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THE SELF-PROCLAIMED STATEHOOD OF THE ISLAMIC STATE BETWEEN 2014 AND 2017 AND INTERNATIONAL LAW

Marco Longobardo*

Abstract

The Islamic State of Iraq and Syria is considered one of the most serious threats to the entire world. In order to provide a lawful response against this threat, it is necessary to verify whether the Islamic State is actually a State. The concept of State is still at the centre of the contemporary international legal order, but there is not a general consensus about the elements that constitute a State under international law, and the conditions pursuant to which international personality is conferred to an entity claiming statehood. Accordingly, it can be useful to examine both the factual bases of the Islamic State and its legal entitlement to aspire to become an independent State under international law. From this enquiry, at the moment the Islamic State appears not to be a State in light of international law, but rather a group of insurgents with a territorial basis.

Keywords: Islamic State; recognition; self-determination; statehood; insurgents; Syria; Iraq

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LA AUTOPROCLAMADA ESTATALIDAD DEL ESTADO ISLÁMICO ENTRE 2014 Y 2017 Y EL DERECHO INTERNACIONAL

Resumen

El Estado Islámico de Irak y Siria es considerado una de las amenazas más serias para el mundo entero. Para luchar contra esta amenaza, es necesario verificar si el Estado Islámico es en realidad un Estado a la luz del derecho internacional. El concepto de estado se encuentra en el centro del orden jurídico internacional contemporáneo, pero no hay un consenso general acerca de los elementos que constituyen un Estado, y acerca de las condiciones necesarias para considerar estado una entidad que reclame esta cualifica. En consecuencia, puede ser útil examinar los fundamentos del Estado islámico y su derecho a aspirar a convertirse en un Estado independiente en el derecho internacional. El Estado islámico no parece ser un Estado a la luz del derecho internacional, sino más bien un grupo de insurgentes con una base territorial.

Palabras clave: Estado Islámico; reconocimiento; autodeterminación; estatalidad; insurgentes; Siria; Irak

I. INTRODUCTION

*I've seen the future, baby: it is murder.*¹

From 2013, the International Community has been struck by the violent actions of the so-called Islamic State of Iraq and Syria (ISIS, also ISIL, Islamic State of Iraq and the Levant, and Daesh). Mass human rights violations are committed daily in the north-eastern part of Syria and in a huge portion of Iraqi territory. ISIS is at hearth a group of extremist jihadist rebels that gained control of a wide area. ISIS is also something more, though; it is a self-proclaimed State and a novelty in the most recent jihadist scenario as groups such as Al-Qaeda have never aimed to create a State before. Luckily, ISIS appears to be about to be defeated; however, this phenomenon still deserves scholarly attention because of the challenges it poses to international law.

The present essay studies ISIS in order to verify whether ISIS ever become a State according to international law. First, the inquiry will start with a brief overview of ISIS history. Then, it will describe the different theories about statehood and will apply the relevant criteria to the Islamic State. The essay will study, therefore, the capacity of ISIS to govern a defined territory and a permanent population, the relevance of the principle of self-determination, and the consequences on the statehood issue of their despotic regime, characterized by mass atrocities and human rights abuses.

This author considers the legal qualification of ISIS to be pivotal for the discourse regarding several international law issues arising from the armed conflict against ISIS in which a number of States are or have been involved. For instance, this is the case of *jus ad bellum* justifications pertaining to the fight against ISIS: even if they are beyond the

¹ COHEN, L., «The Future», *The Future*, (1992).

purview of this paper,² suffice it to say that the qualification of ISIS as a State might influence the debate regarding the resort to armed force against ISIS. In the words of Christian Henderson, ‘there are other issues that have not been addressed ... Firstly, given the way in which IS has proclaimed statehood, has significant capabilities and effective control over territory, to what extent, if any, might the *jus ad bellum* apply to its actions?’³ Just to mention one major issue, it is well known that the International Community accepts actions in self-defence pursuant to Article 51 of the UN Charter when a State faces an armed attack from another State. Conversely, the legality of an action in self-defence against non-state actors’ attacks is more debated, especially since the International Court of Justice seems to have ruled out this possibility, at least when

² The scientific literature on *jus ad bellum* issues in the fight against ISIS is growing constantly. See, among others, ARIMATSU, L., SCHMITT, M. N., «Attacking the ‘Islamic State’ and the Khorasan Group: Surveying the International Law Landscape», *Columbia Journal of Transnational Law Bulletin*, 53, (2014), pp. 1-29; PICONE, P., «Unilateralismo e guerra contro l’ISIS», *Rivista di diritto internazionale*, 98, (2015), pp. 5-27; GRADONI, L., «Gli obblighi *erga omnes*, l’idioma dell’egemone e la ricerca del diritto. Ancora sull’intervento contro l’ISIS e oltre», *Quaderni di SIDIBlog*, 1, (2014), pp. 271-290; HENDERSON, C., «The Use of Force and Islamic State», *Journal on the Use of Force and International Law*, 1, (2014), pp. 209-222; MOSCIATTI GÓMEZ G., «Los argumentos estadounidenses para justificar el uso de la fuerza contra el Estado Islámico», *Revista Tribuna Internacional*, 4, 2015, pp. 109-128; STERIO, M., «The Applicability of the Humanitarian Intervention Exception to the Middle Eastern Refugee Crisis: Why the International Community Should Intervene against ISIS», *Suffolk Transnational Law Review*, 38, (2015), pp. 325–357; LATTY, F., «Le brouillage des repères du jus contra bellum. A propos de l’usage de la force par la France contre Daesch», *Revue Générale de Droit International Public*, 120, (2016), pp. 11-39; CHRISTAKIS, T., (ed), «Symposium on the Fight against ISIL and International Law», *Leiden Journal of International Law*, 29, (2016), pp. 737-852; POZO SERRANO, P., «El uso de la fuerza contra el Estado Islámico en Irak y Siria: problemas de fundamentación jurídica», *Anuario Español de Derecho Internacional*, 32, (2016), pp. 141-188.

³ HENDERSON, C., «The Use of Force», cit., p. 221. See also NIGRO, R., «La risoluzione del Consiglio di sicurezza delle Nazioni Unite n. 2249 (2015) e la legittimità dell’uso della forza contro l’ISIS in base al diritto internazionale», *Diritti umani e diritto internazionale*, 10, (2016), pp. 137-156, pp. 144-145.

the armed groups are located in a territory that is under occupation.⁴ Accordingly, qualifying ISIS as a State would simplify the recourse to self-defence as a justification for the airstrikes against its strongholds.

Similarly, the question of ISIS's statehood is relevant in order to verify which rules of international humanitarian law are applicable. At the risk of simplifying a more complex issue that cannot be examined here properly, the scenario can be summarized as follows: if one considers ISIS to be a State, rules regarding international armed conflicts should be applied; if one considers ISIS to be a non-state actor and that its actions are not supported by the principle of self-determination of peoples, then rules on non-international armed conflicts should be applied.⁵

In order to answer to questions like these, a rigorous analysis of ISIS's statehood claim is important. Clearly, these days ISIS embodies everything that is heinous and that offends the sense of justice of billions of people around the world. However, statehood is not a kind of reward that the International Community bestows upon worthy entities. Rather, it is a status that significantly depends on criteria that should be assessed from a legal perspective. The need for scientific attention on this question is

⁴ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, [2004] ICJ Rep., p. 136, para. 139. For some critical remarks on this paragraph, see MURPHY, S. D., «Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?», *American Journal of International Law*, 99, 2005, pp. 62-76; TAMS, C. J., «Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case», *European Journal of International Law*, 16, 2005, pp. 963-978. On the issue of self-defence against non-state actors, from a broader perspective, see MILANO, E., «Il ricorso all'uso della forza nei confronti degli attori non statali», in A. LANCIOTTI, A. TANZI, (ed.), *Uso della forza e legittima difesa nel diritto internazionale contemporaneo*, Napoli, Jovene, 2012, pp. 105-137.

