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7. Responsibility of non-state rulers in areas of limited statehood

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Abstract:

The chapter discusses the challenges that ALS and the emergence of non-state rulers pose to international law and, in particular, to the institution of responsibility which lead to responsibility gaps. In order to close these responsibility gaps, the chapter puts forward a framework according to which non-state rulers can be held responsible for violations of international law. The chapter then goes on to discuss under what circumstances responsibility can be shared by States and non-state rulers. The overall aim of the framework put forward in this chapter is to enhance the regulatory power of international law in the face of ALS and non-state rulers.

Keywords: non-state rulers, responsibility, attribution, shared responsibility

1. Introduction

The limitations of international law when faced with so-called 'mezzanine rulers' who 'insert themselves at a mezzanine level of rule between the government and the people' has garnered increasing attention over the past few years.[1] As noted by Michael Crawford and Jamie Miscik, to the extent that the international system remains grounded on the Westphalian model of nation-states, '[t]he gulf between international law and local realities frustrates efforts to tackle the problems posed by mezzanine rulers'.[2] The phenomenon of 'mezzanine rulers', with the ensuing challenges it poses on international law, is arguably more prevalent in areas of limited statehood (ALS). These are areas characterized by the withdrawal or weakening of State authority to the point that the State is unable to fulfil its normal functions, such as the provision of basic services or the provision of internal and external security.[3] The governance void that is created as a result is usually filled by other actors who provide forms of governance that are often functionally equivalent to State governance. These are the 'mezzanine rulers' mentioned above who will be referred to in this chapter as 'non-state rulers'.

[1] Michael Crawford and Jami Miscik, 'The Rise of the Mezzanine Rulers: The New Frontier for International Law' (2010) 89(6) *Foreign Affairs* 123.
[2] ibid.
[3] See Linda Hamid and Jan Wouters, 'Introduction: the Rule of Law and Areas of Limited Statehood', Chapter 1 in this volume. See also Thomas Risse, 'Governance under Limited Sovereignty' in Martha Finnemore and Judith Goldstein (eds), *Back to Basics: State Power in a Contemporary World* (OUP 2013).

To give but a few examples, countries like Syria, Libya, Somalia, Congo, Afghanistan, Iraq, and Lebanon can be described as ALS to the extent that the central government, where it exists, is unable to project and assert its power and authority over the whole of the State's territory where other actors exercise authority and control. In Iraq and Syria, for example, power and control over parts of their territory and population was exercised until fairly recently by the Islamic State of Iraq and Levant (ISIL). ISIL had established a political, administrative and military organization with State-like characteristics that commanded virtually all aspects of life, such as healthcare, education, public order and taxation.[4] Although ISIL's so called caliphate has collapsed, State authority has not been restored over the whole of Syria. The Kurds in Syria for example have established an autonomous region with its own constitution, legislative and executive bodies and army over which the Syrian government has no control whereas, in Iraq, the Kurdistan Regional Government is a *de facto* state although still recognised as federal entity by the Iraqi constitution. In Lebanon, Hezbollah has military, political and social control over southern Lebanon and, for this reason, it is often referred to as a State within a State. Hezbollah has a defined leadership, as well as a consultative council and five sub-councils or assemblies - the political assembly, the jihad assembly, the parliamentary assembly, the executive assembly, and the judicial assembly – that oversee different aspects of its activities. Hezbollah prevents the Lebanese army from deploying troops and from exercising control in the area it administers and has proclaimed itself as the defender of the Lebanese land and its people.[5] In Libya, power over the country is divided mainly between the internationally recognised Government of National Accord and the Interim Government supported by the House of Representatives and the Libyan National Army. These two poles of power not only compete with each other for power and legitimacy but also with other militias and groups controlling parts of the country.[6] Somalia is perhaps the most extreme example of limited statehood. For many years, it did not have a functioning central government and was divided into clan-based fiefdoms fighting each other. Even though it currently appears to be inching toward some form of stability and central administration, the Federal Government of Somalia remains unable to assert control and authority over the entirety of its internationally-recognized

[4] The Clarion Project, 'Special Report, the Islamic State' (*The Clarion Project*, 23 August 2016) <https://clarionproject.org/the-islamic-state-isis-isil/> accessed 29 March 2020.
[5] Casey L Addis, Christopher M Blanchard 'Hezbollah: Background and Issues for Congress' (Congressional Research Service, 2011) <https://fas.org/sgp/crs/mideast/R41446.pdf> accessed 29 March 2020.
[6] Human Rights Watch, 'World Report 2020/Libya') < https://www.hrw.org/world-report/2020/country-chapters/libya > accessed 24 March 2020.

territory, with the breakaway entities of Somaliland, Puntland and Khatumo having established their own State-like structures. Furthermore, the Islamist group Al-Shabaab controls parts of the country and has established its own administration, although recently the central government has been somewhat successful in regaining parts of the territories controlled by the group.[7]

Although it is not the purpose of this chapter to engage in the theoretical exploration of the ALS phenomenon or its governance typologies, as this has been aptly done in the Introduction to this volume, the aforementioned examples confirm the fact that there are different variations and gradations of the phenomenon, ranging from cases characterized by the total collapse of State authority to cases defined by the partial withdrawal of State authority in geographic, sectoral, functional terms or a combination thereof. They also confirm the fact that non-state rulers emerge in these areas who substitute State authority and exercise modes of governance which may, however, differ in terms of scope, structure, goals, effectiveness or resources.

