

# LEGAL ANALYSIS: DAESH CONTROL OF WATERCOURSES IN SYRIA AND IRAQ

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*Abstract:* After years of turmoil, the volatile situation in Iraq and Syria erupted into chaos, setting the stage for the rise of Daesh. Under the leadership of Abu Bakr al-Baghdadi since 2013, Daesh has successfully gained control of territory and influence throughout vast regions of Iraq and Syria to create a new religious caliphate.<sup>1</sup> In the water-scarce region, Daesh has executed a plan to capture the most precious resource available: water. The critical threat Daesh poses to watercourse installations along the Tigris and Euphrates in Syria and Iraq poses a pressing challenge to water security in the Middle East. How might state actors hold Daesh accountable for their control, depletion, and weaponization of the public resource of water? In the midst of multi-ethnic sectarian conflicts, what national laws in Iraq and Syria create obligations for a coordinated federal response to protect their watercourses? What duties does an Armed Non-State Actor owe within a positivist international legal system? Do those duties change when that actor draws new borders for a new self-proclaimed “state” made up of transnational sovereign territory?

This note will examine the legal implications that are triggered by Daesh control over watercourses throughout Iraq and Syria. Part I contextualizes the threat Daesh poses to watercourses in Iraq and Syria as well as what type of legal personhood they possess. Part II examines the legal obligations of state actors under domestic, Islamic, and international law with respect to Daesh control of water installations in Iraq and Syria. After establishing the legal basis, Part III analyzes the extent to which Daesh, as an Armed Non-State Actor, can be legally bound under the same sources of law. Part IV applies the sources of law identified in Parts II and III to two case studies of Daesh control and explores mechanisms for enforcing these theories of accountability.

## I. BACKGROUND

### A. *The Threat Daesh Poses to Watercourses in Iraq and Syria*

The Twin Rivers of the Tigris and Euphrates originate in Turkey and flow south into Syria and Iraq.<sup>2</sup> Both Syria and Iraq are dependent on

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<sup>1</sup> Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (March 2015), <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> (Daesh “already rules an area larger than the United Kingdom”).

<sup>2</sup> Bülent Açma, *Water Security in the Middle East: A Case Study of the Euphrates and Tigris Rivers*, in WATER POLICY AND LAW IN THE MEDITERRANEAN: AN EVOLVING NEXUS 90 (Slavko Bogdan ed., 2011).

installations along the Tigris and Euphrates to provide drinking water, electricity, and irrigation to their citizens.<sup>3</sup> Prior to the rise of Daesh, also referred to as the Islamic State of Iraq and Levant (ISIL), in the region, issues related to water access throughout Syria and Iraq had already developed into a crisis.<sup>4</sup> The regional water crisis stems from a longstanding reliance on critical installations that fall short of standards for efficiency and structural integrity.<sup>5</sup> Along the Tigris, key installations include the Badush Dam, Mosul Dam, and the Samarra Barrage in Iraq.<sup>6</sup> Along the Euphrates, key installations include the Baath Dam and the Tabqa Dam in Syria and the Fallujah Barrage Dam and the Haditha Dam in Iraq.<sup>7</sup> The long-term decline in water quantity and quality in the Euphrates-Tigris Basin—a direct result of water diversions in Turkey—also contributed to the water crisis.<sup>8</sup>

Daesh has a well-documented strategy based on controlling territory along the watercourses and controlling their related installations. In early 2013, Daesh captured the Tabqa Dam. This Euphrates installation is a source of water and electricity for five million people, including residents of Aleppo, Syria's largest city.<sup>9</sup> Under Daesh control, the Tabqa's reservoir,

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<sup>3</sup> Lindsay Church, *Water Security and the Islamic State: Challenges and Opportunities for the International Community* 4 (2015) (unpublished policy analysis, University of Washington, Jackson School of International Studies, Middle East Center).

<sup>4</sup> Sharmila L. Murthy, *Iraq's Constitutional Mandate to Justly Distribute Water: The Implications of Federalism, Islam, International Law and Human Rights*, 42 GEO. WASH. INT'L L. REV. 749, 749–51 (2010) (writing of Iraq in 2011: "In Baghdad, Iraq's most populous city, 25% of the population remains disconnected from the water supply network; residents are forced to rely on expensive and unreliable alternative sources of drinking water. Outside of Baghdad, more than 30% of the population does not have access to potable water service delivery, and in rural areas, this figure rises to over 50%. Many Iraqis spend one-third of their income on purchasing potable water."). See also Joshua Hammer, *Is a Lack of Water to Blame for the Conflict in Syria?*, SMITHSONIAN MAG. (June 2013), <http://www.smithsonianmag.com/innovation/is-a-lack-of-water-to-blame-for-the-conflict-in-syria-72513729/?no-ist> (the Gravity Recovery and Climate Experiment documented that between 2003 and 2009 in Tigris-Euphrates Basin, "117 million acre-feet of stored freshwater vanished from the region as a result of dwindling rainfall and poor water management policies," an amount "equal to all the water in the Dead Sea." In Syria a 2006 drought forced many farmers to "abandon their field and migrate to urban centers.").

<sup>5</sup> FREDERICK LORENZ & EDWARD J. ERICKSON, *STRATEGIC WATER: IRAQ AND SECURITY PLANNING IN THE EUPHRATES-TIGRIS BASIN* 103–25 (Shawn Vreeland ed., 1st ed. 2013). See also *id.* at 109 ("On 4 June 2002, a major Syrian dam collapsed; even though it was not widely reported, this event raised questions about Syria and the management of its water resources. Although not within the Euphrates-Tigris basin, the Zeyzoun Dam's rupture and collapse brought to light immediate concerns of dam safety and maintenance in Syria."); *id.* at 125 ("In 2010 the Mosul Dam continued to require a half million dollars per year to repair cracks that threaten its integrity and reduce its effective hydropower potential.").

<sup>6</sup> Church, *supra* note 3, at 4.

<sup>7</sup> *Id.*

<sup>8</sup> LORENZ & ERICKSON, *supra* note 5, at 4–5.

<sup>9</sup> Fred Pearce, *Mideast Water Wars: In Iraq, A Battle for Control of Water*, YALE ENVIRONMENT 360 2 (Aug. 25, 2014), [http://e360.yale.edu/feature/mideast\\_water\\_wars\\_in\\_iraq\\_a\\_battle\\_for\\_control\\_of\\_water/2796/](http://e360.yale.edu/feature/mideast_water_wars_in_iraq_a_battle_for_control_of_water/2796/).

