See No Evil: Assessing U.S. State Responsibility for Violations at al-Hol

There is broad consensus within the international community that conditions in the al-Hol prison camp, which holds thousands of captured wives and children of ISIS fighters, constitute egregious international legal violations. Less clear, however, is which State (or States) may be held internationally responsible for those violations. Litigation at the European Court of Human Rights thus far has centered on the question of whether detainees' States of nationality bear a positive obligation to repatriate or else violate extraterritorial obligations under regional human rights instruments. Yet the primary violations implicated by the camp likely go further than those contained within those treaties—and the States facilitating the continued operation of the camp are not only European States of nationality. The United States, along with several other members of the Global Coalition, have continued to assist the Syrian Democratic Forces in its management of the camp by funding, training, and equipping its members. Yet a finding of international responsibility for those States will likely be hampered by the limitations within the current framework provided by the Articles on the Responsibility of States for Internationally Wrongful Conduct (ASR). This Note seeks to do three things: first, to articulate which rules of international law the camp and its conditions violate; second, to pinpoint the "legal lacuna" in the ASR which allows for complicit States to evade responsibility; and third, to identify the potential solutions for bridging this legal gap.

INTRODUCTION

More than three years since the fall of the "caliphate" of the Islamic State in Iraq and Syria (ISIS), tens of thousands of men, women, and children remain imprisoned in reportedly inhumane conditions in camps across northeastern Syria, perhaps the most infamous of which is al-Hol.[1] Though some individuals have been repatriated,

1. *See Thousands of Foreigners Unlawfully Held in NE Syria*, HUM. RTS. WATCH (Mar. 23, 2021 2:00 AM), [hereinafter HRW REPORT], https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria [https://perma.cc/2NVQ-CHHL] . The al-Roj camp and Gweiran prison have also come under

more than 50,000 remain in the camp. The vast majority of the detainees are the wives of ISIS fighters and their children.[2] The al-Hol camp, along with other makeshift detention centers in the region, has continued to pose challenging political, strategic, and legal questions for States whose citizens have been detained, particularly whether repatriation would constitute a greater security threat than continued detention—and thus vulnerability to radicalization.[3] But while the camps pose theoretical difficulties to the home States of the detainees, they constitute a very real, day-to-day threat to the Kurdish Autonomous Administration of North and East Syria (AANES), which is currently managing them. In March 2021, the Syrian Democratic Forces (SDF), now the defense and security apparatus for the AANES[4] actively running the camp,[5] conducted an operation to root out ISIS cells

international scrutiny, though not to the degree of the al-Hol camp. *See, e.g.*, DANIEL GOREVAN & KATHRYN ACHILLES, SAVE THE CHILDREN, WHEN AM I GOING TO START TO LIVE? THE URGENT NEED TO REPATRIATE FOREIGN CHILDREN TRAPPED IN AL HOL AND ROJ CAMPS 3 (2021); Zeina Karam, *Explainer: Who are the Kids Trapped in Syria Prison Attack?*, ASSOCIATED PRESS (Jan. 26, 2022), https://apnews.com/article/middle-east-syria-iraq-islamic-state-group-8ad5b1b14b10702e5fc59c4b4f382ac1 [https://perma.cc/895T-KTNS].

2. *See* HRW REPORT, *supra* note 1. Note that while most—more than 40,000—camp inhabitants qualify as "detainees," the remainder are refugees from Syria and Iraq with no current or former affiliation to ISIS.

3. *See, e.g.*, Colin P. Clarke, *The Terrorist Threat Posed by Neglect and Indifference*, FOREIGN POL'Y RSCH. INST. (Sept. 19, 2019), https://www.fpri.org/article/2019/09/the-terrorist-threat-posed-by-neglect-and-indifference/ [https://perma.cc/6ZUS-8WDS]; *see also* THOMAS RENARD & RIK COOLSAET, EGMONT INST., CHILDREN IN THE LEVANT: INSIGHTS FROM BELGIUM ON THE DILEMMAS OF REPATRIATION AND THE CHALLENGES OF REINTEGRATION 3 (2018), https://www.jstor.org/stable/resrep21405?seq=1#metadata_info_tab_contents [https://perma.cc/44KC-9U8T] ("The most important dilemma [for European Union authorities] of all . . . is security. The authorities' reluctance to address head-on the issue of returning children is driven by several considerations," including "the uncertainty and the inherent difficulty of reintegrating children back into European societies after they have lived in an ultra-violent environment."); *Nordic Countries: Repatriate Nationals from Northeast Syria*, HUM. RTS. WATCH (May 26, 2021, 1:00 AM), https://www.hrw.org/news/2021/05/26/nordic-countries-repatriate-nationals-northeast-syria [https://perma.cc/RC4S-2JG5] ("In March [2021] Denmark released a Police Intelligence Service report it had delayed for a year that warned the country faced a greater security threat leaving the children in northeast Syria than bringing them home.").

4. Mohammad Hassan, *How Have the AANES's Policies Contributed to the Resurgence of ISIS?*, MIDDLE E. INST. (May 5, 2021), https://www.mei.edu/publications/how-have-aaness-policies-contributed-resurgence-isis [https://perma.cc/F2T5-PGSA].

5. Ruby Mellen, *A Brief History of the Syrian Democratic Forces, the Kurdish-Led Alliance that Helped the U.S. Defeat the Islamic State*, WASH. POST (Oct. 7, 2019), https://www.washingtonpost.com/world/2019/10/07/brief-history-syrian-democratic-forces-kurdish-led-alliance-that-helped-us-defeat-islamic-state/ [https://perma.cc/N4FM-AESV].

responsible for the deaths of several detainees.[6] Even more recently, the SDF struggled to quell a six-day siege of the Gweiran prison in the nearby city of al-Hasakah,[7] which holds both adult ISIS fighters and male children transferred from al-Hol.[8]

Many of the detainees' home States seem unwilling[9] (or, as in the case of Iraq, perhaps unable[10]) to repatriate and prosecute them. As a result, the AANES is stuck between a legal rock and a hard place: either continue running the camps as is, likely continuing to perpetrate violations of international law[11] while placing an ever-greater strain on the limited resources of the Administration[12] or, alternatively, cease managing the camp, thus releasing thousands of foreigners, including many still-radicalized members of ISIS,[13] into an already unstable

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6. *Kurdish-Led Campaign Under Way to Rid al-Hol Camp of IS*, B.B.C. NEWS (Mar. 28, 2021), https://www.bbc.com/news/world-middle-east-56553797 [https://perma.cc/E8XV-3DDA].

7. *See* Omar Abdulkader, *U.S.-Backed Syrian Fighters Retake Prison Stormed by ISIS After Six-Day Battle*, CBS NEWS (Jan. 26, 2022), https://www.cbsnews.com/news/isis-prison-break-syria-hasakah-us-helps-sdf-retake-al-sinaa/ [https://perma.cc/2DF8-JLRB].

8. Jen Patja Howell, *The Lawfare Podcast: An Islamic State Jailbreak*, LAWFARE, at 03:37 (Jan. 28, 2022, 5:01 AM), https://www.lawfareblog.com/lawfare-podcast-islamic-state-jailbreak [https://perma.cc/P57X-A89Y].

9. *See, e.g.*, Sarah Elzas, *France Repatriates Seven More Children of French Jihadists from Syria*, RADIO FR. INTERNATIONALE (Jan. 14, 2021, 1:46 PM), https://www.rfi.fr/en/france/20210114-france-repatriates-seven-more-children-of-french-jihadists-from-syria [https://perma.cc/3VH8-9CNB]; *see also* Ben Hubbard & Constant Méheut, *Western Countries Leave Children of ISIS in Syrian Camps*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/world/middleeast/isis-children-syria-camps.html/ [https://perma.cc/94BE-WHGV].

10. Sarhang Hamasaeed, *What Will Become of Iraqis in Al-Hol?*, U.S. INST. OF PEACE (Nov. 19, 2020), https://www.usip.org/publications/2020/11/what-will-become-iraqis-al-hol [https://perma.cc/9M5T-VFF8] ("Meanwhile, many Iraqis in al-Hol are reluctant to return for fear of capital punishment or acts of revenge. Syrian officials in the Syrian Democratic Council (SDC) and Syrian Democratic Forces (SDF) have also indicated their concerns over returnees facing capital punishment in Iraq.").

11. *See, e.g.*, Heather Colby, *Human Rights Violations in the Syria Detention Camp: A Look at the al-Hol Camp Annex*, DENV. J. INT'L L. & POL'Y (2019), http://djilp.org/human-rights-violations-in-the-syria-detention-camp-a-look-at-the-al-hol-camp-annex/ [https://perma.cc/T3D9-8TTL]; *see infra* Sections II.C.2–C.3.

12. Aleem Maqbool, *Islamic State Group: Syria's Kurds Call for International Tribunal*, B.B.C. NEWS (Mar. 26, 2019), https://www.bbc.com/news/world-middle-east-47704464 [https://perma.cc/6KE8-DFHT].

13. *See* Isabel Coles & Benoit Faucon, *Refugee Camp for Families of Islamic State Fighters Nourishes Insurgency*, WALL ST. J. (June 9, 2021, 12:06 PM), https://www.wsj.com/articles/refugee-camp-for-families-of-islamic-state-fighters-nourishes-insurgency-11623254778 [https://perma.cc/99RB-7R25].

region of the world.[14] AANES officials argue that a theoretical third path—local prosecution of the detainees—is not possible without additional support from the international community, which has yet to materialize.[15]

The situation has created a vacuum of international legal responsibility at both the State and individual level.[16] On the one hand, the home States of detainees and members of the Global Coalition[17] have seemingly washed their hands of responsibility for the detainees[18]: The camps are not located within their territory, nor are the camps directly managed by their militaries (unlike, for example, U.S. management of the detention center on its naval base at Guantánamo Bay[19]). At the same time, the AANES is not recognized as a sovereign State[20] despite acting, some argue, as a de facto State or "proto-

14. *See* Calvin Wilder, *The Deteriorating Security Situation in Northeast Syria*, NEW LINES INST. (July 11, 2022), https://newlinesinstitute.org/human-security/the-deteriorating-security-situation-in-northeast-syria/ [https://perma.cc/FY8C-JFUX].

15. Maqbool, *supra* note 12.

16. In March 2021, French lawyers published a letter referring French President Emmanuel Macron to the Prosecutor of the International Criminal Court, calling for an investigation to determine whether he may be responsible for the war crimes allegedly perpetrated in the camp. *See* Ludovic Rivière (@LudovicRiviere_), TWITTER (Mar. 30, 2021, 1:49 PM), https://twitter.com/LudovicRiviere_/status/1376954725078294531 [https://perma.cc/G5SM-XV8H]. However, this effort has yet to yield any tangible results, at least in the form of the Prosecutor opening an investigation or preliminary examination of the case. *See generally*, *Situations Under Investigations*, INT'L CRIM. CT, https://www.icc-cpi.int/pages/situation.aspx [https://perma.cc/DJ94-UVEZ] (last visited Oct. 31, 2022). Thus, any attempt to establish individual accountability via international criminal law appears to be at a standstill.

17. *See infra* Section I.A.

18. Some home States have gone as far as to strip detainees of their citizenship. *See* Elian Peltier, *Shamima Begum Loses Effort to Return to U.K. in Fight for Citizenship*, N.Y. TIMES (Feb. 26, 2021), https://www.nytimes.com/2021/02/26/world/europe/shamima-begum-citizenship.html [https://perma.cc/K6W6-TJ2D]; *Denmark Passes Legislation to Strip ISIL Fighters of Citizenship*, AL-JAZEERA (Oct. 24, 2019), https://www.aljazeera.com/news/2019/10/24/denmark-passes-legislation-to-strip-isil-fighters-of-citizenship [https://perma.cc/3L53-QPVA].

19. Lily Rothman, *Why the United States Controls Guantanamo Bay*, TIME (Jan. 22, 2015), https://time.com/3672066/guantanamo-bay-history/ [https://perma.cc/37VD-J9JU].

20. *See* HARRIET ALLSOPP & WLADIMIR VAN WILGENBURG, THE KURDS OF NORTHERN SYRIA: GOVERNANCE, DIVERSITY AND CONFLICTS 11 (2019).

government"[21] in the region where the camps are located,[22] which is sometimes referred to as Rojava.[23]

While it may seem most straightforward to lay the blame for these violations at the feet of the AANES, there is an intuitive sense of injustice in concluding that the weakest entity, with the fewest resources and no formal recognition as a State, should be liable for management of a problem from which other, wealthier States have benefited—and which, they have openly admitted, they do not want to handle themselves.[24] The SDF, in the words of Professor Leah West, was "left holding the bag" at the conclusion of the campaign against ISIS when the United States began to withdraw forces in March of 2018.[25]

To that end, several plaintiffs brought cases against France in the European Court of Human Rights (ECtHR), alleging the State has directly violated positive obligations to its nationals who remain imprisoned in the camp.[26] But in its combined decision *H.F. and Others v. France*,[27] the Grand Chamber stopped short of endorsing the plaintiffs' theory that France possessed a positive obligation to repatriate its nationals.[28] The complaint, initiated by the grandmothers of

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21. Dan E. Stigall, *The Syrian Detention Conundrum: International and Comparative Legal Complexities*, 11 HARV. NAT'L SEC. J. 54, 60 (2020).

22. *See, e.g.*, U.S. COMM'N INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 44 (2021) (recommending that the U.S. government "[r]ecognize the AANES as a legitimate, local government, and accordingly expand U.S. engagement with its institutions, lift sanctions from all areas it governs, and demand its inclusion in all activities pursuant to United Nations (UN) Resolution 2254"). *See generally* Joost Jongerden, *Governing Kurdistan: Self-Administration in the Kurdistan Regional Government in Iraq and the Democratic Federation of Northern Syria*, 18 ETHNOPOLITICS 61 (2018).

23. *See, e.g.*, Mirielle Court & Chris de Hond, *Is this the End of Rojava?*, THE NATION (Feb. 18, 2020), https://www.thenation.com/article/world/rojava-kurds-syria/ [https://perma.cc/WA57-G4DK]; Stigall, *supra* note 21, at 61.

24. H.J. Mai, *Why European Countries are Reluctant to Repatriate Citizens Who are ISIS Fighters*, NPR (Dec. 10, 2019, 4:58 PM), https://www.npr.org/2019/12/10/783369673/europe-remains-reluctant-to-repatriate-its-isis-fighters-here-s-why [https://perma.cc/6RLF-57C9].

25. Howell, *supra* note 8, at 15:26.

26. *See H.F. and M.F. v. France and J.D. and A.D. v. France (2021)*, RTS. & SEC. INT'L (July 5, 2021), https://www.rightsandsecurity.org/action/litigation/entry/h.f-and-m.f-v-france-and-j.d-and-a.d-v-france-2021 [https://perma.cc/QSJ2-U8NA].

27. H.F. and Others v. France, Apps. Nos. 24384/19 and 44234/20 (Sept. 14, 2022), https://hudoc.echr.coe.int/eng?i=001-219333 [https://perma. .cc/QJ3K-HHLZ].

