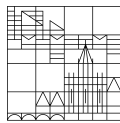


STATING THE OBVIOUS?

How do International Law theories on State and Belligerency recognition characterise the Islamic State?

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“If we like them, they’re freedom fighters, [...]. If we don’t like them, they’re terrorists. In the unlikely case we can’t make up our minds, they’re temporarily only guerrillas.”

– Carl Sagan, Contact

ABSTRACT

The Islamic State has been described as one of the worst terrorist organisations in modern times. The United Nations Security Council has also put ISIS on the same terrorist resolution as al-Qaeda. At the same time, the Islamic State has, in comparison to other terrorist organisations, demonstrated state-like functions in the territories of Syria and Iraq even if no state has recognised it as such. This thesis examines whether and how the existing international law theories on recognition characterises the Islamic State. Through the methodology of congruence analysis the thesis formulate frameworks of the declaratory theory, the constitutive theory and the belligerency theory. These frameworks are applied, through a single case study, on the crucial case of the Islamic State. The result indicates that the constitutive theory cannot characterise ISIS as a state while the belligerency theory is not applicable in this case. The declaratory framework characterise ISIS as a state but cannot explain why it has not been recognised. This thesis can conclude that the dominant legal theory of declaratory recognition is surpassed by the policy driven constitutive theory.

Keywords: Statehood, the Montevideo Convention, Recognition, the Constitutive Theory, the Declaratory Theory, Recognition of Belligerency, the Islamic State, ISIS, IS

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1. INTRODUCTION

ISIL is certainly not a state. [...] It is recognized by no government, nor the people it subjugates. ISIL is a terrorist organization, pure and simple.

– Barack Obama, former US President¹

It's a state and not a group. We aim to build an Islamic State to cover every aspect of life.

– Abu Mosa, the Islamic States Press Officer²

Although they [ISIS] were not recognized as a state or a country they acted like one.

– Ahmed Ramzi Salim, shopkeeper in Tel Kaif³

Daesh, ISI, ISIL, ISIS, IS, terrorist organisation or the Islamic State⁴. It proclaimed its Caliphate in 2014 but started a slow diminish in the beginning of 2016. As the quotes above display, the understanding of how this organisation is defined diverges extremely depending on who answers the question. Even so, not a single state has recognised ISIS, instead the United Nations Security Council issued resolution 2253 in 2015 assigning ISIS to the same terrorist list as al-Qaeda (UNSC, 2015a). However, when Abu Bakr al-Baghdadi announced himself as the Caliph of the Caliphate on the 29th of June 2014 in Mosul, Iraq, ISIS already held a large part of Iraq's territory (Bacchi, 2015). More than 40,000 people from a 100 countries have joined IS since then (Callimachi, 2018e; Danner, 2015) and by 2014 ISIS controlled a population of 6 million people (Cockburn, 2015:27). IS were also shaping governmental organs, it settled legal disputes through a judicial system, took in tax revenues from its citizens, enforced moral law with patrolling police officers, pumped up oil, gave economical support to families and issued ID cards (Cambanis & Collard, 2015). Additionally, it was the first defined terrorist organisation to declare a Caliphate, something that not even Osama bin Ladin did during his time (Barbaro, 2019a), and several other terrorist groups such as Boko Haram declared allegiance to ISIS as enclaves (Boffey, 2015; Bazcko et.al. 2016:29). With this in mind the issue of IS statehood is not a question of morality. Instead, it is a question of the

¹ The quote comes from President Obama's TV address on ISIS to the American people on the 10th of September 2014 (Obama, 2014).

² Vice News travelled to the Islamic State to make a documentary about ISIS in 2014 and was shown around by IS Press Officer in Raqqa (Dairieh, 2014).

³ Interview with a shopkeeper in Tel Kaif, Iraq by the New York Times soon after the town was freed from ISIS (Prickett, 2018).

⁴ This thesis will use the acronyms *IS* or *ISIS* when referring to the Islamic State. The decision not to use Daesh is since the research regards the question of statehood and not the question of terrorism.

conflict between policy and law and if international law can address the question of ISIS potential for recognition. To be able to adhere to the recognition for IS one initial question has to be asked: Which theories on recognition can be used to characterise the Islamic State?

Within international law there is one document, the Montevideo Convention on the Rights and Duties of States from 1933, holding the most accepted legal definition of statehood (Shaw, 2003:178; Grant, 1999:403). However, in the so-called ‘great debate’ the discussion lies between legality and policy through two different theories. The *declaratory theory’s*, or the status-confirming theory’s, standpoint is legal and framed from the Convention’s definition. Recognition is quite straightforward, when an entity upholds the Convention’s legal criteria of statehood it is a state (Talmon, 2005:101;105-106). This provision is also underlined by the Convention’s Article 3 where “[t]he political existence of a state is independent of recognition by the other states”. The *constitutive theory’s*, or status-creating theory’s, standpoint is instead based on policy. States has to formally recognise a new entity for statehood to occur, legal criteria alone are not enough. By refusing recognition an entity cannot take official part in the international community of states or claim the right to be addressed as a legal person under international law (Talmon, 2005:101-103).

In this distinction between policy and law on statehood recognition, there is an additional level of recognition that has to be addressed, which is the question of armed groups. When discussing the potential for recognition “insurgent movements may well enjoy it to a greater degree than the governments against which they are fighting” (Clapham, 1998:152). This addresses the importance of differentiating between a state and a belligerent fighting an established regime. By regarding an armed group as a belligerent brings attention to the Law of Armed Conflict (LOAC^A) and in extension the international law theory, *recognition of belligerency*. This theory does not debate the question of statehood but rather the capacity of an armed group to wage war as a state (Beale, 1896:406) a consideration that can become important to understand ISIS.

Clearly, not a single state has recognised ISIS potential statehood or its potential for belligerency. This brings forth the inherent dilemma of recognition namely the conflict between policy and law. During IS’s peak between 2014 and 2016 (Specia, 2019; Chulov 2019; Barbaro, 2019b; Moorcraft, 2018; BBC, 2019) factual evidence from inside its territory points towards the question of the Islamic State’s *legality*. The *policy* however, has undoubtedly been set by resolution 2253. Even so, when France invoked the mutual defence clause of the European

Union's (EU) Treaty, after the attacks on Paris in 2015, it questioned this perspective because the invoked article refers to the right to respond to an attack performed by another state, not a terrorist organisation (ECFR, 2015; Milanovic, 2010). This might therefore render the question of *de facto*^B recognition for the Islamic State.

Hence, the thesis departs from the inherent tension between legality and policy. In the absence of recognition, the question remains if what the Islamic State's generated between 2014 and 2016 is enough to characterise it as a state from a legal perspective. Or if it instead can be argued that ISIS ends up in somewhat of a grey area between the borders of statehood and belligerency. The central question is therefore whether the existing international law theories on recognition can be used as a method in determining the character of the Islamic State. Through the methodology of congruence analysis (CON) the three theories of declaratory, constitutive and belligerent recognition will be formulated into frameworks, broken down into clear characteristics, which will be applied upon the crucial case of the Islamic State. The result will indicate to what extent, partially or fully, the theories can formulate the characteristics of ISIS.

This thesis will start by asserting specific considerations important for the understanding of international law and then formulate the legal criteria for statehood and the legal criteria for recognition of belligerency. The formulated legal criteria will be continued by the theoretical frameworks, which will be outlined through two matrixes portraying characteristics codified as questions for the empirics. After the thesis methodology and research questions are specified, each theory's framework with questions will be applied on the empirics to indicate to what extent the theories can characterise the Islamic State.

1.1. GENERAL CONSIDERATIONS ON THE CREATION OF STATES

In the creation of new states there are frameworks within international law that can force states to act in a certain way or disclaim new entities the status of recognition. The thesis will not consider these legal norms and regulations because they stand outside the theories frameworks. However, they have to shortly be addressed to understand why this is the case.

1.1.1. *Jus cogens & self-determination*

A state's creation can be in breach of what is called *jus cogens*, or peremptory norms and such a breach would disqualify a potential state from recognition. It is Article 53 of the Vienna

Convention on the Law of Treaties (VCLT) from 1969 outlines *jus cogens*^C. In essence *jus cogens* means that something not written into law still can be compulsory for states to act in accordance with. The International Law Commission (ILC) specifies eight^D separate breaches of *jus cogens*, for example the prohibition of slavery and slave trade (ILC, 2006:189). Even if the VCLT concerns treaty law it can still be applied upon state's actions (Crawford, 2006:105), which also disqualifies the Islamic State's right to statehood due to the use of torture^E and use of force. Yet, "[t]here is no rule against [domestic] rebellion in international law" (Shaw, 2003:1040) and *jus cogens* or other legal considerations are not additional legal criteria for statehood (Worster, 2009:154-156). Additionally, the United Nations (UN) has not, at least until 2005, declared a state in breach of *jus cogens* (Talmon, 2005:138). Hence, "[i]f an entity satisfies the formal actual requirements of a State, to contend that it does not exist is unrealistic and absurd" (Talmon, 2005:135). Bangladesh, for example, was created in breach of the use of force, yet within three month 90 countries had recognised it (Dixon, 2013:123). Accordingly, *jus cogens* will not be taken into account since it is not a criterion for statehood, states have been created in breach of it, and the UN has not consider norm breaches illegal acts in states creations.

Self-determination takes its standpoint from 'peoples' will to gain independence through secession from an established state, for example former colonial states. However, applying it would demand defining who the 'peoples' are, their connection to a certain territory, and if they are being ruled in an oppressive way before considering the criteria of statehood (Dixon, 2013:121-122). Nevertheless, as with the *jus cogens*, self-determination and secession are questions standing outside the theories' framework making them inessential for the formation of the theories.

2. THE FRAMEWORKS OF RECOGNITION

While the constitutive theory is formulated from political considerations the declaratory and belligerent theories incorporates legal criteria. These criteria are in essence political considerations formulated into law through historical cases. Hence, to be able to characterise the theories' frameworks the legal criteria has to be defined first. This section will therefore discuss and define each legal criterion by using case law.

2.1. THE EVOLVEMENT OF STATEHOOD

The debate surrounding statehood has been going on since before the Westphalia Peace Treaty in 1648 and by signing the states consolidated the powers as sovereigns and their connection to their territory. By the nineteenth century recognition, without legal criteria, became a perquisite for acceptance into the international community (Crawford, 2006:10-16). With a policy driven recognition European states could enhance their imperial acquisition around the world by neglecting recognition of statehood to other entities. During the twentieth century, particularly after the First World War, objective legal criteria for recognition were sought, preventing European states to refuse statehood (Grant, 1999:448-449). However, even if the perquisites for statehood has evolved since 1648 there are still to this day no legal definition on what a 'State' is within international law (Crawford, 2006:28-31; Grant, 1999:408).

Several attempts have been made to define states, statehood and recognition, although the results have been insufficient. In 1949 the ILC "concluded that no useful purpose would be served by an effort to define the term 'State'" (ILC, 1949:289). Furthermore, even if concerns were raised within the ILC towards the Montevideo Convention (Grant 1997:653) it still stated, "the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph" (ILC, 1949:289). Whether the reason was a 'brief paragraph' or because the ILC thought it was not "called upon to set forth... the qualifications to be possessed by a community in order that it may become a State" (ibid) is not clear. This unwillingness also continued in the drafting of the VCLT, and in the drafting for the articles on Succession of States in respect of Treaties of 1978 (Grant 1997:653). Neverthe-

less, being a body of international law is different from a transnational organisation. James Crawford (1977:108) pinpoints five characteristics, which in the end outline what can be called the personality of states (Dixon, 2013:117). In sum, State's personality represents the individuality of each state by their ability to act or choose not to act within the international system of states under international law. However, this only underlines already established states, the future question is what legal aspects are needed to become a state.

2.2. THE LEGAL CRITERIA FOR STATEHOOD RECOGNITION

The criteria of the Montevideo Convention were established in 1933 and are, to this day, the one document referred to when the status of new entities are discussed (Shaw, 2003:178; Grant, 1999:403; Crawford, 2006:45-46). The criteria are formulated under Article 1:

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

At the same time there are some questions surrounding the Montevideo Convention. The main issue is the continuing suggestion of amendments to the original four criteria (Grant, 1999:447). However, many writers have agreed that the idea of independence is critical for statehood, even if its precise definition still is debated (Grant, 1999:437-438; Crawford, 2006:62) and similar aspects have been raised about effectiveness (Dixon, 2013:120). Independence and effectiveness will be discussed later on. The focus will be put on the four basic criteria of statehood in accordance to Article 1 of the Montevideo Convention and they will be illustrated and discussed through international law cases.

2.2.1. *A defined territory*

Most of today's countries have evolved through their connection to territory simply because "[w]ithout territory a legal person cannot be a state" (Shaw, 2003:409). With the meaning of a *defined* territory some more aspects have to be considered. Firstly, the size of the territory is one aspect that does not seem to matter, it is enough to look at the Vatican as the smallest territorial entity or Russia as the largest one (Crawford, 2006:47). Instead the question of defined is referred back to *when* the territory is defined.

The so-called Deutsche Continental Gas-Gesellschaft case concerned whether or not the Polish state could liquidate property in former Russian territory, which after the Peace Treaty

in Versailles in 1919 had become Polish. At the time of the liquidation the question was when and if the territory of Poland could be considered Polish (Grant et.al., 2009:151-152). In a statement issued by the German-Polish Mixed Arbitral Tribunal in 1929 it was stated (Lauterpacht, 1935:15; Crawford, 1977:113):

In order to say that a State exists ...it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.