Lake Assad, was dramatically reduced in size, causing blackouts in Aleppo for sixteen to twenty hours a day on average.<sup>10</sup>

In April 2014, Daesh seized control of the Fallujah Dam in Iraq and intentionally released water into the local community. This act destroyed 160 kilometers of downstream cropland and deprived millions of people access to water in downstream cities such as Karbala, Najaf, and Babil.<sup>11</sup> The intent behind the water release was to “use water aggressively as a tool of destruction, targeting populations who live farther south.”<sup>12</sup>

More recently, Daesh launched repeated attacks to gain control of the Haditha Dam, the second largest dam in Iraq, which was built along the Euphrates and is located considerably upstream in Al Anbar Province. It serves as the major source of agricultural irrigation and generates one-third of the country’s electricity.<sup>13</sup> Government officials in Iraq were so concerned with Daesh control of the Haditha Dam that they told workers to be prepared to open the floodgates against Daesh forces rather than relinquish control.<sup>14</sup> Similar concerns exist for the Mosul Dam, Iraq’s largest dam, which Daesh briefly controlled from August 7 to 18, 2014.<sup>15</sup> Daesh was met with little resistance until President Obama authorized two days of concerted airstrikes around the dam.<sup>16</sup> The coordinated airstrikes gave hundreds of Kurdish *peshmerga* fighters and Iraqi forces the ability to reclaim the Mosul Dam.<sup>17</sup>

Daesh has greatly mismanaged and severely limited the public’s access to the watercourse installations under their control. Furthermore, Daesh has demonstrated an intent to weaponize the watercourses based on severely misinterpreted religious thoughts. Based on its behavior, continued Daesh control of watercourses and related installations along the Tigris and

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<sup>10</sup> *Id.*

<sup>11</sup> Nadia Massih, *ISIS Gains Highlight “Aggressive” Use of Water as Weapon of War*, THE DAILY STAR (July 21, 2014), <http://www.dailystar.com.lb/News/Middle-East/2014/Jul-21/264554-isis-gains-highlight-aggressive-use-of-water-as-weapon-of-war.ashx#sthash.9N7f9pWs.dpuf>.

<sup>12</sup> *Id.* (quoting Russell Sticklor, co-author of *Water Challenges and Cooperative Response in the Middle East and North Africa*).

<sup>13</sup> Pearce, *supra* note 9, at 3.

<sup>14</sup> Alissa J. Rubin & Rob Nordland, *Sunni Militants Advance Toward Large Iraqi Dam*, N.Y. TIMES (June 25, 2014), <http://www.nytimes.com/2014/06/26/world/middleeast/isis-iraq.html>.

<sup>15</sup> Azem Ahmed, *In Retaking of Iraqi Dam, Evidence of American Impact*, N.Y. TIMES (Aug. 19, 2014), [http://www.nytimes.com/2014/08/20/world/middleeast/in-retaking-of-iraqi-dam-evidence-of-ameri-can-impact.html](http://www.nytimes.com/2014/08/20/world/middleeast/in-retaking-of-iraqi-dam-evidence-of-american-impact.html).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Euphrates raises grim possibilities. Daesh may destroy dams, use dams to manipulate power grids, reduce water flow from dams to deprive downstream populations of water, use water as a weapon against downstream cities, and use water to overtake larger swaths of territory.<sup>18</sup>

*B. Classifying Daesh as a Legal Actor*

Control and utilization of watercourses and installations in these regions is governed by a combination of domestic law, Islamic Law, and international law. However, any application of these sources of law is complicated by Daesh's status as an Armed Non-State Actor (ANSA).<sup>19</sup> ANSAs are "any armed group, distinct from and not operating under the control of the State or States in which it carries out military operations, and which has political, religious, or military objectives."<sup>20</sup> International law has historically viewed states as the only relevant actors in international conflicts.<sup>21</sup> ANSAs are increasingly a political reality in international conflicts and, thus, disrupt this longstanding state-centric approach. Therefore, the definitive duties that accompany the legal classification of ANSAs are not fully developed. The issue of how to create legal obligations for ANSAs will be discussed at length later in this note.<sup>22</sup> Given the relatively recent emergence of ANSAs, an analysis of legal obligations presents all the challenges inherent to a lack of precedent for legal standing, case law, and practical means of enforcing duties beyond a theoretical perspective. Yet, given the threat posed by Daesh, such analysis is urgently needed and cannot wait for a fully-developed regime to impose legal obligations.

II. LEGAL OBLIGATIONS GOVERNING WATERCOURSES AND INSTALLATIONS

This Part examines the legal obligations of state actors with respect to Daesh's control of water installations in Iraq and Syria under domestic,

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<sup>18</sup> See Church, *supra* note 3, at 5–12.

<sup>19</sup> Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, *International Law and Armed Non-State Actors in Afghanistan*, 93 INT'L REV. RED CROSS 47, 48 (2011) [hereinafter Bellal et al., *ANSAs in Afghanistan*].

<sup>20</sup> Annyssa Bellal & Stuart Casey-Maslen, *Enhancing Compliance with International Law by Armed Non-State Actors*, 3 GOETTINGEN J. INT'L L. 175, 176 n.2 (2011) [hereinafter Bellal & Casey-Maslen, *Enhancing Compliance*].

<sup>21</sup> Frederick M. Lorenz, *The Protection of Water Facilities under International Law*, UNESCO-IHP 18, 46 (2003).

<sup>22</sup> See *Infra* Part III.

Islamic, and international law. First, under domestic law, Iraq and Syria have an obligation to ensure that watercourses remain a public good and that they are justly distributed. Second, under Islamic Law, the Qur'an and hadith literature mandate both that all Muslims should have equal access to water and that water should be used in moderation because it is a finite resource. Third, under international law, the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997 (U.N. Watercourses Convention or UNWC) creates obligations for Iraq and Syria to protect watercourses and the related installations in their territory from harm, emergency situations, and armed conflict. The U.N. Watercourses Convention further brings in a series of International Humanitarian Law provisions for times of armed conflict.

A. *Obligations Under Iraqi and Syrian Domestic Law*

Although Syria and Iraq face massive threats to sovereignty and internal security, any legal analysis should first look to the fundamental obligations of the current regimes. To analyze the obligations created for the state actors of Iraq and Syria, this Part will examine the Iraqi Constitution and Syrian laws pertaining to water management.

1. *Legal Framework for Water Management in Iraq*

In 2005, the Iraqi Governing Council (IGC) drafted and approved an Interim Constitution that has subsequently become permanent.<sup>23</sup> The Iraqi Constitution divides power between federal, regional, governorate, and local governments.<sup>24</sup> Although it broadly outlines the obligations of these different powers, some critics note that it leaves many structural and procedural issues unresolved.<sup>25</sup>

The Iraqi Constitution creates several obligations for the state to respond to potential Daesh control of watercourse installations. First, in Articles 7 and 9, the Constitution contains provisions that establish the obligation for the government to combat Daesh as an ANSA. Second, in Articles 110 and 114, the Constitution mandates that federal and local

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<sup>23</sup> *Iraq Index*, INT'L CONST. L., [http://www.servat.unibe.ch/icl/iz\\_\\_indx.html](http://www.servat.unibe.ch/icl/iz__indx.html) (last visited Feb. 28, 2016).