⁵ On the issue of the *jus in bello* applicable in the fight against ISIS, see LÓPEZ-JACOISTE DÍAZ M.E., «El conflicto armado en Siria a la luz del derecho internacional», *Anuario de Derecho Publico*, 1, 2014, pp. 515-542; KOUTROULIS, V., «The Fight Against the Islamic State and *Jus in Bello*», *Leiden Journal of International Law*, 29, 2016, pp. 827-852; DINSTEIN Y., «The Syrian Armed Conflict and its Singular Characteristics», *The Israel Yearbook on Human Rights*, 46, 2016, pp. 261-279.

proved by the growing academic literature on ISIS's statehood, especially thanks to scholars from civil law systems.⁶ Although so far no scholar has supported the idea that ISIS has ever been a State, there are different opinions regarding ISIS's fulfillment of some statehood criteria, especially regarding the key element of effective capacity to govern a territory. Accordingly, this paper aims to analyze from a rigorous legal perspective whether ISIS is or has ever been a State, in the hope that this analysis would contribute to clarify many issues pertaining to the fight against ISIS.

II. ISLAMIC STATE OF IRAQ AND SYRIA: WHERE ARE YOU FROM?

*Of course you can't say those of us who removed Saddam in 2003 bear no responsibility for the situation in 2015.*⁷

A study regarding the statehood of an entity has to take into account the entity's history; in fact, statehood is strictly connected to human events and it is not possible to examine

⁶ See CHAUMETTE, A.-L., «DAESH: un "État" Islamique?», *Annuaire français de droit international*, 60, (2014), pp. 71-89; TOMUSCHAT, C., «The Status of the "Islamic State" under International Law», *Die Friedens-Warte*, 90, (2015), pp. 223-244; SINKONDO, M., «Daech est-il un état? Retour critique sur la théorie néopositiviste des éléments constitutifs de l'Etat à l'épreuve de l'actualité internationale», *Revue de droit international et de droit comparé*, 93, (2016), pp. 240-258; VAN ENGELAND, A., «Statehood, Proto States and International Law: New Challenges, Looking at the Case of ISIS» in CRAWFORD, J. ET AL (eds.), *The International Legal Order: Current Needs and Possible Responses Essays in Honour of Djamchid Momtaz*, Leiden, Brill, 2017, pp. 75-86.

⁷ Tony Blair spoke these words, as reported by WHAT, N., «Tony Blair Makes Qualified Apology for Iraq War ahead of Chilcot Report», *The Guardian*, 25 October 2015, available at www.theguardian.com/uk-news/2015/oct/25/tony-blair-sorry-iraq-war-mistakes-admits-conflict-role-in-rise-of-isis.

it while ignoring the origins of the entity claiming statehood. This is true also in relation to ISIS, a relatively new-born entity, which has faced several transformations.⁸

In the days in which this paper is finalized, ISIS seems to be close to its end. Its history began in 1999, when a group of Islamic fighters, principally composed of Sunni militias and called *Jama'at al-Tawhid wal-Jihad*, appeared in Iraq. After the 2003 invasion of Iraq, the group, renamed in 2004 al-Qaeda in Iraq, took active part in the insurgency against the occupying coalition and started a policy of cooperation with other militias, especially with former members of the Baath party. In 2006, al-Qaeda in Iraq joined other Sunni Iraqi armed groups and formed the *Mujahideen Shura Council*, which gave birth shortly afterwards to the Islamic State of Iraq. Abu Bakr al-Baghdadi was the leader of this group and led it against the counterinsurgency actions of the Iraqi government, which failed to defeat the rebels, especially after the U.S. abandoned Iraq in 2010.

Al-Baghdadi also led the rebels into the Syrian Civil War, taking advantage from the fragile control that Bashar al-Assad maintained over the Syrian territory, and joining its forces with the al-Nusra front, a ferocious coalition of Syrian anti-Assad groups. Having involved his militias in the Syrian carnage and merged with the al-Nusra front, al-Baghdadi coined the new name of Islamic State of Iraq and Syria in April 2013. Soon after, on 29 June 2014, the group proclaimed the creation of a worldwide caliphate and was renamed Islamic State. Al-Baghdadi obtained the role of caliph, merging religious and political authority.⁹

⁸ On the origin and development of ISIS, see, among others, CHULOV, M., «Isis: The Inside Story», *The Guardian*, 11 December 2014, available at www.theguardian.com/world/2014/dec/11/-sp-isis-the-inside-story; WOOD, G., «What ISIS Really Wants», *The Atlantic*, March 2015, available at www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/; MOLINARI, M., *Il califfato del terrore: perché lo Stato islamico minaccia l'Occidente*, Milano, Rizzoli, 2015.

⁹ In May 2015, al-Baghdadi was wounded in an airstrike (CHULOV, M., SHAHEEN, K., «Isis Leader Abu Bakr al-Baghdadi 'Seriously Wounded in Air Strike'», *The Guardian*, 21 April 2015, available at

In order to consolidate its control over the territory and the population of the northern Iraq and Syria, ISIS government is based on terror and paramilitary actions, which are considered worldwide gross violations of human rights.¹⁰ Religious minorities, including both Shiites and Christian sects such as the Yazidis, have been so far the most vexed groups. It is reported that ISIS policy towards them is different; non-Sunni Muslims can have their lives spared if they become Sunni, whilst people of other religions are brutally killed and their women are sold as forced wives.

In a number of occasions, the UN Security Council has designated ISIS as a terrorist organization,¹¹ and called upon Member States to ‘to take all necessary measures, in compliance with international law [...] to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL’.¹² In this regard, one

www.theguardian.com/world/2015/apr/21/isis-leader-abu-bakr-al-baghdadi-wounded-air-strike).

Subsequently, on 16 June 2017, Russia claimed that he might have been killed in an airstrike launched on 28 May 2017 (DEWAN A., BOYKOFF P., «Russia says it may have killed ISIS leader Abu Bakr al-Baghdadi», *CNN*, 17 June 2017, available at edition.cnn.com/2017/06/16/middleeast/al-baghdadi-isis-killed-russia-airstrike/index.html). His death has not been confirmed yet.

¹⁰ For some details on ISIS gross human rights violations, see the reports of the UN Human Rights Council: *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Rule of Terror: Living under ISIS in Syria*, UN Doc. A/HRC/27/CRP.3 (2014); *Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in Light of the Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups*, UN Doc. A/HRC/28/18 (2015); *Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups*, UN Doc. A/HRC/28/18 (2016).

¹¹ See e.g. SC Res 2170 (2014), UN Doc. S/RES/2170 (2014); SC Res 2178 (2014), UN Doc. S/RES/2178 (2014); SC Res 2199 (2015), UN Doc. S/RES/2199 (2015).

¹² SC Res 2249 (2015), UN Doc. S/RES/2249 (2015). For a discussion, see AKANDE, D., MILANOVIC, M., «The Constructive Ambiguity of the Security Council’s ISIS Resolution», *EJIL: Talk!*, 21 November 2015, available at www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/; MARTIN, J. C., «Les frappes de la France contre l’EIIL en Syrie, à la lumière de la résolution 2249 (2015)

has to note that the Iraqi government required help in order to regain control over its territory controlled by ISIS, and a coalition of States, led by the US, began an aerial campaign against ISIS bases in Iraq; by contrast, in Syria, for many months, al-Assad did not officially request any foreign intervention, but nevertheless, some States decided to intervene after having merely informed the Syrian government, principally claiming a right of self-defence and to intervene since Syria was unwillingly or unable to face such a global menace. At the end of September 2015, however, al-Assad requested and obtained Russian military support against ISIS.¹³ The efforts of all the actors involved in the fight against ISIS have constantly reduced the territory under the group's control, and in June 2017 the Kurd militias were able to enter the ISIS capital Raqqa.¹⁴

ISIS's plan to establish a new State by conquering territories and to persuade people all around the world to join its ferocious war has been between 2014 and 2017 one of the most serious concerns of the Western World.¹⁵ Two main factors have determined this situation: on the one hand, ISIS is incredibly able to give media attention to its atrocities and system of administration in order to instill terror in their enemies while at the same time fascinating potential fighters from all over the world,

du Conseil de sécurité», *Questions of International Law*, Zoom Out 24, (2016), pp. 3-14; HILPOLD, P., «The Evolving Right of Counter-Terrorism: An Analysis of SC Resolution 2249 (2015) in View of Some Basic Contributions in International Law Literature», *ibidem*, pp. 15-34; MILANO, E., «Oltre l'esegesi della risoluzione 2249», *SIDIBlog*, 2 March 2016, available at www.sidi-isil.org/sidiblog/?p=1722.