28. Fionnuala Ní Aoláin & Anne Charbord, *European Court Tackles the Thorny Issue of Family Repatriation in Northeast Syria*, JUST SEC. (Sept. 22, 2022),

two children detained in the camps, argued that by failing to repatriate its nationals, France violated Article 3 of the European Convention on Human Rights (ECHR) prohibiting inhuman or degrading treatment, as well as Article 3 § 2 of Protocol No. 4, guaranteeing the right to enter one's country of nationality.[29] The plaintiffs' claim rested, in part, on the theory that France has extraterritorial jurisdiction over its nationals in the camp and thus extraterritorial obligations under the ECHR that France violated by virtue of its acts and omissions.[30] Because the ECtHR chose not to adopt the broader "functional" approach to defining the boundaries of extraterritorial jurisdiction—a theory endorsed by amici[31] and previously adopted by some other international tribunals[32]—Article 3 obligations would not attach.[33] However, the court also noted, somewhat confusingly, that there existed "special

https://www.justsecurity.org/83146/european-court-tackles-the-thorny-issue-of-family-repatriation-from-northeast-syria/ [https://perma. .cc/UYZ5-SNDX].

29. Press Release, Registrar of the Court, Eur. Ct. H.R., Grand Chamber to Examine Two Applications Concerning Requests to Repatriate Two French Women Held in a Camp in Syria with Their Children (Mar. 22, 2021), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7431242-10174513&filename=Grand%20Chamber%20judgment%20H.F.%20and%20others%20v.%20France%20-%20Examination%20of%20requests%20for%20repatriation%20of%20applicants%E2%80%99%20daughters%20and%20grandchildren%20held%20in%20camps%20in%20Syria%20.pdf [https://perma.cc/Z5XW-W3N3].

30. *Id.*

31. Aoláin & Charbord, *supra* note 28.

32. While the U.N. Committee on the Rights of the Child recently adopted what some have labeled a "provocative" definition of jurisdiction for the purposes of assigning obligations under the Convention on the Rights to the Child (CRC) in its *L.H. v. France* and *F.B. v. France* decisions, *see* Helen Duffy, *French Children in Syrian Camps: The Committee on the Rights of the Child and the Jurisdictional Quagmire*, LEIDEN CHILDREN'S RTS. OBSERVATORY (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787929 [https://perma.cc/CF4N-6LEQ], the European Court has historically taken a relatively more conservative approach in carving out exceptions to the primarily territorial scope of the European Convention on Human Rights (ECHR), finding that a State has extraterritorial jurisdiction where it exerts control over an area or individual, usually through the "strength of the State's military presence in the area." Al-Skeini v. United Kingdom, 2011-IV Eur. Ct. H.R. 99, 169; *see also* Loizidou v. Turkey, App. No. 15318/89, ¶¶ 16, 56 (Dec. 18, 1996), http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58007&filename=001-58007.pdf [https://perma.cc/JCB5-3W3R]; Ilaşcu v. Mold. & Russ., 2004-VII Eur. Ct. H.R. 179, 280; Jaloud v. Netherlands, 2014-VI Eur. Ct. H.R. 237, 302; Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333, 351–52. With no French military presence at the camp, it is not surprising, given its previous interpretations, that the ECtHR did not find plaintiffs had proven effective control by France over its detained nationals sufficient to establish that France owes any conventional extraterritorial obligations.

33. H.F. and Others v. France, Apps. Nos. 24384/19 and 44234/20, ¶ 215 (Sept. 14, 2022), https://hudoc.echr.coe.int/eng?i=001-219333 [https://perma.cc/QJ3K-HHLZ].

features which enable France's jurisdiction" specifically with regard to the claims under Article 3, § 2 of Protocol No. 4.[34] Regardless of that jurisdictional hook, the court nevertheless found that the citizens remaining in Syria "cannot claim a general right to repatriation on the basis of the right to enter national territory."[35] Instead, the court explored the narrower question of whether the "decision-making process followed by the French authorities was surrounded by appropriate safeguards against arbitrariness."[36]

If the claims against detainees' States of nationality fail (or impose nothing more than a requirement for non-arbitrary procedures to refuse repatriation), is it possible to articulate a viable theory of liability for the broader violations by other States involved? This Note seeks to answer this question in the affirmative, but with a caveat: It may be possible to find State actors legally responsible for providing assistance to the AANES and SDF, but only by looking to more progressive interpretive theories of the Articles on the Responsibility of States for Internationally Wrongful Acts (ASR),[37] which is widely considered the authoritative restatement of principles of State responsibility.[38]

This Note will proceed in three parts. Part I describes the conditions in the camp and the fundamental violations of international human rights law (IHRL)[39] and international humanitarian law (IHL)[40] that they implicate.[41] Part II lays out the applicable law on State responsibility as articulated in the ASR, applying it to the fact pattern of

34. *Id.* ¶ 214.

35. *Id.* ¶ 259.

36. *Id.* ¶ 263.

37. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 26 art. 4, U.N. Doc. A/56/10 [hereinafter ASR].

38. *See, e.g.*, Panayotis M. Protopsaltis, *Shareholders' Injury and Compensation in Investor-State Arbitration*, *in* PERMUTATIONS OF RESPONSIBILITY IN INTERNATIONAL LAW 185, 187 (Photini Pazartzis & Panos Merkouris eds., 2019).

39. Such as the prohibition against cruel, inhuman, or degrading treatment or punishment; prohibition against arbitrary arrest and detention; and the right to return to one's country of nationality. *See* International Covenant on Civil and Political Rights arts. 7, 9, 12, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

40. Such as regulations on the lengths and conditions of detention during armed conflict for combatants and non-combatants. *See* Geneva Convention Relative to the Treatment of Prisoners of War arts. 4, 13, 29–32, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

41. *See generally* DURU YAVAN & GEORGIANA EPURE, EUROPEAN STATES' OBLIGATIONS TO REPATRIATE THE CHILDREN DETAINED IN CAMPS IN NORTHEAST SYRIA (2021).

the camp. This application demonstrates how the ASR—as written and currently interpreted by international courts—cannot establish the necessary link to find States internationally responsible for providing assistance in the management of the camp. The relevant Articles discussed in depth are Articles 4 and 8, which define responsibility under a theory of direct attribution,[42] and Article 16, which defines responsibility under an indirect or "ancillary" theory of complicity.[43] Part III looks to emerging rules of customary international law which may provide an alternative basis for, or interpretation of, the rules on State responsibility articulated in the ASR. This Note concludes by considering several additional roadblocks to international adjudication of these claims, including issues of standing and the perverse incentives such litigation would create.

I. INTERNATIONAL LAW VIOLATIONS AT THE CAMP AND ITS CONDITIONS

Part I establishes the primary rules of international law that are likely implicated by the current conditions at the camp. First, this Part provides brief background on the camp's establishment and management. Second, it details the conditions on the ground in the camp today, both in terms of the living conditions of the detained women and children, as well as the level of security-enhancing support that the United States has and continues to provide. Finally, it establishes which protections under both IHRL and IHL the camp's conditions may implicate.

A. Background: The Global Coalition and Operation Inherent Resolve

In September 2014, as ISIS was continuing to amass large swaths of territory across Iraq and Syria, the United States assembled a "Global Coalition" to combat the terrorist group in conjunction with the Iraqi government and select Syrian opposition forces in control of the northern portion of the country.[44] A month later, the U.S. Department of Defense (DOD) launched Combined Joint Task Force –

42. ASR, *supra* note 37, arts. 4, 8.

43. *Id.* art. 16.

44. *See The Fight Against ISIS: Building the Coalition and Ensuring Military Effectiveness: Hearing Before the S. Comm. on Foreign Rels.*, 114th Cong. 3 (2015) (statement of Gen. John. R. Allen (Retired), Special Presidential Envoy for the Global Coalition to Counter ISIL, U.S. Department of State).

Operation Inherent Resolve (OIR), formalizing the already-in-process operations against ISIS.[45]

The primary non-State actor coordinating with the Global Coalition was the SDF.[46] For many years, the United States played a prominent role in both creating and supporting the SDF. Importantly, the presence of U.S. Special Forces also provided a measure of protection against Turkey, which viewed the SDF as a terrorist group, given its significant ties to the Kurdish separatist group, the Kurdistan Workers' Party (PKK).[47] In March 2019, the SDF and Coalition forces captured the final ISIS stronghold in Syria, Al Baghuz Fawqani,[48] bringing approximately 70,000 captured individuals—20,000 women and 50,000 children—to the al-Hol and al-Roj refugee camps on the border between Syria and Iraq.[49]

Today, most detainees in al-Hol are Iraqi, though approximately 11,000 foreign nationals are also detained, including 640 children and 230 women from the United Kingdom and European Union.[50] Al-Hol includes a self-contained "Annex" where the foreign women and children are held.[51] The camp is roughly the size of Monaco and larger than the city of London, but much more crowded, with a population density more than three times that of New York City.[52] The camps are officially administered by the AANES, while Blumont, a humanitarian organization, is said to run many of the day-to-day operations.[53]

45. CARLA E. HUMUD, CONGR. RSCH. SERV., IF11080, SYRIA CONFLICT OVERVIEW: 2011–2021, at 2 (2021) [hereinafter CRS REPORT].

46. *See* Hassan, *supra* note 4.

47. *Who Are the Syrian Democratic Forces?*, AL-JAZEERA (Oct. 15, 2019), https://www.aljazeera.com/news/2019/10/15/who-are-the-syrian-democratic-forces [https://perma.cc/DH63-4VUW].

48. CRS REPORT, *supra* note 45, at 2.

49. RTS. & SEC. INT'L, EUROPE'S GUANTANAMO: THE INDEFINITE DETENTION OF EUROPEAN WOMEN AND CHILDREN IN NORTH EAST SYRIA 11–12 (2021) [hereinafter EUROPE'S GUANTANAMO].

50. *Id.*

51. *See* GOREVAN & ACHILLES, *supra* note 1, at 8.

52. *See* EUROPE'S GUANTANAMO, *supra* note 49, at 11–12.

53. *Id.*

B. Facts on the Ground

1. Conditions in the Camp

The United Nations, operating in conjunction with the International Committee of the Red Cross (ICRC), initially established the al-Hol camp as a refugee camp in the 1990s to accommodate those fleeing from the Gulf War.[54] Today, the presence of the ISIS-affiliated women and children in the camp is not an act of voluntary refuge, but rather one of forced detention.[55] The camp is encircled by two-to-three-meter-high fencing, with armed guards patrolling entry and exit points[56] and sometimes using lethal force to prevent escape attempts.[57]

For the women and children not repatriated to face prosecution in their countries of nationality, there are no processes in place to ensure their due process rights are respected. The detained women and children have not been brought before a court, nor any informal adjudicatory authority,[58] either to face criminal charges or to hear the justification for their internment as having participated in hostilities.[59] It

54. BUREAU OF REFUGEE PROGRAMS, U.S. DEPARTMENT OF STATE, WORLD REFUGEE REPORT 158 (1992); *see also* Neil J. Saad, *The Al Hol Camp in Northeast Syria: Health and Humanitarian Challenges*, BMJ GLOB. HEALTH 1 (2020), https://reliefweb.int/sites/reliefweb.int/files/resources/The%20Al%20Hol%20camp%20in%20Northeast%20Syria.pdf [https://perma.cc/2YEB-YM5E].

55. *See* YAVAN & EPURE, *supra* note 41, at 10.

56. EUROPE'S GUANTANAMO, *supra* note 49, at 16.

57. Press Release, Médecins sans Frontières, Women Treated for Gunshot Wounds Amidst Violence and Unrest (Sept. 30, 2019), https://www.msf.org/women-treated-gunshot-wounds-amidst-violence-and-unrest-al-hol-camp-syria [https://perma.cc/2C83-96KF].

58. *See Syria: Dire Conditions for ISIS Suspects' Families*, HUM. RTS. WATCH (July 23, 2019, 12:01 AM), [hereinafter *Dire Conditions*], https://www.hrw.org/news/2019/07/23/syria-dire-conditions-isis-suspects-families [https://perma.cc/QA8M-8CUS].

59. It is important to note that the rules governing procedural safeguards for internment are more uncertain in non-international armed conflicts (NIAC) than for international armed conflicts (IAC). In an IAC, the Third Geneva Convention explicitly states that any captured individual whose status as a Prisoner of War (POW) is questionable is guaranteed to go before a "competent tribunal" to determine his or her status. Third Geneva Convention, *supra* note 40, art. 5. Furthermore, under the Fourth Geneva Convention, a civilian detained for "absolutely necessary" reasons of State security is entitled, at minimum, to biannual review of the degree of danger that he or she poses to ensure that there is a continued justification for detention. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 42–43, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287. The governing framework for NIACs, on the other hand, makes only a vague reference to internment, without defining any procedural guarantees for those interned. Protocol Additional to the Geneva Conventions of

is critical to note that while some women in the camps may have played an active, even significant, role in ISIS operations,[60] including in recruitment, propaganda production, religious police brigade service, and intelligence work,[61] many others played no active role, are no longer committed to the organization,[62] or were never committed in the first place[63] and instead were trafficked to ISIS-controlled territory against their will.[64] However, investigating the women, so as to distinguish between "true believers" and those with no allegiance to ISIS, comes with its own set of logistical challenges, such as the limited evidence of women's roles in the perpetration of violence given the relative lack of documentation of women by ISIS.[65] Regardless, the guilt or innocence of these women has no bearing on evaluating the potential international law violations of the conditions of their confinement, as will be established in Section I.C.

Rights & Security International, an international non-governmental organization, reported in 2020 that SDF guards have put mothers and their children together in solitary confinement for "various

12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 5, 6(5), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; *see also* Knut Dörmann, *Detention in Non-International Armed Conflicts*, 88 INT'L L. STUD. 347, 353 (2012).

60. ASAAD H. ALMOHAMMAD & ANNE SPECKHARD, THE OPERATIONAL RANKS AND ROLES OF FEMALE ISIS OPERATIVES: FROM ASSASSINS AND MORALITY POLICE TO SPIES AND SUICIDE BOMBERS 1 (2017). *See generally* GINA VALE, INT'L CTR. COUNTER-TERRORISM, WOMEN IN ISLAMIC STATE: FROM CALIPHATE TO CAMPS (2019) (following the trajectory of women's roles in ISIS through the transition from the battlefield to camps like al-Hol).

61. YAVAN & EPURE, *supra* note 41, at 15.

62. It is reported that only a minority of women in the camps remain "hardline" supporters of ISIS. *Id.*; *see also* Anne Speckhard, *Waiting for Return of the Caliphate Among ISIS Enforcers in Syria's al Hol, Ain Issa and Roj Camps*, HOMELAND SEC. TODAY (Sept. 3, 2019), https://www.hstoday.us/subject-matter-areas/counterterrorism/waiting-for-the-return-of-the-caliphate-among-isis-enforcers-in-syrias-al-hol-ain-issa-and-roj-camps/ [https://perma.cc/QAY5-CLMK].

63. YAVAN & EPURE, *supra* note 41, at 15.

64. *See* GOREVAN & ACHILLES, *supra* note 1, at 6.