<sup>24</sup> See *Dustūr Jumhūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005.

<sup>25</sup> William S. Spencer et al., *Next Steps for Implementing The Iraq Constitution*, PUB. INT'L L. & POL'Y GROUP I, 38 (2006).

governments ensure the “just distribution” of water flow to all individuals in accordance with international law and conventions.

*a. Iraq’s Provisions Prohibiting the Existence of Daesh*

The drafters of the new Iraqi Constitution were mindful of the political reality of multi-ethnic sectarianism within the state. As such, the Constitution creates an explicit framework that prohibits the presence of groups such as Daesh and assigns the state an affirmative duty to combat them. Under Articles 7 and 9 of the Iraqi Constitution, Daesh should be considered unconstitutional and the state has an affirmative obligation to combat it.

Article 7, Second of the Constitution mandates that “the State shall undertake to combat terrorism in all its forms, and shall work to protect its territories from being a base, pathway, or field for terrorist activities.”<sup>26</sup> The legislative history of Article 7 contains a very heated discussion of how to outlaw association with the Saddam Hussein-led Ba’ath party.<sup>27</sup> Paragraph One of the provision went through many drafts and ultimately settled on language that outlaws “any entity or program that adopts, incites, facilitates, glorifies, promotes, or justifies racism or terrorism or accusations of being an infidel or ethnic cleansing.”<sup>28</sup> The provision continues to list the Saddam Ba’athists as an exemplar of such activity, yet retains a broad categorization that would include Daesh.<sup>29</sup> Article 7, Second also declares that the State shall combat groups that fit under the Paragraph One categorization. Article 7, Second accordingly creates a legal obligation for the State to actively combat Daesh in order to “protect its territories” from “terrorist activity.”

Article 9 of the Constitution provides for the creation of the Iraqi armed forces and security services while also prohibiting “the formation of military militias outside the framework of the armed forces.”<sup>30</sup> Daesh is a military militia outside of the framework of the armed forces authorized by

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<sup>26</sup> Article 7, Section 2, Dustūr Jumhūrīyat al-‘Irāq [The Constitution of the Republic of Iraq] of 2005.

<sup>27</sup> Ashley Deeks & Matthew Burton, *Iraq’s Constitution: A Drafting History*, 40 CORNELL INT’L L.J. 1, 13 (2007).

<sup>28</sup> *Id.* (citing Article 7, Section 2 Dustūr Jumhūrīyat al-‘Irāq [The Constitution of the Republic of Iraq] of 2005).

<sup>29</sup> *Id.*

<sup>30</sup> Article 9, Section 1, B, Dustūr Jumhūrīyat al-‘Irāq [The Constitution of the Republic of Iraq] of 2005.

Article 9, which must be exclusively created and regulated by the Iraqi Government. Daesh is therefore an illegal entity under Article 9.<sup>31</sup>

Article 7, First and Article 9, First, B of the Constitution define the presence of Daesh in Iraq as illegal. Furthermore, Article 7, Second also establishes an affirmative State obligation to “combat” Daesh. Although “combat” is not further defined in the text, it would include the current activities of the Iraqi State and provide the legal basis for the action. This might be considered analogous to the authority granted by the proposed Authorization for the Use of Military Force (AUMF) against Daesh by the United States.<sup>32</sup>

*b. Iraqi Constitutional Obligations Pertaining to Water Resource Management*

Articles 110 and 114 of the Iraqi Constitution expressly create powers for the federal government and regional authorities to maintain and protect the just distribution of water resources. Daesh seizure and control of watercourses triggers these obligations.

Article 110 lists the exclusive powers and obligations of the federal government. One of those exclusive duties is “[p]lanning policies relating to water sources from *outside* Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance *with international laws and conventions*.”<sup>33</sup> The article thus obliges the federal authorities to prevent Daesh control of watercourse installations and imposes limitations and obligations as defined by international law.

First, as described in the introduction, Daesh control of the water installations in Iraq poses a direct threat to Iraqi citizens who rely on the watercourses for drinking water, electricity, and irrigation. Article 110, Eighth safeguards access to water as a universal right against the sectarian bias of political parties that created the Iraqi Constitution. Second, federal

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<sup>31</sup> Militia is defined as “a military force that engages in rebel or terrorist activities, typically in opposition to a regular army.” *Militia*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/militia?searchDictCode=all](http://www.oxforddictionaries.com/us/definition/american_english/militia?searchDictCode=all) (last visited Feb. 20, 2015).

<sup>32</sup> Letter from President Barack Obama to Congress, Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant (Feb. 11, 2015), <http://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>.

<sup>33</sup> Article 110, Section 8, *Dustūr Jumhūrīyat al-‘Irāq* [The Constitution of the Republic of Iraq] of 2005 (emphasis added).

regulation is subject to international laws and conventions.<sup>34</sup> The legislative history shows that the guarantee of water access according to international laws and conventions was maintained throughout multiple draft forms of the Constitution.<sup>35</sup> These international standards will be discussed more thoroughly in the subsequent discussion of the U.N. Watercourses Convention, to which Iraq has acceded.<sup>36</sup>

Article 114 outlines the powers and obligations shared between the federal government and regional authorities. Article 114, Seventh declares that one of the shared duties is “[t]o formulate and regulate the internal water resources policy in a way that guarantees their just distribution, and this shall be regulated by law.” Here, the importance of “just distribution” is again emphasized. However, Article 114 is ambiguous as to whether assuring distribution is an exclusive power of the federal government or whether it must be carried out in concert with the regional authorities.<sup>37</sup> A Public International Law and Policy Group Roundtable argued that the inclusion of policy pertaining to water rights as both an *exclusive* duty and *shared* duty would likely require a constitutional amendment or legislation clarifying which branch should maintain control over this right.<sup>38</sup> Without such amendment, the duty to protect watercourses from Daesh control most likely rests with the federal government. Article 110 specifies that watercourses originating from *outside* the country fall in the exclusive powers of the federal government, which would apply to both the Tigris and the Euphrates.

Articles 110 and 114 create the obligation for the federal government to maintain “just distribution” of water inside Iraq. Daesh seizure and control of watercourse installations, such as the Fallujah Dam, which flooded thousands of homes and farmland, has proven that their distribution of water would not be just. Therefore, under either Article, the federal government is obliged to respond to Daesh control of the watercourses. Moreover, Daesh violates the Iraqi Constitution in its mission to establish dominion over the watercourses.