The aim of this chapter instead is to examine the implications for international law of the phenomenon of non-state rulers who exercise control and authority over territories and people in ALS. More specifically, the focus of the chapter is non-state rulers who operate independently from the central government and exercise governmental functions over parts of a State's territory and its population, having displaced the government's authority, even if, for international law purposes, the State remains intact and continues to be represented by the central government. The chapter thus adopts a broader view of non-state ruler beyond armed groups, although the latter are included if they exercise government-like functions over territories and people.[8]

From an international law perspective, the existence of non-state rulers gives rise to many challenging questions but two questions, in my opinion, deserve further consideration. The first is how the breakdown of a State's domestic sovereignty coupled with the emergence of non-state rulers who exercise authority over territory and people within the State impinges on the normativity of international law and on its effectiveness as a governance tool. The second question is how international law can respond to the existence of such non-state rulers in order to maintain its power as a governance tool. These are interrelated questions, but this

[7] BTI, 'Somalia Country Report' (2018) <https://www.btiproject.org/de/berichte/laenderberichte/detail/itc/SOM/> accessed on 24 March 2020.

[8] On armed groups as alternative governors, see Tatyana Eatwell, 'Rebel Governors in Areas of Limited Statehood: State Responsibility and 'Agents of Necessity'', Chapter 6 in this volume.

chapter will mainly focus on the second question by looking at the institution of international responsibility although in doing so the chapter will also address issues falling within the first question.[9] The reason why the chapter will focus on the institution of international responsibility is because it is one of international law's main governance tools, being a crucial instrument in the implementation and enforcement of international law and, more generally, in maintaining international order.

The chapter thus proceeds as follows: in the second section, I will explain how ALS as a phenomenon affects the institution of international responsibility and reveal the regulatory and responsibility gaps that emerge when international law is faced with non-state rulers. For this reason, in the third section, I will put forward a normative framework pursuant to which non-state rulers operating in ALS can be held directly responsible for violations of international law. The proposed normative framework is *de lege ferenda* and draws on analogies from general international law and the law of State responsibility in order to fill the identified regulatory and, consequently, responsibility gaps. The reason why it uses analogies is because the responsibility questions raised by the existence of non-state rulers are similar to those dealt with by international law in the case of States.[10] In this section I will thus discuss the conditions under which non-state rulers can be considered subjects of international law and, consequently, subjects of international law obligations as well as the conditions under which wrongful conduct can be attributed to them engaging their responsibility. In the fourth section, I will consider the circumstances under which shared responsibility can arise whereby non-state rulers and States can be held concurrently responsible for a wrongful act or be held responsible for their own contribution to the commission of a wrongful act. Finally, in the conclusion, I will highlight certain lingering problems regarding the role and place of non-state rulers in the international legal system.

2. The challenges posed by ALS to the institution of international responsibility

As was said, the institution of international responsibility is part and parcel of international law. It is a tool for the implementation and enforcement of international law by ascribing consequences when breaches of international legal obligations take place. International responsibility can only operate among international law subjects because it is only them that

[9] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP 2002).
[10] Sandesh Sivakumaran, 'Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief' (2017) 28 EJIL 1097, 1116–1122.

can have obligations and incur responsibility. This immediately reveals the serious challenges ALS pose to international law and to the institution of international responsibility. In order to explain, States are the main subjects of international law and, for this reason, the creation, application and enforcement of international law depends on States and, indeed, on effective states that is, States that are 'able and willing' to perform these functions.[11] ALS represent the opposite phenomenon, where the State's power either disappears, is reduced or is undercut. Such a State loses its effectiveness and is not able to effectuate international law within its territory or in its relations with other States. At the same time, non-state rulers who fill the vacuum created by the withdrawal of State authority are not recognized by contemporary international law as subjects. As a result, ALS poses a serious challenge to international law's function as a domestic governance tool that is, in the relations between the State and individuals within its territory as well as in the relations between the State and non-state rulers on its territory since the State is not able to apply and enforce international law domestically. It also poses a challenge to international law's function as an external governance tool in the relations between States and non-state rulers or in the relations between and among non-state rulers to the extent that non-state rulers are not recognized as international law subjects.

Narrowing this down to the institution of international responsibility, the challenges ALS pose are many and diverse but I will only mention the most emblematic ones. The first relates to the question of legal personality in international law which is central to the institution of responsibility. In order to hold an entity responsible, that entity needs to have legal obligations, and in order to have legal obligations, the entity needs to have legal personality. However, in international law, only States have full legal personality and, to a limited extent, international organizations; for this reason the international law framework of responsibility covers only States and international organisations.[12] Because non-state rulers are not endowed with legal personality in current international law, they have no legal obligations and, without legal obligations, they have no responsibility, with the limited exception of international humanitarian and international criminal law where armed groups and individuals have direct obligations and can incur responsibility.[13] In sum, non-state rulers

[11] Charles de Visscher, *Les effectivités du droit international public* (Pedone 1967).
[12] ILC, 'Draft Articles on the Responsibility of International Organizations, with commentaries' (2011) Vol II(2) ILC Ybk 1.
[13] See Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609;

in most cases exist and operate outside the international law's framework of obligations and responsibility because of the way international law constructs personhood.

The second challenge relates to the ability to implement and enforce international law which is a condition for implementing the institution of responsibility. A State that loses its effectiveness is still recognized as an international law person and is still bound by international law but it lacks the requisite legislative, executive, or judicial means to implement or enforce international law internally or externally. This means that, even if its responsibility is invoked, the State that lacks effectiveness will not be able to implement it by, for example, ceasing the unlawful act or by providing reparation.[14] At the same time, non-state rulers who are able to implement and enforce international law are not held into account because they are not recognised as legal persons by international law.