¹³ See CHAPPELL, B., «Russia Begins Airstrikes In Syria After Assad's Request», *NPR*, 30 September 2015, available at www.npr.org/sections/thetwo-way/2015/09/30/444679327/russia-begins-conducting-airstrikes-in-syria-at-assads-request.

¹⁴ See GEORGY M., «Spirits high among Kurds in Syria as coalition battles for Raqqa», *Reuter*, 15 June 2017, available at www.reuters.com/article/us-mideast-crisis-syria-raqqa-mood-idUSKBN1962PC.

¹⁵ See the statement made by the French President Hollande at the 7272 meeting of the Security Council, UN Doc. S/PV.7272 (2014), p. 6.

which are flowing to Syria and Iraq to fight in the ISIS army;¹⁶ on the other hand, many radical Islamic movements in other countries consider ISIS to be a source of inspiration, so that today the name ISIS is also commonly applied, for instance, to the Libyan anti-government groups and Boko Haram in Nigeria.¹⁷ Even if the creation of a united Islamic State from North Africa to Ancient Persia is proclaimed as one of the ultimate goals of all these terrorist groups, the present essay will deal only with the statehood of ISIS in Syria and Iraq.

III. THE QUESTION OF ISIS'S STATEHOOD

*'Self-determination' should be handled with care.*¹⁸

1. A Still Open Question: of the Concept of 'State' in International Law

States enjoy international legal personality and are the primary subjects of international law. Despite the fact that traditionally international law is considered the law of States and that almost all the international law handbooks and treatises begin with a chapter

¹⁶ See FARWELL, J. P., «The Media Strategy of ISIS», *Survival: Global Politics and Strategy*, 56, (2014) pp. 49–55; KLAUSEN, J., «Tweeting the Jihad: Social Media Networks of Western Foreign Fighters in Syria and Iraq», *Studies in Conflict and Terrorism*, 38, (2015), pp. 1–22.

¹⁷ See ORTIZ, E., «Boko Haram Leader Abubakar Shekau Pledges Allegiance to ISIS in New Audio», *NBC News*, 7 March 2015, available at www.nbcnews.com/storyline/isis-terror/boko-haram-leader-pledges-allegiance-isis-new-audio-n319256; RYAN, Y., «Isis in Libya: Muammar Gaddafi's soldiers are back in the country and fighting under the black flag of the Islamic State», *The Independent*, 16 March 2015, available at www.independent.co.uk/news/world/middle-east/isis-in-libya-muammar-gaddafis-soldiers-are-back-in-the-country-and-fighting-under-the-black-flag-of-the-islamic-state-10111964.html.

¹⁸ H.F.E. Whitlam, Australian representative to the Human Rights Commission during the drafting of the Human Rights Covenants, 264th meeting, 1952, quoted in SUMMERS, J., *Peoples and International Law*, Leiden | Boston, Brill | Nijhoff, 2007, p. ix.

about statehood, the concept of State in international law is controversial among scholars even today. In the absence of a well-established consensus about what is a State, traditionally, Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States is considered a useful guide because it sets forth four statehood criteria: a permanent population, a defined territory, government and capacity to enter into relations with the other States.¹⁹ However, this convention neither creates nor codifies the statehood requirements, as international personality of States is attributed by general international law, not by a regional treaty such as the Montevideo Convention.²⁰ The debate about what a State is and how it gains international personality is far more complex, and can be simplified as follow.

According to the first and oldest theory, the constitutive theory, only entities which are recognized as States by the other States have international personality.²¹ The basic assumption is that States are the primary subjects of international law, and, consequently, that only they may decide whether an entity is a State and bestow on it the powers and duties of a State. This theory is not very popular today, because it relativizes the concept of State so that entity 'A' could be simultaneously recognized as a State by State 'B' but not by State 'C'; it could be recognized today by State 'D' and in twenty years by State 'E'.²² On the contrary, statehood is a status that *objectively*

¹⁹ (1936) 165 LNTS 20. See e.g. HIGGINS, R., *Problem and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, p. 39.

²⁰ See CRAVEN, M., «Statehood, Self-Determination, and Recognition», in M. D. EVANS, (ed.), *International Law*, 4th edn, Oxford, Oxford University Press, 2014, p. 201, p. 217.

²¹ See e.g. OPPENHEIM, L., *International Law*, London, Longmans, London, 1905, p. 110; KELSEN, H., «Recognition in International Law: Theoretical Observation», *American Journal of International Law*, 35, (1941), pp. 605–617.

²² According to KELSEN, H., *op. cit.*, p. 609: «a State exists legally only in its relations to other States. There is no such thing as absolute existence».

attributes powers and duties to all the members of the International Community at the same time.²³

According to a second opinion, developed principally by civil law scholars in the twentieth century, the State is a matter of fact that emerges on the basis of political and historical events; international law does not regulate the creation of the States, but rather it directly confers international personality to entities characterized by a government able to rule effectively and independently over a permanent population settled in a defined territory.²⁴ The effective and independent government is the prevalent element; a government is effective when the entity is able to legislate and enforce its laws in a territory and in relation to certain individuals,²⁵ whilst the independence is related to the absence of legal constraints on the government, save those arising from international law.²⁶ The territory and the population are therefore the spatial and personal scope in

²³ See TREVES, T., *Diritto internazionale: problemi fondamentali*, Milano, Giuffrè, 2005, pp. 58–59.

²⁴ See Conference on Yugoslavia, «Arbitration Commission, Opinions on Questions Arising from the Dissolution of Yugoslavia (Badinter Commission), Opinion n. 1», *International Legal Materials*, 31, (1992), p. 1494, p. 1485. See also, among others, ARANGIO-RUIZ, G., «L'Etat dans le sens du Droit des Gens et la Notion du Droit international», *Österreichische Zeitschrift für öffentliches Recht*, 26, (1976), pp. 3-63 and pp. 265-406; ABI-SAAB, G., «Cours général de droit international public», *RCADI*, 207, (1987/VII), p. 15, pp. 68–69; QUADRI, R., «Stato (diritto internazionale)», in QUADRI, R., *Scritti Giuridici*, Milano, Giuffrè, 1988, pp. 189–238; PELLET, A., «Le droit international à l'aube du XXIème siècle», 1 *Cours Euro-méditerranéens Bancaja de Droit International* (1997/I), p. 19, pp. 55–56; TANCREDI, A., «Lo Stato nel diritto internazionale tra effettività e legalità/legittimità», *Ars Interpretandi*, 16, 2011, pp. 131-172; COMBACAU, J., SUR, S., *Droit international public*, 10th edn., Paris, LGDJ, 2012, p. 267.

²⁵ See DUPUY, P.-M., «L'unité de l'ordre juridique international. Cours général de droit international public», *RCADI*, 297, (2002), p. 9, pp. 95–96; SHAW, M. N., *International Law*, Cambridge, Cambridge University Press, 2008, pp. 198–199.

²⁶ See *Régime Douanier Entre l'Allemagne et l'Autriche (Protocole du 19 Mars 1931)*, Avis Consultatif du 5 Septembre 1931, PCIJ Rep Series A No 41, pp. 57–58 (Judge Anzilotti, individual opinion).

which the government normally exercises its powers and fulfills its duties.²⁷ This theory, which can be called the ‘factual theory’, is built on the principle of effectiveness, which is considered the primary pillar of statehood. As a result, the recognition of other States does not have constitutive effects on statehood, but it is merely declaratory of pre-existing statehood.²⁸ As a further consequence, since a State is an historical fact with legal consequences, no authority can decide whether an entity is a State or not, not even the United Nations. In recent times, however, this theory evolved so that modern supporters concede that international law guides the factual emergency of a State, encouraging or discouraging the stabilization of the effective powers on the basis of respect for fundamental international rules.²⁹

More recently, other scholars have developed a third view, the so-called ‘legalistic theory’. This theory, without repudiating the factual premises, considers that an entity which effectively and independently exercises sovereign powers over a population and a territory may not enjoy international personality if it does not respect some fundamental rules of international law (e.g. the ban on the use of force and the principle of self-determination).³⁰ According to this opinion, the International Community would be

²⁷ See QUADRI, R., *La sudditanza nel diritto internazionale*, Padova, Cedam, 1936, p. 28; ARANGIO-RUIZ, G., *op. cit.*, pp. 50–63.