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<sup>34</sup> Deeks & Burton, *supra* note 27, at 24–25.

<sup>35</sup> *Id.* at 24–25. Draft version from Aug. 23, 2005: “plan policies relating to water sources from outside Iraq and guarantee [the] rate of water flow to Iraq in accordance with laws and international convention.”

<sup>36</sup> *See infra* Part II.C.

<sup>37</sup> Murthy, *supra* note 4, at 12 (acknowledging this ambiguity and arguing, “a more likely interpretation is that under Article 114, the federal and regional governments exercise concurrent, but independent, powers.”).

<sup>38</sup> Spencer et al., *supra* note 25, at 40.



## 2. *Legal Framework of Water Management Under Syrian Law*

In Syria, the legal framework for water management stems from the *Mejelle*, the French Mandate, and more recently, Articles 1234 to 1328.<sup>39</sup> Under these sources of domestic law, watercourses are mandated to be a public good. The Syrian Constitution does not contain any specific provisions about water management. However, the Introduction and Article 114 of the Syrian Constitution establish general legal obligations for the state that are implicated by the threat of Daesh control of watercourses.

### a. *Syria's Constitutional Obligations Related to Daesh*

The most recent Syrian Constitution was passed in 2012 by the Assad government in response to the widespread uprisings that began in 2011.<sup>40</sup> In its current form, the Constitution has no explicit provisions addressing water management. The Constitution does contain several provisions pertaining to obligations to address the threat of Daesh control of watercourses more generally, specifically in the Introduction and Article 114.

The Introduction to the Syrian Constitution reads: “Abiding by righteousness, justice, and international law, the Syrian Arab Republic aims to achieve and maintain peace and international security, both of which it considers to be key objectives.”<sup>41</sup> This language defers to international law in achieving both “peace” and “international security.” Daesh control of water installations would obstruct these objectives. Therefore, the government is obliged to abide by “justice” and “international law” in addressing the threat of Daesh.

Chapter 2, Article 114 of the Constitution provides, “[i]n case of grave danger which threatens national unity or the safety and independence of the homeland . . . the President may take quick action required by the circumstances to face the danger.”<sup>42</sup> Here, the Constitution unequivocally gives power to the President to address any threat to state institutions that might arise. Partially enacted in response to the uprisings in Syria, this

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<sup>39</sup> Raya Marina Stephan, *Legal Framework for Groundwater Management in the Middle East, in WATER RESOURCES IN THE MIDDLE EAST: ISRAEL-PALESTINE WATER ISSUES—FROM CONFLICT TO COOPERATION* 293, 294 (Hillel Shuval & Hassan Dweik eds., 2007).

<sup>40</sup> DUSTUR JUMHURIYYA AL ‘ARABIYYA AL-SURIYYA [CONSTITUTION] Feb. 24, 2012, Introduction (Syria).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*, art. 114.

provision couches presidential authority in broad terms to allow the Executive constitutional leeway in responding to “grave danger.” As it stands, this provision gives the President the authority to coordinate a response to Daesh threat to national security.

Although the central government does not currently control the territory held by Daesh, we must assume that the situation will eventually change. It is essential to plan now for the accountability of Daesh for serious violations of the law.

*b. Syrian Water Law Under the Mejelle, the French Mandate, and Act No. 31*

The legal framework for management of watercourses in Syria primarily stems from the *Mejelle*, which codified Islamic Law during the Ottoman Empire and remained in force even after Syria achieved independence.<sup>43</sup> Article 1234 defines water as a common good,<sup>44</sup> and Article 1235 mandates that water is not the absolute property of any person.<sup>45</sup> Outside of the *Mejelle*, two texts inherited from the French Mandate govern Syria’s water management.<sup>46</sup> First, Order No. 144/S of the High Commissioner, passed on June 10, 1925, defines the public domain as “all things which are by definition affected to the use of all or to a public service. It is alienable and imprescriptible.”<sup>47</sup> Second, Order No. 320, passed on May 26, 1926, governs the conservation and use of watercourses in the public domain.<sup>48</sup>

These texts serve as the foundation for water legislation in Syria and were supplemented with Act No. 31 of November 16th passed in 2005. Act No. 31 “sets forth that watercourses, lakes, waterfalls, springs, and groundwater are deemed to be a public good.”<sup>49</sup> Act No. 31 further provides that watercourses should be protected from depletion.<sup>50</sup> Most notably, it

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<sup>43</sup> Stephan, *supra* note 39, at 294.

<sup>44</sup> *Id.*

<sup>45</sup> Léna Salamé & Rana Karouf-Gaudig, *Water Law in East Mediterranean Countries: The Imperative of a Holistic Approach*, in *WATER POLICY AND LAW IN THE MEDITERRANEAN: AN EVOLVING NEXUS* 1, 5 (Slavko Bogdan ed., 2011).

<sup>46</sup> Stephan, *supra* note 39, at 3.

<sup>47</sup> *Id.* (quoting Order No. 144/S of the High Commissioner, June 10, 1925).

<sup>48</sup> *Id.*

<sup>49</sup> Salamé & Karouf-Gaudig, *supra* note 45, at 5 (quoting Water Legislation Act., SYRIAN OFFICIAL GAZETTE, No. 31 of November 16, 2006).

<sup>50</sup> *Id.* at 10.

mandates that all extraction projects be subject to prior authorization.<sup>51</sup> If the Act is violated, “serious penalties are provided for under criminal law.”<sup>52</sup> Daesh has violated this provision, but for now, as in Iraq, the main obstacle for applying criminal law is that the Syrian government lacks enforcement capability.

Under the *Mejelle*, the French Mandate orders, and Act No. 31, water is to be treated as a public resource that is to be managed by the government. Contrary uses are therefore illegal and the Syrian government thereby has the legal obligation to keep watercourses public. Daesh forces are in violation of these sources of law as demonstrated by their intended seizure, control, and private use of watercourses and related installations in Syria.

### B. *Obligations to Protect Watercourses Under Islamic Law*

Islamic Law, or Sharia Law, creates a series of principles for water management that assert access to water as a universal right. Iraq and Syria have constitutional provisions that mandate Sharia as a source of legislation. In other words, all laws in Syria and Iraq must not contradict Islamic Law. Islamic Law is primarily derived from two sources: the Qur’an and hadith literature. Islamic Law, as derived from the Qur’an and hadith literature, dictates that access to water is a universal right.