The third challenge refers to the issue of attribution, which is a precondition for establishing responsibility. Attribution transforms a private act to an act of a State and, by doing so, it engages its responsibility.[15] For this reason, attribution requires a close link between a State and an individual or between a State and an act. Thus, a State incurs responsibility for the acts of its *de jure* or *de facto* organs;[16] for the acts of entities it empowers to exercise governmental authority; for the acts of an organ placed at its disposal;[17] and for acts it instructed, directed or effectively controlled.[18] The challenge that ALS with non-state rulers pose to attribution relates to the fact that the link between the non-state ruler who commits an unlawful act and the State or the link between individuals under the authority and control of a non-state ruler who commit wrongful acts and the State is broken. For instance, wrongful acts committed by ISIL as non-state ruler or ISIL operatives cannot be attributed, in most cases, to Iraq or Syria because none of the aforementioned attribution criteria are fulfilled. At the same time, these criteria donot apply to the relations between

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Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (ICRC and CUP 2005), Rule 139.

[14] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', UN Doc A/56/10 (2001) Vol II(2) ILC Ybk [hereafter ASR] arts 30-31.

[15] ibid art 2. See also Olivier de Frouville, 'Attribution of Conduct to the State: Private Individuals' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 257, 270.

[16] ASR (n 14) art 4; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 1986, 14 para 109; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 2007, 43 paras 385 and 390-393.

[17] ASR (n 14) arts 5 and 6.

[18] ibid art 8; *Nicaragua Case* (n 16) paras 116-117; *Bosnian Genocide Case* (n 16) paras 398, 402-406, 413-414.

individuals and non-state rulers to hold the latter responsible because as was said the law of international responsibility does not apply to them.

A fourth challenge relates to the fact that States with ALS can rarely be held responsible for breaching their obligation of due diligence in relation to wrongful acts committed by non-state rulers.[19] As is well-known, the obligation of due diligence is an obligation of conduct assessed by capacity.[20] State ineffectiveness in material or legal terms means that there is no capacity to implement this obligation. By way of example, Syria cannot be held in breach of its obligation of due diligence in relation to acts committed by ISIL because, at the time, it exercised no authority over ISIL-controlled territory.

In the preceding paragraphs, it was claimed that non-state rulers remain outside the institution of international responsibility whereas territorial States cannot be held responsible for their acts. In what follows I will discuss to what extent Articles 9 and 10 of International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ASR) can apply to ALS and hold States responsible for the acts of non-state rulers.

According to Article 9 ASR, the conduct of a person or a group exercising elements of governmental authority in the absence or in default of the official authorities can be considered an act of that State.[21] This covers situations where there is total or partial collapse of governmental authority and non-state actors perform governmental functions, thus becoming rulers.[22] In this case, the State is held responsible for their act because these actors exercise governmental authority[23] and the State's authority is not violently displaced by these actors but it is only temporarily replaced. As Article 9 ASR states, the rule of such non-state actors should be 'called for' in the sense of arising out of necessity. In contrast, the aim of non-state rulers is to take over control from the central government whereas their rule is not temporary. It thus transpires that Article 9 ASR is inapplicable in the case of non-state rulers and, as Tatyana Eatwell notes in Chapter 7 of this volume, there are many policy reasons why States may deny their responsibility for the acts of such actors.[24]

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[19] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 1949, 4 22; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 1996, 226 paras 241-242.
[20] *Bosnian Genocide Case* (n 16) para 430; *United States Diplomatic and Consular Staff in Teheran (USA v Iran)* (Merits) [1980] ICJ Rep 1980, 3 para 68.
[21] In this sense, see also Tatyana Eatwell, 'Rebel Governors in Areas of Limited Statehood: State Responsibility and 'Agents of Necessity'' Chapter 6 in this volume.
[22] Crawford (n 9), 114-115.
[23] *Yeager v Iran* Award (1987) 17 Iran-USCTR 92 104.
[24] Tatyana Eatwell, 'Rebel Governors in Areas of Limited Statehood: State Responsibility and 'Agents of Necessity'', Chapter 6 in this volume.

Moving now to Article 10 ASR, according to this article, the conduct of insurrectional or other movements that replace an existing government or establish a new State on the territory of an existing State are considered conduct of that State. The aim of this provision is to close the responsibility gaps that arise from changes in government, however what qualifies as insurrectional movements is debated.[25] For example, is Hezbollah an insurrectional movement? Moreover, Article 10 ASR arguably limits the scope of ensuing State responsibility. When the movement succeeds in establishing a new State., the new State will incur responsibility for violations of international law committed by the movement, but such movements have limited international obligations. Also, Article 10 ASR exonerates actors that participate in a power-sharing agreement and does not deal with the responsibility of those actors that have not been successful in forming a State.

In view of the above, it can be said that there is responsibility deficit in ALS with non-state rulers in their midst. In the first place, non-state rulers are not recognized as subjects of international law and, consequently, as subjects of international law obligations; therefore they cannot incur responsibility. Secondly, the territorial State cannot be held responsible for the acts of non-state rulers because they cannot be attributed to that State but its ineffectiveness also means that it cannot fulfil its own responsibility.

Yet, it is painfully clear that the activities of non-state rulers have serious consequences for States or people. Non-state rulers who exercise power over territory and people can materially commit the same wrongful acts as States do and for which they are held responsible. The inability of international law to regulate non-state rulers poses a serious threat to its function as a governance tool. In the opinion of the present writer, if international law is to maintain its governance functions, it needs to reconcile normativity with effectiveness, acknowledge the reality of non-state rulers, and integrate them into its normative system. This is the only way to regulate their internal and external activities and hold them directly responsible for their acts. For this reason, in the next section I will put forward a framework according to which non-state rulers will be placed within the institution of international responsibility.