²⁸ See CHEN, T., *The International Law of Recognition, With Special Reference to Practice in Great Britain and the United States*, New York, Praeger, 1951, p. 14; BRIERLY, J. L., *The Law of Nations: An Introduction to the International Law of Peace*, Oxford, Oxford University Press, 1963, p. 139.

²⁹ See TANCREDI, A., «A Normative ‘Due Process’ in the Creation of States through Secession», in M. G. KOHEN (ed.), *Secession: International Law Perspectives*, Cambridge, Cambridge University Press, 2006, p. 171, pp. 205–206, and «Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia», *Italian Yearbook of International Law*, 28, (2008), p. 37, p. 54.

³⁰ See e.g. CRAWFORD, J., *The Creation of States in International Law*, Oxford, Clarendon Press, 1979 and 2006; DUGARD, J., *Recognition and the United Nations*, Cambridge, Cambridge University Press, 1987; KOHEN, M. G., «Création d’Etats en droit international contemporain», *Cours euro-méditerranéens Bancaja de droit international*, 6, (2002), pp. 546–635; RAIČ, D., *Statehood and the Law of Self-*

under a duty not to recognize the entity as a State and not to admit it into international organizations; the said entity would be, therefore, classified as a *de facto regime*.³¹ Even for this opinion's supporters, effectiveness is essential for a State, but it is not sufficient; the territorial entity claiming statehood should also demonstrate respect for the basic rules of the International Community.³²

In reality, the debate is far more complex and each of the abovementioned theories can be divided into a number of sub-theories that are, at the same time, interrelated, so that today the divide between factual and legalistic theories is not so wide, and State recognition is considered a relevant legal element in both.³³ Accordingly, albeit this author generally considers a modern approach to the factual theory more in line with the contemporary structure of international relations, the present essay will analyze ISIS statehood both in light of the factual and legalistic views.³⁴

2. *Applying the Statehood Criteria to ISIS*

a. The International Personality of ISIS According to the Factual Theory

Determination, Leiden | Boston, Nijhoff, 2002; ORAKHELASHVILI, A., «Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo», *Max Planck Yearbook of United Nations Law*, 12, (2008), pp. 1–44.

³¹ See FROWEIN, J. A., «De Facto Regime», *Max Planck Encyclopedia of Public International Law online*, 2013.

³² See CRAWFORD, J., *op. cit.*, p. 98.

³³ For a critical overview of the different theories and methodological approaches, see D'ASPREMONT, J., «The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society», *Connecticut Journal of International Law*, 29, (2014), pp. 201-224.

³⁴ The same approach has been employed by this author in the analysis of Palestinian statehood. See LONGOBARDO, M., «Lo Stato di Palestina: emersione fattuale e autodeterminazione dei popoli prima e dopo il riconoscimento dello status di Stato non membro delle Nazioni Unite», in M. DISTEFANO (ed), *Il principio di autodeterminazione dei popoli alla prova del nuovo millennio*, Padova, Cedam, 2014, pp. 9-35.

In order to determine whether ISIS has ever been a State, first one has to verify whether ISIS has ever governed a defined territory and a permanent population independently and effectively. Due to the war in the region, collecting information about the events is no simple task given that the main source of data is ISIS itself, which clearly mixes factual information with propaganda. Consequently, it is necessary not to overestimate these data, which are held as true only for academic purposes and should be subject to confirmation through research on the field.

One has to acknowledge that ISIS developed a sophisticated, albeit heinous, form of governmental organization. According to the UN, 'ISIS functions under responsible command and has a hierarchical structure, including a policy level.'³⁵ The ultimate authority is al-Baghdadi, who governs the controlled territory through a network of local officials, both military and civil.³⁶ ISIS gained control over people and territory through the use of the force, enforcing its power with violence. The territorial scope of its administration is broad. ISIS gained military control over the north-eastern part of Syria and north-western Iraq, including the important cities of Raqqa, Mosul, Falluja³⁷ and, for some months, Palmyr. This area is not particularly cohesive and many ISIS-conquered cities are isolated from the rest of the controlled territory. Muslims of different groups, Christians, and other minorities inhabit this territory. It is one of the Earth's most ancient populated areas, as testified by the many archaeological sites brutally destroyed by ISIS fighters.³⁸

³⁵ UN Doc A/HRC/27/CRP.3, cit., para. 13.

³⁶ *Ibidem*.

³⁷ For a map, see US Department of Defense, *Iraq and Syria: ISIL Reduced Operating Area as of April 2015*, available at www.defense.gov/News-Article-View/Article/604444.

³⁸ See e.g. CULLINANE, S., ALKHALI, H., TAWFEEQ, M., «Tracking a Trail of Historical Obliteration: ISIS Trumpets Destruction of Nimrud», *CNN*, 14 April 2015, available at edition.cnn.com/2015/03/09/world/iraq-isis-heritage/.

ISIS administration incorporates all the traditional branches of the government. ISIS has passed new legislation in the conquered cities, such as the ‘Contract of the City’ of Nineveh, which is an abhorrent list of treatments constituting punishment for several alleged criminal offences.³⁹ ISIS has organized a perverted form of judicial system in order to ensure the implementation of the new legislation;⁴⁰ it is reported that courts located in Iraq, Syria, and even Lebanon⁴¹ have ordered many terrible executions.⁴² The governance structure is very sophisticated in certain regions that have been under ISIS control longer: e.g., in the Syrian city of Raqqa, ISIS has provided for Islamic and elementary education, water and electricity, humanitarian aid and mediation between different tribes.⁴³ In order to accomplish the building of a proper civil administration, ISIS asked foreign doctors, engineers, and administrators to come to the controlled area in order to contribute to the construction of the Islamic State.⁴⁴ ISIS has also released a document in order to inform the world how well it governs the city of Aleppo, boastfully described as a paradise on Earth.⁴⁵

³⁹ For the Arabic text and some remarks, see MOORE, J., «Iraq Isis Crisis: Medieval Sharia Law Imposed on Millions in Nineveh Province», *International Business Times*, 12 June 2014, available at www.ibtimes.co.uk/iraq-isis-crisis-medieval-sharia-law-imposed-millions-nineveh-province-1452401.

⁴⁰ See CARIS, C. C., REYNOLDS, S., *ISIS Governance in Syria. Middle East Security Report n. 22* (July 2014), pp. 18–19.

⁴¹ See e.g. KULLAB, S., SEMAAN, E., «ISIS running Shariah court in Aarsal in bid to win hearts and minds», *The Daily Star Lebanon*, 7 February 2015, available at www.dailystar.com.lb/News/Lebanon-News/2015/Feb-07/286716-isis-running-shariah-court-in-aarsal-in-bid-to-win-hearts-and-minds.ashx.

⁴² See UN Doc A/HRC/28/18, cit., para. 49.

⁴³ See UN Doc A/HRC/27/CRP.3, cit., para. 16; Caris, C. C., and REYNOLDS, S., *op. cit.*, pp. 14–23.

⁴⁴ See ADAMCZYK, E., «ISIS Leader to World’s Muslims: Build Islamic State», *UPI*, 1 July 2014, available at www.upi.com/Top_News/World-News/2014/07/01/ISIS-leader-to-worlds-Muslims-Build-Islamic-State/8971404235322/.

⁴⁵ See KERR, S., SOLOMON, E., «“State of Aleppo” Brochure Reveals Isis Visions for Islamic State», *Financial Times*, 30 June 2014, available at www.ft.com/cms/s/0/0e882b36-005e-11e4-a3f2-00144feab7de.html.

The crucial question is whether this governance system can be considered sufficiently independent and effective to fulfill the statehood criterion.⁴⁶ One has to acknowledge that ISIS is not a puppet government, but rather, shows a defiant scale of independence. Its administration is not bound by the will of another State by virtue of a treaty or any other legal instrument, nor is its action *de facto* directed or controlled by another State.