In a meeting held in December of 1948 in the UNSC similar aspect where raised when the admission of Israel to the UN was debated. The Ambassador of the United States (US) argued that Israel's lack of proper defined territory were not an issue for statehood (UNSC, 1948:11; Crawford, 1977:112):

One does not find in the general classic treatment of this subject any instances that the territory of a State must be exactly fixed by define frontiers. We all know that, historically, many States have begun their existence with their frontiers unsettled ...but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory.

Almost 20 years later the North Sea Continental Shelf Cases from 1969 concerning uncertain territorial properties was brought to the International Court of Justice (ICJ). The dispute involved how access to the North Sea should be divided between Germany, Netherlands and Norway. Germany argued that the length of the coastline should be in proportion to the distribution of the sea and not by distance to it, Germany was later granted most of the territorial area it requested (ICJ, 1969). The ICJ made the following point (ICJ, 1969:33; Crawford, 1977:113):

The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not.

This reasoning by the ICJ was drawn from an advisory opinion in the Permanent Court of International Justice (PCIJ) concerning Albania and particularly referred to 'long periods'. Albania's borders were for a long time never established because of the outbreak of the First World War, even if the state of Albania was established in 1914 under the Prince of Wied (PCIJ, 1924:10).

For an entity to establish the criteria of ‘defined’ territory (1) size does not matter, (2) borders do not have to be exactly defined, (3) absence of exact borders for a long period of time is of no concern, but (4) a state cannot exist without a territory that lack sufficient consistency over time.

2.2.2. A permanent population

The question of population is not of concern since numbers can vary extremely between countries (Crawford, 1977:114). Rather the concern is what is implied with a *permanent* population and if it stipulates that the population have to be permanently living in the area (Dixon, 2013:119).

The ICJ raised this question in an advisory opinion in the Western Sahara Case in 1975. When Spain obtained Western Sahara during the colonial era, the people of the territory were nomadic (Dixon, 2013:119). Since there were no authority, and the people were moving freely over vast areas of land without regarding boundaries, they could not be considered as a permanent population and the land was therefore *terra nullius*^F (ICJ, 1975:30-31). Yet, the Court declared that there was no status of *terra nullius* (ibid 31):

[T]he information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.

The ICJ also pointed out that the King of Spain had made agreements with the head of the different tribes in the area (ibid) and therefore, despite being nomadic, the tribes and its people can be considered as permanent (Dixon, 2013:119).

Clearly, the population of a territory does not have to be permanently fixed to a specific area, but the meaning of who the population is still uncertain. In 1930 the PCIJ where asked for an advisory opinion in the case of the Greco-Bulgarian Communities. One of the issues was how the term community were to be understood in relation to minorities in their countries (PCIJ, 1930:5). The Court defined communities as (PCIJ, 1930:21; Grant, 1997:637):

[A] group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.

Additionally, these communities defined by the PCIJ, are not to be seen as a fixed set of people but rather as a group in continuing transformation through the emigration of old members and the assimilations of new members into the community (PCIJ, 1930:33).

The prospect for determining a permanent population is that (1) the number of people does not matter, (2) a population can move freely, whether its nomadic or through migration or immigration, and (3) there should be some connection to the territory the population inhabits, whether its through traditions, languages, race or religion, as long as there is an aspiration to preserve these things for future generation.

2.2.3. Government

With territory and population there is still a need for an authority acting on behalf of the them: “an act of a State is defined primarily by reference to its organs of government, legislative, executive or judicial” (Crawford, 2006:56). Now, two concepts come into play when government is discussed, namely independence and effectiveness. The power of the government can therefore be divided into two parts, firstly, the internal *effective* exercise of authority towards its own territory and population, and secondly, the right to exercise that authority *independently* from external influence of other states (Crawford, 2006:55-57). This entails that “[i]nternally, state authorities have a monopoly on collecting taxes from the inhabitants of the country and, in return, provide basic services to the population, such as welfare and security; *externally*, they are recognized as the sole representative of the nation in international fora” (Kolstø, 2006:724, emphasis added). Yet, as mentioned earlier, independence and effectiveness is not the only additional criteria suggested to the Convention’s concepts over the years. As Grant (1999:447) expresses it: “It is difficult to distill from contemporary opinion one set of universally accepted addenda to the Convention; but opinion exists that the traditional definition is incomplete, and the extent of that opinion is noteworthy.”

Noteworthy indeed, but as Grant (1999:438) points out himself is that there seems to be a consensus that the basic idea of independence is seen as “critical criterion of statehood”. Furthermore, even if Grant arguably challenges the prospect of effectiveness, at least after 1976^G, effectiveness seems to have been used as a criterion for recognition of the old republics of the Soviet Union (USSR) when it dissolved (Grant, 1997:648). Thus, despite a continuing debate about additional criteria for statehood, the thesis will incorporate effectiveness and independence in the description of the Montevideo Convention.

2.2.3.1. Effective government

It is important for a state to have an effective government exercising authority over its territory even if it can be hard to highlight exactly when a government is effective. Clearly though is that the government does not need to have a superior authority in its territory in every aspect, it can be enough to have capability of control (Dixon, 2013:120). To pinpoint these requirement one particular case stands out, the Aaland Island Question of 1920 (Crawford, 2006:58).

The Council of the League of Nations (LoN) referred the case to the Commission of Jurists who were suppose to answer whether the Aaland Island belonged to either Sweden or Finland and, secondly, if Aaland should be a demilitarised zone or not (LoN, 1920:3). Yet, the Commissions advisory opinion also discussed the authority of Finland because “the conditions required for the formation of a sovereign State did not exist” (ibid 8). Between the years of 1809 until 1917 Finland was an autonomous part within the Russian empire, but after the Russian revolution Finland declared its independence since it was entitled self-determination (ibid 7-8). However, after stating its independence Finland still had a questionable effective authority (LoN, 1920:8; Crawford, 1977:118):

Political and social life was disorganised; the authorities were not strong enough to assert themselves; civil war was rife; further, the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party, and the Government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and Russian troops, and after a time Germans also, took part in the civil war between the inhabitants and between the Red and White Finnish troops.

For the Commission it seemed that it was not until May of 1918 when the civil war came to an end that the Finnish Republic started a political and social normal strive to be a state (LoN, 1920:9; Crawford, 1977:118):

It is, therefore, difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.

What has to be noted is that effectiveness in some part goes hand in hand with independence. To a degree the Aaland Case raises this question because Finland had both German and Rus-

sian troops, but also Swedish one's on its territory (LoN, 1920:12). The distinction between independence and effectiveness will become clearer further on, nevertheless what is important to put forward on effectiveness is the following, (1) political and social life has to be stable, (2) the government have to be able, with force if necessary, to assert this political and social life in the state, and (3) the government have to be able to carry out its duties set up by the political and social life, for example through taxations and with them provide basic services.

2.2.3.2. Independent government

If effectiveness is the internal sovereignty of a state, independence is its external counterpart. James Crawford (2006:62-89) provides a long detailed debate on the context of independence suggesting several different and nuanced aspects to incorporate into independence. Yet, as noted above by Grant: the *basic* idea of independence seems to be proposed as a criterion. A more general aspect of independence will therefore be introduced, rather than the detailed description that Crawford upholds.

Independence, as external sovereignty, lies upon the aspect that every state has the right to choose in what way and by which means it runs its internal affairs through culture, political and economical systems. The organisation of internal affairs, such as legislative issues and jurisdiction, should therefore not be interfered by other actors (Talmon, 2005:150). If there is interference by outside actors in internal matters of a state, that state might become a so-called "puppet-state" (Crawford, 2006:63).

The Customs Régime between Austria and Germany from 1931 draw attention to this matter (ibid). The PCIJ was asked for an advisory opinion concerning a customs union between Austria and Germany and whether the union would be possible in relation to the regulations set up under Article 88 of the Peace Treaty of Saint-Germain from 1919 (PCIJ, 1931:5). Austria needed consent from the League of Nations if any of its measures would affects its independence (ibid 9). Judge Anzilotti, one of the judges on the case, agreed with the Courts decision but made a separate opinion on the case. In it he discussed and defined his view on independence as (PCIJ, 1931:24-25; Crawford, 2006:65):

a... State... not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as... *external sovereignty*, by which is meant that the State has over it no other authority than that of international law... It follows that... the restrictions upon a State's liberty, whether arising out of ordinary international law or contractual engagements, do not as

such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State...

Judge Anzilotti also explains Crawford's term puppet-states as the relationship between an inferior state and its superior where the inferior is an "abnormal class of States known as 'dependent States'" (PCIJ, 1931:25). This relationship of dependency takes its intent in an inferior state constraining itself to the legal burden put upon it by a superior state (ibid).

Now, in reference to the problem of interconnectedness between effectiveness and independence, its division lies in effectiveness referent to the internal affairs and how effective the state is functioning inside its territory, while independence is the external protection of the right to exercise that effect without external influence. In the Aaland Case, both effectiveness and independence was put into question. Finland both lacked effective control over its territory and lacked independence because of the foreign troops present on its territory.

Two characteristics of independence can be noted from what has been mentioned above, (1) every state should have authority over its own territory without external influence, and (2) the restrictions put upon a state's own liberty by international law or through other engagements do not affect the factual independence of a state as long as the state choose to do so.

2.2.4. Capacity to enter into relations with the other states

The fourth and last criterion of the Convention has a two-sided divide in its interpretation. On the one hand capacity is seen as the consequence of upholding the first three criteria of the Convention, rather than a prerequisite for statehood (Grant, 1999:434; Crawford, 2006:61; Talmon, 2005:117). On the other hand capacity is regarded as a part of independence and therefore capacity to withhold outside influence (Dixon, 2013:120-121; Shaw, 2003:181). Yet, since the criteria of independence and effectiveness has been introduced in 'government' it falls in its own place that "capacity to enter into relations with other States... is a conflation of the requirements of government and independence" (Crawford, 1977:119). Additionally, the capacity to enter into relations with other states is not something distinctive for states. Most types of international organisations or non-recognised entities have the ability to make treaties with states (Talmon, 2005:117) and therefore, "[e]ven if capacity were unique to states, the better view seems to be that, though capacity results from statehood, it is not an element in a state's creation" (Grant, 1999:435).

Moreover, even if there is a capacity to enter into relations with other states there is nothing forcing any state to do so. Alison Eggers (2007:219) clarifies this point in the case of recognition of Somalialand. The importance is not whether or not a state has factual *relations* with other states but rather if they have the *capacity* to do so. If then, accordance to the above paragraph, a state has fulfilled the first three criteria then they have also gained the fourth criterion of the Convention, and can thereafter choose to enter into relations.

The fourth criterion can therefore be understood as (1) capacity is not an element for the creation of statehood but rather its result, and (2) it is not implied that a state has to have factual relations with other states but it should be able to have the essential means to enter into such relations if the state finds it necessary to do so.

2.3. OUTLINING STATEHOOD RECOGNITION THEORY

With the legal framework for the declaratory theory formulated above it is time to characterise how the two statehood theories, declaratory and constitutive, acknowledges the legal personality of a new entity and whether or not it is based upon political or a legal attributes.

2.3.1. *The 'Great Debate' of Statehood Recognition*

The declaratory theory affirms legal criteria as objective means for recognising a state, without legality a universal recognition might be undermined and leave the question of the entity's statehood in borderline (Worster, 2009:128). However, there are concerns, firstly state practice does not necessarily support it. Secondly, there is nothing suggesting that the Montevideo Convention's criteria are accurate since including additional criteria are rule rather than exception. There is also the tendency to apply different criteria to different states as the European Community's Guidelines^H demonstrated in the case of former Yugoslavia (ibid 119). Nonetheless, the Montevideo criteria are the most accepted legal principles when it comes to recognition and statehood, simply because "we are faced with a fact, an organized status the existence of which seems to it indisputable. We recognize it because it exists," (Lauterpacht, 1944:424)⁵ "we do not recognize nothingness" (ibid 423)⁶.

⁵ The quote is originally in French and translated with Google translate: "Quand un gouvernement étranger reconnaît un nouvel Etat il constate, par là même, qu'on se trouve devant un fait, un statut organisé dont l'existence lui paraît incontestable. On le reconnaît parce qu'il existe".

⁶ The quote is originally in French and translated with Google translate: "On ne reconnaît pas le néant".

The constitutive theory, on the other hand, is policy oriented, an entity can only gain its international personality through recognition by other states, but the entity might still exist *de facto* even if its aspirations for statehood are not acknowledged. This means that its existence is accepted but restrains the entity from acting within the international community as a fully functioning state (Worster, 2009:136-137). This state-centric perspective also results in the most common problem of the theory, its relativism (Dixon, 2013:136; Lauterpacht, 1944:458; Crawford, 1977:102; Talmon, 2005:102). The recognition of Israel in 1948 pinpoints this relativism when the US granted Israel *de facto* recognition, the USSR granted *de jure* recognition, while the Arab states refused recognition (Briggs, 1949:119). This raises additional questions, firstly, to become a state how many states have to recognise it? Secondly, exists the state only in relation to the recognisers? Thirdly, does facts on the ground matter or is it an absolute policy choice? (Sloane, 2002:117). Despite this, it is clear that the theory adhere to one aspect: “[T]he act of recognition as such is not a matter governed by law, but a question of policy” (Lauterpacht, 1944:386).