#### 1. *Sharia as Source of Law in the Iraqi and Syrian Constitutions*

Since 1950, the majority of Arab countries have enacted constitutions with provisions that mandate that Islamic norms are a controlling source of legislation.<sup>53</sup> In countries such as Kuwait, Sudan, Yemen, Egypt, United Arab Emirates, Qatar, and Bahrain, constitutions contain what Clark Lombardi, a scholar of Islamic Law, refers to as “sharia-as-source-of-legislation” provisions (SSL). These are provisions that make Islamic norms “a” or “the” chief source of legislation.<sup>54</sup> SSL provisions are apparent in both the Syrian and Iraqi Constitutions.

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<sup>51</sup> *Id.*

<sup>52</sup> Salamé & Karouf-Gaudig, *supra* note 45, at 11 (quoting Water Legislation Act., SYRIAN OFFICIAL GAZETTE, No. 31 of November 16, 2006).

<sup>53</sup> Clark Lombardi, *Constitutional Provisions Making Sharia “A” or “The” Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?*, 28 AM. U. INT’L L. REV. 733, 734 (2013) [hereinafter Lombardi, *Constitutional Provisions*].

<sup>54</sup> *Id.*

The 1950 Syrian constitutional declaration, Article 2, states: “Islamic *fiqh* [traditional scholarly interpretations of Islamic law] shall be the chief source of legislation.”<sup>55</sup> In 1973, Syria enacted a new constitution that changed the language to make Islamic *fiqh* “a chief source of legislation.”<sup>56</sup> This same clause remains in the current constitution, which the Assad government passed in 2012.<sup>57</sup> Article 2, First of the Iraqi Constitution reads, “Islam is the official religion of the State and is a foundation source of legislation,” and further mandates that “[n]o law may be enacted that contradicts the established provisions of Islam.”<sup>58</sup> Under the assumption that adherence to Islamic Law could be inconsistent with human rights values, Lombardi points out, “the U.S. government in 2004 worked hard to prevent the government of occupied Iraq from drafting a constitution that made Islam ‘the chief source’ of legislation.”<sup>59</sup>

The SSL provisions in the Syrian and Iraqi Constitutions make Sharia “a” source of legislation in both contexts. While this requires that laws respect Sharia norms, the provisions hold a more symbolic role for lawmaking than if Islamic Law had been defined as “the” only source of legislation.<sup>60</sup> Even if applying the stricter standard of Sharia being “the” only source of legislation, the domestic water legislation previously examined in both states would harmonize with principles of Islamic Law. This is because the sources of Islamic Law, the Qur’anic text and hadith principles, confirm the obligation of the state to guarantee access to water as a universal right.

## 2. *Laws Derived from Qur’anic Text*

Qur’anic scripture is the primary source of Islamic Law.<sup>61</sup> In Islam, the Qur’an is believed to be the direct transmission from God. As such, any passages that contain goals that are unambiguous and whose meaning is

<sup>55</sup> *Id.* at 737 (citing AL-DUSTURAL-SURI [CONSTITUTION] Sept. 5, 1950 (Syria)).

<sup>56</sup> *Id.* at 745.

<sup>57</sup> *Id.*

<sup>58</sup> Article 2, Section 1, Dustūr Jumhūrīyat al-‘Irāq [The Constitution of the Republic of Iraq] of 2005.

<sup>59</sup> Lombardi, *Constitutional Provisions*, *supra* note 53, at 735 (citing Gihane Tabet, *Women in Personal Status Laws: Iraq, Jordan, Lebanon, Palestine, Syria*, UNESCO SHS, at 10 (SHS Papers in Women’s Studies/Gender Research Paper Series 10 No. 4, 2005)) (quoting Paul Bremer, U.S. Transitional Administrator to Iraq, as saying “Islam is the official religion of the Iraqi State and *one of the* sources of law,” and further insisting he would “veto any draft constitution for an independent Iraq that made Islam the chief or principle source of legislation.”).

<sup>60</sup> *Id.* at 773.

<sup>61</sup> CLARK LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT* 21 (2006) [hereinafter LOMBARDI, *STATE LAW AS ISLAMIC LAW*].

absolutely certain are considered binding to all Muslims.<sup>62</sup> The Qur'an contains about 500 verses with legal content, several of which refer to access to natural resources.<sup>63</sup> Water in particular holds tremendous religious significance for Muslims for the part it plays in ablution and bathing.<sup>64</sup> Indeed, the Qur'anic scripture mentions water sixty-three times.<sup>65</sup>

In general, the Qur'an presents a central tenant that God entrusts humans with "the stewardship of the earth."<sup>66</sup> The Qur'an emphasizes the common good, deeming it inappropriate "for one person to despoil what has been provided by the Creator for the use and enjoyment of *all*."<sup>67</sup> In verses such as 13:8, 15:21, and 25:2, the Qur'an obligates man to maintain natural systems.<sup>68</sup> To that end, Muslims are held accountable for any acts of destruction committed against the earth.<sup>69</sup> The Qur'an regards water as common property and, as such, requires the protection and regulation of watercourses as a central dictum.<sup>70</sup>

The Qur'an has two definite principles regulating water management: the supply of water is fixed (Chapter 23: Verse 18) and water should not be wasted (Chapter 7: Verse 31).<sup>71</sup> The Qur'an views water as an exhaustible resource that humans must manage responsibly.<sup>72</sup> These principles show that in the Qur'an, water is defined as a public commodity. Such a reading supports current classifications and management of watercourses in the Iraqi Constitution as well as in Syrian legislation. In light of this understanding, any maneuver by Daesh to alter access to the natural watercourses and related installations violates the Qur'anic decree that they should remain public goods

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<sup>62</sup> *Id.* at 22–23.

<sup>63</sup> *Id.* at 22.

<sup>64</sup> Laura Wickström, *Islam and Water: Islamic Guiding Principles on Water Management*, 25 FINNISH INST. INT'L AFF. 98, 99 (2010).

<sup>65</sup> *Id.*

<sup>66</sup> Lisa Wersal, *Islam and Environmental Ethics: Tradition Responds to Contemporary Challenges*, 30(3) ZYGON 451, 452 (1995).

<sup>67</sup> *Id.* at 453.

<sup>68</sup> Wickström, *supra* note 64, at 99. *See also* THE QUR'AN 13:8, 15:21, 25:2.

<sup>69</sup> Wickström, *supra* note 64, at 100; THE QUR'AN, SURRAS 2:205, 7:85

<sup>70</sup> Richard Foltz, *Ecology and Religion: Ecology and Islam* 2651–54 (2005); The Qur'an, Surras, 54:28.

<sup>71</sup> Wickström, *supra* note 64, at 100; THE QUR'AN 23:18, 7:31.