[25] Protocol II (n 13) art 1; Crawford (n 9) 118, para 9; *Prosecutor v Limaj, Bala and Musliu* (Judgement) ICTY-03-66-T, T Ch II (30 November 2005) paras 88–170; *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgement) ICTY-04-84-T, T Ch I (3 April 2008) paras 37–60.

3. An international legal framework for the responsibility of non-state rulers

In this section, I will put forward a *de lege ferenda* framework according to which non-state rulers can be held legally responsible. It main contention is that non-state rulers who have effective control over territory and exercise government-like functions on such territory and its people should be recognized as legal persons[26] having international law obligations and, consequently, incurring responsibility for their wrongful acts. In the remainder I will explain each parameter in more detail.

As I said, this framework applies to effective non-state rulers. Effectiveness as a *sine qua non* attribute of non-state rulers is important not only because it allows them to effectuate international law and responsibility but also because it can establish their legal personality. Effective non-state rulers have an organisational structure that provides them with the capacity to will and to act internally and externally. Put it slightly differently, it allows them to exercise government-like powers over territory and people and, as far as international law is concerned, it allows them to receive, apply, implement and enforce international law. Being effective rulers over certain territory and its people, they also demarcate their authority and can thus distinguish themselves from their members and from other entities (States or non-state actors). In sum effective non-state rulers act as autonomous persons effectuate their authority through their organs. It is for this reason that they should be endowed with legal personality in international law. In my opinion, there is no legal hurdle to do so since international law in fact takes a functional approach to legal personality by recognizing effective entities as legal persons. In its *Reparations Advisory Opinion,* the International Court of Justice (ICJ) ascribed legal personality to the United Nations because of its functions, its capacity to possess rights and duties and the possession of organs with separate will from that of its member States. At the same time, the ICJ observed that attribution of personality relates to the 'requirements of international life' and the needs of States to interact with other actors.[27]

That having been said, States may be less receptive to the idea of granting legal personality to non-state rulers for fear of bestowing on them a certain degree of legitimacy or

[26] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 1949, 174 178; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 1975, 12 para 148; UNHRC, 'Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya' (1 June 2011) UN Doc A/HRC/17/44 para 72: 'it is increasingly accepted that where non-state groups exercise de facto control over territory, they must respect fundamental human rights of persons in that territory'.

[27] *Reparations Advisory Opinion* (n 26) 178-9.

because they may want to use the full force of the law to suppress them. Yet, the existence of these alternative rulers is also proof of a State's diminishing authority and, for this reason, international law should acknowledge this reality in order to maintain its regulatory function. The regulation of belligerency in the law of armed conflict is an instructive example of how international law can overcome political sensitivities in order to close the regulatory gaps that divided territorial authority presents. The recognition of belligerency is in effect the recognition of the existence of two equally powerful authorities on the same territory: the government and the insurgents.[28] In doing so international law lays down the rules that apply equally to them in the pursuit of their objectives but does not prevent them from fighting each other or from trying to overwhelm one another. In the same vein, recognizing effective non-state rulers and integrating them in the international legal system means that they will exist, operate and pursue their objectives within the framework of international law, as long as they maintain their effectiveness. If they succeed to extend their authority over the whole State or if they succeed in forming their own State, they will have the totality of rights and duties commensurate to a State;[29] if they are defeated, they will lose their legal status and the territorial State will restore its full sovereignty over its territory and people. The critical issue here is to avoid the regulatory gaps that emerge in-between these two outcomes and it is for this reason that they should be recognised as legal persons with obligations and responsibility, as I argue here.

However, legal personality should not be endowed to every non-state ruler. Non-state rulers that violate *jus cogens* norms – for example, they commit genocide or crimes against humanity – should not be recognized as legal persons because this would undermine important international constitutional norms. *Jus cogens* norms are part of the international law constitution and non-recognition is international law's sanction for their violation. This sanction is more effective when meted out at the point of the emergence of a new actor because at that early point international law exerts more power.[30] This means that ISIL would not have been recognised as legal person due to the *jus cogens* violations it committed. Furthermore, legal personality should not be endowed to non-state rulers when the bulk of their activities are illegal. Such non-state rulers would resemble a criminal organization than a government. For instance, the purpose of drug cartels that also control territory is not

[28] Antonio Cassese, *International Law* (2nd edn, OUP 2005) 124-131. See also Yair Lootsteen, 'The Concept of Belligerency in International Law' (2000) 166 Mil L Rev 109.
[29] ASR (n 16) art 10.
[30] ibid arts 40-41.

actually to administer territories or people, but to pursue their criminal activities. As such, they will obviously not be recognized as international legal persons.

If non-state rulers are recognised as legal persons, the issue to be considered next is the scope of their international law obligations. In the first place they will be bound by customary international law obligations[31] in the same vein as new States are bound by customary law.[32] This is because customary law is the law that applies to all international legal persons.[33] That said, non-state rulers will not only be bound by customary norms but will also contribute to the development of new customary rules or to new interpretations of existing customs.[34] Second, non-state rulers will be bound indirectly by treaty law to the extent that a specific treaty rule has acquired customary law status. Third, they will be bound by all *jus cogens* norms which are, in principle, customary rules of a peremptory nature.[35] Fourth, they will be bound by general principles of law which apply to all subjects of international law because of their general scope and the generality of their use. Fifth, non-state rulers will be bound by any contractual obligations they assume. Sixth, non-state rulers will be bound by any territorial obligation binding upon the State whose authority they have partially displaced[36] but not by other obligations incumbent upon the territorial State unless they consent to.

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[31] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 1980, 73 89-9; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (16 August 2012) UN Doc A/HRC/21/50 Annex II para 11: 'Non-state actors cannot formally become parties to international human rights treaties. They must nevertheless respect the fundamental human rights of persons forming customary international law (CIL), in areas where such actors exercise *de facto* control'. See also UNHRC, 'Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya' (n 26), para 72.