2.3.2. Declaratory – the practice of the status-confirming theory

To gain the legal status of statehood the new entity is not dependent upon other states recognition, instead it is about fulfilling the legal criteria of statehood and by doing so being confirmed (or declared) as having statehood (Dixon, 2013:132-133).

In the Aaland case, Finland declared its independence in 1917 and got recognised by several states in a short period of time. Yet, since there was issues with Finland’s effective control the judge declared: “these facts [of recognition] by themselves do not suffice to prove that Finland, from this time onwards, became a sovereign State” (LoN, 1920:8; Crawford, 2006:24). Even if Finland’s recognition started out as constitutive the recognition became declaratory because the Judge stepped in and determined that legality is a prerequisite for recognition. Finland’s unfulfilment of effectiveness constrained it from statehood during that that particular time.

In 1948 the United Nations General Assembly (UNGA) signed a resolution on the separation of Korea. It declared that the Republic of Korea was the only government elected in the territory and that UN members should work towards a unification of the whole territory under that established government (UNGA, 1948:25-27; Crawford, 2006:60). However, since the governing regime of the Democratic People’s Republic of Korea (DPRK) showed effective con-

trol over its territory the Security Council recommended in 1991 that DPRK should be admitted to the UN as a full member and UNGA admitted DPRK the same year (UNGA, 1991; UNSC, 1991:46; Crawford, 2006:60). Nevertheless, already in 1973 the Swedish government decided to open up diplomatic relations with DPRK and established formal presence with an embassy in 1975 (Regeringskansliet, 2019). It is unclear if Sweden's early delegation to DPRK was based on the declaratory theory, such facts has to be reviewed more closely. However, it could indicate that Sweden saw the legal criteria of statehood established long before the UN chose to review it. Nevertheless, UN's admittance was based on a legal declaration of DPRK.

The theory is quite straightforward, either the legal criteria are fulfilled or they are not. In light of this the declaratory theory can be summarised as follows:

- 1) The theory is based upon *legal* criteria laid down in international law. The formulation of these criteria is debated but there exist somewhat of a general consensus that the legal criteria for statehood are formulated in the description of the Montevideo Convention.
- 2) These legal criteria must be upheld by a new entity and as soon as these conditions are fulfilled, the entity starts to exist as a fact, and in extension as a subject of, and a subject to, international law.
- 3) The recognition of the new state is merely an act of declaration of existing legal facts in the particular case. Recognition has no legal affect or influence of the factual existence and will not in any way change the outcome of that reality.

2.3.3. *Constitutive – the practice of the status-creating theory*

An entity becomes a legal person, not because it upholds certain legal criteria, but because already existing states *chooses* to acknowledge, by stating (or creating), its existence through recognition (Sloane, 2002:116-117). In practice, this becomes apparent in relation to the history of the US (Worster, 2009:142):

Foreign policy decision makers have utilized recognition in myriad ways, depending on the political circumstances of the time and their perception of the national interests involved in a change of government. Thus, for example, the United States has used recognition as a political tool to support antimonarchical governments (under George Washington), to advance economic imperialism (under Theodore Roosevelt), to promote constitutional government (under Woodrow Wilson), and

to halt the spread of communism (under Dwight Eisenhower). The practice of other states is similarly diverse.

Such realities also became evident in the 1990s when the break up of Yugoslavia showed inconsistencies of recognition. States' that upheld proper internal sovereignty were not recognised (former Yugoslav Republic of Macedonia) while other states (Croatia and Bosnia-Herzegovina) were recognised even though they lacked proper control over their territory (Rich, 1993:63).

In 2011 when the Palestinian Authority (PA) applied for membership to the UN their application were addressed through the Montevideo criteria but since Hamas held *de facto* authority over 40 percent of the population the PA could not be deemed a government with effective control (UNSC, 2011:1-2)¹. With reference to effective control the UN affirmed legality over policy. Yet, in October 2014 Sweden decided to recognise the state of Palestine and even if Sweden acknowledged the lack of effective control they referred to Sweden's earlier recognitions of Croatia and Kosovo, which both had similar problems as Palestine (Wallström, 2014):

We want with our recognition, firstly to give our support to the moderate forces among the Palestinians... Secondly, we want to ease a settlement by making both parties in the negotiations less unequal... And thirdly, we hope that we will contribute to more hope, and a belief in the future for the young Palestinians and Israelis who otherwise would risk radicalisation in the belief that there is no alternative to the violence and the status quo. The government deem the legal criteria for recognition under international law of the Palestinian State to be met.⁷

It is clearly debatable if the PA had achieved effective control by 2014, even so, Sweden argued for recognition through legal criteria, yet, the criteria were not the motive for recognition. Sweden used recognition as a political tool to try to create a momentum in the conflict between Palestine and Israel, or put simply, a constitutive approach to a legal problem. It is difficult to say if Sweden's recognition is out of self-interest or out of altruism, interesting enough, in comparison to the historical usage by the US above, it pinpoints that political recognition can be used as a tool for both selfishness and unselfishness.

⁷ I have done the translation from Swedish into English myself. The correct Swedish quote is as follows: "Genom vårt erkännande vill vi, för det första, ge vårt stöd till de moderata krafterna bland palestinierna... För det andra vill vi underlätta en uppgörelse genom att göra parterna i dessa förhandlingar mindre ojämlika... Och för det tredje hoppas vi kunna bidra till mer hopp och framtidstro bland de unga palestinier och israeler som annars riskerar radikaliserar i tron att det saknas alternativ till våld och status quo. Regeringen anser att de folkrättsliga kriterierna för ett erkännande av Staten Palestina är uppfyllda."

With the policy driven theory of recognition it is time to summarise:

- 1) The international arena operates from a state-centric perspective and an entity cannot exist without being recognised by other states because it will lack a personality under international law.
- 2) Relativism guides the action of the theory and it does not matter if the decision to recognise an entity is based on personal gain or not, it is simply up to the recogniser to decide why it chooses to recognise making the decision primarily a political act.
- 3) The act of recognition can be based upon legal criteria if the recogniser wishes, but even without recognition a state can still give *de facto* recognition by acknowledging certain legal criteria upheld by the entity, even if it is not enough for recognition.

2.3.4. Theoretical framework for statehood recognition

The matrix formulated below is the frameworks that will be applied on the case to examine declaratory and constitutive recognition. The characterisations formulated as questions will guide the analysis of the case. In comparison, the difference between the two theoretical frameworks becomes apparent. For the declaratory approach the legal criteria determine whether or not recognition is possible. On the other hand, the ‘selectiveness’ incorporated in the constitutive approach underlines the state-centric perspective of recognition. This however does not discard the theory since there is still the question of *de facto* recognition.

Declaratory Theory Criteria		Characterisations	Constitutive Theory Criteria	Characterisations
Territory	<i>Consistency of territory over time within an area without exactly defined borders</i>	(1) Does the entity hold territory? (2) Is the territorial area somewhat stable or does it substantively vary over time?	<i>Selective Criteria</i>	
Population	<i>Connection to the territory through traditions, language, race or religion</i>	(3) Is there somewhat of a stable population in numbers? (4) Does the population have a connection to the territory by speaking the same language, having the same race or religion?	<i>Selective Criteria</i>	
Governmental Effectiveness	<i>Self-sustained through taxation or other income and in return provides basic services and is</i>	(5) Is the entity self-sustained by state revenues through taxation or other forms of income? (6) Does the entity provide welfare or other	<i>Selective Criteria</i>	

	<i>able to uphold internal security</i>	services? (7) Does the entity have a judicial system enforcing the rule of law? (8) Does the entity have an agency or an organisation enforcing the rule of law?		
Governmental Independence	<i>Upholding independence from external actors' influence, whether by force or diplomacy</i>	(9) Does the entity have the instruments or military capacity to protect its territory from foreign intervention?	<i>Selective Criteria</i>	
Capacity for relations	<i>Having the instruments necessary for entering into relations with other states</i>	(10) Is there a functioning organ, or other instruments, capable of diplomatic relations with external actors?	<i>Selective Criteria</i>	
Recognition: de jure, de facto or non-recognition	<i>By upholding the legal criteria recognition is achieved.</i>	(11) Are the legal criteria met by the entity?	<i>Only through the political acknowledgement by other states can recognition be achieved.</i>	(1) Has a state officially recognised the entity? (2) Is there an underlying acquisition of de facto recognition?

Figure 1: The matrix portrays the legal criteria for the declaratory theory and how each of the criteria are defined. Formulated from the criteria are the characterisations (questions) that will be applied upon the case. The constitutive theory's legal criteria are portrayed as 'selective' since recognition is a political act. The criterion essential for the constitutive approach is the recognition criterion. This criterion is also characterised into questions to be applied upon the case.

2.4. THE EVOLVEMENT OF THE LAW OF ARMED CONFLICT & BELLIGERENCY

The belligerency theory is different from the declaratory and constitutive theories, described above. Belligerency takes its standpoint, not from the Montevideo Convention, but from the law of armed conflict. LOAC is a combination of different laws such as the Hague Convention of 1899 and 1907, the Geneva Conventions however where written and added after the Second World War. The laws were primarily written to protect warring states and are therefore only relevant in international armed conflict (IAC) and not in non-international armed conflict (NIAC) (Kolb & Hyde, 2008:18-19). Before 1949 the term NIAC did not exist which meant that there were no protections for the parties of a civil war (Radin, 2013:118). The only way to have LOAC fully implemented in a civil war was through recognition of belligerency, and in comparison to rebellion and insurgency, belligerency is the only level of domestic conflict that has defined legal criteria (Radin, 2013:123). In response, Common Article 3^J (CA3) and Additional Protocol II^K (AP2) to the Geneva Conventions were written to circumvent the non-protections during civil wars (Kolb & Hyde, 2008:19). This result has caused recognition

of belligerency to sometimes be referred as “legal history” (Kolb & Hyde, 2008:80). However, even if CA3 and AP2 extend protection in NIACs they do not give the full protections as LOAC (Radin, 2013:119).

Common Article 3 gives limited protections to more or less all civil wars while Additional Protocol II incorporate more protections but has a stricter area of application. Firstly, the drafters of CA3 acknowledged the high threshold of belligerency recognition and therefore created *minimum* protections to parties of NIACs when belligerency could not be given (Lotsteen, 2000:122; Radin, 2013:134). The minimum criteria of CA3 impose no demand for a full on civil war, moreover, neither territorial control nor a governmental organisation are required by the rebels (Radin, 2013:133). CA3 should therefore be seen as a supplement to belligerency and not a replacement of it. Secondly, AP2 complemented CA3 by expanding protections in NIACs but imposed stricter criteria, similar to the criteria of belligerency, yet it does not encompass the whole spectrum of LOAC since it neglects the laws for war prisoners and laws of combatants status (Radin, 2013:136; Lotsteen, 2000:127). In essence, CA3 and AP2 do not make belligerency status obsolete but rather improve the protection for civil wars when belligerency cannot be recognised.

2.4.1. THE LEGAL CRITERIA FOR BELLIGERENCY RECOGNITION

With only a few exceptions^L there are consensus for the legal criteria of belligerency: (1) there has to be a civil war in the territory of a state with the complexity similar to a war between states, (2) the armed group has to control a considerable part of territory against whom they are fighting, (3) there has to be a governmental-like and military organisation in the obtained territory with some effective control, and (4) the armed group has to follow the laws of war in its hostilities (Lotsteen, 2000:109; Radin, 2013:123; Moir, 1998:346-347; Kelsen, 1941:616; Lauterpacht, 1947:176; Shaw, 2003:1040-1041). These legal criteria are formulated below and after upholding them the insurgency should be formally recognised by the state it is fighting or by third-party states.

2.4.1.1. Ongoing civil war

The hostilities have to be persistent over time and cannot be an abrupt rebellion^M. Secondly, the conflict should be widespread, not limited to small areas in the state and affect large parts of the population. For example, the Spanish Civil War between 1936-1939^N was a conflict having the sufficient consistency for belligerency status even if it was not recognised as such

because it quickly escalated to an international character. Thirdly, the conflict should involve all branches of the armed forces something the Brazilian Revolution^O lacked since the naval forces were the only part of the military engaged in hostilities (Radin, 2013:124-125).

2.4.1.2. Control over a large part of the territory

There is no exact measure of the territory needed, yet the area usually has to be of considerable size. The considerable size is, however, based on the prerequisite that a governmental like organisation need an extensive part of territory to be able to wage a civil war for a long period of time (Radin, 2013:125).

2.4.1.3. Governmental-like structure

The debate on this criterion is two-folded where some argue that the rebel administration's structure has to be political in nature with some sort of civil authority and that a military command is not sufficient. On the other hand, there are those who believe that a clear command structure is satisfactory as a rebel organisational structure. A third point incorporates both a political organisation and a military structure. Even so, the generally view seems to be that the organisation of the rebels should have a state-like consistency mirroring the decision-making of a state. To illustrate, during the American Civil War 1861-1865^P belligerent status was withheld by the US Government since the Confederate States lacked a proper organised organ of government (Radin, 2013:125-126).

