely than Saudi Arabia and does so in public. *Id.* at 16–37.

119. See generally Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (arguing that countries transitioning to a more just and democratic future cannot gain legitimacy without reckoning for international crimes of the past).

120. *Prospects for Protecting People Improve When Sovereignty Not Viewed as 'Wall or Shield'*, Secretary-General Tells Security Council in Ministerial Debate, U.N. (Feb. 23, 2015), <https://www.un.org/press/en/2015/sc11793.doc.htm>.

121. The Islamic State's frequent attacks on fellow Muslims has caused a rift within jihadist groups and caused even al-Qaeda to distance itself from the organization. See MCCANTS, *supra* note 3, at 95–96.

bounds, ISIS relishes its role as a threat to people and a disrupter of societies the world over.¹²²

Regardless of its motivations or doctrinal teachings, ISIS's pattern of conduct is fundamentally hostile to orderly relations among bordered nations. Even States that are notoriously repressive internally—North Korea, Zimbabwe, China, or Saudi Arabia—rarely sponsor or coordinate terrorist attacks in locations far beyond their spheres of influence. By contrast, ISIS routinely attacks civilians in territory to which the organization makes no claim, a pattern of conduct replicated by Boko Haram's infamous abduction of 276 girls at Chibok Government Secondary School in Nigeria and al-Shabaab's deadly attack on Kenyan university students in 2015.¹²³

All successful States eventually delineate their territorial ambitions. While precise borders may be contested, the claim to statehood is ultimately a demand for recognition of a people to a place, without which there may be no center, no homeland, and no diaspora. In that regard, the Islamic State's multiple identities, including its State-like attributes, have bewitched the international community. Security Council Resolution 2249, calling on U.N. Member States to take all necessary measures in "the territory under the control of ISIL" to suppress terrorist acts, reflects the conceptual incoherence provoked by ISIS, which is seen as both the responsible party in law and a temporary authority, a transitory tormenter of the local population.¹²⁴

In the classic story of new State recognition, a restive portion of an existing entity seeks independence from the parent State.¹²⁵ Opposition from the encompassing State is consistent and predictable, and the parties involved generally understand the costs and benefits of designating territory for a new unit.¹²⁶ As the process unfolds, sometimes under U.N. stewardship, the international community legitimates some groups' desire for complete self-determination, sometimes at the expense of others.¹²⁷

122. Wood, *supra* note 62.

123. See Kevin Sieff, *Boko Haram kidnapped 276 girls two years ago. What happened to them?*, WASH. POST (Apr. 14, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/04/14/boko-haram-kidnapped-276-girls-two-years-ago-what-happened-to-them/?utm_term=.897cde946618; Jessica Hatcher & Kevin Sieff, *Al-Shabab attacks Kenyan university, killing at least 147*, WASH. POST (Apr. 2, 2015), https://www.washingtonpost.com/world/africa/70-killed-hundreds-rescued-after-kenya-university-attack-by-al-shabab-militants/2015/04/02/0c554516-d951-11e4-ba28-f2a685dc7f89_story.html?utm_term=.a0eaafd9a353.

124. S.C. Res. 2249, ¶ 5 (Nov. 20, 2015).

125. See generally Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1 (2009).

126. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 337 (2004); see generally Alexander H. Berlin, *Recognition as Sanction: Using International Recognition of New States to Deter, Punish, and Contain Bad Actors*, 31 UNIV. PA. J. INT'L L. 2 (2009).

127. See generally Charles Riziki Majinge, *Emergence of New States in Africa and Territorial Dispute Resolution: The Role of the International Court of Justice*, 13 MELB. J. INT'L L. 462 (2012).

The Islamic State's unrelenting violence in far-flung locales disrupts this analysis in at least three ways. First, it creates adversaries of States beyond the parent, whose recognition or acquiescence are needed to reconceive of the entity in question. Since multiple States now bear the brunt of the Islamic State's terrorist activities or the contagion of cross-border attacks, those same countries have a material interest in marginalizing ISIS and are far less likely to admit the source of the conflict into the family of recognized nations.

Second, ISIS exploits the vulnerabilities of an international world built on cooperation among sovereign equals and the flow of people, goods, and ideas across borders. Operating from a base of territory in Syria and Iraq, ISIS has deployed trans-State and non-State terrorist tactics to amplify its capacity.¹²⁸ Bahrin Naim reportedly organized and funded the January 14, 2016, bombing in Jakarta.¹²⁹ ISIS has also attracted militants from dozens of countries far from Iraq and Syria and is now engaged in human rights violations that cross frontiers and nationalities but benefit from a secure, centralized location.¹³⁰

Third, the Islamic State's use of social media transcends traditional boundaries, allowing it to reach audiences well beyond its territorial control. Web-based technologies provide multiple platforms to disseminate messages and evade the chokepoints and censorship that curbed previous generations of speech, hateful or otherwise. ISIS regularly films and disseminates gruesome acts of violence, recruits foreign fighters, wires funds, encrypts its communication, and experiments with brand and marketing ideas, all online.¹³¹ Magazines and pamphlets once connected relatively small numbers of extremist readers; today, social media, including Twitter, Facebook, Instagram, and YouTube, enables instantaneous and memorialized broadcasting from anywhere on the planet.