[32] Restatement (Third) of the Foreign Relations Law of the United States (1987) sect 102.

[33] *North Sea Continental Shelf Case (Germany/Netherlands; Germany/Denmark)* (Merits) [1969] ICJ Rep 1969, 3 para 63.

[34] Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37(1) Yale J Intl L 107. According to the ILC, the practice on non-state actors does not constitute 'practice' for purposes of the formation of customary law but this is mainly linked to the ILC's view on legal subjects: ILC, 'Identification of customary international law' (30 May 2016) UN Doc A/CN.4/L.872, Draft Conclusion 4 [5] (3). As the ILC Special Rapporteur however noted in the Fourth Report, 'although the conduct of "other actors" is not directly creative, or expressive, of customary international law, it may very well have an important (albeit indirect) role in the development and identification of customary international law': ILC, 'Fourth report on identification of customary international law' (8 March 2016) A/CN.4/695 para 21.

[35] Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649 para 226; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (22 February 2012) UN Doc A/HRC/19/69 para 106: '.. the commission notes that, at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups'.

[36] Vienna Convention on Succession of States in respect of Treaties (adopted 29 August 1978, entered into force 6 November 1996) 1946 UNTS 3 art 12.

However, it should be noted that non-state rulers will not have the same rights and obligations as States do because legal personality is not equivalent to sovereignty. Instead, non-state rulers would have those rights and obligations commensurate to their character, power and functions. This was affirmed in the *Reparations Advisory Opinion*, where the ICJ introduced a differentiated system of legal rights and obligations among legal persons, depending on their functions.[37]

Having legal personality and international law obligations means that non-state rulers can be held responsible for violations of their obligations. In order for this to happen, the violative act needs to be attributed to the non-state actors. In the first place, acts of their organs such as their leadership or army will automatically be attributed to them.[38] As was said previously, many non-state rulers possess a State-like internal organization therefore their organs can be identified easily. However, there are also non-state rulers that do not have a formalized organizational structure, or may not publicize their internal organizational structure for security reasons. For this reason, more emphasis should be placed on the concept of *de facto* organs[39] that is, persons or entities that are completely dependent on the non-state ruler. Proving dependency is however quite difficult.[40] For example, although ISIL and Boko Haram[41] shared the same ideology and, Boko Haram declared its allegiance to ISIL,[42] there is little evidence to prove dependency in order to characterise Boko Haram an ISIL *de facto* organ. Secondly, when the non-state ruler delegates the exercise of certain of its governmental functions to individuals or other entities, their conduct will be attributed to the non-state actor.[43] This will be the case for example if the non-state actor creates a hacker group to defend its infrastructure from external attacks. Thirdly, the wrongful acts of

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[37] *Reparations Advisory Opinion* (n 26) para 178.
[38] I use the term *de jure* organs in recognition of their institutional character. For example, all acts of their armed forces (official or private) will be attributed to them. See Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 art 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 art 9; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Merits) ICJ Rep 2005, 168 para 214.
[39] *R v Zardad* [2004] Central Criminal Court T2203 7676 paras 27-33.
[40] *Nicaragua Case* (n 16) para 109; *Bosnian Genocide Case* (n 16) paras 390-391 and 307.
[41] See David Cook, 'Boko Haram: A New Islamic State in Nigeria' (2014) James A Baker III institute for Public Policy of Rice University Research Paper <https://www.bakerinstitute.org/media/files/files/5f1f63c4/BI-pub-BokoHaram-121114.pdf> accessed 31 March 2020.
[42] ISIL, 'Remaining and Expanding' (2015) 5 Dabiq 22, 24-25 <https://clarionproject.org/docs/isis-isil-islamic-state-magazine-issue-5-remaining-and-expanding.pdf> accessed 31 March 2020; Ryan Cummings, 'Boko Haram's Pledge to ISIS: Public Relations or Reality' (*Global Observatory*, March 13 2015) <https://theglobalobservatory.org/2015/03/boko-haram-pledge-allegiance-isis/> accessed 31 March 2020.
[43] ASR (n 14) art 5.

individuals or groups who act under the instructions, direction or control of non-state rulers will be attributed to those non-state rulers.[44] For example, if individuals commit terrorist attacks under the instructions or control of a non-state ruler, the attacks will be attributed to that non-state ruler. It should be noted however that instructions and directions are quite difficult to prove in the absence of formal or publicly given orders. As to the criterion of control, the ICJ requires 'effective' control which makes attribution quite difficult.[45] For example, ISIL communicated with local governorates in Algeria, Libya, the Sinai, Saudi Arabia, Yemen and Khorasan (Afghanistan-Pakistan), approved of their operational concepts, provided strategic resources and military training[46] but such conduct does not amount to effective control. Therefore, ISIL cannot be held responsible for the acts of these local governorates. Finally, if a non-state ruler acknowledges and adopts as its own certain conduct, that conduct will be attributed to the non-state actor.[47] This could apply, for instance, in relation to the acknowledgement by ISIL of terrorist acts such as those in Paris and Brussels and its pledge to intensify such acts.

In order to conclude, in this section I explained why effective non-state rulers should be recognised as legal persons and then put forward a framework according to which they can be held responsible for violations of international law. In this respect, I explained that their international law obligations should be commensurate to their character, functions and resources and that their responsibility should be dependent on attribution.

4. Shared responsibility between and among States and non-state rulers

If non-state rulers can indeed bear responsibility for their wrongful acts, an issue that deserves more detailed analysis is that of shared responsibility between non-state rulers and States.[48] This is because non-state rulers may be assisted in the commission of wrongful acts by States or other non-state rulers or they may collaborate with States or other non-state rulers in the commission of wrongful acts.