2.4.1.4. Hostilities should follow the rules of war

“[T]he hostilities should be conducted in accordance with the laws of war” (Radin, 2013:126). The phrasing ‘should’ pinpoint the unclear dimension of the criterion. The overall agreement is that the criterion should be incorporated for recognition, however the question is in what way. Even if the insurgency chooses to follow the laws of war it does not mean that they will be recognised as a belligerent. This means that insurgencies, until potential recognition, will have less legal protection during the conflict since they risk not fulfilling the requirement of combatant status under the Hague Convention^Q (Lawrence, 1973:407-408). It is therefore not in the self-interest of an insurgency to act in accordance with LOAC, nor, can it be argued, is it in the interest of the home-state to give the insurgents combatant status since it would force the state to adhere to the rules for prisoner of war. This might also be the reason why some neglect the criterion all together (Kelsen, 1941). A more nuanced perspective might therefore be to view this criterion in relation to criterion 3 above. For an insurgency to even be able to

follow LOAC there need to be a functioning authority and hierarchy responsible for the military actions taking place on the ground (Radin, 2013:126). From such an outlook the criterion instead can be viewed as the *capacity* to follow the laws of war and not that LOAC has to be strictly ensured.

2.5. OUTLINING BELLIGERENCY RECOGNITION THEORY

With the legal framework for belligerency theory formulated above some distinctions can be made in comparison to statehood recognition. While the declaratory theory uses legality and the constitutive theory uses policy, the doctrine of belligerency incorporates both policy and legality but instead gives the full protections of LOAC between recogniser, belligerent and third-party states.

Even if the legal criteria are quite straightforward, states need to formally recognise belligerency. As with the constitutive approach, it is up to each individual state to decide over recognition. Despite this, it is generally agreed that the warring state can give belligerent recognition before the insurgents upholds the legal criteria. Yet, recognition was often given *implicit* by states rather than *explicit*. The reason for implicit recognition may vary but two of the most common reasons were blockades and declaration of neutrality by third-party states (Radin, 2013:127;146). By declaring neutrality the third-party actor maintain a non-intervention approach towards both sides of the conflict and in doing so the third-party can continue free trade with both actors under the protection of international law. Yet, declaring neutrality should only be performed if the insurgents uphold the legal criteria and the third-party is, or will be, affected by the conflict. A hasty decision could be seen as inference in the domestic concerns of the warring state and could have severe reprisals or even proclamation of war against third-party actors (ibid 128). It is also illegal for the third state's government to aid the insurgency, but civilian involvement to either side is not considered a violation (O'Rourke, 1937:409). Moreover, when LOAC is initiated through recognition it legally differentiates between the acts of belligerents and the acts of their home state. By not recognising belligerency the home state might get repercussions since non-recognition gives third-party states the possibility to claim compensation from the home state for injuries originated from the insurgency in the conflict (ibid 401). Still, recognition of belligerency is not the same as statehood recognition because "[r]ecognition of belligerency does not admit the belligerent into the family of nations, or even acknowledge its actual existence as a state, but only that it claims to be a state and is *de facto* making war as such" (Beale, 1896:406).

2.5.1. The practice of the belligerency theory

The case of the American Civil War contains both of implicit and explicit recognition. The US President refused belligerent status to the Confederate States but the US Supreme Court ruled against the President since he blockaded the Confederate's harbours, something only performed when there is a lack of effective control over them. Logically, Britain's explicit third-party declaration of neutrality in 1861 was a response to the blockade since they saw the blockade as an implicit recognition to the southern states (Lauterpacht, 1947:177-178). Even if the US government saw the act as premature recognition the British stood affirm because the blockade could have affects upon British vessels and merchants travelling to the ports, something that the US Supreme Courts ruling^R underlined (Moir, 1998:348). Hence, belligerency was a fact in the conflict, at least from an international law perspective.

The Spanish Civil War is the last known case where the doctrine of belligerency was debated vigorously (Lotsteen, 2000:115-117) and started when the Spanish government blocked areas controlled by the Nationalist's, yet several countries viewed the blockade as ineffective and Franco's insurgency were not recognised as belligerents. The discussion instead involved whether or not the Nationalist's had an inherent right to recognition, something Franco's insurgency contended^S. However, the civil war quickly became international in character since several European governments actively assisted the insurgency. Recognition of belligerency could therefore not be given, not because the involvement was illegal, but because the conflict's structure had changed to another part of international law. Had foreign support been withdrawn and had the conflict maintained its civil war status, then belligerency could have been granted (Lauterpacht, 1947:251-253).

With this important notion, differentiating belligerent status from statehood, it is due time to summarise the theory:

- 1) Armed groups have to uphold the legal criteria of belligerency to be recognised. Premature recognition performed by the affected state is accepted, however, premature recognition done by third-party actors can have repercussions if the affected state sees the recognition as an illegal interference in its domestic issues.
- 2) Even if the legal criteria are upheld it is still up to the recogniser to do what they see fit. The explicit decision of recognition is guided through self-interest and whether or not the third-party state or the warring state has something to gain from recognition. Yet,

certain acts towards the insurgency can constitute implicit recognition whether or not they were suppose to be interpreted as such in the first place.

- 3) The legal effects of recognition are the full protections under LOAC for third-party states and the conflicting parties. Third-party's neutrality prevents them from direct involve in the conflict but would protect their trade interests against both parties.

2.5.2. Theoretical framework for belligerency recognition

The matrix formulated below is the framework that will be applied on the case to examine belligerency recognition. The characterisations formulated as questions will guide the analysis of the case. To fully characterise IS each identified question has to be answered in an affirmative process.

Belligerency Theory Criteria		Characterisation
Civil war	<i>A persistent conflict going on for a long period of time involving a large part of the population</i>	(1) Is there an ongoing domestic conflict in the territory continuing over a long period of time? (2) Are there a lot of people affected by the conflict?
Territory	<i>A large part of the territory should be under control by the insurgents</i>	(3) Does the insurgents have control over a considerable part of the territory?
Government-like structure	<i>A state-like organisation mirroring the organisation of a proper state in the form of internal and external control</i>	(4) Is power divided between military and public organs? (5) Does the insurgency have a hierarchy for its decision-making?
Following the rules of war	<i>There should be such a stable governmental-like structure that there will be a capacity to follow LOAC</i>	(6) Is the hierarchy stable enough for decisions to be adopted by the people enforcing them on the ground?
Recognition: explicit, implicit or non-recognition	<i>States have to choose whether or not they will recognise, and on what premise (as third-party or warring party) they give it.</i>	(7) Has the warring states explicitly recognised the insurgency? (8) Is there any support for implicit recognition done by Iraq, Syria or third-party states?

Figure 2: The matrix portrays the criteria for the belligerency doctrine and how they are defined. The first four criteria are legal while the last one is political. Formulated from the criteria are the characterisations (questions) that will be applied upon the case.

3. RESEARCH DESIGN & QUESTIONS

3.1. RESEARCH QUESTIONS

The aim of the thesis is to examine how the theories on recognition characterises the Islamic State during its peak between 2014-2016. The first question is preparatory to enhance the underlying legal frameworks of the theories. The remaining three questions are addressed through an examination guided by analytical frameworks set up on basis of the three theories.

The following questions will guide the thesis:

1. How are the legal criteria in international law of statehood and belligerency defined?
2. How does the declaratory theory of state recognition characterise the Islamic State?
3. How does the constitutive theory of state recognition characterise the Islamic State?
4. How does the belligerency theory characterise the Islamic State?

3.2. RESEARCH DESIGN: CONGRUENCE ANALYSIS

This thesis is a small-N research with a single case study of a crucial case where theories are tested. CON works as a control method through which empirical observations are used to see how well the theories hold in the real world (Blatter & Haverland, 2012:149). Case study research makes “causal inferences about an individual event by applying theoretical arguments to the within case data” (Sinkler, 2011:6). The tools provided by CON helps this process by braking down the theories into sections that can be used for analytical purpose. It draws its “inferences from the (non-)congruence of concrete observations with specified predictions from abstract theories” (Blatter & Blume, 2008:325) and by doing so can explain cases and show functionality of theories. Thus, this thesis will apply the characterised questions in the matrixes, which in this case are the conditions for recognition, from the theories of statehood and belligerency onto the case of the Islamic State during the period 2014-2016. This method allows the investigation into whether or not the Islamic State fulfils the characterisations, fully or partially, either as a state or a belligerent, and if so to what extent.

3.2.1. Theory selection

In the examination of ISIS it would have seemed appropriate to compare the theories on recognition of states with a theory on terrorism. However, within international law no such theory exists. Terrorism is instead defined by states on a domestic level, which generates different definitions not necessarily similar to each other and therefore prevents a crime of terrorism (Chainoglou, 2008:510-511). Additional reasons also limit this progress, for example if states can commit terrorism, or how to differentiate between *who is a terrorist* and *who is a freedom fighter* (Greene, 2017:413). Instead of trying to establish a framework for terrorism this thesis has selected belligerency recognition as an alternative. The reason is that belligerency relates to armed groups fighting an established regime but cannot be regarded as states.

3.2.2. Methodological inference & application

CON's deductive approach does not emphasize singular relationship between independent and dependent variable, instead the deduction operates through abstract predictions (characterisations) formulated from the theories. This demands more abundant theories since they need to be broken down into essential components for analytic use (Blatter & Blume, 2008:326). One "smoking-gun" explanation, as in casual process tracing, does not strengthen or discredit a theory, instead a set of data observations deduced from rich theories is needed to test the empirical world (Sinkler, 2011:13-14). CON is much more open in its search for these relationships and puts its emphasis on the interpretations of them (Blatter & Haverland, 2012:166). The reliability therefore lies in "the question of whether the (predicted) observations express the meaning of the abstract conceptualization in an accurate manner" (ibid). Even if the matrix is outlined into predicted yes or no questions, the process behind answering them should therefore not be overlooked since the interpretational work is the "major role in conducting a congruence analysis" (ibid 167).

After formulating predictions (characterisations) CON is constructed through a three-step process. Firstly, the predictions from theory 1 are analysed through well-reinforced empirical observations. Its results can have three different outcomes, (A) the predictions are verified by the empirics, (B) the predictions are not verified by the empirics, or (C) the predictions are not credited nor discredited but instead gives an explanation outside of the boundaries of the theory. Secondly, the same process is conducted with the next theory and its results might or might not lead to the same conclusion as the first theory. Lastly, the results from the theories

are compared to assess their explanatory relationship between each other in relation to the case (ibid 189). This also pinpoints one additional factor. CON differentiates between dominant and less dominant theories for their future usage: “Only if the major conceptual aspects of a dominant theory [declaratory] are empirically disconfirmed and the major conceptual aspects of a non-dominant theory [constitutive or belligerency] are empirically confirmed a case study will have a substantial impact on the theoretical discourse” (ibid 178).

The results reveal how ISIS is characterised, and the differences between the theories formulated frameworks. The declaratory theory is considered as the predominant theory within international law (Crawford, 2006:93; Shaw, 2003:370; Worster, 2009:125). This entails that if the declaratory approach characterise IS as a state it will put doubt into its dominance since no state has confirmed a legal status for ISIS. Such a result will be even more noticeable if the constitutive or belligerency theory holds in their characterisations. If, however, there is no legal characterisation of IS and there is no constitutive or belligerent recognition, the international community’s standpoint will be confirmed and international law theory on recognition cannot characterise the case. This would imply that theories outside of the thesis’s scope would have to be tested.

3.2.3. Case selection, generalisability & reliability

Cases can be selected as a most-likely or a least-likely case. The most-likely case is picked to make it easy for the theory to explain the case, if the theory does not hold its overall validity can be put into question. A least-likely selection takes its aim on finding a difficult case and if validity holds it strengthens the theory’s generalisability to other cases (Esaiasson et.al. 2012:161-163). Such generalisability does not lie in the results capability to draw conclusion on the population of different cases, as it does under statistical research, instead, population within CON refers to the “theoretical discourse”. This implies how the outcome of the research might inflict reasonable doubt or reasonable proof that the theories under scrutiny will or will not suffice in their further usage on other cases (Blatter & Haverland, 2012:197). Within CON cases are selected on the basis of theory. This selection has to be performed on the premise of what can be expected from the relationship between the case and the theories. For CON crucial cases therefore become the appropriate choice. The reason is that CON aims to test the strength of theories through empirics and whether theories can predict, or characterise, the case (Blatter & Blume, 2008:346).

The Islamic State is a crucial least-likely case in relation to all three theories because it stands out in comparison to other armed groups. Firstly, the international community classifies ISIS as a terrorist organisation even if its characteristics touch upon statehood (Callimachi, 2018e). Secondly, it declared a Caliphate, something not even Osama bin Laden did during his time (Barbaro, 2019a), and thirdly several terrorist organisations around the world such as Boko Haram and others in Afghanistan and Pakistan declared their allegiance to ISIS as enclaves to the new Caliphate (Boffey, 2015; Bazcko et.al. 2016:29). Consequently, the basic reason for selecting the least-likely scenario is a result of the theories leading status in the field of recognition. They have a historical record on recognising new entities and would therefore perform well in a most-likely scenario. Instead, testing their functionality on a disputed emerging entity could share a more nuanced understanding of the theories characterisation of the case. If ISIS legally can be deemed a state it would further nuance the contrast when legality is overruled by policy.

With this in mind, one important issue is reliability – if the empirics cannot support the predictions portrayed. The risk is that empirics can be illustrated as accounts that happened at specific times in a larger story and therefore be argued as untenable in the broader picture that is the Islamic State. However, it is worth noting that recognition per se is not an exact science, it is about weighing factuality and whether it is enough to underline that a specific theory's prediction can be understood as such. This therefore underlines the importance of justification and transparency when conclusions are carried out, and if the results are valid enough to make such a conclusion the next question is, what do we do with the results.

3.3. MATERIAL & DATA SELECTION

Material and data can be selected from a variety of sources whether it is primary sources through interviewees or secondary sources such as newspapers or research papers (Blatter & Haverland, 2012:187-188). With this in mind there are some shortcomings studying the Islamic State through primary sources. Firstly, the difficulty and risk in finding interviewees, secondly the language gap, and thirdly the continuing conflict in Iraq and Syria.