65. U.N. SEC. COUNCIL COUNTER-TERRORISM COMM. EXEC. DIRECTORATE, CTED ANALYTICAL BRIEF: THE PROSECUTION OF ISIL-ASSOCIATED WOMEN 3 (2020), https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Jan/cted_analytical_brief_the_prosecution_of_isil-associated_women.pdf [https://perma.cc/TSY8-JESB]. Note that determining the role that the detained women played in the organization (i.e., whether they "engaged in hostilities," *see* U.S. DEP'T OF DEF., LAW OF WAR MANUAL, ¶ 4.19.3, at 162 (2016)), while important to evaluating the procedural detention rights guaranteed to them and the lawful length of their detention, is not at all relevant to assessing potential violations of the right to be free from inhuman treatment, which is the legal right this Note will highlight. *See infra* Section I.C.

infractions" committed by the mothers.[66] Male children, in particular teenagers between the ages of twelve and seventeen, have been forcibly separated from their families[67] and placed in what AANES officials have characterized as "deradicalization"[68] or "rehabilitation" centers.[69]

Physical violence is widespread—not just between guards and detainees, but among the detainees themselves.[70] In the camp's Annex, where foreign-born detainees are held, outbreaks of violence are particularly rampant due to tensions between women who consider themselves loyal to the ISIS ideology and those they perceive to be "less adherent" to the cause.[71] Sexual violence against both women and children has also been reported, with perpetrators ranging from fellow detainees and guards to older children.[72]

Children in the camp, already more vulnerable to the widespread violence, face additional risks of trafficking and indoctrination.[73] The risk of indoctrination, particularly for young boys, is both internal and external to the camp, and security experts around the world have highlighted this threat as a potential source of future violent

66. EUROPE'S GUANTANAMO, *supra* note 49, at 16.

67. *Id.* at 24; *see also* Fionnula Ní Aoláin, *Gendering the Boy Child in the Context of Counterterrorism: The Situation of Boys in Northeast Syria*, JUST SEC. (June 8, 2021), https://www.justsecurity.org/76810/gendering-the-boy-child-in-the-context-of-counterterrorism-the-situation-of-boys-in-northeast-syria/ [https://perma.cc/UK2W-GAN7].

68. EUROPE'S GUANTANAMO, *supra* note 49, at 25.

69. INT'L CRISIS GRP., WOMEN AND CHILDREN FIRST: REPATRIATING THE WESTERNERS AFFILIATED WITH ISIS 3 (2019), https://d2071andvip0wj.cloudfront.net/208-women-and-children-first.pdf [https://perma.cc/596F-RBLW].

70. EUROPE'S GUANTANAMO, *supra* note 49, at 19; Louisa Loveluck, *Syrian Detention Camp Rocked by Dozens of Killings Blamed on Islamic State Women*, WASH. POST (Sept. 19, 2021, 12:00 PM), https://www.washingtonpost.com/world/2021/09/19/syria-isis-al-hol-camp/ [https://perma.cc/CU6L-TA84].

71. *See* Loveluck, *supra* note 70; *see also* Jiwan Soz, *The Crisis of Female Jihadists in Al-Hawl Displacement Camp*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 14, 2022), https://carnegieendowment.org/sada/87510 [https://perma.cc/TH6P-TRRS].

72. EUROPE'S GUANTANAMO, *supra* note 49, at 20.

73. YAVAN & EPURE, *supra* note 41, at 11.

extremism.[74] Both Danish[75] and American[76] intelligence have confirmed reports of ISIS kidnapping children from the camp, while inside the camp, children are "surrounded by hard-line, militant women."[77] Videos from within the camp have depicted children chanting extremist slogans and mimicking the 'group's calls for violence.[78] U.S. Central Command confirmed that ISIS has "focused their radicalization efforts on children and teenagers," according to a recent Inspector General (IG) report on the status of OIR.[79]

Though hundreds of children die in the camps each year,[80] many deaths are attributable not to acts of violence, but rather to preventable disease and malnutrition.[81] In 2019, a Belgian medical team

74. *Id.* at 13–14; Javed Ali et al., *Open Letter from National Security Professionals to Western Governments: Unless We Act Now, the Islamic State Will Rise Again*, THE SOUFAN CTR. (Sept. 11, 2019), https://thesoufancenter.org/open-letter-from-national-security-professionals-to-western-governments-unless-we-act-now-the-islamic-state-will-rise-again/ [https://perma.cc/7N62-NRAZ].

75. Nagieb Khaja et al., *Danske børn i fare: Islamisk Stat har udset sig 350 børn* [*Danish Children in Danger: Islamic State Targeted 350 Children*], EKSTRA BLADET (Mar. 16, 2021), https://ekstrabladet.dk/nyheder/politik/danskpolitik/danske-boern-i-fare-islamisk-stat-har-udset-sig-350-boern/8505324 [https://perma.cc/KFK3-7BNJ].

76. Jeff Seldin, *Islamic State Group Smuggling Boys to Desert Training Camps*, VOA NEWS (Aug. 3, 2021, 7:41 PM), https://www.voanews.com/a/middle-east_islamic-state-group-smuggling-boys-desert-training-camps/6209124.html [https://perma.cc/QKW9-TRWE].

77. Charlie Savage, *ISIS Fighters' Children Are Growing Up in a Desert Camp. What Will They Become?*, N.Y. TIMES (July 19, 2022), https://www.nytimes.com/2022/07/19/us/politics/syria-isis-women-children.html [https://perma.cc/4K7T-HUB3].

78. MYRIAM FRANCOIS & AZEEM IBRAHIM, THE CHILDREN OF ISIS DETAINEES: EUROPE'S DILEMMA, CTR. GLOB. POL'Y 8 (2020), http://newlinesinstitute.org/wp-content/uploads/CGP-Children-of-ISIS-June-2020.pdf [https://perma.cc/74H2-SBC7]; *see also* Mark Stone, *Islamic State: New "Mini-Caliphate" Forms at Syrian Holding Camp*, SKY NEWS (Nov. 11, 2019, 4:04 PM), https://news.sky.com/story/islamic-state-new-mini-caliphate-forms-at-syrian-al-hol-camp-11858828 [https://perma.cc/R5QH-LCGV].

79. OFFS. OF INSPECTOR GEN., U.S. DEP'T OF DEF., U.S. DEP'T OF STATE, & USAID, OPERATION INHERENT RESOLVE: LEAD INSPECTOR GENERAL REPORT TO THE UNITED STATES CONGRESS APRIL 1, 2021–JUNE 30, 2021, at 17 (2021) [hereinafter OIR REPORT JUNE 2021].

80. It is estimated that 370 children died in 2019. *See* EUROPE'S GUANTANAMO, *supra* note 49, at 21. An additional 170 children were reported dead in 2020. *See* Wilson Fache, *En Syrie, le cimetière des enfants perdus du "califat"*" [*In Syria, the Cemetery of the Lost Children of the "Caliphate"*], LIBÉRATION (May 4, 2021, 8:27 PM), https://www.liberation.fr/international/moyen-orient/en-syrie-le-cimetiere-des-enfants-perdus-du-califat-20210504_TOLCSLDEWZEINJNYY6PDNAXYFA/ [https://perma.cc/X7AD-5YZQ].

81. Statement, Paulo Sérgio Pinheiro, Chair of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic at the 41st Session of the Hum. Rts. Council (July 2, 2019),

found that seventy percent of the children examined in the camp were suffering from malnourishment.[82] Access to food, water, and medical services is severely limited, with multiple human rights organizations alleging that the camp fails to meet minimum standards for humane treatment given its current conditions.[83] Humanitarian groups, which serve as a critical source of basic necessities like food, shelter, and medical services, are either unable or unwilling to provide the same level of services as they do for other refugee camps around the world.[84] That the negotiations over access to the camps are facilitated by the Syrian government further impedes delivery of services.[85] Aid organizations also remain wary of providing support to the camp, some out of reluctance to lend assistance to alleged ISIS supporters, others concerned about the moral implications of reinforcing what could be the unlawful and indefinite detention of the women and children inside.[86]

The three-plus years of detention in the camp have also deprived children of access to education, in some cases compounding the impaired physical and cognitive development caused by malnutrition.[87] There are no formal schooling facilities,[88] despite the more than 7,000 child residents in the camp under the age of twelve.[89] Informal

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https://www.ohchr.org/en/statements/2019/07/statement-mr-paulo-sergio-pinheiro-chair-independent-international-commission [https://perma.cc/XFD2-AKW9]; *see also* Statement, Henrietta Fore, UNICEF Exec. Dir., *Eight Children Die in Al Hol Camp, Northeastern Syria in Less Than a Week* (Aug. 12, 2020), https://www.unicef.org/press-releases/eight-children-die-al-hol-camp-northeastern-syria-less-week [https://perma.cc/U26D-ABTY].

82. EUROPE'S GUANTANAMO, *supra* note 49, at 27.

83. *See id.* at 26 ("From the point of view of sanitation, basic living amenities, and healthcare, the North East Syrian camps also fall far below acceptable minimum standards, and accordingly appear to violate basic human rights to water, food, health, and humane treatment."); *see also* YAVAN & EPURE, *supra* note 41, at 68 (arguing that the camp's "inhumane conditions" violate the children's right to life due to the "real and immediate risk of death"); *Dire Conditions*, *supra* note 58 (describing the conditions in al-Hol as "inhuman or degrading").

84. *Dire Conditions*, *supra* note 58.

85. HUM. RTS. WATCH, RIGGING THE SYSTEM: GOVERNMENT POLICIES CO-OPT AID AND RECONSTRUCTION FUNDING IN SYRIA (2019), https://www.hrw.org/report/2019/06/28/rigging-system/government-policies-co-opt-aid-and-reconstruction-funding-syria [https://perma.cc/C77R-CESP].

86. *See Dire Conditions*, *supra* note 58.

87. *See* EUROPE'S GUANTANAMO, *supra* note 49, at 31.

88. *See id.*

89. *Dire Conditions*, *supra* note 58.

education offered by NGOs in the Annex is available only during limited morning hours.[90]

The cumulative effect of these conditions creates a life-threatening environment—for the children in particular—potentially implicating both international human rights law and international humanitarian law, as addressed below.

2. Support Provided by the Coalition States

The United States, along with several coalition partners,[91] has provided substantial financial support to the SDF and affiliated groups, some of which is expressly for the purpose of supporting detention efforts.[92] As early as 2019, government reports on the progress of OIR explicitly articulated that, as part of the ongoing stabilization efforts in Syria, U.S. and coalition-partner contributions would be used for the detention of captured ISIS members, with funding to support "physical security enhancements; prison management and administration support; repatriation of families and children; and reintegration and deradicalization support" as well as to "supplement the humanitarian response in al-Hol and other areas of northeast Syria."[93]

The DOD continues to support and train the SDF and other affiliated groups to provide "wide area security and detention facility security for ISIS detainees."[94] *New York Times* reporting on the funding in 2018 included DOD officials' statements that "several thousand detainees—including at least 400 fighters from more than three dozen countries *and their families*, as well as other Syrian militants—were

90. EUROPE'S GUANTANAMO, *supra* note 49, at 31.

91. OFFS. OF INSPECTOR GEN., U.S. DEP'T OF DEF., U.S. DEP'T OF STATE, & USAID, OPERATION INHERENT RESOLVE: LEAD INSPECTOR GENERAL REPORT TO THE UNITED STATES CONGRESS APRIL 1, 2019–JUNE 30, 2019, at 36 (2019) [hereinafter OIR REPORT JUNE 2019].

92. Elizabeth McLaughlin, *'"Risk of a Mass 'Breakout" at ISIS Prison Camps in Syria: Report*, ABC NEWS (May 14, 2020, 5:06 PM), https://abcnews.go.com/Politics/risk-mass-breakout-isis-prison-camps-syria-report/story?id=70687237 [https://perma.cc/FUV5-FRXA] ("The coalition does train and equip the SDF prison guards, as well as help construct more prison structures.").

93. OIR REPORT JUNE 2019, *supra* note 91, at 37.

94. OFF. SEC'Y DEF., U.S. DEP'T OF DEF., JUSTIFICATION FOR FY 2022 COUNTER-ISLAMIC STATE OF IRAQ AND SYRIA (ISIS) TRAIN AND EQUIP FUND (CTEF) 15 (2021), https://comptroller.defense.gov/Portals/45/Documents/defbudget/FY2022/FY2022_CTEF_J-Book.pdf [https://perma.cc/PS5P-22WN].

being held in several camps."[95] More recently, OIR spokesperson Wayne Marotto confirmed that the United States provided support to the SDF fighters who conducted a 2021 operation to eliminate ISIS sleeper cells from the camp.[96]

The most recent OIR report for the period of July to September 2021 stated that by the end of 2021, there would be no U.S. forces in combat roles on the ground in Iraq but that this transition would not "impact operations against ISIS or logistics in Syria."[97] Perhaps in a sign of the continued investment of resources into security at the prisons, SDF sources told CBS News that "U.S. helicopters, F-16 fighter jets, and drone aircraft all played a big role" in the most recent operation to defeat ISIS in its attempted prison break in al-Hasakah.[98]

Thus, while U.S. personnel and resources are not deployed specifically to create the harsh conditions within the camp, they are used to strengthen camp security—and thus prevent escape from those conditions.

C. Applicable International Humanitarian and Human Rights Law

The conditions in the camp—lack of due process, medical care, and access to basic necessities like food and water, coupled with the lethal risks of preventable diseases and uncontrolled violence—implicate several foundational human rights on their face, including the right to life[99] and freedom from cruel treatment.[100] But other, less obvious rights may also be implicated by the camp's conditions,

95. Eric Schmitt, *Pentagon Wades Deeper Into Detainee Operations in Syria*, N.Y. TIMES (Apr. 5, 2018), (emphasis added) https://www.nytimes.com/2018/04/05/world/middleeast/pentagon-detainees-syria-islamic-state.html [https://perma.cc/WT36-G9PT].

96. Dan Sabbagh, *Kurdish Forces Enter Detention Camp in Syria to Eliminate ISIS Cells*, THE GUARDIAN (Mar. 28, 2021, 1:40 PM), https://www.theguardian.com/world/2021/mar/28/kurdish-forces-enter-refugee-camp-in-syria-to-eliminate-isis-cells [https://perma.cc/HK78-RWA3] (citing OIR Spokesperson (@OIRSpox), TWITTER (Mar. 28, 2021, 7:03 AM), https://twitter.com/OIRSpox/status/1376127853088096257 [https://perma.cc/85DZ-G9QZ]).

97. OFFS. OF INSPECTOR GEN., U.S. DEP'T OF DEF., U.S. DEP'T OF STATE, & USAID, OPERATION INHERENT RESOLVE: LEAD INSPECTOR GENERAL REPORT TO THE UNITED STATES CONGRESS JULY 1, 2021–SEPTEMBER 30, 2021, at 2 (2021) [hereinafter OIR REPORT SEPTEMBER 2021].

98. Abdulkader, *supra* note 7.

99. As first laid out in G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR], and later codified as ICCPR, *supra* note 39, art. 6.

100. UDHR, supra note 99, art. 5; ICCPR, *supra* note 39, art. 7.

including the right to return to one's home country[101] and the right to access consular assistance.[102] The corpus of human rights law may not be the only international legal regime implicated: Since these families were initially detained in the course of the fight against ISIS, it is possible that IHL, also known as the law of armed conflict (LOAC), applies, either in conjunction with, or displacing, IHRL.[103]

1. The Question of IHL Application

The question of whether IHL is still applicable to the detainees depends, first and foremost, on whether there continues to be an armed conflict. If yes, the question is then one of classification—whether the Coalition war to defeat ISIS constitutes an international armed conflict (IAC) or a non-international armed conflict (NIAC)—thus defining which set of rules within the corpus of IHL applies.