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[44] ibid art 8.
[45] *Bosnian Genocide Case* (n 16) paras 402-406.
[46] Col (ret) Dr Jacques Neriah, 'The Structure of the Islamic State (ISIS)' (*Jerusalem Centre for Public Affairs*, 8 September 2014) <https://jcpa.org/structure-of-the-islamic-state/> accessed 4 April 2020.
[47] ASR (n 14) art 11; *Diplomatic and Consular Staff in Teheran* (n 20) para 74.
[48] See, generally, André Nollkaemper and Ilias Plakokefalos, *Principles of Shared Responsibility in International Law An Appraisal of the State of the Art* (CUP 2013); André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015); André Nollkaemper, 'The duality of shared responsibility' (2018) 24 Contemporary Politics 524.

One scenario where shared responsibility may arise is when a State and a non-state ruler commit jointly a wrongful act by joining, for example, forces to attack another State. To the extent that the attack is committed jointly by their organs, by a common organ created for that purpose, or by entities under their instructions, direction and control, it will be attributed to both parties and engage their joint responsibility.

Another scenario is when a State or a non-state ruler aid or assist each other in the commission of a wrongful act. This scenario gives rise to responsibility for complicity. Article 16 ASR introduces this form of responsibility when a State aids or assists another State in the commission of a wrongful act[49] but contemporary practice has extended its scope to also cover aid and assistance provided by States to non-state actors who go on to commit wrongful acts.[50] In such situations, the entity that commits the wrongful act (direct perpetrator) incurs responsibility for that act, whereas the other entity is held responsible only for its aid and assistance.[51] For example, if a State provides assistance to a non-state ruler which then goes on to attack another State, the non-state ruler will be held responsible for the attack whereas the assisting State will be held responsible for complicity to the attack. A slightly different scenario is when a State assists a non-state ruler who is under the control of another State and who commits an unlawful act. In this case, the assisting State will be held responsible for aiding or assisting that other State. For example, if State A provides weapons to a non-state ruler who is controlled by State B and the non-state ruler uses the military

[49] ASR (n 14) art 16; *Bosnian Genocide Case* (16) para 420. According to the Court it represents customary law.
[50] For example, Austria declared in relation to the supply of arms to Syria:

> Should supplied arms be used by armed opposition groups in Syria in the commission of internationally wrongful acts, the States who had supplied these arms and had knowledge of these acts would incur State responsibility for their aid and assistance in the commission of such acts.

Austria, 'SYRIA: Austrian Position on Arms Embargo (*as of 13 May 2013)*' (2013) Austrian Position Paper 3 <https://im.ft-static.com/content/images/1721c482-bcbc-11e2-b344-00144feab7de.pdf> accessed 4 April 2020.
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material to attack State C, State A will be held responsible for assisting State B in attacking State C whereas the non-state ruler will be held responsible for the attack.

That said, it should be noted that the scope of responsibility for complicity is quite narrow in international law. Although it now covers the relations between States and non-state actors, it does not cover instances of aid or assistance rendered by non-state actors to States or to other non-state actors. These gaps will be filled under the framework presented in the preceding section where the legal personality of non-state rulers is recognised. The law on complicity will consequently cover the relations between and among non-state rulers and the relations between non-state rulers and States. Thus, if a non-state ruler assists a State or another non-state ruler in the commission of a wrongful act, the assisting non-state ruler will be held responsible for complicity whilst the assisted State or non-state ruler will be held responsible for the wrongful act as direct perpetrators.

There are certain other factors that may however limit the scope of responsibility for complicity. The first factor refers to the type of required aid or assistance. According to current jurisprudence it can include financial, material, technical, operational or logistical assistance, but would non-material assistance such as moral assistance or omissions be included? Existing jurisprudence seems to exclude non-material assistance[52] whereas, with regard to omissions, the ICJ opined that 'complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators'[53] which seems to also exclude them. Omissions can however facilitate the commission of a wrongful act and, for this reason, it would not be unreasonable to include them within the definition of aid or assistance. For instance, if a State facilitates a non-state ruler to attack a neighbouring State by allowing the non-state ruler's forces to transit its territory or by allowing the non-state ruler to use bases on its territory to launch the attack, this, in my opinion, would constitute aid or assistance than dereliction of that State's duty of due diligence provided that all the other requirements are fulfilled and there is nexus between the omission and the attack. Under our construction, a non-state ruler that allows State forces or the forces of another non-state ruler to transit its territory or use bases on the territory it controls to commit a wrongful act against another State or another non-state ruler, will also be held responsible for complicity.

[52] *Bosnian Genocide Case* (16) para. 419; Crawford (n 9) 147-8, para 9. It excludes moral assistance or instigation or abetting.
[53] *Bosnian Genocide Case* (n 16) para 432. For criticism see Vladyslav Lanovoy, 'Complicity in an Internationally Wrongful Act' in Nollkaemper and Plakokefalos (n 49) 134, 145-150; Miles Jackson, *Complicity in International Law* (OUP 2015), 156–58.

Another factor that can limit the scope of the law refers to the mental element required to establish complicity. Article 16 ASR requires knowledge of the circumstances making the assisted conduct illegal. This gives rise to a number of further questions such as whether knowledge should be actual and specific or whether constructive knowledge would suffice.[54] Moreover, the ILC commentary states that 'aid or assistance must be given with a view to facilitating the commission of the wrongful act'. [55] This formulation introduces a volitional and, indeed, a high mental standard which raises the threshold for triggering complicit responsibility. Using one or the other standard can lead to different outcomes, although in certain cases it will not make a difference as when a State is aware of the fact that a non-state ruler uses the materials it receives to commit violations of international law and continues to provide such materials in which case intent can be easily inferred. In this case, the State will be held responsible for complicity irrespective of whether intent or knowledge is the requisite mental standard.