Firstly, for a period the aim was to select one ISIS fighter, one Peshmerga fighter and one refugee who lived in the area during ISIS rule. Interviewing them would have given three different viewpoints that could have been weighted against each other identifying similarities on what had been achieved in the area. For security reasons the Swedish Secret Service were

contacted, because of personal risks they advised against it. However, some contacts were initiated but they insisted on economical compensation, which could result in crimes financing terror activities. Instead attempts were made to interview journalist who had visit the area, however they were reluctant to participate. Primary sources from interviewees were therefore dropped in the research.

The Islamic State's own magazine, *Dabiq*, was considered as a primary source but as a product of ISIS it would be difficult to confirm its authenticity. The documents collected from ISIS former territory by journalist and researchers are written in Arabic yet measures have been taken to translate them and since there is a lack of Arabic knowledge and a capacity to translate them the thesis have to assume that freely translated documents are correct. This also brings the problem of the ongoing conflict in the region. Since there is an ongoing conflict a lot of material have been lost or destroyed, the bits and pieces found have however been put together by journalists and researchers producing secondary sources.

Because of what been outlined above this thesis will use secondary sources, mostly from newspapers, research papers, books and, when it is available, translated document from the Islamic State. The newspaper that will be primarily used is the New York Times (NYT) it has invested heavily in their search to explain ISIS. Furthermore, as Rukmini Callimachi from the NYT explains in her podcast *Caliphate*: "I've interviewed two to three dozen of these guys [ISIS members], and with this project, I'll have put three of them on the record. Three. And the reason for that is that we can't take people at face value" (Callimachi, 2018f). The validation of the produced research by the NYT is carried out through their own journalistic control mechanisms. When sources that might be put into question for their validity are presented the thesis will try to have similar control mechanism by adding a control to emphasise that the fact presented in the analysis are supported by at least two, from each other, independent sources. The selected books will hopefully also give a wider depth than newspaper articles can uphold adding to the layers of understanding. These books were written during the period when the Islamic State was at its peak and when it was diminished, broadening the historical perspective of IS.

4. STATING THE OBVIOUS?

The analysis will take its position during the time period between 2014 and 2016. It will try to answer the question if the frameworks of the theories can characterise the Islamic State. It was in 2014 that IS declared its Caliphate and it was in 2016 that it started to lose large portions of its territory (Specia, 2019; Chulov 2019) and by the spring of 2019 the last IS-held, the town of Baghuz close to the border between Iraq and Syria in the south, was captured (Chulov, 2019).

4.1. DECLARATORY CHARACTERISATIONS

The framework for the declaratory theory is constructed through characterisations of the legal criteria. This section will present the empirics through each characteristic and examine to what extent the case fulfils them.

4.1.1. Characteristic 1: Holding territory

It is apparent that ISIS did hold territory, bulldozers physically dismantled the border between Syria and Iraq in mid 2014 making it possible for Iraqis and Syrians to move freely over it (Cockburn, 2015:43; Dairieh, 2014). In Iraq ISIS controlled almost all the Sunni areas, which was equal to more or less a quarter of the country (Cockburn, 2015:43). The exact area that IS controlled is of course debated because exact measurements could never be done. However, some estimated an area equal to the size of Great Britain (Callimachi, 2018g; Cockburn, 2015:27), while others estimations came closer to the country of Jordan (Dairieh, 2014) or 88,000 square kilometres (BBC, 2019). With this territorial acquisition ISIS had control over several large cities such as Tikrit, Baiji, Mosul, Fallujah and Raqqa, but also, for a short period of time, the Fallujah dam controlling the flow of water in the Euphrates before the Iraqi government diverted the water (Cockburn, 2015:17;48).

What is important to observe is in which way IS held territory. The infrastructure of the countries is vital to move between cities and villages. With the surrounding desert other routes are scarce. Thus, if the cities and villages are the vital organs of the countries then the

roads are its veins and arteries. By putting up roadblocks in and out of the cities IS quickly could control large part of the territory because everyone passing between different cities were stopped and inspected before they could continue their journey (Murad, 2019:207;261). With this tactic ISIS quickly held the authority over large territorial areas both in Syria and Iraq, indeed showing a capacity to hold territory.

4.1.2. Characteristic 2: Territorial consistency over time

Consistency over time underlines the quality of the territorial acquisition, if the territory is not consistent it can easily be argued that it is not enough for upholding the territorial criterion. One question is therefore when ISIS started its territorial conquest and when it ended. IS's predecessors, al-Qaeda in Iraq, initially declared the Islamic State in Iraq (ISI) in 2006, yet quite quickly lost support and became a "paper state" by 2009 (McCants, 2015:36;42). However, after al-Baghdadi took over ISI's leadership in 2010 it managed to regroup (Napoleoni, 2014:11) and by April 2013 it merged together with the al-Qaeda supported Jabhat al-Nusra changing its name from ISI to ISIS (Chulov, 2019; Napoleoni, 2014:17). As such, it can be argued that 2013 was the year ISIS started but that the proclamation of the Caliphate during the summer of 2014 was the leap that pushed ISIS towards a territorial entity. Accordingly, IS stood firmly grounded from 2014 onwards throughout 2015 but by mid 2016 it started to decrease in territory (Chulov, 2019; Barbaro, 2019b; Moorcraft, 2018; BBC, 2019, Specia, 2019). This loss also became apparent when the Islamic State's senior leadership changed strategy in 2016 and asked supporters to execute attacks in their own countries instead of joining the Caliphate, which also rapidly decreased its territorial annexation (Chulov, 2019). In June 2018 ISIS held three percent of its former territory (Callimachi, 2018j) and by spring 2019 it had lost it all.

As maps over time clearly portrays (BBC, 2018; Moorcraft, 2018), ISIS territorial control was not fixed in any way, it conquered vast lands and it lost them too. Yet, the way in which they held territorial control between 2014 and until, at least, beginning of 2016 gives clear indications that the Islamic State had a consistency in its obtained territory. As mentioned above, by taking control through roadblocks IS could administer the rest of the territory between the cities. Even if it lacked defined borders, ISIS was in control over large territories, opened the boarder between Iraq and Syria, and for a brief period of almost two years stood firm in their authority. The consistency of territory over time within an area without exactly defined borders can therefore arguable be seen as met.

4.1.3. Characteristic 3: Somewhat stable population

Over time all territories experience emigration and immigration of people, an exact number of people in a territory does therefore not matter. However, it should be pointed out that millions of people fled Syria while millions were displaced within Iraq (UNHCR, 2019a; 2019b). With this in mind the exact number of people under the Islamic State's rule varies quite substantially. During the autumn of 2014 they controlled a population of about 6 million people (Cockburn, 2015:27) while during its highest peak had an estimated population of 12 million people (Callimachi, 2018a). This number might be considered extensive but it is important to remember that not only did ISIS hold a large territory, is also held several big cities across both countries. In addition, the Sunni population in Iraq is estimated to 6 million, many whom rose against the new Iraqi government because of the marginalisation of the Sunni population (Cockburn, 2015:45). With this in mind, it is clear that it was not a utopia and thousands of IS members fled from the territory (Callimachi, 2018e).

What is important to understand is the connection between population and territory. As long as ISIS held territory it also controlled a population, as the territory decreased so did the population. Nonetheless, even if the numbers, as with the territory, varied over time it is clear that ISIS had control over a large part of the population in both countries between 2014 and 2016.

4.1.4. Characteristic 4: The population's connection to territory

It is difficult to contend that most of the people living under IS's rule did not have connection to the territory. The majority in both countries are Arabs, speaking Arabic and adhere to Islam as religion. In Syria 87 percent are Muslims with a minority of Shia. For Iraq 95-98 percent are Muslims with a minority of Sunni (CIA, 2020a; 2020b). With this in mind the question instead becomes how the population would be connected to the new territory of the Islamic State. Al-Baghdadi formulated this view by stating that ISIS is "a state where the Arab an non-Arab, the white man and black man, the easterner and westerner are all brothers... Syria it not for the Syrians, and Iraq is not for the Iraqis. The Earth is Allah's" (Cockburn, 2015:xi). Even if it is a clear encouragement to gain supporters from all over the world a more correct perspective is that ISIS was building a state connected to ethno-religiousness rather than purely ethnic (Napoleoni, 2014:107). This is certainly true for the 40,000 (Callimachi, 2018j)

up to 50,000 members from around the world who joined the Islamic State (Chulov, 2019) and also, perhaps, for the additional fighters who quit al-Qaeda for ISIS (Callimachi, 2018c).

However, what is more noteworthy is how IS co-opted local leaders. Instead of conquering and forcefully rule over new areas ISIS engaged in incorporating these leaders and their people as members to their new territory. By doing so they reinforced loyalty from newly attained areas (Napoleoni, 2014:31-32). This could result in an exponential members growth. When a group of 100 IS fighters took over a new area it usually resulted in recruitments of between five and ten times their force, not necessarily as fighters but as protectors of the area (Cockburn, 2015:145). Shia Muslims were also driven out of the territories. In Mosul, for example, Sunni attacked Shia soldiers still in the city (Cockburn, 2015:16) purifying the Islamic State's definition of Muslims. Direct and continued threats of reprisals were also hanging over IS's citizens and were described by the inhabitants of Mosul once it was liberated. Yet, accounts from people who fled ISIS's captivity describe a normally functioning daily life in the city where people did not seem to be distressed by the fact that IS had control over their lives (Murad, 2019:249-250). Whether this acceptance can be explained as a result of fear, or out of approval, for the new rulers is hard to say. However, it is incorrect to state that all citizens were IS supporters, as it is incorrect to state that all citizens despised IS, even if the exact number of factual supporters never will be accounted for. Even so, living under IS meant that you had to abide by the rules, regulation and ethno-religious culture that the Islamic State enforced. Albeit all citizens did not agreed upon these interpretations they had to follow suit, forcing a new connection between IS's population and its territory.

4.1.5. Characteristic 5: Self-sustainment through state revenues

It is important to understand that the Islamic State, in many ways, started out its revenue collections through a well-organised extortion network (Lister, 2015:38; al-Tamimi, 2015:125), which by 2014 produced an income around 12 million USD a month (Lister, 2015:38-39). These extortion money came from different areas of society, for example, a contractor had to pay 500,000 USD per month for being able to continue building according to the plan set up before ISIS came to his area (Cockburn, 2015:12). Moreover, in Mosul alone, before it were incorporated into the territory, ISIS taxed people selling products in markets but also mobile phone companies amounting to an income around 8 million dollars a month. Supporters would also not eat at restaurants that did not enforce the new tax laws set up by ISIS (Cockburn, 2015:49). According to the US Department of Defense, this extortion bureaucracy was

in place between 2005-2010 and most likely continued through 2014. Before the Caliphate was announced the cells of its predecessor ISI sent 20 percent of all collected revenues to the higher steps in the leadership to distribute it to areas where money were needed (Lister, 2015:36).

However, as the Islamic State continued taking territory they simultaneously seized control over most of Syria's oil and gas fields changing their revenues from extortion techniques towards a more nuanced income (Cockburn, 2015:27). By August 2014 it sold an estimated 70,000 barrels of oil on the black market each day, with incomes ranging between 1-3 million dollars. Additionally, the Islamic State put up custom controls along the western highways and targeted trucking transportations with a flat rate of 800 dollars. Yet, after payment were received the drivers got a counterfeit Iraqi government tax receipts allowing them to pass by Iraqi Army checkpoints without having to pay additional fees. In addition, ISIS also got income from agriculture products such as cotton, water and electricity (Lister, 2015: 38-40). In the city Samarra, Iraq, documents found from one bureaucrat show transactions of 19 million USD from taxations of agriculture areas. IS was in many ways a self-sustaining entity, it taxed every step in the production line, from fields that produced the seeds, to the mills that made the flour, to the transport and selling of the end product and the merchants' yearly outcome (Callimachi, 2018h). The *zakat*, or almsgiving, were an additional tax taken from the people under ISIS rule but was more accepted since the Quran stipulates it as mandatory (Moorcraft, 2018:142-143). The *zakat* bureau collected the money for the poor but it was also used to help farmers with their harvests (Napoleoni, 2014:38-39).

Even if these examples not necessary show a complete picture IS's whole territory it still pinpoints that ISIS had a diverse portfolio of revenues. It was "a group that was hell-bent on being independent, on being self-sufficient, on relying on no one" (Callimachi, 2018h). Nonetheless, ISIS did get a lot of its weapons and other support through the Turkish boarder, but when it was finally closed in 2015 IS had already gained enough oil and gas fields that outside support was not needed anymore (Cockburn, 2015:37). This is important to keep in mind since the most common approach to stop terrorist organisations is to sanction their external donors, which would not work as affective against IS (Callimachi, 2018h). It had in many ways become self-sufficient.

4.1.6. Characteristic 6: Providing welfare or other services

“[ISIS] came to Mosul, and they built their state on the back of the one that already existed... And so, the civil servants who had worked in the Ministry of Agriculture and the Department of Sanitation and the Electricity Division, they kept doing the same job that they had done before” (Callimachi, 2018h). This underlines two important aspects of the Islamic State, on the one hand it shows that they had departments or ministries, so called Diwans, for different purposes, such as Health, Agriculture and Environment, Military and Defence, Public Services, and several more (al-Tamimi, 2015:123; Lister, 2015:44). On the other hand it also pinpoints that IS did not build these by themselves, rather they used already existing ministries and reorganised them in a way so they would fulfil the Islamic State’s purpose. The Diwan for Education, for example, did not close down University of Mosul, instead it rearranged curriculums and closed down specific departments (al-Tamimi, 2015:124).