Generally speaking, an IAC is a war in the "classical" sense, waged between two or more internationally recognized States' militaries—think conflicts between Allied and Axis forces during the Second World War. A NIAC, on the other hand, is a conflict between a non-State actor and either (1) a State, or (2) another non-State actor where the conflict has met particular criteria for both intensity of the conflict and level of organization of the non-State party (or parties) involved.[104] Note, however, that once there is at least one State on each "side," the conflict is considered "internationalized," thus triggering the application of broader IHL obligations under the Geneva Conventions.[105]

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101. ICCPR, *supra* note 39, art. 12.

102. Vienna Convention on Consular Relations art. 36(1)(a), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

103. *See infra* Section I.C.2.

104. *See infra* notes 108–115 and accompanying text.

105. Even this ostensibly straightforward dichotomy may lead to complex questions surrounding conflict classification. A given conflict may have elements of both an IAC and a NIAC, or a conflict may have simultaneous but separate IACs and NIACs occurring in parallel. For example, the ICJ's judgment in the 1986 *Nicaragua* case found that two distinct conflicts were occurring simultaneously within the State: (1) an IAC between Nicaragua and the United States via its control over the contras and (2) a NIAC between Nicaragua and the contras not under U.S. control. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 219 (June 27) [hereinafter Nicaragua Judgment]. Non-state actor rebel groups might "transform" into a State actor by virtue of their assertion of independence, thus transforming the conflict into an IAC. For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) found that armed conflict during the dissolution of the former Yugoslavia had been sufficiently internationalized because Croatia had a permanent population, a defined territory, an effective government, and the capacity to

Why the insistence on classification given the complexity of the exercise? Vitally, classification changes not only the defined "end" of a conflict—and thus whether IHL applies at all—but also which substantive body of rules governing conduct in conflict applies.[106] Only a limited subset of the customary and treaty-based rules comprising the body of IHL apply in NIACs.[107] In essence, only once one classifies the conflict can one then determine which IHL rules, if any, are binding on parties.

While many armed conflicts have proved complicated to classify,[108] the Global Coalition's fight against ISIS is more clearly a NIAC for three reasons. First, no State recognized ISIS as an independent State,[109] even at its geopolitical peak when the group controlled substantial territory in both Iraq and Syria.[110] Second, the States on whose territory the war was fought—Syria and Iraq—did not

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enter into international relations. *See* Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 83–115 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004), https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm [https://perma.cc/3L9A-GPVR]. For more, see Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32 (Elizabeth Wilmhurst ed., 2012). State actors might also insert themselves into a conflict by exerting a sufficient degree of control over a non-State actor or by State 1's use of force against a non-State actor on State 2's territory without the consent of State 2, thereby "internationalizing" what had once been considered a decidedly internal conflict. *See id.* at 60, 73. Thus, conflicts may go through phases of "internationalization" and "de-internationalization" as States enter and exit the conflict. *See* Beth van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change,* 90 INT'L L. STUD. 20, 21 (2014).

106. *See* GEOFFREY CORN ET AL., THE LAW IN WAR: A CONCISE OVERVIEW 11 (2018).

107. *See id.* at 31–32.

108. *See supra* note 105.

109. While it is true that the Montevideo Convention on Rights and Duties of States, in articulating the criteria for state recognition, expressly noted that "[t]he political existence of the state is independent of recognition by other states," Montevideo Convention on the Rights and Duties of States art. 3, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19, widespread state practice at the time of the Islamic State's rise and the Global Coalition's intervention indicates that it did not constitute a State regardless. *See, e.g.*, Joe Boyle, *Islamic State and the Idea of Statehood*, B.B.C. NEWS (Jan. 6, 2015), https://www.bbc.com/news/world-middle-east-30150681 [https://perma.cc/B9EL-FRCA] ("Islamic State's claims [of statehood] have no support among states"); Jessica Anderson, *ISIS: State or Terror Group?*, SMALL WARS J. (June 21, 2016, 10:08 AM), https://smallwarsjournal.com/jrnl/art/isis-state-or-terror-group [https://perma.cc/7J5S-PAUY] ("ISIS has not obtained statehood, as the group has not been recognized or legitimized by either the United Nations or a number of other states.").

110. *See* WILSON CTR., TIMELINE: THE RISE, SPREAD, AND FALL OF THE ISLAMIC STATE (2019), https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state [https://perma.cc/QM3A-HLAR].

fight the 'Coalition's presence, and thus there was no "State-on-State" conflict at any point; in fact, the States consented to the 'Coalition's presence.[111] Third, even though multiple States were involved in the conflict, their presence did not transform the conflict into an IAC since all recognized States were on the same "side" of the conflict.[112] An IAC, defined as a "resort to armed force between States,"[113] necessarily requires at least one State on either side of the conflict.[114] Thus, as many experts have agreed,[115] the Global Coalition fight against ISIS can readily be classified as non-international in nature.

With classification settled, the question then turns to an analysis of the standards for NIACs: When do the rules governing NIACs no longer apply? The ICTY Appeals Chamber, in its *Tadić* decision, laid out several standards and judicial tests relating to international humanitarian law still cited by courts today,[116] including its definition for the existence of a NIAC and the temporal scope of IHL:

> [A]n armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such group within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities . . . in the case of

111. *See id.*

112. *See* Akande, *supra* note 105, at 36:

> Since international armed conflicts are essentially inter-state conflicts, whether or not intervention in a non-international armed conflict transforms that conflict into an international armed conflict (or at least grafts an international armed conflict onto an existing, and perhaps continuing, non-international armed conflict) will depend on which side of the conflict the foreign State intervenes.

113. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), https://www.icty.org/x/cases/tadic/acdec/en/51002.htm [https://perma.cc/HDM9-XH27] [hereinafter *Tadić* Jurisdiction Appeals Decision].

114. CORN ET AL., *supra* note 106, at 26.

115. *See, e.g.*, EUROPE'S GUANTANAMO, *supra* note 49, at 14; GENEVA ACAD. INT'L HUMANITARIAN L. & HUM. RTS., NON-INTERNATIONAL ARMED CONFLICTS IN IRAQ (2022), https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-iraq#collapse1accord [https://perma.cc/3VRW-YNJH]; Tom Gal, *Legal Classification of the Conflict(s) in Syria*, *in* THE SYRIAN WAR: BETWEEN JUSTICE AND POLITICAL REALITY 29, 29–43 (Hilly Moodrick-Even Khen, Nir T. Boms & Sareta Ashraph eds., 2019).

116. *See generally* Dino Kritsiotis, *The Tremors of* Tadić, 43 ISR. L. REV. 262, 267 (2010) (characterizing the Appeals Court's dictum in paragraph 70 as its "seminal declaration" defining the concepts of both IACs and NIACs and tracing the impact of those definitions in the practice of international humanitarian law that followed).

> internal conflicts, [until] a peaceful settlement is achieved.[117]

The Court did not go further in articulating what constitutes a "peaceful settlement," though some have interpreted the decision as implying a conclusion of a peace agreement between parties.[118] Other scholars have offered a more practical theory that NIACs end once the conflict no longer satisfies at least one of the two criteria required for their existence[119]: (1) the requisite intensity of violence and (2) degree of organization on the part of the non-State party.[120]

Other treaty materials applicable in NIACs provide no further guidance on defining the end of a conflict. Common Article 3 of the Geneva Conventions of 1949, which defines the scope and nature of IHL obligations in the case of a NIAC, fails to include any indication regarding when, or under what conditions, application of IHL should end.[121] Article 2(2) of the Geneva Protocol II of 1977 (Additional

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117. *Tadić* Jurisdiction Appeals Decision, *supra* note 113, ¶ 70.

118. *See, e.g.*, Rogier Bartels, *Temporal Scope of Application of IHL: When do Non-International Armed Conflicts End? Part 1*, OPINIO JURIS (Feb. 18, 2014), http://opiniojuris.org/2014/02/18/guest-post-bartels-temporal-scope-application-ihl-non-international-armed-conflicts-end-part-1/ [https://perma.cc/E4YZ-TN8L] (citing to the theory that a peace agreement is the prerequisite for concluding the application of IHL, but asserting instead that such a standard is "too rigid" and "not supported by the IHL").

119. *See, e.g.*, Marko Milanović, *The End of Application of International Humanitarian Law*, 96 INT'L REV. RED CROSS 163, 170 (2014) ("In the absence of any specific guidance to the contrary, [the following] general principle makes perfect sense in the factual, objective conceptual space of the Geneva Conventions," namely, that "the application of IHL will cease once the conditions that triggered its application in the first place no longer exist."); *see also* Rogier Bartels, *From* Jus In Bello *to* Jus Post Bellum*: When Do Non-International Armed Conflicts End?*, *in JUS POST BELLUM*: MAPPING THE NORMATIVE FOUNDATIONS 297, 303 (Carsten Stahn, Jennifer S. Easterday & Jens Iverson eds., 2014) (citing INT'L L. ASS'N COMM. ON THE USE OF FORCE, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 32 (2010)) ("If a NIAC only starts when organized groups are engaged in fighting of a certain intensity, then logically, the armed conflict ends when these two criteria are no longer present.").

120. These two criteria were first articulated in the *Tadić* Jurisdiction Appeals Decision, requiring "protracted armed violence" involving "organized armed groups"" and have been adopted and expanded by courts in the years to follow, *see* Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶¶ 49, 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), https://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf [https://perma.cc/66FR-49DQ] (enumerating specific factors to consider when measuring group organization and conflict intensity), and later incorporated into the Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 3.

121. As its name suggests, "Common Article 3" is a nearly identically-phrased article which all four Geneva Conventions share. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949,

Protocol II) provides some specifications on rules relating to detention, stating that "at the end of armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict . . . shall enjoy the protection of Article 5 and 6 [of Additional Protocol II] until the end of such deprivation or restriction of liberty."[122] Once again, however, a more precise definition of when a NIAC is deemed to be "at the end" is not provided.[123]

Without further guidance from the applicable treaties, experts suggest that the uncertainty of the security situation and the thousands of ISIS attacks conducted in the region since 2019 render the armed conflict of a sufficient intensity to consider it "continuing."[124] A recent example of the continuation of the conflict is the sustained attack on the Gweiran prison by ISIS fighters in an attempt to release detainees, called the group's "biggest operation since U.S. forces declared defeat" over ISIS in 2019.[125] Six days after ISIS seized the prison, the SDF reported it had recaptured the facility with the support of U.S.-led Coalition forces,[126] later confirmed by Combined Joint Task Force – OIR.[127] In its reporting on the siege, CBS News linked videos recorded by several journalists on the ground appearing to show U.S. Special Forces "working closely" with the SDF.[128]

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6 U.S.T. 3114; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217; Third Geneva Convention, *supra* note 40, art. 3; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516. For clarity, this Note will make future reference to "Common Article 3."

122. Additional Protocol II, *supra* note 59, art. 2(2).

123. While Additional Protocol II similarly fails to further specify when a NIAC is "at its end," the Commentary elaborates that those detained during NIAC "will continue to enjoy the fundamental guarantees of humane treatment and of judicial guarantees after the end of hostilities." INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4481 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987).

124. *See* EUROPE'S GUANTANAMO, *supra* note 49, at 15 ("[T]he security situation in the region remains uncertain and resumption of hostilities cannot be ruled out, as the more than 2,000 ISIL attacks in North East Syria from March 2019 onwards attest.").

125. Abdulkader, *supra* note 7.

126. *Id.*

127. Inherent Resolve (@CJTFOIR), TWITTER (Jan. 26, 2022, 5:12 AM), https://twitter.com/CJTFOIR/status/1486280783014805507?cxt=HHwWhoCyweufqqApAAAA [https://perma.cc/V55R-28XG].

128. Abdulkader, *supra* note 7.

2. International Law Violations

In the case that the rules governing NIACs remain applicable to those involved with the conflict against ISIS, the indefinite detention of women and children in al-Hol likely violates several rules of IHL. The corpus of applicable IHL is comparatively limited for NIACs relative to IACs,[129] yet several foundational rules are still in force. In general, all parties to a NIAC—States and non-State actors alike—must, at a minimum, abide by the rules contained in: (1) Common Article 3; (2) Additional Protocol II; and (3) relevant customary international law.[130]

But what of the application of IHRL?[131] Does it continue to operate where an armed conflict is ongoing, or is it supplanted entirely by IHL? Some States and international courts[132] have interpreted the relationship between IHL and IHRL as one of *lex specialis*, meaning that "where a specific provision of humanitarian law contradicts a more general provision of human rights law, the provision of humanitarian law must apply."[133] In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ wrote that "[t]he test of what is an arbitrary deprivation of life . . . falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."[134]

But resolving the contentious question of the inter-applicability of IHL and IHRL to the same fact pattern is not necessary if one narrows the analysis only to those most fundamental protections provided unequivocally under both regimes: namely, the prohibitions against

129. *See* CORN ET AL., *supra* note 106, at 32.

130. INT'L COMM. RED CROSS, THE LAW OF ARMED CONFLICT LESSON 10: NON-INTERNATIONAL ARMED CONFLICT 4 (2002), https://www.icrc.org/en/doc/assets/files/other/law10_final.pdf [https://perma.cc/C4R4-7SW4]; *see also* Rome Statute of the International Criminal Court art. 8(2)(c)–(e), July 17, 1998, 2187 U.N.T.S. 90 (enumerating the possible war crimes charges against individuals where the conflict in question qualifies as a NIAC).

131. The questions of (1) the extraterritorial applicability of human rights law obligations and (2) whether non-State actors owe such obligations will be discussed in greater depth when applying the rules of attribution in Part II.

132. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

133. Marko Milanović, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing* Hamdan *and the Israeli* Targeted Killings *Case*, 89 INT'L REV. RED CROSS 373, 390 (2007).

134. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. ¶ 25.

(1) the arbitrary deprivation of life and (2) cruel and inhumane treatment.[135]

As several NGOs have asserted,[136] perhaps the most fundamental of human rights[137] that the camp's conditions violates is the right to life, as enshrined in Article 6 of the International Covenant on Civil and Political Rights (ICCPR).[138] IHRL places a positive obligation on States to protect the right to life,[139] including through the imposition of due diligence obligations for reasonably foreseeable threats, even if the conduct creating the threat is not attributable to the State.[140] Other violations which the camp's conditions may violate—specifically, the prohibitions against cruel treatment and arbitrary detention—can also create serious adverse impacts on detainee's health and thus be "incompatible"[141] with the right to life.[142]

IHL similarly prohibits arbitrary deprivation of life, though its precise contours, as articulated by the ICJ in its *Nuclear Weapons* Advisory Opinion, are distinct from those in IHRL. Rule 89 of the

135. Interestingly, the ECtHR in its *H.F. and Others v. France* decision did not grapple with this question of interoperability and whether rights guaranteed only under the IHRL regime might not apply, despite the court's cursory acknowledgement of several "relevant provisions" of IHL to the situation. *See* H.F. and Others v. France, Apps. Nos. 24384/19 and 44234/20, ¶¶ 122–24 (Sept. 14, 2022), https://hudoc.echr.coe.int/eng?i=001-219333 [https://perma.cc/QJ3K-HHLZ]. For the sake of brevity, many potential violations have been omitted, particularly those that are derogable per ICCPR art. 4 (e.g., Article 12(4)'s right to return to one's own country). For an in-depth analysis of IHRL violations as they relate specifically to the children in the camps, including violations of the right to nationality, the right to access consular assistance, the right to enter one's own country, the right to life, the right to be free of torture and ill-treatment, the right to liberty and security, and the right of child victims of armed conflict to reintegration and recovery, see YAVAN & EPURE, *supra* note 41, at 34–78.