However, ISIS administration appears to lack effectiveness. Although the will of ISIS officials is normally enforced, the governmental powers' scope of application *ratione personarum* and *ratione loci* is not sufficiently stable to assess the effectiveness of the whole government.⁴⁷ Due to continuing fights with the Iraqi, Syrian, and Kurdish armies and the international coalition's airstrikes, ISIS is unable to govern a portion of territory in a stable way. Rather, its powers are often just sporadic and the government apparatus shifts from area to area following the turns of the war.⁴⁸

⁴⁶ For the position according to which ISIS exercises governmental authority on the territory it controls, see SHANY, Y., COHEN, A., «ISIS: Is the Islamic State Really a State?», 14 September 2014, available at www.en.idi.org.il/analysis/articles/isis-is-the-islamic-state-really-a-state/; GRANT, T. D., «Is the Islamic State Actually a State? No, but Letting It Say So Is Dangerous», 8 June 2015, available at www.newrepublic.com/article/121988/far-reaching-implications-islamic-stateclaiming-statehood.

⁴⁷ See ZICCARDI CAPALDO, G., «Le nuove situazioni territoriali illegittime. L'intervento 'tutelare di sicurezza immediata' nei territori sotto il controllo dell'ISIL: un *tertium genus* di intervento armato a titolo collettivo?», November 2014, p. 8, available at www.sidi-isil.org/wp-content/uploads/2014/11/G.-ZICCARDI-CAPALDO-per-forum-SIDI.pdf.

⁴⁸ ISIS is losing control of several areas while conquering others. See MACKAY, M., «U.S.: ISIS Loses Quarter of Territory in Iraq: 3 Things You Need to Know», *CNN*, 16 April 2015, available at edition.cnn.com/2015/04/15/middleeast/isis-loses-territory-iraq/; CHULOV, M., HAWRAMY, F., «Peshmerga Forces Enter Sinjar in Fight against Isis», *The Guardian*, 11 November 2015, available at www.theguardian.com/world/2015/nov/13/peshmerga-forces-sinjar-isis-oust-gunfire-kurdish; EVANS, D., «Islamic State Driven Out of Syria's Ancient Palmyra City», *Reuters*, 28 March 2016, available at uk.reuters.com/article/us-mideast-crisis-syria-palmyra-idUKKCN0WT04R.

Stability is not a different criterion in and of itself, but rather, it is part of effectiveness. A governmental act, e.g. a law, cannot be effectively implemented if there is no continuity in the administration of a territory since may not be a court to enforce it when the need arises.⁴⁹ In this respect, the obstacle to ISIS statehood is not the fact that its territory is not precisely defined, a circumstance which does not affect the international personality of already established States,⁵⁰ but rather the fact that it is totally unclear what territory is claimed, since ISIS control changes greatly daily and there is no historical title that can be used as a reference. Consequently, for the time being, ISIS lacks effective government, and therefore, statehood.⁵¹

Not only is a defined territory totally absent with the aforementioned repercussions on the statehood of ISIS, but it is also impossible to circumscribe a permanent population subject to ISIS government, since its control over entire human communities shifts every months.

In light of these factual elements, ISIS appears to be an insurrectional group. Insurgents are international subjects that exercise *de facto* powers over a territory but are provisional in character since they are doomed to be quelled and disappear if their outcome is not the formation of a new State.⁵² This is the ISIS scenario: its administration is provisional in the sense that it is not stable, and, therefore, ISIS cannot be considered a State. Due to its relative scarcity of men, ISIS is like an oil spill in the sea: it reaches many far areas, but in doing so it is losing consistence, i.e. control over certain zones, since its army cannot control at the same time all the areas where the

⁴⁹ See QUADRI, R., *Diritto internazionale pubblico*, 4th ed., Napoli, Liguori, 1968, p. 444; CRAWFORD, J., *op. cit.*, p. 60.

⁵⁰ See *Deutsche Continental Gas-Gesellschaft v Polish State*, 5 *International Law Reports* (1929) p. 11, pp. 14–15; *North Sea Continental Shelf cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, para. 46.

⁵¹ See RAIČ, D., *op. cit.*, pp. 61–62.

⁵² See CASSESE, A., *International Law*, 2nd edn, Oxford, Oxford University Press, 2005, p. 71 and p. 130.

hostilities are conducted; therefore, there are many gaps in the structure of ISIS territory, and many others are created every time ISIS is forced to loosen its ranks in order to move troops to conquer other positions. By contrast, if ISIS consolidate its power over a delimited area and its inhabitants, then it could claim to be a State according to the factual theory. At the moment, on the basis of the ineffectiveness of the territorial control ISIS exercises, statehood is a goal, not a reality.⁵³ Fortunately, in light of the most recent developments, it is extremely unlikely that ISIS will fulfill this goal although in the past this risk seemed concrete.

b. ISIS Statehood in Light of the Principle of Self-Determination of Peoples

Beside the factual theory, ISIS cannot be considered a State from a legalistic view as well.

The core concept of the legalistic theory is that the factual criteria are insufficient to determine statehood by themselves, but that the territorial entity claiming to be a State should be entitled to statehood by virtue of the principle of self-determination of peoples, and must respect the most important rules of international law, for instance those regarding the ban on the use of force and gross human rights violations.⁵⁴

In general terms, applying one of the traditional categories about State modification (dismemberments, merger, incorporation, secession, devolution) to the current situation in Iraq and Syria caused by ISIS insurgency is difficult. On the one hand, one could consider that ISIS is performing two different secessions respectively from Iraq and Syria, with the aim to unify the resulting territorial entity into a new integrated State; on the other, it is likely that ISIS wants to create a State on the *entire* territory of Iraq and Syria, and, therefore, its actions could be qualified as a revolution, more precisely as an

⁵³ See PICONE, P., «Unilateralismo», cit., p. 25; WATKIN, K., «Targeting “Islamic State” Oil Facilities», *International Law Studies*, 90, (2014), p. 499, p. 500.

⁵⁴ See the authors cited *supra* note 30.

attempt to change at the same time two regimes (in Iraq and Syria) and to merge the resulting entities.⁵⁵ But this phenomenon is far more complex. If one considers Iraq as the historical ISIS basis, it is possible to argue that Syria is facing an armed attack from a non-state actor located in Iraq that also enjoys the support of part of the Syrian population.

However, one should consider whether ISIS is acting pursuant to the principle of self-determination, the legal basis of every statehood claim.

The principle of self-determination is embodied in the UN Charter, in the 1966 Covenants, and in general international law, and it was born in the decolonizing era.⁵⁶ On the basis of this principle, the UN General Assembly 'Declaration on Friendly Relations among States' affirmed that 'the legitimacy of the struggle of peoples under colonial and alien domination recognized as being entitled to the right to self-determination to restore to themselves that right by any means at their disposal.'⁵⁷ In

⁵⁵ On the use of the term 'revolution' in the international law discourse, see TAYLOR, O., «Reclaiming Revolution», *Finnish Yearbook of International Law*, 22, (2011), pp. 259–292.

⁵⁶ See UN Charter, Articles 1(2) and 55; International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, common Article 1. See generally KOSKENNIEMI, M., «National Self-Determination Today: Problems of Legal Theory and Practice», *International and Comparative Law Quarterly*, 43, (1994), pp. 241-269; CASSESE, A., *Self-Determination of Peoples. A Legal Reappraisal*, Cambridge, Cambridge University Press, 1995; CHRISTAKIS, T., *Le droit à l'autodétermination en dehors des situations de décolonisation*, Paris, La documentation française; CASTELLINO, J., *International Law and Self-determination*, Leiden | Boston, Nijhoff, 2000; FERRER LLORET, J., *La aplicación del principio de autodeterminación de los pueblos: Sahara Occidental y Timor Oriental*, Alicante, Universidad de Alicante, 2002; SUMMERS, J., *op. cit.*; OETER, S., «Self-Determination», in B. SIMMA et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd edn, Oxford, Oxford University Press, 2012, pp. 313–334; PALMISANO, G., «Il principio di autodeterminazione dei popoli», in *Enciclopedia del Diritto*, Annali V, Milano, Giuffrè, 2012, pp. 82-133; RUIZ MIGUEL, C., «El principio y derecho de autodeterminación y el pueblo del Sahara Occidental», *Anuario Español de Derecho Internacional*, 31, 2015, pp. 267-296.