In my opinion, a more 'objectified' mental standard based on knowledge is more appropriate in this case if international law is to maintain it function as an effective governance tool and maintain legality. Otherwise States or non-state rulers will continue to provide assistance to other States and non-state rulers but hide behind the claim that they did not intent to facilitate the commission of an unlawful act, even if information to the opposite is readily available. Such an 'objectified' mental element applies in relation to serious violations of international law namely, violations of peremptory norms. According to Article 41(2) ASR '[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation'.[56] In this case, it is assumed that the State 'must have known' of the violations of the peremptory norm.

Still another factor that can condition complicit responsibility is that both parties – the assisted and assisting party – need to be bound by the same obligations. Treating non-state rulers as legal persons brings a measure of equivalence between and among States and non-state rulers but still their respective obligations as was said previously. As a result, collaborating States and non-state rulers will still be able to circumvent their responsibility unless this requirement is removed.[57] Indeed, since responsibility for complicity is derivative triggered because of the illegality of the committed act and not because of the illegality of the

[54] *Bosnian Genocide Case* (n 16) para 421.
[55] Crawford (n 9) 148-9.
[56] ASR (n 14) art 41(2); *Legal Consequences of the Construction of a Wall* (n 61), para 159.
[57] Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart 2016) 240-258.

provided assistance *per se*, it will serve the governance function of international law if this requirement of opposability is removed in particularly in relation to non-state rulers.

Where complicity can give rise to direct responsibility is when the provided aid and assistance is indispensable for the commission of the wrongful act.[58] In this case both parties (assisting and assisted) will be held responsible for the wrongful act as co-perpetrators. For instance, if State A provides weapons which are used by a non-state ruler to attack State B and without such weapons the non-state ruler would not have been able to commit the attack, both the State and the non-state ruler would be held responsible for the attack. Under our construction, the same reasoning would apply to the case where a non-state ruler provides indispensable aid or assistance to a State or to another non-state ruler which goes on to commit a wrongful act.

Moving now to a different scenario, if a State allows its territory to be used by a non-state ruler to commit violations of international law, the non-state ruler will be held responsible for the international law violations it has committed, whereas the tolerating State will be responsible for allowing its territory to be used for acts that violate the rights of other States.[59] This amounts to breach by the State of its due diligence obligation which differs from complicity because there is no participation by the State into the wrongful conduct of the non-state ruler. However, this will not cover situations where a State's authority over its territory has been disrupted by a non-state ruler because the State in this case has not capacity -legal or otherwise – to prevent such acts from being committed from that territory. This immediately shows the responsibility gaps that the rise of non-state rulers create. This gap will be filled under our construction because non-state rulers will have direct obligations which will regulate their conduct on the territory they control and will incur responsibility for their violation. Moreover, non-state rulers will breach their duty of due diligence if they allow their territory to be used by other States or non-state rulers to violate the rights of other States or non-state rulers.

There are several other scenarios where shared responsibility can arise. Under Common Article 1 of the 1949 Geneva Conventions, States have an obligation to respect and to ensure respect of the laws of armed conflict.[60] This is a customary law obligation that

[58] Crawford (n 9) 151. Also see ASR (n 14) art 47.
[59] In the *Corfu Channel* case, the ICJ referred to 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'. See *Corfu Channel* (n 19).
[60] See Article 1, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Commentary of 2016 <https://ihl-

applies to both international and non-international armed conflicts. The obligation to ensure respect includes an obligation not to encourage, aid, or assist in the commission of violations of international humanitarian law (IHL) and an obligation to exert influence to bring IHL violations to an end or to prevent IHL violations that are foreseeable; in this respect, it is broader than Article 16 ASR. The obligation to ensure respect is an obligation of conduct which binds not only the parties to the armed conflict but all States.[61] Applying now the obligation to respect and ensure respect of IHL to non-state rulers; they will incur responsibility for their own violations of IHL and, if they fail to prosecute the culprits, they will breach their obligation to ensure respect for IHL. If non-state rulers commit violations of IHL, States and, under our construction, non-state rulers will breach their obligation to ensure respect of IHL if they fail to take lawful measures to stop such violations or prevent the commission of IHL violations. However, the obligation of third parties to ensure respect is a relative and differentiated obligation because, whether responsibility is incurred, depends on the proximity or influence that a State or a non-state ruler can exert on the culpable non-state ruler, something that is easier to establish in cases of collaboration.[62]

Likewise, under international human rights law (IHRL), there is an obligation to respect, protect and fulfil human rights. The obligation to protect translates itself into a due diligence obligation and extends even on to areas not controlled by the State. In the *Ilaşcu* case, which involved claims of human rights violations committed by a separatist regime, the European Court of Human Rights held that, although Moldova did not exercise effective control over Transdniestria, it still had a 'positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial and other measures that it is in its power to take and are in accordance with international law to secure the rights guaranteed by the Convention'.[63] The scope of this obligation varies depending on the facts on the ground but a State still incurs responsibility if it fails to make at least 'minimum effort' to protect

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databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD> accessed 24 March 2020. See also Henckaerts and Doswald-Beck (n 13) Rule 144; *Nicaragua Case* (n 16) para 220; *Nuclear Weapons Advisory Opinion* (n 19) paras 79-97; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) [2004] ICJ Rep 2004, 136 paras 106-181; *Armed Activities* (n 38) paras 215-217.