136. EUROPE'S GUANTANAMO, *supra* note 49, at 21; HRW REPORT, *supra* note 1; YAVAN & EPURE, *supra* note 41, at 68–69.

137. *See* Christof Heyns & Thomas Probert, *Securing the Right to Life: A Cornerstone of the Human Rights System*, EJIL: TALK! (May 11, 2016), https://www.ejiltalk.org/securing-the-right-to-life-a-cornerstone-of-the-human-rights-system/ [https://perma.cc/W9K2-6RVU]; Hum. Rts. Comm., General Comment No. 36, ¶ 2, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) [hereinafter General Comment 36] ("[Article 6] is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies.").

138. ICCPR, *supra* note 39, art. 6.

139. General Comment 36, *supra* note 137, ¶ 18.

140. *Id.* ¶¶ 6, 7, 18, 23; *see also* Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 3042/2017, ¶¶ 8.3–8.5, U.N. Doc. CCPR/C/130/D/3042/2017 (Apr. 28, 2021). For further discussion on due diligence obligations in the IHRL regime, see *infra* Section II.D.1.

141. YAVAN & EPURE, *supra* note 41, ¶ 111.

142. General Comment 36, *supra* note 137, ¶¶ 54, 57.

ICRC's study on customary international humanitarian law, governing "Violence to Life," points only to particular instances where civilian deaths resulting from attacks may constitute unlawful killings.[143] International and regional courts have disagreed as to which definition is appropriate to apply in times of armed conflict.[144] Thus, were an international court to apply the more conservative definition under the IHL regime, the deadly conditions of the camp imposed by the SDF (e.g., the lack of food, medical care, or basic sanitation) may not constitute a violation of the right to life.

Freedom from cruel, inhuman, or degrading treatment or punishment is another non-derogable[145] right that all enjoy, not just within the IHRL regime,[146] but within the IHL regime as well.[147] Common Article 3, broadly considered to reflect customary international law,[148] expressly prohibits certain treatment for detainees, including cruel treatment and torture.[149] Additional Protocol II's Article 4(2) contains several "fundamental guarantees" for individuals covered in Article 4(1), which applies to anyone who is not (or is no longer) taking active part in hostilities.[150] These guarantees include a prohibition on cruel treatment.[151] The arbitrary and indefinite detention of the detainees—children in particular—may qualify as cruel treatment given that

143. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 314 (2005) (footnote omitted):

> In its advisory opinion in the *Nuclear Weapons* case, the International Court of Justice stated that '"the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities'." As discussed in the chapters that deal with the conduct of hostilities, unlawful killings can result, for example, from a direct attack against a civilian (see Rule 1), from an indiscriminate attack (see Rule 11) or from an attack against military objectives causing excessive loss of civilian life (see Rule 14), all of which are prohibited by the rules on the conduct of hostilities.

144. *See id.*

145. Hum. Rts. Comm., CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 3, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 200 (Mar. 10, 1992).

146. ICCPR, *supra* note 39, art. 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, *opened for signature* Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85.

147. Dörmann, *supra* note 59, at 350.

148. *Id.* at 348; *Tadić* Jurisdiction Appeals Decision, *supra* note 113, ¶ 98 ("[S]ome treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions . . . .").

149. *See* Third Geneva Convention, *supra* note 40, art. 3.

150. Additional Protocol II, *supra* note 59, arts. 4(1)–4(2).

151. *Id.* art. 4(2)(a).

the well-documented[152] toll that the conditions of the camp have taken on detainees' psychological wellbeing, or the cumulative infliction of "psychological harm," has previously been recognized as cruel treatment.[153]

Furthermore, Additional Protocol II outlines several specific guarantees for children to "be provided with the care and aid they require," including an education, protection from recruitment to take part in hostilities, and, "where necessary," removal from "area[s] in which hostilities are taking place," accompanied by "persons responsible for their safety and well-being."[154]

In sum: The conditions in the prison camp create a high risk of death, particularly for the children detainees, due to the exposure to physical violence paired with the lack of food and medical care. The children are also denied access to an education, are at a well-known risk of being kidnapped and recruited by ISIS (if not indoctrinated from within the camp), and have been left in the camp despite the frequent outbreaks of violence. The AANES, the non-state actor group managing the camp, receives substantial financial and logistical support from the United States to continue the indefinite detention of these women and children in these conditions. Since the conflict with ISIS represents an ongoing non-international armed conflict, IHL likely applies (as opposed to IHRL exclusively). Even when treating IHL as *lex specialis*—and thus applying IHL's more conservative definitions of the right to life and freedom from cruel or degrading treatment—an application of those fundamental guarantees strongly suggests that the conditions of the camp violate those guarantees.

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152. *See, e.g.*, EUROPE'S GUANTANAMO, *supra* note 49, ¶ 39 (describing the psychological trauma among detainees as "endemic"); *see also* Ben Hubbard & Constant Méheut, *Western Countries Leave Children of ISIS in Syrian Camps*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/world/middleeast/isis-children-syria-camps.html [https://perma.cc/KR4K-MQQK] ("Human rights groups say leaving the children in Syria threatens their mental and physical health . . . ."); U.N. POPULATION FUND, AL-HOL SITUATION REPORT 1 (Mar. 20, 2019), https://reliefweb.int/sites/reliefweb.int/files/resources/Al-Hol%20Camp%20Situation%20Report-%20Update%203%2C%2020%20March%202019%20-%20%5BUNFPA%2C%20Syria%5D.pdf [https://perma.cc/QY54-9WNE] (reporting that women and children are suffering "notable symptoms" of distress).

153. *See* Hum. Rts. Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (108th session) concerning Communication No. 2094/2011, ¶ 9.8, U.N. Doc. CCPR/C/108/D/2094/2011 (Oct. 28, 2013).

154. Additional Protocol II, *supra* note 59, arts. 4(3)(a), 4(3)(c), 4(3)(e).

II. APPLICABLE THEORIES OF STATE RESPONSIBILITY—AND WHY THEY FAIL

Having provided in Part I a brief overview of the potential violations of international law implicated by the camp's conditions, this Note turns in Part II to lay the foundation of the law of attribution as articulated in the ASR. It applies the relevant articles to the fact pattern in al-Hol in order to ascertain potential U.S. responsibility for those violations.

A breach of international law is but one half of the legal "equation" necessary to establish a State's liability for that breach. States are not people; thus, mere proof of a violation is insufficient, on its own, to link the violation to the State. The laws of attribution do just that, providing the theoretical and legal "bridge" between the wrongful conduct and the State.[155]

Attribution can be thought of in the context of international law as a category of "secondary rules." While "primary rules" define the substantive violations that a state may or may not carry out (e.g., torturing a criminal suspect), secondary rules, like attribution, define how those primary rules "come into existence" and "how they can be changed."[156] H.L.A. Hart, in his seminal work, *The Concept of Law*, describes the distinction: Primary rules are those which govern primary human (or, in this case, State) conduct out in the world, while secondary rules are those which govern how those primary rules are to be enacted, adjudicated, and enforced.[157]

Thus, for the United States to be responsible for the violations of international law occurring within al-Hol (i.e., for those primary rule violations to be enforced), attribution must fill the formidable legal void between the State and violations occurring halfway around the world, where the State in question ostensibly has no presence.

A note on terminology: When used in the context of State responsibility for international law violations (and for the purposes of this Note), the term "complicity" has a much narrower scope than in U.S. criminal law. "Complicity" as conceived of in international law is most often equated with "aiding and assisting," described under

155. CARLO DE STEFANO, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION 3 (2020).

156. Hugh Thirlway, *The Sources of International Law*, *in* INTERNATIONAL LAW 91, 91 n.2 (Malcom D. Evans ed., 4th ed. 2014).

157. H.L.A. HART, THE CONCEPT OF LAW 81 (3d ed. 2012).

Article 16 of the ASR.[158] Yet "aiding and abetting" under the U.S. Model Penal Code (MPC) is but one "sub-sub-category" of conduct which can render an individual complicit, i.e., "legally accountable," for the criminal conduct of another.[159] One of the means of finding an individual complicit is to define them as an "accomplice,"[160] and "aiding and abetting" is one means of establishing accomplice liability. In this way, complicity in domestic criminal law is an umbrella concept that captures several ways of legally linking the criminal conduct of one individual to another, beyond simply aiding and abetting the primary actor's crimes.

For example, the broad MPC definition of complicity would include instances where an individual "is made accountable for the conduct of such other person by the Code or by the law defining the offense."[161] In international law, on the other hand, this type of connection would be considered to establish liability under a theory called "direct attribution,"[162] a concept distinct from complicity.[163] Going forward, any reference to "complicity" in this Note refers to the narrow international law concept of aiding and assisting the wrongful conduct of another, as articulated in ASR Article 16.[164]

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158. *See, e.g.*, HELMUT PHILIPP AUST, COMPLICITY AND THE LAW OF STATE RESPONSIBILITY 1, 193–94 (2011) (first defining the scope of complicity in international law as "whether States which aid or assist other States in the commission of wrongful acts incur responsibility for their support," then rejecting analogies to criminal law conceptions of complicity); VLADYSLAV LANOVOY, COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY, 71–90 (2016) (mapping the drafting of what became Article 16 of the ASR (formerly counted as Article 27) from its initial conception by Special Rapporteur Ago, to its final formulation published by the International Law Commission (ILC) in 2001, under the chapter entitled "Codification of Complicity in the Law of International Responsibility"). Similarly, the ICJ in its 2007 *Bosnian Genocide* decision emphasized the distinction between attribution and complicity, articulating that the question of "effective control" (one means of establishing attribution, see *infra* Section II.B.2) "in the law of international responsibility, extend[s] beyond complicity." Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 420 (Feb. 26) [hereinafter Bosnian Genocide Judgment].

159. MODEL PENAL CODE § 2.06(3)(a)(ii) (AM. L. INST., Proposed Official Draft 1962).

160. *Id.* § 2.06(2)(c).

161. *Id.* § 2.06(2)(b).

162. *See infra* Section II.B.

163. Several international legal scholars describe complicity as a category of establishing international responsibility completely separate from direct attribution. *See, e.g.*, JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 115 (2013); LANOVOY, *supra* note 158, at 4; AUST, *supra* note 158, at 9–10.

164. *See* ASR, *supra* note 37, art. 16.

A. Introducing the Draft Articles

Special Rapporteur Roberto Ago first embarked on the project of formally defining the rules of attribution in the 1960s, endeavoring to lay out this necessary layer of secondary rules of international law in Part I of the Draft Articles on State Responsibility.[165] The final version of the ASR, adopted by the International Law Commission (ILC) in 2001, begins by articulating the critical elements in the legal equation of international responsibility: "There is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."[166]

Many—though not all—Draft Articles have been recognized by international tribunals and States as reflections of customary international law regarding state responsibility.[167] Yet several other States[168] and scholars have asserted the contrary, arguing that tribunals have placed too much weight on the ASR and that several of the articles "clearly involve the progressive development of the law *rather than its codification.*"[169]

The question of custom is key: Since the ASR is not in itself a treaty to which States may bind themselves through ratification,[170] the articles are only binding on States to the extent that they have risen to the level of customary international law. Without that customary status, the ASR could at most be considered persuasive before the Court as the product of highly qualified publicists, merely a subsidiary source of international law and means of interpretation.[171]

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165. *See* CRAWFORD, *supra* note 163, at 36.

166. ASR, *supra* note 37, art. 2.

167. *See, e.g.*, Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 51 (Sept. 25); Differences Relating to Immunity from Legal Process of a Special-Rapporteur of the Commission of Human Rights, Advisory Opinion, 1999 I.C.J. 62, 87 (Apr. 29); Bosnian Genocide Judgment, *supra* note 158, ¶¶ 385, 420; Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 213–14, 242–43, 251 (Dec. 19).

168. *See, e.g.*, U.N. Secretary-General, *Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments*, at 1–2, U.N. Doc. A/71/79 (Apr. 21, 2016) [hereinafter State Comments on ASR].

169. David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857, 858 (2002) (emphasis added).

170. *See* State Comments on ASR, *supra* note 168, at 1.

171. Statute of the International Court of Justice art. 38(1)(d) June 26, 1945, 33 U.S.T. 993 [hereinafter Statute of the ICJ].

B. Direct Responsibility via Attribution

States are, in essence, no different from any corporate entity in that they may only act through intermediaries—individuals or groups acting as the State's agents.[172] Thus, the typically corporate concept of agency—a relationship between two consenting parties where one (the principal) consents to the other (the agent) "act[ing] on his behalf and subject to his control"[173]—is relevant to understanding how a State can "violate" the law. Chapter II of the Draft Articles delineates ways in which agency theory can be interpreted in the international context to connect the actions of individuals and groups back to a State.

1. Article 4: Organ of the State

Article 4 ASR states: "The conduct of any State organ shall be considered an act of that State under international law"[174]—a "well-established rule" of international law considered by the ICJ to have risen to the level of a customary rule.[175] "State organs" are traditionally conceived of as falling into one of two categories: first, de jure organs, or those explicitly recognized by the State as such by its internal laws, authorized to exercise some form of power as an "expression of the government of a State;"[176] and second, de facto organs, which, though not "co-opted into the legal apparatus of the state,"[177] are still "bestowed" with the status of state organ by means of internal practice, rather than the internal laws of the State.[178]

The bar for establishing an entity as a de facto state organ is high, requiring a demonstration of the entity's "complete dependence" on the State.[179] Merely providing support for the entity's "most

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172. *See* Marko Milanovic, *Special Rules of Attribution of Conduct in International Law*, 96 INT'L L. STUDS. 295, 296 (2020); *see also* CRAWFORD, *supra* note 163, at 5.

173. RESTATEMENT (SECOND) OF AGENCY § 1(1) (AM. L. INST. 1958).

174. ASR, *supra* note 37, art. 4(1).

175. Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, ¶ 62 (Apr. 29); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 242 (Dec. 19); Bosnian Genocide Judgment, *supra* note 158, ¶ 385.

176. DE STEFANO, *supra* note 155, at 28. This would include, for example, national courts, legislatures, or law enforcement officers, authorized to exercise judicial, legislative, and executive power, respectively.

177. CRAWFORD, *supra* note 163, at 115.

178. *Id.* at 124.

179. Bosnian Genocide Judgment, *supra* note 158, ¶ 392.

significant" activities is not enough;[180] complete dependence must be shown "in all fields" of the entity's activities.[181] For example, in the case that Nicaragua brought against the United States for its support of the contras, the Court found that despite the provision of weapons and other subsidies, the contras nonetheless "constitute[d] an independent force" and "the only element of control" that the United States could exercise was "cessation of aid."[182]

The AANES and SDF are not de jure organs of the United States government, nor is it likely that they could be characterized as de facto organs given the high threshold for such a finding,[183] which would require that the groups "act in 'complete dependence'"[184] on the United States "in all fields."[185] To establish that an entity is the de facto organ of a State, a showing of financial support is expressly insufficient; complete dependence requires a showing of "whether state involvement exceeded the provision of training and financial assistance."[186] At most, the support that the joint task force, via OIR, provides to the SDF is for the enhancement of capabilities specific to countering ISIS within the camp, not for the day-to-day operations of the camp.