When ISIS assumed authority over a new area it took control over everything from bakeries and local factories to the public sphere. By doing so IS established full control over the foundations of the daily lives of the people in the area and could subsidise various products. In Deir Ezzor, Syria, for example, ISIS lowered the price of bread from 200 to 45 Syrian pounds, in Mosul it made hospital visits and the vaccination of children free, reduced the price of renting homes to 85 USD and even made public transport free. For the poor or those who lost their homes, ISIS established soup kitchens, they also held a Consumer Protection Agency to prevent insufficient products and an Office for Orphans to pair children with new families (Lister, 2015:47-48; Napoleoni, 2014:36-37). Beyond this IS ran the electricity in the cities, installed new power lines and advised how to repair broken ones (Napoleoni 2014:38-39).

More than half of the Islamic State’s revenues went to families who had lost loved ones (Lister, 2015:36). Other expenses went to people working for IS and they were paid in accordance to the size of a family (Callimachi, 2018i). Consequently, what in the end differentiated the Islamic State from other terrorist organisation was that they could pay salaries (Lister, 2015:40). However, it is important to add that the civil servants who worked under the Islamic State continued to get their salaries paid by their official government (al-Tamimi, 2015:125).

Abroad ISIS had built a support system for people who wanted to join, it had transportation, safe locations to stay at, specific spots for pick ups and what excuses could be use to friends and family before leaving. One IS fighter described it as being as simple as “when you’re in

high school and... your friends convince you to come out to a party” (Callimachi, 2018b). Later, when these new recruits arrived in IS territory, fighters had to fill out forms with names, education level and other experiences (Callimachi, 2018c). They would have to hand in their old ID cards and was issued new Islamic State ID cards (Callimachi, 2018f; Cambanis & Collard, 2015).

The overall work of the Islamic State’s administration was considered “fast and efficient” by the citizens and the different departments were connected in a way that information sharing worked (Lister, 2015:44). Even if ISIS did not build its own bureaucracy from the ground it worked to uphold the core of what was still functioning in Syria and Iraq. Still, when IS first arrived to new areas it promised to make a lot of things better. In some aspects IS also did, yet in several smaller areas such as al-Hamdaniya district in Iraq, the only way to get electricity was through generators and garbage disposal did not always work (Murad, 2019:196-197). Furthermore, things had become worse after the Iraqi government had cut off electricity to several territories controlled by ISIS, which it had been unable to restore (al-Tamimi, 2015b). Yet in other areas the collection of trash and the function of running electricity actually improved from just a few hours a day to a consistent flow through out the day, even if it did not have the same full capacity of western countries (Callimachi, 2018g).

Clearly enough, things improved in some areas while in others it did not. What can be pointed out is that satellite images taken over different cities demonstrate that IS’s capture of cities did not have an all over negative effect. In some cities the Islamic State did uphold traditional state-like functions, while in cities that took more military effort for IS to capture did declined more rapidly since areas too costly for IS to hold instead was destroyed (Robinson et.al. 2017:181-182). To some extent the Islamic State provided different services to its citizens especially in areas where IS had authority over a longer time. It was not providing these services to the same capacity as western countries, yet overall there was not an all negative effect in comparison to how it had been before IS.

4.1.7. Characteristic 7: Judicial system enforcing rule of law

“[I]n the conquered territories, one of the first tasks that IS carries out is the imposition of Sharia law” (Napoleoni, 2014:107). The Sharia law was enforced through a Sharia court system (Napoleoni, 2014:48; Lister, 2015:46; Dairieh, 2014) and was performed by judges several of whom came from Saudi Arabia (Moorcraft, 2018:132). In addition, similarities can be

drawn between the Islamic State's and Saudi Arabia's judicial systems. This was certainly true when it came to penalties: "death for blasphemy, homosexual acts, treason, and murder; death by stoning for adultery; one hundred lashes for sex out of wedlock; amputation of a hand for stealing; amputation of a hand and a foot for bandits who steal; and death for bandits who steal and murder" (McCants, 2015:136).

However, what differentiates ISIS from Saudi Arabia was that the Islamic State performed its verdict and sentencing in public. References to Islamic scriptures were also offered especially if the sentence in anyway could be questioned (McCants, 2015:137). An example of this was a tank operator whose sentence was to be crushed by a tank. Brutal as the act was, putting it into the relation of Islamic jurisprudence, the killing was referred to the *qisas* a legal perspective of "an eye for an eye" implying that since the operator killed others with tanks, so would he (Callimachi, 2018g). Other legal text that ISIS produced with reference to the Quran concerned, in detail, how to handle a *sabaya* (female sex slave). The pamphlet contained what to do with the *sabaya* when it's owner died and how it could be sold on to others (Murad, 2019:154-155).

The jurisprudence of the Islamic did not only contain brutality. The Agriculture Department in the Deir az-Zor Province in Syria determined fishing regulations for the Euphrates River forbidding fishing with electric currents, explosive materials, chemicals, or during proliferation (al-Tamimi, 2015c). Furthermore, Christians had special protections by ISIS since they were considered people of faith. They were usually given two options, either they had to convert to Islam or they would need to pay an additional tax as non-Muslims (Murad, 2019:196; Lister, 2015:45; Dairieh, 2014). However this came with restrictions such as "not building additional places of worship, must remove all visible signs of faith, not bear arms, and not sell or consume pork and alcohol" (Lister, 2015:45) and most of the Christians fled the area they lived in when ISIS took control (Dairieh, 2014).

The laws and regulations that ISIS implemented were handed out as flyers, put out through speakers, and "it laid out, in a constitution-like form, both the new rules under which the population would now be governed. [...] Their promises to the people... was, you have lived under these infidel regimes. You have seen what a disaster it's been. Now you're going to see a huge difference with the Islamic State. Corruption is not going to be allowed. They are now going to live in a virtuous society and that they are going to see the fruits of that virtue as a result of their citizenship in this caliphate" (Callimachi, 2018g).

4.1.8. Characteristic 8: Organisation enforcing the rule of law

While Sharia judges regulated the laws, a Sharia educated police force enforced them. Several recruits from abroad were put into the police force and given training for their task. The training was formulated as realistic as possible. Dolls made out of ballistic gel with bags as organs were constructed so the recruits could practice by cutting, stabbing, beheading and shot the dolls (Callimachi, 2018d). The system of punishment was similar to most western systems with codes connected to them, no. 148 concerned cigarettes, no. 192 was tax evasion and no. 166 for drug dealing. The reason for this was quite straightforward: “You need to know why you’re giving out punishments, ...you need to know why you’re saying what you’re saying” (Callimachi, 2018c). When laws were broken the police officers would take the evidence and the accused to a police chief who would give out the punishment. The span between severe and not severe was quite broad. A dress code violation or being flirtatious would be on the low end of reprisals where the convicted would be sat in a cage in the middle of the street. At the higher end was hiding undeclared weapons, adultery, drugs and alcohol and resulted in the death penalty. However, the most basic punishment given was lashes (Callimachi, 2018c). Women also had a standing role in the law enforcement, especially women from western countries. The Khansa Brigade would police “un-Islamic behavior” or dress code violations especially directed to women. Breaking the law would usually end up in a choice of punishment, either lashes or a so-called biter – an object with teeth that would be put on women’s breasts (McCants, 2015:113).

Obedience was an important factor for ISIS’s control and its extreme violence was displayed across the territory with theatres showing videos reminding people what would happen if they disobeyed IS (Callimachi, 2018g). Most of the punishments were also enforced publically, cutting of hands from robbers, crucifying people for murder (Napoleoni, 2014:48) or killing citizens for drug related crimes and displaying the body with a sign around the neck declaring the crime (Callimachi, 2018e). However, with law enforcement came solving regular grievances between ordinary people, or having meeting with different tribes to solve disputes between them (Lister, 2015:32). For example, a street merchant selling chickens made an agreement with a customer that half the price would be upfront and the rest be paid later, but the customer refused to pay the difference. The merchant went to the police station, they wrote down a complaint without taking a bribe, arranged for an officer to look into it and within a couple of days the customer paid. During the Iraqi government the bribe for the pol-

ice would have been higher than what the customer owed and would therefore not been worth it (Callimachi, 2018g).

In sum, the Islamic State had formulated a judicial system from Islamic scriptures and managed to establish a police force enforcing their perspective of the rule of law. However, it is important to keep in mind that there is an inconsistency on how well this enforcement worked. As with the garbage disposal, different areas had different levels on how well IS's organisation worked. The more conflicted an area was the harder it became to enforce the laws. What is clear is that the longer ISIS held control the more absolute the regulations became (Lister, 2015:47).

4.1.9. Characteristic 9: Instruments for foreign protection

What differentiates the Islamic State from other armed groups fighting in the area of Syria and Iraq was its ability to prevent the otherwise easy breakdown of loyalty and command structures. Usually militia fighters' loyalty are assigned to their commander on the battlefield, however, since ISIS managed to construct a military hierarchy and administration surrounding its troops it reduced the risk of mutiny and deterioration (Napoleoni, 2014:28). Haji Bakr, a former military colonel in the Iraqi forces, enabled this capacity. He cleansed ISIS's leadership and replaced it with former Ba'athist security and military officers, people who had experience in authoritarianism and insurgency pre and post Saddam Hussein's era (Lister, 2015:30; McCants, 2015:153). Former generals were placed as governors over cities such as Mosul and Tikrit, a cabinet with eight ministers together with military council consisting of thirteen members was also set up to keep control over the territory. This together with approximately 1,000 additional field commanders gave the Islamic State expertise that no other insurgency had in the area (Lister, 2015:33-35).

To become a frontline fighter ISIS had a robust system keeping records, educating and testing abilities before sending new members to fight. The training started out with small arms while heavier weapon system would be added during the course of time as they evolved in their fighting skills (Lister, 2015:28). It was not only westerners joining as fighters, before announcing the Caliphate ISI broke out hundreds of prisoners many who later joined IS (ibid 17). As a military organisation the Islamic State had between 25,000-30,000 fighters spread over its territory (ibid 67). They were sustained by sophisticated weapons similar to the capacity of a regular national army with "tanks, armoured personnel carriers, field artillery, self-propelled

howitzers, multiple-rocket launchers, an assortment of antitank guided missiles, anti-aircraft guns, and a small number of man-portable air-defense systems” (ibid 26). On top of the weapon systems, ISIS had a military manufacturing and development faculty that produced ISIS’s own weapons and ammunition (Callimachi, 2018h; CAR, 2016).

On the operational side IS worked on two fronts, firstly on a domestic level in the territory’s of Syria and Iraq, and secondly on international arena. The operations performed by ISIS domestically were performed in two steps, first they started placing out informers in towns and villages posing as regular citizens or missionaries. These informers gather intelligence and reported up the chain of command (Moorcraft, 2018:118). These intelligence soldiers then carried out direct attacks against politicians and ranking military officers deteriorating the morale and capacity of enemy troops. These attacks were often followed by urban warfare with small groups, supported by ISIS military infrastructure, and would make as much damage as possible (Lister, 2015:28-30). The military capacity of IS can be put in light through the battle of the Anbar province in 2014. The Iraqi army had stationed five divisions^T but lost substantially against ISIS with 5,000 men wounded and killed, and additional 12,000 deserting (Cockburn, 2015:48-49). On the international level the Islamic State had a department, the Amniyat al-Kharji, which was the external branch executing attacks abroad. The department had set up networks with safe houses, communication, transportation, tactical help such as formations, potential targets and maps showing how to get in and out of areas during an assault. This group is believed to have performed the attacks in Paris in 2015 and Brussels in 2016 (Callimachi, 2018d).

By putting all these factors together it becomes quite clear that IS had the capacity to attain territory and protect it from outside influence, especially with its capability to produce its own weapons. However, ISIS endurance as a small military organisation became its downfall, even if it managed to protect its territory between 2014 and 2016.

4.1.10. Characteristic 10: Instrument for diplomatic relations

The capacity for relation with other states relies upon the functionality of the entity and is therefore a result rather than a demand for statehood. Clearly, there is a need for a functioning organisation within the entity to be able to uphold a potential diplomatic relation. The Islamic State had a cabinet running its territory, it had ministries governing specific areas. However, ISIS did not have one for external relations. However, with the already functioning ministries

and diwan's running everything else, it would be hard to argue that there would not be a possibility to appoint a new minister for foreign relations. With this in mind it is worth mentioning the strong capacity of ISIS's military media organisation spreading its message out on twitter. During the 2014 World Cup in Brazil, for example, IS added hashtags such as #Brazil2014 and #WC2014 trying get an affiliation with the ones to already established for the games (Lister, 2015:41-42).

On top of the outreach on the internet several Islamist terror organisations around the world pledged allegiance to ISIS and became emirates to IS's dawla, one of the more well known was Boko Haram in Nigeria but also, among others, groups in Libya, Algeria, Gaza, Philippines and Indonesia (Lister, 2015:58-59, Moorcraft, 2018:127-130). It is of course questionable how much communication these organisations had with the leadership of ISIS and how much influence ISIS had over them. Yet it pinpoints an underlying aim to follow the ideas and perspectives of the proclaimed views of the Islamic State with a form of ability to attain relations with others.