<sup>72</sup> *Id.*

### 3. *Laws Derived from Hadith Literature*

Hadith literature is the secondary source of Islamic Law.<sup>73</sup> The hadith reports the events in the life of the Prophet Mohammad and his companions, which set an example of how to interpret the words of the Qur'an into laws and practice.<sup>74</sup> The Prophet Mohammad, through hadith literature, supports the view of universal access to water and the duty to protect it.

The Prophet Mohammad prohibits Muslims from wasting water. The hadith quoted Abu-Dawood 3470 as saying: "Muslims have a common share in three things: grass (pasture), water, and fire (fuel)."<sup>75</sup> Throughout the hadith, Muslim scholars have found that the Prophet Mohammad annexed penalties for water misuse, including polluting clean water.<sup>76</sup> One clear hadith passage on point can be found in al-Tirmidhi 427 in regards to ablution (the act of washing oneself), wherein the Prophet Mohammad showed that "water was not to be wasted even when the ablution was performed on the bank of a fast-flowing (large) river."<sup>77</sup>

The hadith passages here show that the value of water as a communal property is important to interpreting the Qur'an's message. Domestic law in Syria and Iraq values that distinction, consistently maintaining that watercourses should be managed in a manner that gives just distribution to all in the territory. The same holds true for international law on water as codified by the U.N. Watercourses Convention, which will be discussed in the next section. Laura Wickström argues that the principles of water management created in the Qur'an and hadith are in accordance with the U.N. Watercourses Convention precisely because they are both based on universal values.<sup>78</sup>

What is consistent throughout the Islamic principles relating to water is that there is an obligation to respect watercourses as communal property and to manage and protect them accordingly. Given the record of Daesh seizure, control, and use of watercourses, Daesh control violates these

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<sup>73</sup> LOMBARDI, STATE LAW AS ISLAMIC LAW, *supra* note 61, at 23.

<sup>74</sup> *Id.*

<sup>75</sup> See Naser I. Faruqi, *Islam and Water Management: Overview and Principles*, in WATER MANAGEMENT IN ISLAM 1, 2 (Naser I. Faruqi et al., 2001) (quoting SUNAN ABU DAWOOD, bk. 23, no. 3470).

<sup>76</sup> Wickström, *supra* note 64, at 100.

<sup>77</sup> Faruqi, *supra* note 75, at 5 (quoting SUNAN AL-TIRMIDHI, bk. 2, no. 427).

<sup>78</sup> Wickström, *supra* note 64, at 104.

principles of Islamic Law as prescribed in the Qur'an and hadith literature. Moreover, Daesh control of watercourses and related installations essentially transforms them from a communal resource to exclusive property.

Daesh has repeatedly claimed it is acting in accordance with God's law. In its captured territories it has installed "religious police" that are responsible for enforcing its interpretation of Sharia Law. Under its interpretation, violations include not praying five times a day and women wearing incomplete veils.<sup>79</sup> Such violations are punishable in a variety of ways, from confiscation of valuables to capital punishment through beheading, stoning, and hanging. Daesh provides non-Muslims in these territories a grim ultimatum: convert or die.<sup>80</sup> Daesh has used the media and Internet propaganda to publicize its religious interpretations and showcase its enforcement.

Daesh extends its punishment and reward system to their control of dams along the Tigris and Euphrates. The group has cut off or reduced water flow to uncooperative towns and villages downstream from its strongholds. Conversely, those that comply with their authority are provided with water and power. When compared to the actual foundations of Islamic Law, Daesh is in clear violation. It is important to understand the inherent hypocrisy of their "Islamic" mission with respect to water rights.

### C. *Obligations for State Actors to Protect Watercourses Under International Law*

The U.N. Watercourses Convention is the primary source of international law related to water. Both Syria and Iraq are party to the Convention. The U.N. General Assembly adopted the UNWC on May 21, 1997 and it entered into force on August 17, 2014.<sup>81</sup>

First, this section will examine how the UNWC became the primary source pertaining to international water law. Second, it will discuss the obligations of state actors to protect the watercourses under Daesh control.

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<sup>79</sup> Justen Charters, *Life Under ISIS Religious Police is Brutal and Merciless*, INDEP. J. REV. (2015), <http://www.ijreview.com/2014/08/167051-life-isis-religious-police-brutal-merciless/>.

<sup>80</sup> Mohamed Ghilan, *The Consequences of Not Challenging the Islamic State*, AL JAZEERA (Aug. 2, 2014), <http://www.aljazeera.com/indepth/opinion/2014/08/islamic-state-iraq-minorities-20148114244751872.html>.

<sup>81</sup> United Nations Treaty Collection, *Status of the Convention on the Law of the Non-Navigational Uses of International Watercourses* (as of Feb. 20, 2015), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-12&chapter=27&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en) [hereinafter *Status of the UNWC*].

Specifically, under Article 7, states must prevent significant harm to watercourses; under Article 26, states must protect watercourse installations in particular; and under Article 27, in the instance of an “emergency situation,” states must take all measures to protect the watercourse installations and mitigate the harmful effects of the emergency. Third, this section will show how Article 29 of the UNWC incorporates International Humanitarian Law in times of armed conflict, and how Articles 14 and 15 of Protocol II of the Geneva Convention also apply to the ongoing Daesh conflict.

### 1. *History of the U.N. Watercourses Convention*

On May 21, 1997, more than one hundred U.N. Member States voted to approve the U.N. Watercourses Convention.<sup>82</sup> The General Assembly laid the groundwork for the UNWC in 1970, with a resolution tasking the International Law Commission (ILC) to study the law applicable to international watercourses.<sup>83</sup> The express goal of the resolution was to create a governing system for international water management that would supersede the fragmented system of bilateral treaties and regional regulations under which water management was “based in part on general principles of customary international law.”<sup>84</sup> The ILC drafted the UNWC over a period of nearly thirty years, during which it considered comments from a large number of nations.<sup>85</sup> The final draft of the UNWC passed by the General Assembly in 1997 codifies many customary international water law practices.

The U.N. Watercourses Convention required thirty-five states to ratify, accept, or accede in order to be entered into force.<sup>86</sup> Seventeen years after it was passed by the General Assembly, the UNWC entered into force in

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<sup>82</sup> The goal of the convention was to provide a “framework for the utilization, development, conservation, and protection of international watercourses, whilst promoting optimal and sustainable utilization thereof for present and future generations, and accounting for the special situation and needs of developing countries.” *Frequently Asked Questions*, U.N. WATERCOURSES CONVENTION: ONLINE USER’S GUIDE, <http://www.unwatercoursesconvention.org/faqs/> (last visited Feb. 20, 2015) [hereinafter *FAQs*, U.N. WATERCOURSE CONVENTION]. See also G.A. Res. 51/229, U.N. GAOR, 51st Sess., U.N. Doc. A/51/869, Preamble (Apr. 11, 1997) [hereinafter UNWC].