2. Article 8: Controlled by the State

Article 8 of the ASR provides a basis for a finding of direct attribution even without establishing an entity's "complete dependence" on the State. Under Article 8, "[t]he conduct of a . . . group of persons shall be considered an act of a State under international law if the . . . group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[187]

In the 1986 *Nicaragua* case, the ICJ held that "the combination of funding, training, public support, strategic guidance, and tactical directives [provided by the United States to the Contras] . . . was

180. *Id.* ¶ 394.

181. *Id.* ¶ 392; Nicaragua Judgment, *supra* note 105, ¶¶ 109–10.

182. Nicaragua Judgment, *supra* note 105, ¶ 109 (alteration in original).

183. *See supra* notes 173–175 and accompanying text.

184. CRAWFORD, *supra* note 163, at 125 (quotations omitted).

185. Bosnian Genocide Judgment, *supra* note 158, ¶ 391; Nicaragua Judgment, *supra* note 105, ¶ 109.

186. CRAWFORD, *supra* note 163, at 125.

187. ASR, *supra* note 37, art. 8.

insufficient for a finding of state responsibility."[188] The Court later clarified in its 2007 *Bosnian Genocide* decision that private State conduct of this kind "is not attributable unless the state also exercises a high level of control '*in respect of each operation* in which the alleged violations occurred.'"[189] Thus, the ICJ's test requires proof of control over *individual operations* in order to attribute third-party conduct to a State.[190] These operations must be specific and identifiable,[191] and the involvement by the State in those operations must be more than general "participation,"[192] but rather providing instructions to the group, or else directing or controlling its operations.[193]

This exacting standard, as Oona Hathaway and others point out, creates an "accountability gap" for States employing non-State actors to conduct wrongful acts on their behalf. By the ICJ's narrowing of the scope of Article 8 to require such a high degree of control and specificity in the operations, "states can—merely by issuing instructions at a relative level of generality—easily avoid attribution for crimes as egregious as genocide."[194]

In the *Tadić* decision, by contrast, the ICTY articulated a slightly less stringent standard for establishing control of a group by a State—though, notably, not in the context of attempting to articulate a theory of attribution, but rather in determining whether a conflict had been sufficiently "internationalized" by a State's control over a non-State actor on one side of the conflict to transform the conflict from a NIAC to an IAC. . .[195] This "overall control" test for organized, hierarchically structured groups did not require specific instructions for each individual operation.[196] Instead, overall control "resided not only in equipping, financing, or training and providing operational support

188. Oona Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539, 550 (2017); *see* Nicaragua Judgment, *supra* note 105, ¶¶ 103–07, 115.

189. Hathaway et al., *supra* note 188, at 560 (emphasis added) (quoting Bosnian Genocide Judgment, *supra* note 158, ¶ 400).

190. *See id.* at 552–53.

191. Bosnian Genocide Judgment, *supra* note 158, ¶ 287.

192. Stefan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT'L & COMP. L.Q. 493, 503 (2009).

193. ASR, *supra* note 37, art. 8.

194. Hathaway et al., *supra* note 188, at 553–54.

195. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 120 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter *Tadić* Appeals Judgment], https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf [https://perma.cc/AWJ9-MX4U].

196. *Id.* ¶¶ 120, 122.

to the group, but also in coordinating or helping in the general planning of its military or paramilitary activity."[197]

The ICJ explicitly rejected the ICTY's "overall control" formulation in its 2007 *Bosnian Genocide* decision[198] on two grounds. First, the discussion as it applied to State responsibility was dictum, since it was "an issue which was not indispensable for the exercise of its jurisdiction."[199] Second, the test was formulated to determine the status of an armed conflict, *not* to establish state responsibility, and thus was unpersuasive in that context.[200]

An argument under Article 8 seems equally untenable given the lack of evidence necessary to establish control over the AANES, assuming application of the ICTY's overall control test would be rejected in favor of the stricter effective control test endorsed by the ICJ. The difficulty here lies in defining the "individual operations" for which the Court would have to find the United States had the requisite level of control. One could argue that the very act of detention is a violation of the women's fair trial rights; however, whether the conditions may constitute a "specific" operation" (i.e., the continuous, indefinite operation of the camp coupled with the lack of a plan in place to stand up a tribunal) would prove difficult to demonstrate. This seems to more comfortably fit within the "overall control" test since the CJTF and SDF could be said not to "comprise two separate armies in any genuine sense,"[201] particularly in the context of the counter-ISIS operations and raids regularly conducted within the camp.

Yet another obstacle to applying a theory of direct attribution specifically in the context of the human rights violations identified is the United States' consistent stance that its human rights obligations do not apply beyond its territorial boundaries.[202] Unlike the vast

197. Antonio Cassese, *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649, 657 (2007) (citing *Tadić* Appeals Judgment, *supra* note 195, ¶¶ 131, 137).

198. Bosnian Genocide Judgment, *supra* note 158, ¶¶ 402–03.

199. *Id.* ¶ 403.

200. *Id.* ¶ 405.

201. *See Tadić* Appeals Judgment, *supra* note 195, at ¶ 151.

202. *See, e.g.*, van Schaack, *supra* note 105, at 22–23; Matthew Waxman, Principal Deputy Dir. for Pol'y Plan., Dep't of State, Opening Statement on the Report Concerning the International Covenant on Civil and Political Rights (ICCPR) (July 17, 2006), https://2001-2009.state.gov/g/drl/rls/70392.htm [https://perma.cc/HY6X-T6G9] ("it is the long-standing view of the United States that the Covenant by its very terms does not apply outside of the territory of a State Party.").

majority of the international community, including international[203] and regional[204] courts and organizations,[205] the United States rejects the contention that even in "exceptional circumstances"[206] where the State exerts "effective control" over a territory or an individual, a State may acquire human rights obligations extraterritorially. Given that the violations in question are occurring far outside U.S. territory, any successful attempt at direct attribution is rendered moot if there are no primary violations to which State responsibility may attach.[207]

C. Ancillary Responsibility (Complicity)

ASR Chapter IV outlines responsibility of a State when it is tied to the act of another State, a concept commonly labeled "complicity" in American criminal legal contexts (though the word does not appear once in the Draft Articles). Articles 16, 17, and 18 address, respectively, instances of aiding and assisting, the exercise of "powers of direction and control," and coercion.[208]

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203. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 111–13 (July 9); Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 216–17 (Dec. 19).

204. *See, e.g.*, Al-Saadoon v. United Kingdom, 2010-II Eur. Ct. H.R. 61, 127; Alejandre v. Cuba, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 23 (1999).

205. *See, e.g.*, U.N. Hum. Rts. Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Delia Saldías de Lopez v. Uruguay, U.N. Hum. Rts. Comm., ¶¶ 12.1–12.3, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981).

206. Catan v. Moldova, 2012-V Eur. Ct. H.R. 309, 356.

207. This conundrum—that the United States might simply be able to "reject" a rule of purportedly binding customary international law (a law that most of the rest of the international community agrees is valid)—raises the more fundamental critique of the validity of international law generally and whether it is simply a reflection of geopolitical power, rather than a set of rules that actually binds or limits the conduct of States. This question of whether international is "really law," though important, is not the focus of this Note. For more on theories of State compliance (or lack thereof), see generally LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (2d ed. 1979); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

208. ASR, *supra* note 37, at ch. IV, cmt. 6; *see also id.*, arts. 16–18.

1. Complicity in the ASR: Article 16

ASR Article 16 establishes that a State may be held internationally responsible when it "aids or assists" another State in committing an internationally wrongful act *if*: "(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."[209]

The ILC Commentaries on Article 16 provide examples of what acts count as "aiding" or "assisting" another State in the commission of wrongful conduct, including "knowingly providing an essential facility or financing the activity in question."[210]

The aid or assistance need not be "indispensable"[211] to the commission of the wrongful act; in fact, the assistance "may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered."[212] Yet, at the same time, the aid or assistance must be "clearly linked" to the primary act, and, perhaps unintuitively, "significant."[213] Unfortunately, without any guidance from the ICJ interpreting the language of Article 16 or applying it to a particular case, there is no conclusive means to resolve such descriptive inconsistencies between scholars.[214]

The ILC cabined state liability for such conduct through the addition of a scienter requirement: Only in cases where the State in question provides aid or assistance "with knowledge" of the circumstances of the internationally wrongful act may the aiding State be held internationally responsible.[215] Although several States attempted to expand the knowledge requirement to include constructive

209. *Id.* art. 16.

210. *Id.* art. 16 cmt. 1.

211. CRAWFORD, *supra* note 163, at 402.

212. ASR, *supra* note 37, art. 16 cmt. 10.

213. *Id.* art. 16 cmt. 5; CRAWFORD, *supra* note 163, at 405.

214. *See* AUST, *supra* note 158, at 192–268. The closest that the Court has come to defining Article 16 of the ASR is its discussion of complicity as articulated in the Genocide Convention in the *Bosnian Genocide* case. Bosnian Genocide Judgment, *supra* note 158, ¶¶ 420–21. A review of the literature analyzing complicity in the context of international responsibility uncovered no additional ICJ opinions applying ASR Article 16. *See generally* MILES JACKSON, COMPLICITY IN INTERNATIONAL LAW (2015); DE STEFANO, *supra* note 155; AUST, *supra* note 158; LANOVOY, *supra* note 158; CRAWFORD, *supra* note 163.

215. *See* CRAWFORD, *supra* note 163, at 399.

knowledge,[216] the provision's final text is limited to a State's actual knowledge.[217]

2. The Customary Status of Article 16

There appears to be a strong basis to assert that Article 16 has achieved the status of customary international law, despite the positions of some States at the first reading that it represented a progressive development of international law.[218] Helmut Aust argues that the ILC implicitly articulated as much, when it stated in the ASR Commentary that "State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance."[219]

Forming a rule of customary international law requires two elements: State practice and *opinio juris*[220] (i.e., a demonstration of States' belief that their conduct in conformity with this rule of custom is motivated by legal obligation[221]). State practice "should be general,"[222] meaning it is "both extensive and virtually uniform."[223] This requirement does not imply *all* States must participate in the formation of such a rule.[224] However, the States adhering to the custom should ideally be "representative" of "different legal cultures and traditions."[225]

A majority of legal scholars have come to the conclusion that there is both sufficient State practice and *opinio juris* to find that

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216. *Id.* at 406.

217. ASR, *supra* note 37, art. 16(a) ("that the State does so *with the knowledge* of the circumstances of the internationally wrongful act") (emphasis added).

218. CRAWFORD, *supra* note 163, at 401.

219. AUST, *supra* note 158, at 97 (citing ASR, *supra* note 37, art. 16, cmt. 7).

220. Thirlway, *supra* note 156, at 95.

221. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20); *see also* LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 63 (7th ed. 2019).

222. AUST, *supra* note 158, at 174.

223. North Sea Continental Shelf, ¶ 74.

224. *See, e.g.*, Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 559, 577 (1976); ALAN VAUGHAN LOWE, INTERNATIONAL LAW 37 (2007); Robert Kolb, *Selected Problems in the Theory of Customary International Law*, 50 NETH. INT'L L. REV. 119, 135 (2003).

225. AUST, *supra* note 158, at 174.

Article 16 of the ASR constitutes customary international law,[226] a position which has been affirmed by the ICJ.[227] However, some assert that complicity in practice has related primarily to peremptory norms.[228] However, as Aust articulates, peremptory norms or "*jus cogens*" play "no prominent role in the international practice [of complicity]. . . . Accordingly, there is no apparent reason to restrict the finding with respect to the customary character of a rule establishing responsibility for complicity to the domain of peremptory norms."[229]

The ICJ confirmed the customary status of ASR Article 16 in its 2007 *Bosnian Genocide* decision, expressly stating that the article was "reflecting a customary rule."[230] However, it is important to note that international legal scholars have characterized the Court's analysis of ASR Article 16 as dicta[231] because, in that particular case, the Court was simply using an analogy to the ASR as a means of interpreting "complicity" in the Genocide Convention, as opposed to directly applying Article 16 to the facts of that case. The Court admits as much, stating that "because it concerns a situation characterized by a relationship between two states, [it] is not directly relevant to the present case."[232]

3. Complicity in Violations by AANES / SDF

Intuitively, it might seem that the United States easily checks every box required for a showing of aiding and assisting. The first

226. *Id.* at 98 n.5 (citing several international legal scholars who assert Article 16's customary status, including: John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. INT'L L. 77, 103, 131 (1987); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 433, 500–01 (2003); Stefan Talmon, *A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq*, *in* THE IRAQ WAR AND INTERNATIONAL LAW 185, 218 (Phil Shiner & Andrew Williams eds., 2008); Claus Kress, *The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression Against Iraq*, 2 J. INT'L CRIM. JUST. 245, 251–52 (2004)).

227. Bosnian Genocide Judgment, *supra* note 158, ¶ 107.

228. *See, e.g.*, *Voluntarism* versus *Majority Rule*, *in* CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 108, 110 (Antonio Cassese & Joseph H.H. Weiler eds., 1988) (statement of Ian Brownlie); Oliver Dörr, *Codifying and Developing Meta-Rules: The ILC and the Law of Treaties*, 49 GER. Y.B. INT'L L. 129, 147 (2006).

229. AUST, *supra* note 158, at 190–91.

230. Bosnian Genocide Judgment, supra note 158, ¶ 420.

231. *See* AUST, *supra* note 158, at 226.

232. Bosnian Genocide Judgment, supra note 158, ¶ 420.

page of the IG report's executive summary to the U.S. Congress on the status of OIR makes explicit the State's provision of assistance:

> At the end of the quarter, Acting Special Envoy John T. Godfrey led a delegation of officials to northeast Syria to visit al-Hol camp, where they met with humanitarian assistance groups and camp administration. The purpose of the visit was to build understanding of the challenges that humanitarian assistance groups and local authorities face in providing services and managing al-Hol *so that the DoS [Department of State] can better channel assistance and advocacy on this complex issue.*[233]

The report goes on to detail precisely the types of "assistance" that the joint task force is providing to the SDF in order to manage al-Hol, including "riot control, escalation-of-force, biometric enrollment, and public affairs training . . . in support of its operations at detention centers and to address ISIS-related violence at the al-Hol camp."[234] The al-Hol camp is mentioned by name sixty-three times in the June 2021 report,[235] and another forty-five times in the September 2021 report,[236] almost exclusively in the context of discussing the threat that ISIS still poses from within the camp—and strategies deployed to mitigate it.

The primary obstacle to the successful application of Article 16 to this case comes not from the details of the "aid or assistance provided." This level of assistance, at the level of specificity illustrated in detail by the OIR IG reports, would more than satisfy the requirement.[237] Nor does it seem that the "subjective" element of complicity in this case is difficult to prove. The United States is providing this aid and assistance "knowing the circumstances" of the camp—the deplorable conditions, the lack of due process for the detainees, and the threat to life that detainees, children in particular, face daily.[238] This is not merely a reasonable inference, given the IG report's emphasis on the need to repatriate children in the camp[239]—rather the reports say

233. OIR REPORT JUNE 2021, *supra* note 79, at 2 (emphasis added).

234. *Id.* at 6.

235. *See id.*

236. *See* OIR REPORT SEPTEMBER 2021, *supra* note 97.

237. *See supra* Section I.B.2.

238. *See supra* Section I.B.