4.1.11. Characteristic 11: Is the legal criteria met by the entity?

If legality ruled the international system of states, then the debate of recognition would surround its capacity to uphold these legal criteria, not whether it was politically or morally right to do so. Setting morality aside, there are support that the Islamic State upheld a capacity during the period of 2014-2016, it held control over territory and borders, had a population, enforced law and order through a police force and Islamic courts, it had a capacity to siege territory and protecting it from foreign intervention. It is from these evidences, on the ground, that the debate have to be initiated, not from morality.

However, it is clear that we cannot accept that IS was a fully functioning state from a purely western country perspective, nor is it possible to say that it was a fully established working state controlling every inch of its territory. Rather the Islamic State was a state in continuous transformation surrounded by conflict, trying to uphold the factual formalities of statehood controlled through a brutal judicial system. Evidently, this "probably won't create a state many people would want to live in. But that doesn't mean it won't work" (McCants 2015:150). This point is important since it is up to every state to choose what type of judicial, culture or other system it wants to engage in and these choices should not be interfered by other states (Talmon, 2005:150) even if it does not commit to the same international standards

as the rest of the world. To a large extent, as much of the characteristics above demonstrate, the empirics that have been examined indicate that the Islamic State functioned as a legal entity under the declaratory theory. Evidently, the whole picture cannot be presented because of ongoing civil war. However, from what have been presented, for period of about two years the Islamic State did follow through on the legal concept of statehood. Clearly, it was not a perfect entity, but it had set up the functionality of the legal statehood framework needed to continue to build its own legal system as it saw fit. As long as the Islamic State functioned this way the recognition of other states would not be required since the legal existence of a state under the Montevideo Convention's Article 3 is independent from the policy consideration of the other states. However, even if the legal framework indicates statehood for the Islamic State it does not explain why no state has accepted the legality of it.

4.2. CONSTITUTIVE CHARACTERISATIONS

The Islamic State was never recognised by any other state, which is the reason why characteristic 1 of the theory is not analysed. Would however the Islamic State continued to hold its territory and kept building its capacity then future discussion may have considered the act of recognition. The outline for the theory is, in comparison to the declaratory theory, quite simple. If a state want to recognise an entity it can rightfully do so. Even so, there is clearly a need for some kind of notion of statehood.

4.2.1. Characteristic 2: An underlying acquisition of de facto recognition

There is no recognition of IS, nor is there any explicit *de facto* recognition of it. However, France might be considered the one state in the world that gave the Islamic State *de facto* recognition – implicitly. Soon after the Paris attacks in November 2015 France invoked Article 42.7 of the Lisbon Treaty, which implies that all EU member states shall come for the aid of an EU-state that is the victim of aggression upon its territory, this in accordance with Article 51 of the UN Charter (ECFR, 2015). What makes the situation of Article 51's self-defence clause problematic is the way it is connected to Article 2(4) of the UN Charter. Article 2(4) regulates the sovereign integrity of the state while Article 51 regulates the right to bypass sovereignty in the case of self-defence in the situation of armed aggression. Thus, Article 51 can only be applied when Article 2(4) is in play. Clearly, if a non-state actor, situated in an area of *terra nullius* for example Antarctica, conducts an attack on a state the right to self-defence would not be necessary since no sovereign would be under retribution. That is, if

there is no proven connection between the non-state actor and another state. Even so, Article 51 will only be relevant “when the attacked state responds by violating the sovereignty of some other state” (Milanovic, 2010). Such an armed attack also has to meet the quite high threshold underlined by the ICJ in the Nicaragua v. US case of 1986 which imply that all illegal use of force not necessary meets the threshold of armed aggression and therefore self-defence in accordance to Article 51 will not be lawful. Furthermore, the self-defence clause cannot be attributed towards the non-state actor, instead it has to be towards the home state of the non-state actor (Martin, 2019:397-398).

However, the doctrine of “Unwilling or Unable” can circumvent the threshold of the Article 51 if the state asserting its right to act in self-defence can demonstrate that the host state is unable or unwilling to stop the non-state actor to carry out its attacks (Martin, 2019:404-405). The problem is that when France invoked Article 51 to the UNSC they failed to refer to the unwilling or unable doctrine (UNSC, 2015b; Heller, 2015). This therefore circles back to the initial problem where policy meets law. Why invoke an article mandating the laws surrounding states when what initially carried out the attack were terrorists supported by the organisation of IS. By invoking Article 42.7 and later Article 51 France might implicitly state that the Islamic State is an organisation working differently from what we are used to. Because, “[w]ithholding the legal status of ‘State’ does not mean that the non-recognized State is to be treated as a nullity. Rights, powers and privileges are only to be withheld to the extent that they express a claim to statehood. The non-recognizing States do not close their eyes to the (illegal) reality insofar as the non-recognized State exercises *de facto* authority over its territory” (Talmon, 2005:147). The United State’s Supreme Court has since the American Civil War also pinpointed this particular perspective: “[A]ny government, however violent and wrongful in its origin, must be considered a *de facto* government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation” (Eggers, 2007:215). Whether this reflect a change in customary international law towards a more nuanced perspective on when the right to self-defence can be initiated is hard to tell. However, acting on its legal basis can entail some *de facto* capacity of the Islamic State during the period of 2014-2016, whether or not France gave it explicitly.

4.3. BELLIGERENCY CHARACTERISATIONS

There are similarities between the legal criteria of statehood and the legal criteria of belligerency. The difference is that the threshold evidently is lower in belligerency than in statehood. Keeping this in mind some descriptions will follow suit of what already been described.

4.3.1. Characteristic 1: Ongoing conflict over a long period of time

The conflicts in Syria and Iraq have been going on for years. The exact starting point can be discussed, however the escalation in Iraq started mid 2011 and had its peak between 2014-2017 with a fast decline the last year. The same timeline can be given to the conflict in Syria yet with a higher escalation in casualties in the beginning than Iraq and a sooner decline and de-escalation of the conflict (UCDP, 2020a; 2020b). In retrospect it has been a persistent conflict continuing over time and is still going on even if the Islamic State is not a major actor any more.

4.3.2. Characteristic 2: Large part of the population is affected

As mentioned in the characteristic of *stable population* under the declaratory theory, millions of people have fled the conflicted area or been displaced in their own country. Whether it is necessary to specify how many people fled the area and how many people were affected by the Islamic State's control, it is clear that the total number of affected people in both situations counts to the millions. This clearly underlines that large parts of the population were affected.

4.3.3. Characteristic 3: Control over a large part of the territory

Again with similarities to the declaratory theory on territory, it is evident that IS held large part of territory. The control was managed through a network of roadblocks controlling the ingoing and outgoing traffic of the cities. By having authority over the veins of the countries ISIS could enforce its rule over the inhabitants in its territory.

4.3.4. Characteristic 4: Division of power between military and public organs

It has become apparent that many of Iraq's former generals and military personnel, both from the security services but also the regular armed forces joined the ranks of IS. With Abu Bakr al-Baghdadi as the Caliph these generals and other senior officials took the positions as gov-

ernors over the cities such as Mosul, Tikrit and Raqqa but also as ministers of the different Diwan's, or departments, such as education, public services or health (Lister, 2015:76-86; al-Tamimi, 2015:123-124). With this in mind it is clear that IS both had a military branch and a public branch. However, it is unclear how strict this divide between organs was. Considering the situation of conflict that both countries endured it is hard to imagine that it would be a clear-cut differentiation between what was public or military. Yet, the Islamic State built its organisation upon the old bureaucratic structures of Syria and Iraq by keeping the old employees of the different departments and letting them do the same work as before (Callimachi, 2018h). Furthermore, to circumvent militants targeting the civilian population IS differentiated between military and civilian militants, because civilian militants will protect the public from being targets of the military branch (Napoleoni, 2014:37). Even if former military leaders controlled the majority of decisions, as in most military dictatorships, IS had still divided the different ministries so that public and military organisation were not mixed together under the same department.

4.3.5. Characteristic 5: Hierarchy for decision-making

It is evident that there is a debate on how exactly the organisational structure of ISIS was run. What has come forth is that there exist some divide between public and military organs in the over all hierarchic structure of ISIS, the exact details however is still not exactly clear. Yet, as the commander in chief al-Baghdadi controls his territory through two deputies, one over Syria and one over Iraq. Each deputy had split their territory into 12 provinces controlled by the same number of governors overseeing each area. Each governor then had eight councils, such as finance, law and military. The executive branch that oversaw the whole organisation was al-Baghdadi, his two deputies, a cabinet with advisors and the Shura Council (controlling that all level of governmental branches were following ISIS interpretation of Islamic law). The two deputies refer orders from the executive branch down to their governors, which then have to implement these orders through the different councils directly under them (Moorcraft, 2018:137; Thompson & Shubert, 2015). Even if there is a lack in precise measurement how this worked in reality, it is clear that IS had a line of hierarchy through out its decision-making.

4.3.6. Characteristic 6: Capacity to follow Law of Armed Conflict

With similarities to the declaratory theory's capacity for relations, the characterisation is whether or not the armed groups have the capacity to uphold LOAC. As pointed out earlier, an armed group without some sort of hierarchic order would not be able to follow through on LOAC, simply because they would not have the structure to do so. As for ISIS, when they took the area of Anbar al-Baghdadi decided, because of the former history between the province and al-Qaeda, that IS fighters were not to raise ISIS's flag if the inhabitants refused, he also order not to hurt religious men or the men members of the police force (Napoleoni, 2014:32-33). Evidently, this does not give an accurate picture to an organisation that was prone to violence, it however pinpoints that the decision taken by the executive branch actually trickled down to the fighters on the ground. Even if IS was far from following the laws of war there are visible signs that if the debate of belligerency status had been taken, and if IS had accepted, ISIS would have had the capacity to follow through.

4.3.7. Characteristics 7 & 8: Is there any implied recognition of belligerency?

The reason for merging the two predictions together is simply because the theory relies on a constitutive approach for it to be applicable. It is quite evident that no state have explicitly or implicitly recognised the belligerent status of ISIS. It is true, however, that the US blocked, through air strikes, ISIS fighters fleeing in convoys from Syria into Iraq (Nordland, 2017), yet it cannot be considered a fully functioning blockade since it was one specific event and since it was enforced by a third-party actor. Furthermore, this leads into the second reason why belligerency would not be possible to recognise. As with the Spanish Civil War, the conflict quickly changed character from domestic to international. Saudi Arabia financially sponsored several of the different Sunni jihadi groups in the area until beginning of 2014 simply to depress any Shia influence (Cockburn, 2015:35-36) and Turkey did not secure its long boarder towards Syria until late 2015 when the conflict already had escalated (Yayla & Clarke, 2018). There is also evidence suggesting that Turkey's military intelligence service transported military equipment into Syria during 2014 (Pamuk & Tattersall, 2015; Cockburn, 2015:37) and that Turkey bought oil directly from the Islamic State, while also being engaged in Operation Inherent Resolve to depress ISIS (Yayla & Clarke, 2018). Despite the moral ambiguity of Turkey's actions it underlines the quickly changing character towards an international conflict. On the other hand, putting other state-actors aside, if Turkey had not let its intelligence service support ISIS it could have recognised belligerency as a third-party state to protect its

trade interests with the areas controlled by IS. However, such an act would legally be debatable, firstly because the UNSC defined IS as a terrorist organisation making a legal argumentation for recognition of belligerency difficult, if not impossible. Secondly, it cannot be neglected that IS also initiated attacks outside of the contested territory bringing forth a response from France, an actor not in the close proximity of the escalating conflict and therefore also forcing additional states to engage in the civil war.

Evidently, recognition of belligerency, even if the legal criteria have been met, would not have been possible since the conflict engaged too many outside actors both supporting IS and the coalition against it. Nevertheless, if we for a theoretical moment ascribe the correct aspects of belligerency to the case surrounding the Islamic State the question of constitutive recognition still would apply. The inherent problem with recognising a belligerent is that it implies that the ruling state has to recognise it has lost control over parts of its territory, a concession not many governments are inclined to do. Yet, such a view fails to acknowledge the potential legal protections belligerency gives the recogniser. If, for example, the Taliban regime in Afghanistan had recognised al-Qaeda as belligerents then the Taliban could have argued for freedom from liability and not have the attacks from al-Qaeda attributed towards the regime. Whether such a legal act would have influenced the US decision to invade Afghanistan in the first place is a precarious question to answer, however it might have given the Taliban a political distance from the attack on September the 11th. Still, such a debate is speculative but it pinpoints the policy driven perspective of states when it comes to law versus policy. Because, “in practice, states very rarely make an express acknowledgement as to the status of the parties to the conflict, precisely in order to retain as wide a room for manoeuvre as possible” (Shaw, 2003:1041). This cuts directly at the point of relativism. Why should France, Britain or any other state for that matter recognise that a member of the international community is losing grip of its territory when such a statement entails that the performer of recognition have to stay neutral to the rest of the conflict. Clearly, as long as there exists an interest from the actors, either through proxy or by direct engagement, to have the conflict lean towards a specific outcome states will stay hesitant to recognise belligerency.

5. CONCLUSION

The central question for the thesis was whether or not the existing international law theories could be used as a method in determining the character of the Islamic State. Now, as the analysis of the constitutive theory has shown, there is no state that have recognised the Islamic State, nor given explicitly *de facto* recognition. The action performed by France, however, can indicate that ISIS perhaps could have been considered a *de facto* state during the period of examination. Yet, it does not change the fact that the official stand was, and still is, that the Islamic State is a terrorist organisation. With such a result the theory of constitutive recognition stands firm and it cannot characterise ISIS as a state. As for the belligerency theory, its mixture of legal criteria and political considerations gives a divided result. While the legal criteria were met to a great extent not a single state recognised it as a belligerent. The reason might however lay in the escalation of the civil war to an international conflict rather than the reluctance of recognition. For this reason the theory's guidelines for application stood outside of the fact on the ground and the theory cannot therefore characterise the Islamic States as a belligerent.