<sup>83</sup> G.A. Res. 2669 (XXV) (Dec. 8, 1970).

<sup>84</sup> *Id.* Frederick Lorenz has identified the fundamental principles of customary law applicable to protection of water facilities in-depth as “those of humanity, discrimination, proportionality, and military necessity.” Lorenz, *supra* note 21, at 11.

<sup>85</sup> *FAQs*, U.N. WATERCOURSE CONVENTION, *supra* note 82.

<sup>86</sup> UNWC, *supra* note 82, art. 36, § 1.



2014.<sup>87</sup> Under international law, a treaty, once entered into force, becomes enforceable amongst its signatories.<sup>88</sup> Iraq acceded to the U.N. Watercourses Convention on July 9, 2001.<sup>89</sup> Per Article 110, Eighth of the Iraqi Constitution, the Iraqi federal government must plan policies relating to water sources in accordance with international laws and conventions.<sup>90</sup> Thus, Article 110, Eighth gives deference to the UNWC. Syria was one of the original signatories of the U.N. Watercourses Convention on August 11, 1997.<sup>91</sup> On April 2, 1998, Syria ratified the UNWC with a reservation that doing so “sh[ould] not under any circumstances be taken to imply recognition of Israel and sh[ould] not lead to its entering into relations therewith that are governed by its provisions.”<sup>92</sup>

Both Syria and Iraq were early signatories to the UNWC because of Article 7 of the Convention, which establishes the obligation not to cause significant harm. This requires that states “take all appropriate measures to prevent the causing of significant harm” to other states sharing an international watercourse. Because the waters of the Tigris and Euphrates rise in Turkey, the downstream countries (both Iraq and Syria) are heavily dependent on the resource.<sup>93</sup> This provision could potentially aid Iraq and Syria in establishing long-term water rights and challenging Turkey’s use—or excessive use that causes significant harm—of the rivers.<sup>94</sup> Article 7 is broad enough to cover activities occurring within the signatory states, a matter covered later in this section.

The UNWC defines “watercourses” as “a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.”<sup>95</sup> Accordingly, “international watercourses” are watercourses as defined above, parts of which are situated in different states.<sup>96</sup> The Tigris and Euphrates

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<sup>87</sup> For further discussion on the delayed process of the UNWC entering into force, see Alistair Rieu-Clarke & Flavia Loures, *Still Not in Force: Should States Support the 1997 UN Watercourses Convention?*, 18 REV. EUR. COMMUNITY & INT’L ENVTL. L. 185, 185–97 (2009).

<sup>88</sup> Vienna Convention on the Law of Treaties, art. 24, May 23, 1969, 1155 U.N.T.S. 331.

<sup>89</sup> Status of the UNWC, *supra* note 81.

<sup>90</sup> Article 110, Section 8, *Dustūr Jumhūrīyat al-‘Irāq* [The Constitution of the Republic of Iraq] of 2005.

<sup>91</sup> Status of the UNWC, *supra* note 81.

<sup>92</sup> *Id.*

<sup>93</sup> LORENZ & ERICKSON, *supra* note 5, at 4–5.

<sup>94</sup> *Id.* at 11–12.

<sup>95</sup> UNWC, *supra* note 82, art. 2(a).

<sup>96</sup> *Id.* art. 2(b).

rivers are “international watercourses” as defined by the UNWC since they constitute a unitary whole and flow into the common terminus of the Persian Gulf through the multiple states of Turkey, Syria, and Iraq. Consequently, the UNWC applies to all installations on both international watercourses, including the Badush, Mosul, and Samarra Barrage Dams on the Tigris and the Baath, Fallujah Barrage, Haditha, and Tabqa dams on the Euphrates.

The UNWC contains elements relating to human rights law. Article 10 identifies access to water as a “vital human need.”<sup>97</sup> Indeed the UNWC was the first water-related agreement to include this term, which has been defined as “sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation.”<sup>98</sup> In recognizing the human right to water, the UNWC creates state obligations towards individuals to prioritize this right in all dealings.<sup>99</sup>

The UNWC, particularly Articles 7, 26, 28, and 29, provides a framework that can be applied to Daesh control of installations on the international watercourses.<sup>100</sup> Articles 7, 26, and 28 list the obligations for state parties to protect and maintain watercourses and related installations from harmful human conduct at all times. Article 29 stipulates that the laws of armed conflict apply in a period of armed conflict.

## 2. *State Obligations to Protect Watercourses Under Articles 7, 26, and 28*

The UNWC has a broad ecological focus and most of the protections are designed to maintain the sustainability of watercourses. However, three Articles specifically create the obligation for states to protect watercourses against harmful human conduct: Article 7, Article 26, and Article 28.

Article 7 creates the obligation to do no significant harm, assuring that watercourse states *shall* “take all appropriate measures to prevent the causing of significant harm” to the watercourse in their territories.<sup>101</sup>

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<sup>97</sup> UNWC, *supra* note 82, art. 10 (“In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to Articles 5 and 7, with special regard being given to the requirements of vital human needs.”).

<sup>98</sup> Alistair Rieu-Clarke, Ruby Moynihan, & Bjørn-Oliver Magsig, U.N. Watercourses Convention User’s Guide 129 (2012), <http://www.unwatercoursesconvention.org>.

<sup>99</sup> *Id.* at 130 (“By using the term ‘special regard’ in Article 10 (2) it has to be presumed that water to meet vital human needs will almost certainly take precedence over other uses.”).

<sup>100</sup> UNWC, *supra* note 82, arts. 7, 26, 28, 29.

<sup>101</sup> *Id.* art. 7, § 1

Actions that would cross the threshold of “significant harm” include harm to human health or safety.<sup>102</sup> The “do no harm” provision of Article 7 creates a broad state obligation of due diligence in utilization, specifically to the standard of a reasonable government in a similar circumstance.<sup>103</sup> Under this standard, a state will breach its obligation to “do no harm” not only if it causes the harmful event itself, but also if it does not take reasonable steps to prevent others in its territory from causing it.<sup>104</sup> Here, the UNWC creates an affirmative obligation for Syria, Iraq, and all other watercourse nations to prevent significant harm to watercourses in their territory.<sup>105</sup> Harm to watercourses and human safety have been demonstrated outcomes of Daesh control of watercourse installations and can be further anticipated as possible effects of future Daesh control.<sup>106</sup>

Article 26 creates the state duty of care for all installations related to an international watercourse.<sup>107</sup> The ILC definition of installations includes dams, barrages, dykes, and weirs.<sup>108</sup> The provision mandates that all watercourse states *shall* “employ their best efforts to maintain and protect” such installations.<sup>109</sup> The obligation to employ a state’s “best effort” requires a state to perform due diligence that a dam is kept in good order such that it will not burst and cause significant harm to other watercourse states.<sup>110</sup> The ILC further states, “all reasonable precautions should be taken to protect such works from foreseeable kinds of damage due to . . . human acts, whether willful or negligent.”<sup>111</sup> A willful human act would include terrorism and sabotage.<sup>112</sup> Article 26’s duty of care for installations applies directly to Daesh threat of control of installations along the Tigris and

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<sup>102</sup> RIEU-CLARKE ET AL., *supra* note 98, at 117.