⁵⁷ GA Res. 2625 (XXV), UN Doc. A/RES/25/2625 (1970) paras 1-2.

that context, some authors argued that national liberation movements may use force against the Colonial State in order to gain independence.⁵⁸ A national liberation movement is a non-state actor that is representative of a people entitled to self-determination and that exercises this right on behalf of the people.⁵⁹ However, ISIS does not appear to be involved in a war of national liberation. First, ISIS is not a national liberation movement because there is no colonial system or alien domination in Syria and Iraq that bar a people from exercising its right to self-determination. Second, all the national liberation movements are representative of the people for whose self-determination they fight:⁶⁰ this representativeness is normally supported by the International Community, which, through the UN, acknowledges the representative character of these groups and considers them partial subjects of international law, as in the case of the Palestinian Liberation Organization.⁶¹ By contrast, ISIS is not representative of the Syrian and Iraqi population, and its struggle received no legitimization by the International Community.⁶² Actually, national liberation

⁵⁸ See WILSON, H. A., *International Law and the Use of Force by National Liberation Movements*, Oxford, Clarendon Press, 1988, pp. 91–146; CASSESE, A., *Self-Determination of Peoples*, cit., pp. 197–198; RUIZ COLOMÉ, M. A., *Guerras civiles y guerras coloniales*, Madrid, Eurolex, 1996, pp. 97-99.

⁵⁹ See generally LAZARUS, C., «Le Statut International des Mouvements de Libération Nationale à l'Organisation des Nations Unies», *Annuaire Français de Droit International*, 20, (1974), pp. 173–200; BARBERIS, J., «Nouvelles questions concernant la personnalité juridique international», 179 *RCADI* (1983/I), p. 145, pp. 239–268; CASSESE, A., *International Law*, cit., pp. 140–142.

⁶⁰ See the authors mentioned *supra* note 59 and D'ASPREMONT, J., *La légitimité des rebelles en droit international*, (2008), pp. 4–7, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1266047.

⁶¹ The United Nations recognized the PLO role e.g. with the GA Res. 3210 (1974), UN Doc. A/Res/3210 (XXIX) (1974); GA Res. 3237 (1974), UN Doc. A/Res/3237 (XXIX) (1974). Cf. POISSONNIER, G., «La Palestine, état non-membre observateur de l'Organisation des Nations Unies», *Journal du droit international*, 140, (2013), p. 427, pp. 430–433.

⁶² The Jordan delegate at the 7242 meeting of the Security council clearly affirmed: «[w]e stress that ISIS and other extremist groups *do not represent* Sunnis in Iraq. We reaffirm that the Sunni community in Iraq

movements are not common today since the decolonization process has been mostly accomplished in all the corner of the world. After the decolonizing era, self-determination can be exercised only in cases of foreign occupation or apartheid; it has been suggested that these situations could justify revolts against the foreign occupant⁶³ or the racist government.⁶⁴ However, Iraq and Syria are not occupied countries nor apartheid regimes, and, therefore, ISIS insurgency cannot be justified on the basis of the principle of self-determination with reference to this scenario.

According to some scholars, ethnic, religious or racial groups may claim a right to secession when persecuted by their own country, on the basis of the so-called remedial secession doctrine, which is based on a peculiar interpretation of a provision embodied in the UN General Assembly 'Declaration on Friendly Relations among States'.⁶⁵ Yet ISIS cannot claim to be fighting for a remedial secession. Even if the fighters could be considered potentially entitled to self-determination as members of a religious group (the Sunni) in theory, this is incorrect *in concreto* since the governments of Iraq and Syria are not massively violating the human rights of that specific group. In Syria, a violent civil war between Sunni rebels and Assad has resulted in the death of thousands

must be an essential part of any inclusive political process» (UN Doc. S/PV.7242 (2014), p. 5) (emphasis added). See also Henderson, C., *op. cit.*, p. 210.

⁶³ The inhabitants of an occupied territory do not have a duty of obedience towards the Occupying Power and insurgency is considered legitimate. See BAXTER, R. R., «The Duty of Obedience to the Belligerent Occupant», *British Year Book of International Law*, 27, (1950), pp. 235–266.

⁶⁴ Since State practice is limited to the South African apartheid, it is not possible to assess whether there is a right to insurgency in these situations. However, the positive view would require the fighting group to be at least representative of the discriminated minority (cf. D'ASPREMONT, J., *op. cit.*, pp. 13–14).

⁶⁵ GA Res. 2625 (XXV), UN Doc. A/RES/25/2625 (1970), para. 7. See e.g., TOMUSCHAT, C., «Self-Determination in a Post-Colonial World», in C. TOMUSCHAT (ed.), *Modern Law of Self-Determination*, Leiden | Boston, Nijhoff, 1993, pp. 1–20; DOEHRING, K., «Self-Determination», in B. SIMMA (ed.), *The Charter of the United Nations — A Commentary*, 2nd edn, Oxford, Oxford University Press, 2002, pp. 47–63; DUGARD, J., «The Secession of States and Their Recognition in the Wake of Kosovo», *RCADI*, 357, (2011), p. 9, pp. 112–121.

of people, but it did not originate from religious or ethnic hatred, but rather from the clash between political factions for the control of the Syrian State — a scenario far from legitimate struggles for gaining political self-determination.⁶⁶ Even if, prior to the awareness of their affiliation with ISIS, some Western States recognized the anti-Assad rebels as the legitimate representatives of the Syrian people,⁶⁷ these acts should be considered merely political and no more relevant in the present scenario. Consequently, any reference to a right of self-determination in this situation is improper.⁶⁸ In any case, the existence of an international customary rule about remedial secession is not supported by an uniform State practice,⁶⁹ and it was not endorsed by the International Court of Justice.⁷⁰

⁶⁶ On this topic, see CARPENTER, T. G., «Tangled Web: The Syrian Civil War and Its Implications», *Mediterranean Quarterly*, 24, (Winter 2013), pp. 1–11; JENKINS, B. M., *The Dynamics of Syria's Civil War* (2014), available at www.rand.org/pubs/perspectives/PE115.

⁶⁷ See «Syria conflict: UK Recognises Opposition, Says William Hague», *BBC News*, 20 November 2012, available at www.bbc.co.uk/news/uk-politics-20406562.

⁶⁸ Even supporters of the fight against Assad avoid delving into the attribution of the right to self-determination to ISIS and consider that an analysis of the right of self-determination of the Syrian opposition 'focuses only on the initial phases of the Syrian revolution (roughly, March 2011 to February 2012). Developments since that have dramatically changed the nature of the conflict' (NAHLAWI, Y., «Self-Determination and the Right to Revolution: Syria», *Human Rights & International Legal Discourse*, 8, (2014), p. 84, p. 86).

⁶⁹ See VIDMAR, J., «Remedial Secession in International Law: Theory and (Lack of) Practice», *St Antony's International Review*, 6, (2010), pp. 37–56; HILPOLD, P., «Secession in International Law: Does the Kosovo Opinion Require a Re-assessment if This Concept?», in P. HILPOLD (ed.), *Kosovo and International Law. The ICJ Advisory Opinion of 22 July 2010*, Leiden | Boston, Brill | Nijhoff, 2012, p. 47, pp. 59–65; DEL MAR, K., «The Myth of Remedial Secession», in D. FRENCH, (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press, Cambridge, 2013), pp. 79–108; OETER, S., «The Role of Recognition and Non-Recognition with Regard to Secession», in C. WALTER, A. VON UNGERN-STERNBERG, K. ABUSHOV (eds), *Self-Determination and Secession in International Law*, Oxford, Oxford University Press, 2014, p. 45, pp. 59-60.

Accordingly, Iraqi and Syrian governments have the right to quell the rebellion by virtue of the principle of territorial integrity, while respecting the international humanitarian law norms about internal conflicts at the same time.⁷¹ ISIS fight cannot be considered a legitimate exercise of the right to self-determination.

c. Other Legal Criteria Applied to ISIS

In recent decades, other statehood criteria have been suggested by scholars, as actual additional criteria or as elements which would give stability to the territorial entity and reinforce the effectiveness of its government. These additional criteria will be briefly analyzed here with regard to ISIS, even if they would not be sufficient to consider ISIS a State abstain the aforementioned factual and legal criteria.