The most comprehensive result is from the declaratory theory's framework. From a legal standpoint the Islamic State can, to a large extent, be considered a state. It is true that in comparison to other westernised or modern states ISIS is lacking in several aspects. But since the legal criteria under international law are framed in quite broad terms there is little to indicate that a state has to pursue the standards of a democracy. This result therefore questions the dominant aspect of the theory. On the one hand the legal framework points to recognition of statehood. However the refusal to view the Islamic State as such might pinpoint a change into which theory is to be considered as dominant in international law. As the constitutive theory stands firm in the results, perhaps there is a reason to underline that legal criteria is not enough for recognition and, in fact, states chooses to acknowledge statehood when they see it as fit. For this reason the declaratory theory can characterise the Islamic State, yet, the theory cannot explain why this were not the case in reality.

With the results in mind, one of the more difficult aspects has been to concretise the legal aspects through the empirics presented from the territory of ISIS. Since much of the information only can be viewed as snapshots of particular timeframes it has been challenging to paint an overall summarising picture of the case. The thesis has tried to circumvent this issue by presenting books with more comprehensive material and the podcast produced by Callimachi at the NYT. Furthermore, since this is a single case study it is difficult to generalise the result to a broader perspective. However, it clearly shows the collision between policy and law, and how legal recognition is surpassed when the international community defines a new entity as a terrorist organisation. This in turn raises the issue of an absent legal definition on terrorism. If terrorism is not defined through international law it becomes up to the actor (or recogniser) to define the conflicting party in their territory. In a state-centric perspective the definition taken will most likely benefit the state.

Providing an insight into a characterisation of the Islamic State can give an understanding how similar organisations in the future are to be managed. Even if an organisation is defined as a terrorist organisation but upholds the legal criteria of recognition it indicates that the terrorists has created a platform outside the ‘regular’ definition of a terrorist organisation like al-Qaeda. By differentiating al-Qaeda’s or other terrorist groups’ durability of financial support, control of territory, hierarchic structures, supplies of weapons and ammunition, from the Islamic State’s might help to formulate future countermeasures. Formulating such countermeasures for each different case of terrorism might earlier prevent further escalation of a conflict. A comparative study between different terrorist organisations and their functionality could therefore be a first step towards such an understanding.

Throughout the research the biggest obstacle has been the ambiguity of recognition. International law is operated from a state-centric perspective and states can argue in a spectrum of ways whether or not they will recognise. “Sometimes they are misstating or misleading regarding the theory they apply, and sometimes they are simply not intending to apply any particular theory. They switch from a theory of constrained power to unlimited power, from the creation of a new state to the acknowledgement of a pre-existing state, to justify desired political outcomes” (Worster, 2009:169). Hence, depending on the case’s future political implications, the more focus is drawn between what is deemed necessary for recognition and what is not. This problem lines well with the result. Even if the characterisations of the declaratory theory indicate legal aspects for recognition there is still a discrepancy between theory and practice that cannot be explained by the declaratory doctrine. This therefore illustrates that the

constitutive perspective, in the end, is the theory that states fall back on when legality does not fit the desired outcome, especially when it involves a terrorist organisation.

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APPENDIX I: ACRONYMS & ABBREVIATIONS

AP2	Additional Protocol II of the Geneva Conventions
CA3	Common Article 3 of the Geneva Conventions
DPRK	Democratic People's Republic of Korea
EU	European Union
IAC	International Armed Conflict
ICJ	International Court of Justice
ILC	International Law Commission
ICTY	International Criminal Tribunal for the former Yugoslavia
IS	the Islamic State
ISI	the Islamic State of Iraq
ISIL	the Islamic State of Iraq and the Levant
ISIS	the Islamic State of Iraq and Syria [or al-Sham]
LOAC	Law of Armed Conflict
LoN	League of Nations
NIAC	Non-international Armed Conflict
NYT	New York Times
PA	the Palestinian Authority
PCIJ	the Permanent Court of International Justice
UN	the United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States of America
USSR	Soviet Union (Union of Soviet Socialist Republics)
VCLT	Vienna Convention on the Law of Treaties

APPENDIX II: SUPPLEMENTARY EXPLANATIONS

^A LOAC, or International Humanitarian Law (IHL) is the law, which regulated the conduct of war between states in an international armed conflict. “[I]t is a branch of international law limiting the use of violence in armed conflict by: a) sparing those who do not or no longer directly participate in hostilities; b) limiting the violence to the amount necessary to achieve the aim of the conflict, which can be— independently of the cause fought for—only to weaken the military potential of the enemy. This definition leads to the basic principles of IHL:

- the distinction between civilians and combatant;
- the prohibition to attack those *hors de combat* [wounded and sick or prisoners of war];
- the prohibition to inflict unnecessary suffering;
- the principles of necessity; and
- the principles of proportionality.”

(Kolb & Hyde, 2008:15-16).

^B The concept *de facto* is often described with its opposite understanding *de jure*. *De facto* independence is the internal sovereignty (or effective control) of the state with its full authority over citizens and territory. *De jure* independence is the external sovereignty (or its independence) where the authority of the state is recognised as the represent for the population in its territory (Kolstø, 2006:724; Coggins 2006:89). Therefore, “[i]n general it is believed that *de jure* recognition is final, whereas *de facto* recognition is only provisional and thus may be withdrawn” (Kelsen 1941:612, emphasis added).

^C “[A] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

^D (a) the prohibition of aggressive use of force; (b) the right to self-defence; (c) the prohibition of genocide; (d) the prohibition of torture; (e) crimes against humanity; (f) the prohibition of slavery and slave trade; (g) the prohibition of piracy; (h) the prohibition of racial discrimination and apartheid, and (i) the prohibition of hostilities directed at civilian population (“basic rules of international humanitarian law”).

^E A female ISIS member from Germany is standing trial for war crimes because she and her ISIS husband bought a Yazidi woman and her daughter as slaves. This case is considered as the first case brought to trial for war crimes against the Yazidis. The UN Human Rights Council has also deemed ISIS’s actions against the Yazidi population as genocide (Shubert, 2019).

^F Terra Nullius – A territory belonging to no one, either by being empty of people; or having groups of people living in the area but who has not formed a community; or a community of people but whom do not have sovereignty over the territory. Occupation by a foreign power of such a territory could therefore be considered as legal since there is a lack of legal authority over it (Grant, et.al. 2009:596).

^G In his article Grant (see page 415) refers to the United States Department of State where effective control was identified in a situation from 1976: “In [judging whether to recognize an entity as a state], the United States has traditionally looked to the establishment of certain facts. These facts include **effective control** over a clearly defined territory and population; an organized governmental administration of that territory; and a **capacity to act effectively** to conduct foreign relations and to fulfill international obligations.” (Emphasis added). In Grant’s article there seems to be no more attention put on the particular issue of effective control after this.

^H One example is the European Community’s (EC) Guidelines on Declaration on Yugoslavia and on New States in Eastern Europe and the Soviet Union (Dixon, 2013:135). In addition to the criteria of the Montevideo Convention the EC added democracy, human rights, guarantees for ethnical minorities, disarmament and non-proliferation of nuclear weapons, among other things (EC, 1991:1487). This was the first time additional content was put into practice and became a mandatory aspect to the recognition. Whether the EC guidelines meant that a territory not upholding this additional criteria could not be a state or at least would not be considered a state by the EC is a bit unclear (Dixon, 2013:135), but it gives a insight into what the EC considered as important question for the European Community. On a further note, by putting these guidelines forward the EC, probably unknowingly, started a debate whether or not these guidelines should be seen as a constitutive recognition since the EC in some way demanded new subjective criteria, for example a specific form of government, to be met (ibid).

^I The Committee ended its report by stating that they were unable to come to a unanimous recommendation to the Security Council in the case. One recommendation, however, stated that Palestine should get the status of “Observer State” (UNSC, 2011:3). About a year later the General Assembly adopted a resolution where Palestine got the non-member observer State status (UNGA, 2012:3).

^J Article 3 of the Geneva Conventions: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities ... shall in all circumstances be treated humanely... (2) The wounded and sick shall be collected and cared for ...”.

^K Additional Protocol II is an addition to Article 1 of Additional Protocol I of the Geneva Conventions. Article 1 of Protocol II summarise the scope of material field of application as follows:

1. This Protocol ... shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

^L Hans Kelsen (1941:616) only put forward three points of the criteria, leaving the last one out. The reason for his decision is a bit unclear, but it might be because “[t]he legal act of recognition of insurgents as a belligerent power implies that the above-mentioned facts, *determined generally* by international law, exist in the given case.” (Kelsen, 1941:616, emphasis added). Kelsen’s point of ‘generally determination’ might be that he sees the prospect of the criteria as something that can change depending on situation. A further, perhaps better explanation, might be to view the compliance with LOAC in similarity to capacity for relations as the declaratory theory. This would mean that the compliance is about having good enough organisation to be able to follow through on LOAC if necessary. Not that the armed group have to follow suit to get recognised. But as mentioned, it is unclear why Kelsen stands out on the particular point of the requirement of the laws of war.

Lindsey Moir (1998:346-347) follows the idea of belligerency status as Hersch Lauterpacht (1947:176), which incorporates the four criteria mentioned above but add an additional fifth point: “hostilities must have reached such a magnitude that foreign States found it necessary (either diplomatically or economically) to define their attitude towards the contesting factions by according them belligerent status.” This fifth point, here incorporated by Moir and Lauterpacht as part of the criteria, is what Lotsteen (2000) and Radin (2013) describes as the subjective aspect of the doctrine – or constitutive aspect to use the terms of state recognition.

^M The Commune of Paris in 1871 – After France capitulated in the Franco-German War the National Guard sieges Paris and declared the Commune on the 18th of March. The reasons were several but an economic recession, the capture of Napoleon III and the failure in the Franco-German War were enough to reinforce the resentment and advance radical socialistic ideas among the citizens and the National Guard in Paris. The siege ended in what was called the bloody week on the 28th of May and nearly 25 000 Parisians had been killed (Gould, 1991:717-719). This rebellion only lasted for more or less 70 days, which was considered to short period of time for an ongoing civil war.

^N The Spanish Civil War 1936-1939 – The war started as a response to what was perceived as anti-Spanish policies set out by the Republic government and in July of 1936 some military generals started an insurrection against the government. The conflict quickly escalated into a war containing a strain of different conflicts; religion, class, political ideology and nationalism, all mixed together with at least half the country involved in the conflict. Franco’s Nationalist movement ended up grabbing the hold of power and Spain was ruled by the Franco regime until 1975 when he died (Holguín, 2005:1770;1779).

^O The Brazilian Revolution 1893-1894 – The Brazilian and US government had signed a treaty of cooperation between each other in 1891 and the sitting president Peixoto protected the bill in the Brazilian Parliament. Opponents of the president and the bill started the rebellion to get rid of the president. An Admiral of the Brazilian Navy took war and commercial vessels and sieges the port of Rio de Janeiro with the goal to stop all foreign ships entering the harbour, which in the long run would force the government to bankruptcy because of the vital importance of the harbour. With small exception of fighting on the main land of southern Brazil the whole insurgency took place in and around the harbour (Lafeber, 1960:107-108).

^P The American Civil War – President Ulysses Simpson Grant in a speech to Congress in 1869 refused recognition of belligerency to the Confederates. However, the Supreme Court of the United States had earlier decided in a Prize Case (in 1861) that the Confederates had belligerent status. The reasons were that a state could not blockade its own ports: if there were no conflict a state would simply close them down. By blocking the harbours the United States recognised that they did not have control over their own ports and therefore implicitly gave the Confederates belligerent status (see Radin 2013 *supra* notes 58 and 45; US Supreme Court Case 1861).

For a comparison, look at President Grant’s State to the Union Address from 7th of December 1875. President Grant, did not give the Cuban insurrection belligerent status because he “fail[ed] to find in the insurrection the

existence of such a substantial political organization, ... having the forms and capable of the ordinary functions of government toward its own people and to other States” (Beale, 1896:418).

^Q “The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army’.” (Article 1 of the 1907 regulations attached to the Hague Convention No. IV).

^R Even after the Supreme Court’s ruling in 1861 the US government still asserted its position as can be seen by President Grant’s speech to Congress in 1869. Because of this it can be interesting to point out a statement made by an American jurist in the case: “[I]f the British Government erred in thinking that the war began as early as Mr Lincoln’s proclamation in question, they erred in company with our Supreme Court” (Moir, 1998:349).

^S “The National Government ... deem the grant of belligerent rights to be right. There exist to a full extent in National Spain the conditions necessary to request that it may be recognized:

- (a) The possession of, and full sway over, a portion of the national Spanish territory which greatly exceeds that held by the enemy.
- (b) A legal and regular Government which *de facto* exercises over the said portion of territory the rights inherent in sovereignty.
- (c) A regular land and air army, perfectly organized and subject to a strict military discipline, which affords and guarantee of order ...respecting and causing to be respected with the upmost scrupulousness the laws and customs of warfare...”

(Lauterpacht, 1947:251)

^T A military division contains approximately between 10 000-25 000 soldiers.