239. *See* OIR REPORT JUNE 2021, *supra* note 79, at 18:

so explicitly, detailing the security threat posed by continued attempts by ISIS to recruit young boys from the camp[240] and the "dire conditions" camp detainees face.[241]

Instead, application of Article 16 is frustrated on two grounds. First, Article 16—and in fact all other Articles contained within ASR Chapter IV—speaks only to the "Responsibility of a State in Connection with the Act *of Another State*."[242] Thus, the conduct of non-State actors such as the SDF or AANES are not contemplated in the text. Second, even if Article 16 encompassed non-state actors (i.e., if the text of Chapter IV instead spoke to the "responsibility of a State in connection with the act of *another State or a non-state actor*"), there may be no "internationally wrongful conduct" by the non-state actors to which complicity liability could attach. In short, the AANES must violate an obligation it owes for a state to be complicit in that violation—yet no such primary violation exists per se. The violations of IHL and IHRL laid out in Part I only constitute "internationally wrongful acts"[243] by the AANES if they owe those primary obligations in the first place—generally, only States owe such obligations to other States within the international legal system.[244] There are, however, as Peter Tzeng articulates, four conditions under which non-State actors may "acquire" international legal obligations: (1) where the non-State actor "is a national of, on the territory of, or within the jurisdiction of" a State which is bound by that obligation;"[245] (2) where the non-State actor expressly consents to being bound by that obligation; (3) where customary international law binds the non-State actor; and (4) where

> The United States, the United Nations, SDF officials, and aid agencies have urged countries to repatriate their citizens from al-Hol as the only durable long-term solution for non-Syrians. The DoS said that giving children a chance at re-establishing normalcy and reunification with families in their home countries is the "best hope" for these individuals. The DoS added that it continues to encourage the international community to consider how they might support humanitarian organizations providing education, psychological support, and protection services at the camp.

240. *Id.* at 17; OIR REPORT SEPTEMBER 2021, *supra* note 97, at 22, 26.

241. OIR REPORT SEPTEMBER 2021, *supra* note 97, at 4, 26; *see also* OIR REPORT JUNE 2021, *supra* note 79, at 18 (footnote omitted) ("The Near and Middle East Regional Director [of the ICRC] . . . reported . . . that conditions in al-Hol are worse now than the 'horrifying' suffering he saw in 2019 . . . .").

242. ASR, *supra* note 37, at ch. IV (emphasis added).

243. *Id.* at ch. I.

244. *See* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 35 (2006).

245. Peter Tzeng, *Non-State Actors as Respondents Before International Judicial Bodies*, 24 ILSA J. INT'L & COMP. L. 397, 410 (2018).

the obligation "corresponds to a right established in international law."[246]

The Common Article 3 and ICCPR violations may be more easily characterized as obligations owed—and breached—by the SDF and AANES. In the context of non-State actors participating in armed conflicts, the international community is broadly in agreement that non-State actors "derive their rights and obligations contained in Common Article 3 and Protocol II through the state on whose territory they operate."[247] Syria, the territorial state on which the AANES operates the camp, is a State Party to the Geneva Conventions[248] and the ICCPR[249] but has not acceded to Additional Protocol II.[250] Nevertheless, non-State actors may still be bound to individual articles within the Protocol which have risen to the level of customary international law.[251]

Thus, there are several substantial obstacles that must each be overcome for a finding of complicity to be viable; failure at any stage renders Article 16 responsibility a non-starter. Article 16 can be relied on as a valid articulation of State responsibility *if and only if* Article 16 has risen to the level of customary international law. Article 16 only articulates a theory that may be applicable to the actions of the AANES *if and only if* the AANES meets objective criteria for statehood sufficient to constitute a State for the purposes of Article 16 application. Article 16 complicity attaches *if and only if* the primary obligations breached are owed by the AANES independently. Finally, the United States satisfies the criteria for Article 16 *if and only if* it can be shown that U.S. funding is provided with the actual knowledge that it is to be used to facilitate breaches of the obligations owed by the AANES.

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246. *Id.*

247. LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 15 (2002).

248. Int'l Comm. Red Cross, Treaties, State Parties, & Commentaries, *Convention Relative to the Treatment of Prisoners of War, 12 August 1949*, INT'L HUMANITARIAN L. DATABASE https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/state-parties?activeTab=default [https://perma.cc/WQ2C-TFJK] (last visited Jan. 12, 2023).

249. United Nations Treaty Collection, International Covenant on Civil and Political Rights, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND [https://perma.cc/DCS7-LGYQ] (last visited Oct. 31, 2022).

250. United Nations Treaty Collection, Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, https://treaties.un.org/pages/showDetails.aspx?objid=08000002800f3cb8 [https://perma.cc/TCB9-K95N] (last visited Oct. 31, 2022).

251. ZEGVELD, *supra* note 247, at 20.

The U.S. position would likely be that such a claim fails at that first obstacle: Article 16, as a progressive development of international law rather than existing custom, has no binding force[252] and is not accepted as a means of attaching responsibility to States. Even for those who argue that Article 16 is, in fact, *lex lata*, an argument that it extends to the conduct of non-State actors is a bridge too far.[253] The weakness of an Article 16 claim, thus, is an inversion of the problem with applying an Article 8 theory of direct attribution: While the degree of control the State must exert over the actors engaging in the wrongful conduct is lower, Article 16 limits the types of actors who may engage in that wrongful conduct only to other States, as opposed to any actor, regardless of status or recognition.

4. Complicity in Violations by States of Nationality

If the path to defining complicity for non-State actors appears so fraught, are there any other means by which U.S. funding for the

252. *See* Julian Simcock, Deputy Legal Advisor, U.S. Mission to the U.N., Remarks at a UN General Assembly Meeting of the Sixth Committee on Agenda Item 75: Responsibility of States for Internationally Wrongful Acts (Oct. 14, 2019), https://usun.usmission.gov/remarks-at-a-un-general-assembly-meeting-of-the-sixth-committee-on-agenda-item-75-responsibility-of-states-for-internationally-wrongful-acts/ [https://perma.cc/LK7G-ZUUR] (arguing against conversion of the ASR into a binding convention, in large part because "those draft articles that represent the progressive development of international law, and which are not necessarily accepted by all States, may not be ready for negotiation"). However, Simcock also notes in his speech that the United States *does* consider some of the Articles as "providing guidance" on customary international law, making reference to citations by the United States to certain Articles and their Commentaries in pleadings before international courts. *Id.* One indication that the U.S. position on the customary status of Article 16 might actually be one of implicit endorsement can be seen in its pleading before the ICJ in the *Treatment in Hungary of Aircraft and Crew of United States of America* case, where it argued that Hungary had been "aided and abetted" by the Soviet Union in the seizure of a military aircraft. Treatment in Hungary of Aircraft and Crew of United States of America, Application Instituting Proceedings Against the Union of Soviet Socialist Republics (U.S. v. Hung.; U.S. v. U.S.S.R.), 1954 I.C.J. Pleadings 42, ¶ 3 (Feb. 16, 1954); *see also* AUST, *supra* note 158, at 168. It too should be noted that, during the Sixth Committee discussion of the first formulation of the Draft Articles, the United States was not among the five States objecting to the inclusion of then-Article 27 (what later became Article 16), rather providing "constructive criticism" that the subjective element of the Article (i.e., the requirement for "knowledge" versus "intent" that the aid or assistance rendered should assist in the commission of a wrongful act) should be strengthened. *Id.* at 169–72.

253. *See* JACKSON, *supra* note 214, at 214–15 (acknowledging the expanding array of obligations which international law is imposing on non-state actors, but proposing that an "analogue" to Article 16 that directly addresses non-state actors is the solution, since Article 16 "speaks only to the ways in which states participate in wrongdoing committed by other states").

continued operation of the camp could be framed as complicity for the breaches of a *State*?

As introduced at the start of this Note,[254] the ECtHR is currently considering allegations of direct State violations in relation to the camps. The joined plaintiffs accuse France of failing to uphold obligations to its citizens to guarantee protection from cruel or inhumane treatment or punishment, and to ensure their right to return to their country of nationality, in violation of several articles of the ECHR and Protocol No. 4 to the Convention.[255]

An application of Article 16 to the conduct here would be, to put it generously, unusual. First, U.S. support—in the form of funding, training, and equipping with military weapons—is not going to France, but rather to the AANES. One might first have to go through the exercise of establishing that the AANES is an agent of the French state, through one of the direct attribution theories discussed earlier, for this theory to hold water.

Second, the *types* of support that the United States is providing—funding, training, equipping—do not directly facilitate (i.e., "aid or assist") the French State in one of the key violations of which it is accused: failing to repatriate its nationals. Claiming that the provision of riot-control counter-ISIS training renders the United States complicit in France's refusal to bring its nationals home is tenuous at best. In this case, the causal link between the aid provided and the obligations violated is likely too remote[256]—a scenario that members of the ILC cautioned against during consideration of Article 16:

> [P]articipation must be active and direct. . . . If . . . participation [is] too indirect, there might be no real complicity. For instance, it would be difficult to speak of complicity in an armed aggression if the aid and assistance given to a State consisted in supplying food to ensure the survival of the population for humanitarian reasons.[257]

254. *See supra* notes 26–30 and accompanying text.

255. H.F. et M.F. contre la France, Requête No. 24384/19, Exposé de faits [H.F. and M.F. v. France, App. No. 24384/19, Statement of Facts] (Eur. Ct. H.R. Feb. 10, 2020).

256. *See* LANOVOY, *supra* note 158, at 94–95.

257. *Summary Record of the 1519th Meeting*, [1978] 1 Y.B. Int'l L. Comm'n 238, ¶ 11 U.N. Doc. A/CN.4/SER.A/1978.

III. PATHS TO RESOLVE THE LEGAL LACUNA

In light of the difficulties with existing interpretations of State responsibility outlined above, Part III of this Note introduces two possible theories of interpretation for ASR Articles 8 and 16 to address the legal lacuna identified in Part II. As articulated in Section II.C.2, the gap in coverage of State conduct between Articles 8 and 16 allows State actors to evade international responsibility so long as they (1) outsource the wrongful conduct to *non-State actors*, as opposed to other States (avoiding Article 16), *and* (2) they *do not exercise control* over the non-State actor sufficient to find attribution under the "effective control" standard (avoiding Article 8). The following chart illustrates this gap:

		Number of Actors Applicable	
		State Actors Only	*State + Non-State Actors*
Degree of Control	*High*	*High degree of control required, only States applicable*	*High degree of control required, States & non-State actors applicable* Article 8
	Low	*No control required, only States applicable* Article 16	*No control required, States & non-State actors applicable* ***No current ASR Articles ("The Legal Lacuna")***

This obstacle is not insurmountable: Legal scholars have already put forward theories, with varying degrees of assertion as to the *lex lata* versus *lex feranda* status of those theories, which may, if applied, bridge the legal gap created by the al-Hol fact pattern. These theories include: (A) to conclude that Article 16 is applicable in the context of wrongful conduct by non-State actors, either by interpreting the term "States" more broadly than its formalistic definition of "internationally recognized States," or else by asserting that a new rule of custom has emerged that has created a parallel to Article 16 that encompasses non-State actors, and; (B) to reject the stringent "effective control" test in favor of the "overall control" test for application of Article 8.

A. Apply Article 16 to Non-State Actors

Despite the ostensibly strict language in the ASR limiting Article 16 applicability to complicity *vis-à-vis* the conduct of another *State*, scholars have suggested that, as a customary rule, a finding of responsibility via aiding and assisting need not be limited to instances where the assistance is provided to a formal State entity.[258]

Special Rapporteur Ago did not envision the scope of Article 16 to apply narrowly only to "States" in the formal sense; rather, he believed complicity should cover aid and assistance given to *any subject of international law*, whether a State or some other entity.[259] However, Ago stated in the preparatory work that the ILC would only take into consideration complicity for wrongful conduct of *another State*, despite the fact that "it may well be presumed that the same principles would apply if one of the protagonists were a subject of international law *other than a State*."[260]

As Richard Mackenzie-Gray Scott writes, the reason for this omission may be simple: At the time of the initial drafting of the ASR, the "idea of entities other than states bearing international obligations . . . was controversial, which is why [non-State actors] remained excluded from reworks of the provision."[261] James Crawford, in his role as Special Rapporteur during the final revisions of the ASR, made no mention of non-State actors, again due to the belief that non-State actors were not entities capable of acquiring obligations under international law.[262]

As established in Part II,[263] in the twenty years since the ASR was finalized, there has been a substantial evolution in international law with regard to the theory that non-State actors may, in fact, acquire international legal obligations in a variety of circumstances.[264] Though the precise scope and source of those obligations remains up

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258. *See, e.g.*, Ryan Goodman & Vladyslav Lanovoy, *State Responsibility for Assisting Armed Groups: A Legal Risk Analysis*, JUST SEC. (Dec. 22, 2016), https://www.justsecurity.org/35790/state-responsibility-aiding-assisting-armed-groups-legal-risk-analysis/ [https://perma.cc/L58E-8G3T]; Richard Mackenzie-Gray Scott, *State Responsibility for Complicity in the Internationally Wrongful Acts of Non-State Armed Groups*, 24 J. CONFLICT & SEC. L. 373, 377 (2019).

259. *See* Scott, *supra* note 258, at 375.

260. Roberto Ago, *Seventh Report on State Responsibility*, [1978] 2 Y.B. Int'l L. Comm'n 31, ¶ 76, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (emphasis added).

261. Scott, *supra* note 258, at 376.

262. *Id.*; *see also* Goodman & Lanovoy, *supra* note 258.

263. *See supra* Section II.C.3.

264. *See supra* notes 245–251 and accompanying text.

for debate, the fact that there now exists "a core of obligations [owed by non-State actors] is not controversial."[265] Thus, the concerns apparently animating both Ago and Crawford's choice to omit non-State actors from Article 16 no longer apply. In fact, one could argue, the very object and purpose of the Article would now be frustrated by *not* reading it more broadly to encompass non-State actors. The Commentary to Article 16 makes clear the intent of the ILC at the time of its drafting: "[A] State cannot do by another what it cannot do by itself."[266] Yet without a means to apply Article 16 to non-State actors, the ASR leaves open that very possibility—for States to outsource their wrongful conduct, and successfully dodge attribution, so long as they use non-State actors, as opposed to other States, as the instrument of their wrongful conduct.

As Scott lays out, there is a credible argument to be made that a new rule of customary international law has emerged as to the application of complicity liability of States for assistance rendered to non-State actors,[267] particularly in light of the 9/11 attacks and the War on Terror. U.N. General Assembly resolutions,[268] State position papers,[269] and domestic court decisions[270]—all of which constitute evidence of State practice and *opinio juris* for the purposes of developing a new rule of customary international law[271]—have utilized the

265. JACKSON, *supra* note 214, at 215; *see also* DARAGH MURRAY, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ARMED GROUPS 23–50 (2016) (establishing that non-State armed groups can satisfy the criteria of international legal personality required for international legal obligations to attach).

266. ASR, *supra* note 37, art. 16, ¶ 6.

267. Scott, *supra* note 258, at 377.

268. *See, e.g.*, G.A. Res. 2625 (XXV), at 123 (Oct. 24, 1970).

269. *See, e.g.*, Julian Borger, *The Austrian Position on Arms Embargo in Syria*, THE GUARDIAN (May 15, 2013), https://www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf [https://perma.cc/6SYB-XWLU].

270. *See, e.g.*, McDonald v. Socialist People's Libyan Arab Jamahiriya, 666 F. Supp. 2d 50, 53 (D.D.C. 2009).

271. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 70–71 (July 8) (citing U.N.G.A. resolutions as evidence of *both* State practice and *opinio juris*); Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, ¶ 96 (Feb. 3) (referring to decisions of various domestic courts to establish the customary rule that *jus cogens* does not displace the law of State immunity); Int'l L. Comm'n, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10, at 133, 140 (2018) (first identifying "verbal conduct" by States and "executive conduct" in the form of decrees or official statements as a potential form of State practice, then identifying "public statements made on behalf of States" and "official publications" as examples of evidence of *opinio juris*).

language of complicity liability to argue that a State has violated international law *vis-à-vis* support rendered to a non-State actor. Regional courts and human rights treaty monitoring bodies have also found that complicit acts of assistance to non-State actors may trigger State responsibility, though sometimes without explicit reference to Article 16 as the basis for such a finding.[272] For example, in the ECtHR's decision in *Ilaşcu v. Moldova and Russia*, the Court ruled that a State's provision of economic and military support to a non-State actor rendered the State internationally responsible.[273]

Therefore, a finding of international responsibility based on complicity liability would be viable, so long as an international or regional court accepted the contention that there was a sufficient demonstration of Article 16's customary applicability to non-State actors.

B. Use the Overall Control Test for Article 8 Application

Unlike the United States or another common law system, prior judicial decisions by the ICJ are not formally binding,[274] but often inform the court's decisions as it strives for "judicial consistency" where possible.[275] In fact, judges often refer to the "settled jurisprudence" of the Court,[276] leading some scholars to suggest that the Court is becoming more "common law-like" in terms of its relationship to precedent.[277] Thus, some scholars view the ICJ's *Bosnian Genocide* judgment as foreclosing applicability of the ICTY's "overall control" test in the context of attribution.[278] Others posit that, in order to reconcile the two, the "overall control" test can be understood as underlying only

272. *See* Goodman & Lanovoy, *supra* note 258.

273. Ilaşcu v. Mold. & Russ., 2004-VII Eur. Ct. H.R. 179, ¶¶ 392–93.

274. Statute of the ICJ, *supra* note 171, art. 59.

275. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 21 (5th ed. 1998).

276. James Gerard Devaney, *The Role of Precedent in the Jurisprudence of the International Court of Justice: A Constructive Interpretation*, 35 LEIDEN J. INT'L L. 641, 648 n.61 (2022) (citing several cases where the court has used this language).

277. *See id.* at 648 n.59 (citing Wolfgang Alschner & Damien Charlotin, *The Growing Complexity of the International Court of Justice's Self-Citation Network*, 29 EURO. J. INT'L L. 83, 85 (2018); Niccolò Ridi, *The Shape and Structure of the "Usable Past": An Empirical Analysis of the Use of Precedent in International Adjudication*, 10 J. INT'L DISP. RESOL. 200, 245 (2019).

278. *See, e.g.*, Constantine Antonopoulos, *State Responsibility for Acts of Non-State Actors*, *in* PERMUTATIONS OF RESPONSIBILITY IN INTERNATIONAL LAW 11, 15–16, 29 (Photini Pazartzis & Panos Merkouris eds., 2019); Kubo Mačák, *Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors*, 21 J. CONFLICT & SEC. L. 405, 415 (2016).

the rule of attribution underASR Article 4, leaving "effective control" as the sole means of establishing attribution under Article 8.[279]

However, as Antonio Cassese articulated in his 2007 article parsing the ICJ's attribution rulings in its 1986 *Nicaragua* and 2007 *Bosnian Genocide* judgments, the "effective control" test was equally unsupported by State practice or judicial precedent when established by the Court in *Nicaragua*.[280] In fact, Cassese writes, "[n]o reference is made by the Court either to state practice or to other authorities," and thus the Court declared the customary status of the "effective control" test without "explaining or clarifying the grounds on which it was based."[281] In contrast, the ICTY in *Tadić* cites to a number of cases to demonstrate the state practice in support of the overall control test.[282]

Notwithstanding this lack of foundation required to establish custom, Cassese claims that the test, by setting such a restrictively high bar for attribution, in fact undermines the very principles underpinning the rules on attribution:

> [S]tates may not evade responsibility towards other states when they, instead of acting through their own officials, *use* groups of individuals to undertake actions that are intended to damage, or in the event do damage, other states; if states so behave, they must answer for the actions of those individuals, even if such individuals have gone beyond their mandate or agreed upon tasks—lest the worst abuses should go unchecked.[283]

This very logic is what motivated the ICTY in its *Tadić* decision to depart from the Court's strict standard in *Nicaragua* and instead develop a more flexible "overall control" test. The ICTY explicitly denounced the necessity of proving specific instructions to an organized group from the state with regard to particular operations in order to establish attribution.[284] Such a high bar, the tribunal reasoned, was more appropriately reserved for the conduct of individual actors, to

279. *See, e.g.*, Hathaway et al., *supra* note 188, at 560 (noting that some scholars "have suggested that the 'overall control' standard is best understood in terms of the legal theory of attribution underlying the ICJ's control standard under Article 4, rather than under Article 8"); Marko Milanović, *State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücken*, 22 LEIDEN J. INT'L L. 307, 312–14, 316–19 (2009).

280. Cassese, *supra* note 197, at 653.

281. *Id.*

282. *Tadić* Appeals Judgment, *supra* note 195, ¶¶ 125–30.

283. Cassese*, supra* note 197, at 654.

284. *Tadić* Appeals Judgment, *supra* note 195, at ¶ 120.

ensure that States were not unfairly accountable for *ultra vires* acts of those agents.[285]

Intuitively, a rule requiring control over "specific operations" also unnecessarily cabins the rule only to violations of IHL which occur in the context of "operations" more generally. Take, for instance, violating the right to due process for detainees—what "specific operation" could a court reasonably identify as the source of that violation? This highlights the difficulty that the Court may encounter in finding attribution through Article 8 in future cases, in two types of circumstances in particular: (1) where the wrongful conduct in question is an *omission*, rather than a positive act, and (2) where the wrongful conduct takes place outside the context of armed conflict, in which defining "specific operations"—and placing the conduct in the context of such an operation—is not applicable.

The policy argument, Cassese concludes, in favor of applying the overall control test is highlighted by the troubling international trend of States providing substantial support to armed non-State actors engaged in conflicts abroad; without a means within the laws of attribution to hold those enabling States accountable, it "may lead to full-blown international armed conflicts or at any rate to serious threats to peace and security."[286]

The al-Hol camp perfectly encapsulates the very threat to peace and security that Cassese envisioned back in 2007; with no clear means of "making supporting states answerable for violations of international law by the armed groups,"[287] as Cassese urges, the camp and its inhabitants have been left to languish in the desert. Meanwhile, ISIS continues its attempts to recruit and regrow its membership from within the camp.[288] Were the Court to revisit the law on attribution in the context of the camp, there are plausible arguments grounded in both customary law and policy that might persuade the Court to reconsider its current position.

CONCLUSION

The situation in al-Hol presents a formidable legal challenge when it comes to articulating a viable theory of State responsibility—not just with respect to the United States, but for *any* State actor.

285. Cassese, *supra* note 197, at 657.

286. *Id.* at 665.

287. *Id.*

288. *See supra* notes 73–79 and accompanying text.

Though the theoretical paths to accountability laid out above are clear enough, the practical viability for each is difficult, if not impossible, to evaluate without resort to rank speculation. On the one hand, reversing course from prior ICJ opinions and displacing the "effective control" test with its "overall control" counterpart seems highly unlikely given the Court's resistance to reversing its own judgments.[289] On the other, expanding the conception of State responsibility to encompass the conduct of non-State actors (which would be, to many, an explicit departure from the text of the ASR) would likely incur a great deal of pushback from States like the United States, and render international buy-in for the ASR even more fragile, given its non-binding status.[290] As such, it is difficult to envision a viable path for either of these options to be recognized as binding custom, at least in the near term.

On top of these challenges, several other procedural, legal, and policy hurdles would remain. The avenues for adjudication are few and far between, particularly for IHL claims. The only international tribunal which hears claims of State violations of IHL is the ICJ. The Inter-American Court of Human Rights, whose jurisdiction the United States has not recognized,[291] only considers applications and interpretations of the American Convention on Human Rights,[292] to which the United States is not a party[293]—though even if it were, claims of violations would run into the same obstacles regarding the extraterritoriality of those human rights obligations articulated in Part II.[294]

A second obstacle is the issue of standing. The AANES could not bring a claim on behalf of the detainees for two reasons. Lacking recognition as a State, the AANES is likely not entitled to bring *any* claims before the Court per Article 34(1) of the Court's Statute.[295]

289. *See supra* notes 274–278 and accompanying text.

290. *See supra* notes 169–171 and accompanying text.

291. *The Practical Guide to Humanitarian Law, Inter-American Court of, and Commission on, Human Rights*, MEDECINS SANS FRONTIÈRES, https://guide-humanitarian-law.org/content/article/3/inter-american-court-of-and-commission-on-human-rights/ [https://perma.cc/T3K9-GGSF] (last visited Oct. 31, 2022).

292. Statute of the Inter-American Court of Human Rights art. 1, Oct. 1, 1979, 1 O.A.S.T.S. No. 88.

293. Inter-Am. Comm'n H.R., *B-32: American Convention on Human Rights ("Pact of San Jose, Costa Rica") Signatories and Ratifications*, https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm [https://perma.cc/MGQ9-AC7Z].

294. *See supra* notes 202–206 and accompanying text.

295. Statute of the ICJ, *supra* note 171, art. 34(1). It is important to note that the question of whether entities potentially satisfying the objective criteria of statehood in the Montevideo

Even if the AANES could bring a claim, would they even be entitled to bring a claim on behalf of the detainees? The AANES can assert no diplomatic protection over the detainees since they are citizens of other States—States which under no circumstances are likely to bring a claim on behalf of citizens they are attempting to disown.[296] Nor could the AANES, logically, bring a claim for the primary violations of international law *they themselves* are technically perpetrating. Instead, a third State would have to bring these claims as obligations *erga omnes*, meaning obligations owed not just to a specific State, but to the international community as a whole.[297]

Even beyond the technical jurisdictional wrangling necessary to get this case in front of the ICJ, a broader issue is at stake: If providing aid could expose a State to legal liability, would enforcing these laws do more harm than good? What could disincentivizing the United States from providing *any* aid whatsoever to the management of the camp possibly do to improve the situation? Surely, the conditions of the camp would only deteriorate further without such assistance.[298]

All of which leads to the same dead end: So what? So what if there are explicit violations of international humanitarian and human rights law occurring in the camp? And why try to attribute them to a particular State, especially one like the United States, which not only

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Convention, see *supra* note 109, are nonetheless entitled to bring claims before the Court is in itself a contentious question generating a body of international legal literature on the topic. *See, e.g.*, Charles F. Whitman, *Comment: Palestine's Statehood and Ability to Litigate in the International Court of Justice*, 44 CAL. W. INT'L L.J. 74 (2013); Jure Vidmar, *Palestine v United States: Why the ICJ Does Not Need to Decide Whether Palestine is a State*, EJIL: TALK! (Nov. 22, 2018), https://www.ejiltalk.org/palestine-v-united-states-why-the-icj-does-not-need-to-decide-whether-palestine-is-a-state/ [https://perma.cc/XAL2-V4LK].

296. *See supra* note 18 and accompanying text.

297. *See* Barcelona Traction, Light and Power Co. (Belg. v. Spain), Second Phase Judgment, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5). Examples of such obligations might include violations of *jus cogens* (i.e., "peremptory norms"), though an exhaustive list of violations which constitute breaches of *jus cogens* norms is not settled. *See* MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* 48 (1997). However, the ILC's Special Rapporteur on Jus Cogens, Dire Tladi, has recently published the Commission's most recent report on peremptory norms of general international law, which included a "non-exhaustive list" of eight potential substantive norms. *See* Int'l Law Comm'n, Fifth Rep. on Peremptory Norms of General International Law (Jus Cogens), U.N. Doc. A/CN.4/747, at 66 (2022). Some scholars have asserted that certain procedural fair trial rights have risen to the level of peremptory norms, see Anthony Colangelo, *Procedural* Jus Cogens, 60 COLUM. J. TRANSNAT'L L. 377, 383–85 (2022), which could potentially be invoked in the case of the women indefinitely detained without trial in the camp.

298. *See supra* Section I.B.2.

appears detached from the violations themselves, but is one of the few States invested in improving conditions?

The answer is that, without the international community pushing to close this "accountability gap"[299] in the rules of State responsibility, these problems will remain unresolved. As frustratingly and imperceptibly slow as it may be, international law is built, at least in part, off the body of literature generated and refined by international legal scholars.[300] This Note has, admittedly, offered no new theories of attribution, but rather applied existing (but progressive) interpretations of attribution previously articulated by those scholars to new facts. What this Note makes clear is the necessity of reinforcing the customary status of complicity as a means of attribution for non-State actors, as well as further articulating the legal tests required under ASR Article 8 so as to guarantee that the international community does not create yet another detention camp resting in the limbo of a "legal black hole."[301] There will undoubtedly be future armed conflicts with complex international and non-international characteristics, leading inevitably to complex legal questions surrounding the detention of those

299. Hathaway et al., *supra* note 188, at 554.

300. *See generally* Sandesh Sivakumaren, *The Influence of Teachings of Publicists on the Development of International Law*, 66 INT'L & COMP. L.Q. 1 (2017).

301. *See* Aoláin & Charbord, *supra* note 28 (referring to the ECtHR decision in *H.F. and Others v. France* regarding France's obligations to its citizens in al-Hol as "reintroduc[ing] human rights protection, lawfulness, and the rule of law into what has essentially been a legal black hole"). For references to Guantánamo Bay, see generally Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1 (2004); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror*,*"* 87 INT'L REV. RED CROSS 39 (2005).

involved.[302] That does not mean there needs to be yet another Guantánamo.[303]

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302. The Russian invasion of Ukraine in February 2022 and the resulting armed conflict highlights the urgency of this question. The status of persons participating in hostilities, and thus the applicable rules of detention, has already created some controversy, particularly as it relates to (1) foreign fighters who have joined the Ukrainian International Legion, (2) foreign individuals and entities fighting on behalf of Russia, including the Wagner Group, and (3) Russian-backed separatists (who are also Ukrainian nationals). *See* Tanya Mehra & Abigail Thorley, *Foreign Fighters, Foreign Volunteers, and Mercenaries in the Ukrainian Armed Conflict*, INT'L CTR. FOR COUNTER-TERRORISM (July 11, 2022), https://icct.nl/publication/foreign-fighters-volunteers-mercenaries-in-ukraine/ [https://perma.cc/GVL2-UXDG]. Russia claims that foreign members of the Ukrainian legion are "mercenaries" and thus "unlawful combatants" ineligible for POW status if captured. *See* David Malet, *The Risky Status of Ukraine's Foreign Fighters*, FOR. POL'Y (Mar. 15, 2022), https://foreignpolicy.com/2022/03/15/ukraine-war-foreign-fighters-legion-volunteers-legal-status/ [https://perma.cc/2Z6P-BSR5]. However, several legal experts challenge Russia's characterization, arguing instead that these fighters are combatants qualifying for POW status under the Third Geneva Convention. *See, e.g.*, Petra Ditrochová & Veronika Bílková, *Status of Foreign Fighters in the Ukrainian Legion*, ARTICLES OF WAR (Mar. 15, 2022), https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion/ [https://perma.cc/N67H-J9WZ].

303. *See* EUROPE'S GUANTANAMO, *supra* note 49.

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