First, some commentators have argued that, in the pursuit of independence, an entity claiming to be a State should respect some fundamental rules of international law, such as the ban on the use of force, the principle of self-determination, and the principle of *uti possidetis juris*. If the territorial entity gains effectiveness by violating these

⁷⁰ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, p. 438, paras. 82–83. On this issue, the opinion has been criticised by some authors, e.g. by BERMEJO GARCÍA, R., GUTIÉRREZ ESPADA, C., «La declaración unilateral de independencia de Kosovo a la luz de la opinión consultiva de la Corte Internacional de Justicia de 22 julio de 2010 y de las declaraciones, opiniones individuales y disidentes a la misma», *Anuario Español de Derecho Internacional*, 26, (2010), 7-59, 27-28; SOROETA LICERAS, J., «La opinión consultiva de la corte internacional de justicia sobre Kosovo de 22 de julio de 2010 una interpretación judicial sui generis para un caso que no lo es: Aplicabilidad de la cláusula de salvaguardia de la resolución 2625 (XXV) o de la “secesión como remedio”», *REVISTA ELECTRÓNICA de ESTUDIOS INTERNACIONALES*, 25, (2013), 1-29.

⁷¹ See Common Article 3 of the Geneva Conventions of 1949. See CRAWFORD, E., *The Treatment of Combatants and Insurgent Under the Law of Armed Conflict*, Oxford, Oxford University Press, 2010, pp. 78–152; DINSTEIN, Y., *Non-International Armed Conflicts in International Law*, Cambridge, Cambridge University Press, 2014, pp. 132–172 and pp. 205–245.

norms, it would not enjoy international personality.⁷² Even supporters of a modern factual theory considers that the respect for the fundamental rules of international law constitutes a ‘normative due process’ in the creation of a State,⁷³ and that in case of violations of these rules, the entity is not automatically prevented from gaining international personality, but other States are under a duty not to recognize its statehood and to consider void its acts,⁷⁴ making it very difficult for the said entity to govern effectively and independently.⁷⁵ In addition, some authors argued that negotiations between the relevant stakeholders are *per se* fundamental procedural means to achieve self-determination,⁷⁶ since self-determination in the post-colonial era is particularly relevant as a procedural principle.⁷⁷

It is clear and indisputable that ISIS is not claiming statehood through peaceful means, nor is it respecting the principles of self-determination and *uti possidetis*, nor is

⁷² See LAUTERPACHT, H., (ed.), *Oppenheim’s International Law: A Treatise*, vol. I, London, Longmans, 1948, p. 137

⁷³ See TANCREDI, A., *La secessione nel diritto internazionale*, Padova, Cedam, 2001, pp. 669–710 and «A Normative», cit., pp. 193–207.

⁷⁴ See ILC, «Draft Articles on State Responsibility with Commentaries», 34(2) *Yearbook of the International Law Commission*, (1980), p. 114, Article 41(2). On the relationship between statehood and the duty not to recognise illegal situation, see MILANO, E., «The Non-Recognition of Russia’s Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question», *Questions of International Law*, Zoom out I (2014) pp. 35–55.

⁷⁵ See DUGARD, J., *Recognition*, cit., pp. 127–163; TANCREDI, A., *La secessione*, cit., pp. 714–789.

⁷⁶ See WILLIAMS, P. R., JANNOTTI PECCI, F., «Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination», *Stanford Journal of International Law*, 40, (2004), pp. 1-40; BARNIDGE, R. P., Jr., *Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine*, Oxford, Hart, 2016.

⁷⁷ See KLABBERS, J., «The Right to Be Taken Seriously: Self-Determination in International Law», *Human Rights Quarterly*, 28, (2006), pp. 186-206.

ISIS negotiating its statehood with Iraq and Syria.⁷⁸ Although no State has openly supported ISIS insurgency by military means, the whole Middle East is a battlefield, and, since ISIS is not a self-determination unit, the situation in Iraq and Syria should be qualified as an armed conflict between ISIS and the governments of the two States, with the intervention of some third States.

Moreover, there is room to argue that the Islamic State is an entity created in violation of the procedural aspect of the principle of self-determination since the true will and aspirations of the local population have not been taken into account.⁷⁹ *E.g.*, no referendum or election have been held in order to ask the local population whether they would like to be part of the future Islamic State. Indeed, the population seems terrified by ISIS, which is far more popular among fundamentalists around the world (the so-called foreign fighters) than among the inhabitants of Syria and Iraq,⁸⁰ as demonstrated by the enormous flux of refugees from Syria and Iraq. By not respecting the procedural norms relating to the will of the local people,⁸¹ ISIS reinforces the idea that it is pursuing statehood in an illegal way.

⁷⁸ ISIS, due to its heinous crimes, has not been invited to the Geneva peace-talks regarding Syria, nor did the ceasefire brokered by Russia and US cover operations against ISIS (see *Joint Statement of the United States and the Russian Federation, as Co-Chairs of the ISSG, on Cessation of Hostilities in Syria*, 22 February 2016; SC Res. UN Doc. S/RES/22/68 (2016)).

⁷⁹ According to the International Court of Justice, self-determination could be seen ‘as the need to pay regard to the freely expressed will of peoples’ and its application ‘requires a free and genuine expression of the will of the peoples concerned’ (*Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, p. 33, para. 59 and p. 32, para. 55).

⁸⁰ See HAWRAMY F., MOSLAWI, M., «Iraqis Living under Isis Rule in Mosul Begin to Show Resistance», *The Guardian*, 1 August 2014, available at www.theguardian.com/world/2014/aug/01/iraqis-isis-mosul-resistance.

⁸¹ On the value of referendum in the creation of States, see BEIGBEDER, Y., «Referendum», in *Max Planck Encyclopedia of Public International Law online*, 2011; TANCREDI, A., «Crisi in Crimea, referendum ed autodeterminazione dei popoli», *Diritti umani e diritto internazionale*, 8, (2014), p. 480, pp. 484–487; PETERS, A., «The Crimean Vote of March 2014 as an Abuse of the Institution of the

Second, it has been suggested that respect for human rights is a condition of statehood. It is generally agreed that State sovereignty today implies the duty to protect and secure the human rights of the population,⁸² and, for this reason, some scholars consider that a State must be able and willing to secure fundamental human rights in order to have international personality.⁸³ However, this opinion is not supported by State practice and the respect for fundamental human rights is not a statehood criterion today.⁸⁴ Rather, the systematic violations and widespread atrocities committed by ISIS contribute to the idea that ISIS is *not* a State; in fact, other States consider it a perversion that ISIS calls itself a State while simultaneously violating the fundamental rights of local inhabitants.⁸⁵

Lastly, the centrality of the principle of self-determination and of human rights law in the current statehood discourse has led some commentators to consider the existence of a democratic government as a cornerstone of modern statehood.⁸⁶ This fascinating idea simply does not accord with the present structure of the international legal order,

Territorial Referendum», in C. (ed.), *Liber Amicorum für Torsten Stein zum 70. Geburtstag*, Baden Baden, Nomos, 2015, pp. 278–303; BERMEJO GARCÍA, R., *La vuelta de la Crimea a la madre-patria. Algunas reflexions a la luz del Derecho Internacional*, Valencia, Tirantlo Blanch, 2015, chapter 4.

⁸² See UN General Assembly, *2005 World Summit Outcome*, GA Res. 60/1, UN Doc A/RES/60/1 (2005), para. 138. See also PETERS, A., «Humanity as the A and Ω of Sovereignty», *European Journal of International Law*, 20, (2009), pp. 413–544.

⁸³ E.g., it has been suggested that one of the benchmarks for Palestinian statehood would be the ability of the Palestinian Authority to secure fundamental human rights. See QAFISHEH, M. M., «The Ability of Palestinian Legal System to Secure Adequate Standards of Living: Reform or the Failure Of State Duty», *Asian Journal of International Law*, 3, (2013), pp. 393–412.