In this fashion, ISIS profits from phenomena that exceed the capacity of any one State to regulate. The enlistment of foreign fighters, easy cross-border travel, occasional fraudulent refugee claims, and internet-based communication are so hard to control that ISIS has effectively turned the international system against itself.¹³²

At base, statehood within the international community reflects a bargain. In exchange for internal autonomy, each State recognizes that others enjoy the same status. Moreover, each State tacitly or explicitly acknowledges that it cannot, by itself, control all people and territory. The principle of sovereign co-

128. Ahmed Rafik, *Story of Bahrin Naim, Suspected Mastermind of the Jakarta Attack*, TEMPO (Jan. 15, 2016), <https://en.tempo.co/read/news/2016/01/15/055736518/Story-of-Bahrin-Naim-Suspected-Mastermind-of-the-Jakarta-Attack>.

129. *Id.* (Bahrin Naim is an Indonesian computer expert whose last known whereabouts were in Syria).

130. See WARRICK, *supra* note 6, at 289–90.

131. See LISTER, *supra* note 7, at 48–49.

132. French antiterrorism police compiled a report documenting the difficulties French and Belgian authorities had sharing intelligence or preventing one of the Paris assailants from traveling to Brussels following the November 13, 2015, attack. Callimachi et al., *supra* note 16.

existence, therefore, enables the enduring practices of comity, diplomacy, and the mutuality of recognition necessary for functioning State-to-State relations.

Many non-State groups that once scorned the geopolitical habitat have later embraced the conventions of statehood. Today's Palestinian representatives have achieved inclusion in some international fora by observing a set of geopolitical rules that the PLO airplane hijackers or Munich Olympic assailants of the 1970s did not.¹³³ Similarly, Kurdish nationalists have largely repudiated guerilla attacks against Turkish, Syrian, and Iraqi State figures in favor of a strategy aimed at defining Kurdistan within the borders of present-day Iraq.¹³⁴ The September 25, 2017, referendum on Kurdish independence was held entirely within Iraq and aimed to exploit the Peshmurga's battlefield successes against ISIS.¹³⁵ Somaliland too has long struggled to achieve international recognition of its State-like institutions and to disassociate itself with the chaos of Somalia.¹³⁶ One lesson from each of these States-in-waiting is that independence movements mature over time and that the experience of governing people and territory inculcates leaders with ideas central to sovereignty and the maintenance of a functioning international system. Viewed collectively, these entities have come to understand that they will not achieve statehood if they produce excessive negative externalities for the global commons in the form of piracy, terrorism, the production of refugees, or environmental pollutants and infectious disease.

In the final analysis, membership in the international community demands acceptance of a shared set of expectations. These norms range from hortatory commitments to robust multilateralism, to the demarcation of territory and the delineation of bordered spaces. Unless and until ISIS, or any other non-State organization, recognizes the existence of other sovereign actors, it cannot become a full player on the world stage within the meaning of international law.

133. *General Assembly grants Palestine non-member observe State status at U.N.*, U.N. NEWS CENTRE (Nov. 29, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43640#.WhHeSbQ-dE6>.

134. Like other breakaway regions and people wanting self-determination, Kurds in Iraq have begun to deploy the trappings of Statehood, including the issuance of Kurdistan license plates. See Richard A. Oppel Jr., *Iraq's Kurds Enjoy Self-Rule and Are Trying to Keep It*, N.Y. TIMES (Dec. 31, 2014), <http://www.nytimes.com/2004/12/31/world/middleeast/iraqs-kurds-enjoy-selfrule-and-are-trying-to-keep-it.html>.

135. Galip Dalay, *After the Kurdish Independence Referendum: How to Prevent a Crisis in Iraq*, FOREIGN AFF. (Oct. 2, 2017), <https://www.foreignaffairs.com/articles/middle-east/2017-10-02/after-kurdish-independence-referendum>.

136. Brad Poore, *Somaliland: Shackled to a Failed State*, 45 STAN. J. INT'L L. 117 (2009); see also J. Peter Pham, *Somalia: Where a State Isn't a State*, 35 FLETCHER F. WORLD AFF. 133, 148 (2011) ("The reality is that [Somalia] has long ceased to be a state; meanwhile, what are at least potentially viable successor states, in not already such in all but name, continue to be denied recognition."); Mary Harper, *Somaliland: Making a Success of Independence*, BBC NEWS (May 18, 2016), <http://www.bbc.com/news/world-africa-36300592>.

CONCLUSION

ISIS represents the latest challenge to “the role, content, and scope of the legal norms on State recognition.”¹³⁷ To address ongoing uncertainty surrounding the recognition dynamic, the International Law Association has convened the Committee on Recognition in International Law.¹³⁸ The committee is conducting a multi-year survey to derive “a conclusion about the current state of international law with respect to the recognition of States and government”¹³⁹ The results may be instructive because how the global community treats ISIS is no longer strictly academic. Since the Islamic State’s 2014 territorial expansion, relief organizations, cross-border business enterprises, U.N. agencies, and neighboring States have been forced to grapple with a non-State actor that controls land and lives and operates through select statist modalities.

More fundamentally, recognition implies an inquiry into the motivations of the potential State, the impact on existing political communities, and the priorities of evaluating States, regional organizations and global institutions. To date, the Islamic State’s nihilism and contempt for the Westphalian order—coupled with military defeats—have allowed the international community to avoid serious consideration of ISIS as a candidate for sovereignty.

But in the nearly uniform condemnation of the Islamic State lie clues to what is and ought to be valued in any discussion concerning the attributes of statehood. Clarifying those factors begins with the Montevideo Convention pillars but quickly extends to the core of recognition—common principles and the acknowledgment of an international order premised on formal, moral, and political equivalence. In the space between what Montevideo allows and what ISIS represents, respect for human security and sovereign co-existence offers a means of distinguishing the next generation of sovereign States from rights-abusing movements.

137. Roth, *supra* note 20, at 647.

138. *Id.*

139. Int’l Law Ass’n, *supra* note 80, at 424–25.