[61] For a contrary view see *Turp v. Canada* (Foreign Affairs), 2017 FC 84 (CanLII), paras 70-73. Also see Brian Egan, Former Legal Advisor to the State Department 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign', Address to the American Society of International Law (2016) <https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf> accessed 29 March 2020

[62] *Bosnian Genocide Case* (n 16) paras 434-438, Commentary of 2016 (n 59), para 167.
[63] *Ilaşcu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) paras 330-331.

human rights within the territory it does not control.[64] One can trace behind this an attempt to close the gaps that arise in human rights protection due to the existence of non-state rulers.[65] Applying the above reasoning to non-state rulers, the territorial State should do whatever feasible to protect the human rights of those individuals living under the authority of the non-state ruler whereas the non-state ruler will bear responsibility for violating their human rights. Under our construction, non-state rulers would also have a due diligence obligation to protect the human rights of individuals living on territory under their authority even if certain parts of their territory are controlled by other non-state rulers.

Shared responsibility can also arise when individuals commit international crimes, for example genocide. In this case, individual criminal responsibility for genocide will operate in tandem with State or non-state rulers' responsibility for genocide. In the *Bosnian Genocide Case*, the ICJ aligned individual criminal responsibility with State responsibility by opining that the Genocide Convention imposes both individual criminal responsibility and State responsibility.[66] In the same case, the Court also associated the criminal law notion of complicity with the notion of aiding or assisting in the law of State responsibility.[67] The ICJ noted that both modes of responsibility require, on the one hand, assistance and, on the other, knowledge by the assisting party of the facts surrounding the crime, opining that they are related as a result.[68] The Court then went on to attribute the acts of individuals found responsible for committing genocide or for being complicit in genocide to a State, thus holding that State responsible for breaching its corresponding obligations.

Applying this reasoning to non-state rulers would mean that if individuals commit for example genocide and their acts are attributed to a non-state ruler, that individual will incur criminal responsibility for genocide whereas the non-state ruler will incur responsibility for genocide. If a non-state ruler's organ or agent is held criminally responsible for committing genocide but their genocidal acts are attributed to a State because theyacted under its instructions, direction or control, that State will be held responsible for committing genocide, unless the genocidal acts were committed under joint control in which case the non-state ruler and the State will incur concurrent responsibility for genocide. If State organs provide aid or

[64] ibid para 334.
[65] Linda Hamid and Jan Wouters, 'Areas of Limited Statehood: Undermining the Possibility of an International Rule of Law', Chapter 2 in this volume. For criticism see Marko Milanović and Tatjana Papić, 'The Applicability of the ECHR in Contested Territories' (2018) 67(4) Intl Comp LQ 779.
[66] *Bosnian Genocide Case* (n 16) paras 173 and 418-424.
[67] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 3(e); *Bosnian Genocide Case* (n 16) para 167.
[68] *Bosnian Genocide Case* (n 16) paras 422-432.

assistance to a non-state ruler's organs who then go on to commit genocide, said organs will be held criminally responsible for committing genocide, the non-state ruler will be held responsible for committing genocide, the State organ who provided assistance will be held criminally responsible for complicity in genocide, whereas the State will be held responsible for aiding or assisting in the commission of genocide.

5. Conclusion

This chapter has shown that, because of the State-centric character of international law, ALS and the emergence of non-state rulers can undermine international law and this is particularly evident in the law of international responsibility, where States and non-state rulers can evade responsibility. To address the responsibility vacuum that arises and, even more critically, to bring law closer to the political and factual realities on the ground, this Chapter has argued that, instead of viewing or treating non-state rulers in negative terms as security threats or outlaws, effective non-state rulers that exercise authority over territory and people and exercise governmental functions should be recognized as subjects of international law with rights, obligations and, consequently, with responsibility. In this way, international law will be implemented, respected and enforced and, thus, continue to perform its governance function. However, it must be admitted that this is a *de lege ferenda* proposal which is not a panacea even if it is accepted and acted upon.

To mention but a few of its limitations, the first is that it is limited to effective non-stare rulers that have government-like qualities and a territorial basis; thus it excludes many other actors who do not exhibit these traits, but still can affect people and who equally pose great challenges to international law. Secondly, the proposal is more amenable to non-state rulers that strive for internal as well as external legitimacy. However, there may also be actors who do not aim for such legitimacy and who enforce their rule through sheer power, oblivious of any legal niceties. Thirdly and related to the above, its success depends on the attitude of such rulers towards international law or towards the existing international legal order. Non-state rulers may, however, reject international law because they have not participated in its formation or because they may want to establish a new world order, as ISIL tried to do for instance. If that is the case, the proposal is a non-starter. Conversely, non-state rulers may accept existing international law but adopt different interpretations of the law. In this case, the proposal provides a way forward, but the immediate question is how

international law can integrate those non-state rulers in its processes. Would, for example, their practice and *opinio juris* be integrated in the process of custom formation or would it contribute to a different process of customary law formation? Fourth, unless different attribution standards are introduced to reflect more informal structures of authority, or, unless different interpretations of the existing standards are introduced,[69] the current standards which are informed of certain set ideas about state organisation will not be able to encapsulate the reality of non-state rulers and will certainly frustrate attempts to hold them responsible. Fifth, holding non-state rulers legally responsible will encounter many substantive and procedural hurdles because there are no formalized mechanisms to determine their responsibility other than *ad hoc* ones. Therefore, new mechanisms need to be established or existing mechanisms need to revise their competence, jurisdiction and admissibility conditions.

In sum, what transpires from the preceding discussion is that integrating non-state rulers fully into international law and holding them responsible for their wrongful conduct is important if international law is to maintain its function as a governance tool but requires normative, procedural, structural, and attitudinal changes at the macro-level, which is undoubtedly an extremely challenging endeavour.

[69] *R v Zardad* (n 39) para 33.