⁸⁴ See CRAWFORD, J., *op. cit.*, pp. 148–150.

⁸⁵ See the statement of the Australian Prime Minister Abbott, UN Doc. S/PV.7272, *cit.*, p. 14.

⁸⁶ See VIDMAR, J., *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice*, Oxford, Hart, 2013, pp. 61–64, pp. 78–138 and pp. 235–253.

but rather reflects a new trend, politically supported by mainly the Western Countries.⁸⁷ *De lege lata*, the capacity to effectively govern a territory is sufficient for the emergence of a new State even if the government is not democratic.⁸⁸ However, one should note that ISIS government is not democratic, and the future possible State would not be a democratic State but, rather, a caliphate; such a theological and dictatorial form of government could present a danger for the international community, but it is not *per se* sufficient to prevent ISIS from gaining international personality.

In conclusion, the failure of ISIS to fulfill the additional legal statehood criteria that have been formulated by scholars in recent decades reinforces the idea that ISIS is not a State.

3. *The International Community Before ISIS's Claim to Be a State*

After having concluded that ISIS is not a State according to the factual and legalist theories, but that it is merely a group of insurgents, it is now time to consider the attitude that other States have towards ISIS. Even if the constitutive theory has been rejected in principle above, it is commonly believed today that an unanimous recognition by other States, the admission of an entity to international organizations and its participation in many bilateral or multilateral treaties play a role in the statehood

⁸⁷ See CRAWFORD, J., cit., pp. 150–155; FOCARELLI, C., *International Law as a Social Construct*, Oxford, Oxford University Press, 2012, p. 195; KLABBERS, J., *International Law*, Cambridge, Cambridge University Press, 2013, p. 71.

⁸⁸ See SANTULLI, C., «La crise ukrainienne: position du problème», *Revue Générale de Droit International Public*, 118, (2014), p. 799, p. 803: «Le principe essentiel est lié à la neutralité traditionnelle à l'endroit de l'organisation intérieure de l'Etat. Il implique l'indifférence aux modalités d'accession au pouvoir, et de la transmission de ce dernier. Si la pratique et les usages diplomatiques tendent à retarder souvent la négociation avec les représentant issus de coups de force – pratique de «faveur démocratique» ... – la maître de facto devient, s'il consolide sa position dans le temps, la source de la représentation étatique, et le seul habilité à délivrer les pleins pouvoirs».

discourse. The Montevideo Convention uses the formula ‘capacity to enter in relations with the other States’ and considers it a fundamental criterion. More correctly, though, this capacity should be considered as a mere consequence of the independence and effectiveness of a government, and not a statehood precondition.⁸⁹

However, since States are the main actors in the international legal order and choose freely whether to recognize another entity as a State, whether to admit it into an international organization, and whether to conclude accords with it, all these phenomena are considered relevant as manifestations of the International Community’s attitude about the existence of an entity as a State. According to factual scholars, the international ‘sociality’ of an entity is a demonstration of its fulfillment of the statehood criteria, and, at the same time, an exercise of effective and independent powers in the sphere of the international relations.⁹⁰ According to legalistic views, a wide recognition and membership in several international organizations can contribute to the creation of the international personality of an entity by partially supplying to the lack of factual elements;⁹¹ some authors even suggest that UN membership is clear and sufficient evidence of an entity’s statehood.⁹²

It is also undisputed that collective non-recognition and non-participation in international agreements can affect statehood to a certain extent. On the one hand, supporters of the factual theory consider that the total lack of international relations undermines the effectiveness and independence of the entity, which cannot therefore be

⁸⁹ See RAIČ, D., *op. cit.*, pp. 73–74.

⁹⁰ See, with different emphases, CASSESE, A., *International Law*, *cit.*, pp. 73–77; GIOIA, A., «Kosovo’s Statehood and the Role of Recognition», *Italian Yearbook of International Law*, 28, (2008), p. 3, p. 14; LONGOBARDO, M., «La recente adesione palestinese alle convenzioni di diritto umanitario e ai principali trattati a tutela dei diritti umani», *Ordine internazionale e diritti umani*, 1, (2014), p. 771, pp. 774–777.

⁹¹ See e.g. RAIČ, D., *op. cit.*, pp. 426–437; CRAWFORD, J., *op. cit.*, pp. 26–28; DUGARD, J., «The Secession’, *cit.*, pp. 54–57.

⁹² See, e.g., DUGARD, J., *Recognition*, *cit.*, pp. 78–80; ROSENNE, S., *The Perplexities of Modern International Law*, Leiden | Boston, Brill | Nijhoff, 2004, p. 240.

considered a State.⁹³ On the other, in a legalistic view, collective non-recognition is the sanction faced by the entity that has violated those fundamental rules of international law considered to be legal statehood criteria.⁹⁴

ISIS is totally isolated in the international arena because no State has recognized its statehood, and the UN has not endorsed its claim.⁹⁵ There is no international agreement between ISIS and other international actors, let alone States. Finally, ISIS is not a member of any international organizations. It is clear and indisputable that the entire International Community rejects the idea that ISIS has ever been a State.

Since all the UN official documents and records consider ISIS to be an armed group or an ensemble of armed groups,⁹⁶ it is reasonable to conclude that the International Community considers ISIS to be a group of insurgents. It clear that the International Community's attitude towards ISIS makes it very difficult the possibility for ISIS of entering in relations with other States.⁹⁷

IV. CONCLUSIONS

The difference between the Islamic State and an actual state should be

⁹³ See TANCREDI, A., «A Normative», cit., pp. 204–207, and «Neither Authorized», cit., pp. 53–54.

⁹⁴ See DUGARD, J., *Recognition*, cit., pp. 127–170; CRAWFORD, J., *op. cit.*, pp. 157–163.

⁹⁵ See the statement of the Secretary-General, UN Doc. S/PV.7272, cit., p. 3.

⁹⁶ See UN Doc S/RES/2170 (2014), cit.; UN Doc S/RES/2178 (2014), cit.; UN Doc S/RES/2199 (2015), cit.; UN Doc A/HRC/27/CRP.3, cit.; UN Doc A/HRC/28/18, cit.; UN Doc. S/PV.7272, cit.; UN Doc. S/PV.7242, cit. See also Office of the Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS*, 8 April 2015, available at www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-08-04-2015-1.aspx.

⁹⁷ *Contra* SHANY, Y., COHEN, A., *op. cit.*

*as obvious as the difference between John Kerry and a helicopter.*⁹⁸

It is impossible to foretell future developments in an area as complex as the Middle East, but for the time being, ISIS is not a State because it lacks the factual and legal elements required by international law. However, qualifying ISIS as insurgents should be considered a warning since insurgency is inherently a temporary status; after some time, insurgents either become States or are defeated. Defeating ISIS and creating an inclusive environment where such aberrations cannot find fertile soil are the main challenges faced by the International Community today.⁹⁹ Even if this goal seems to be about to be achieved, the International Community must learn from past errors in the area.

The quite surprising fact is that ISIS has never looked for international recognition, membership in international organizations or agreements with existing States. ISIS propaganda is about radically changing the world, and, accordingly, there is no desire to become part to the *ordre établi*. For this reason, even if it necessary to analyze ISIS statehood according to a conceptual framework of international law, one should pay due attention to the fact that the ultimate goal ISIS boasts is the radical change of the world community and the creation of a centralized and potentially universal Islamic State. Fortunately, this is far from a realistic scenario as confirmed by the historic failure of every dream of universal conquer and the success of the fight against ISIS in Syria and Iraq. However, ISIS ultimate goal must be acknowledged and rationalized in order to avoid illegal and unjust responses dictated by simple fear.¹⁰⁰

⁹⁸ See GRANT, T. D., *op. cit.*.

⁹⁹ See SHANY, Y., COHEN, A., *op. cit.*

¹⁰⁰ On this topic, see BIANCHI, A., «Fear's Legal Dimension: Counterterrorism and Human Rights», in L. BOISSON DE CHAZOURNES, M. G. KOHEN, (eds.), *International Law in Quest of Its Implementation. Liber Amicorum Vera Gowlland-Debass*, Leiden | Boston, Brill | Nijoff, 2010, pp. 175–192.