<sup>103</sup> *Id.* at 119.

<sup>104</sup> The ILC clarified this point in a commentary it adopted with the proposed resolution. See Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries Thereto and Resolution on Transboundary Confined Groundwater, 2 Y.B. INT’L L. COMM’N 1994 89, 103, U.N. Doc. A/CN.4/SER.A/1994/Add.1 [hereinafter UNWC Commentary].

<sup>105</sup> The scale of obligation between Iraq and Syria is different, as the latter one is still the mid-stream riparian state, and has more obligations not to cause significant harm for Iraq, while Iraq is the last downstream riparian state, which entails fewer obligations towards Syria and Turkey, but rather to ensure its internal water is protected.

<sup>106</sup> Church, *supra* note 3, at 11–12. See *infra* Part IV, “Potential Outcomes: Daesh Control of Watercourses.”

<sup>107</sup> UNWC, *supra* note 82, art. 26, § 1.

<sup>108</sup> UNWC Commentary, *supra* note 104, at 127.

<sup>109</sup> UNWC, *supra* note 82, art. 26, § 1.

<sup>110</sup> UNWC Commentary, *supra* note 104, at 103.

<sup>111</sup> *Id.* at 127.

<sup>112</sup> *Id.* at 128.

Euphrates, creating an obligation for Iraq and Syria to employ their best efforts to maintain and protect the installations within their respective territories.

Article 28 deals with the responsibility of states when an emergency situation occurs.<sup>113</sup> Under the article, an emergency is “a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States” and can be created by human conduct.<sup>114</sup> While this provision was generally aimed at human-created emergencies such as “industrial accidents,” the statutory language leaves the category broad enough that seizure by an armed militant group could create an “emergency” situation.<sup>115</sup> The relevant obligations established by Article 28 maintain that once a state is aware of an emergency, it must notify other potentially-affected states and “competent international organizations” and “take all practical measures necessitated by the circumstances to prevent, mitigate, and eliminate harmful effects of the emergency.”<sup>116</sup> The provision here foresees the possibility that the emergency-affected state may need to cooperate their response with a competent international organization “such as a joint commission,” that might be better suited to deal with the emergency.<sup>117</sup> Daesh’s human conduct poses an imminent threat of causing serious harm to the watercourse states of Iraq and Syria and is therefore an “emergency” as defined by Article 28. Even without the notification step, both states are required to coordinate their response with other affected states and international organizations.

### 3. *State Obligations Under International Humanitarian Law*

Article 29 of the UNWC reads: “international watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules.”<sup>118</sup> The article does not create a new rule. Instead, it binds states to the outside sources of international law for internal armed conflict, including those that involve international

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<sup>113</sup> UNWC, *supra* note 82, art. 28.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* art. 28, § 1

<sup>116</sup> *Id.* art. 28, §§ 2–3.

<sup>117</sup> UNWC *Commentary*, *supra* note 104, at 130.

<sup>118</sup> UNWC, *supra* note 82, art. 29, §§ 2–3.

watercourses.<sup>119</sup> Effectively, in addition to the relevant provisions previously discussed, Article 29 introduces the binding external treaties of International Humanitarian Law (IHL). In other words, while the UNWC is not an IHL treaty, it invokes the IHL provisions that would apply to watercourses. Article 29 aims to clarify and strengthen the guidelines for the protection of watercourses and facilities from existing legal obligations and state practice.<sup>120</sup>

Under Article 29, states are obligated to protect watercourses under the Convention during times of armed conflict. Furthermore, if affected by the conflict the rules and principles of international law governing international and non-international armed conflict also apply.<sup>121</sup> For the purposes of Article 29, an “armed conflict” is a “protracted armed confrontation” which takes place in a contracting state 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 operation.”<sup>122</sup>

Article 29 fails to list precisely which public international law external to the UNWC would apply to the protection of watercourses during armed conflict. The 2012 User’s Guide to the UNWC (User’s Guide) provides a useful tool to interpret which IHL would apply in tandem with the UNWC provisions in times of armed conflict.<sup>123</sup> The User’s Guide states that in the event of “armed conflict between the State and one or several non-State actors” the applicable IHL would be the Protocol Additional to the Geneva Conventions of 12 August 1949, and the Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 1977.<sup>124</sup> The relevant sections of Protocol II that apply in the present instance are Articles 14 and 15. Article 14 of Protocol II prohibits the attack of any

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<sup>119</sup> *UNWC Commentary*, *supra* note 104, at 131.

<sup>120</sup> This approach is similar to the one advocated by Frederick Lorenz, who drew from existing international legal obligations and from state practice to create the “Draft Guidelines for Military Manuals and Instructions on the Protection of Water Facilities in Times of Armed Conflict.” Lorenz, *supra* note 21, at 37–38.

<sup>121</sup> *UNWC Commentary*, *supra* note 104, at 131.

<sup>122</sup> International Committee of the Red Cross (ICRC), *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, ICRC Opinion Paper (Mar. 3, 2008), <https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.html>. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, ¶ 1, June 8, 1977, 1125 U.T.N.S. 609 [hereinafter Protocol II].

<sup>123</sup> See generally RIEU-CLARKE ET AL., *supra* note 98.

<sup>124</sup> *Id.* at 218 (Figure 6.2).

object indispensable to the survival of a civilian population in armed conflict, including “drinking water installations and supplies and irrigation works.”<sup>125</sup> Article 15 protects works and installations containing dangerous forces, singling out that dams and dykes “shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.”<sup>126</sup>

In addition, a non-binding relevant source of international law comes from the Berlin Rules on Water Resources resolution adopted by the ILA Conference in 2004 (Berlin Rules).<sup>127</sup> Article 52 of the Berlin Rules calls on combatants during armed conflict to not “destroy or divert waters, or destroy water installations, when such acts would cause widespread, long-term, and severe ecological damage prejudicial to the health or survival of the population of if such acts would fundamentally impair the ecological integrity of waters.”<sup>128</sup>

The instruments of IHL “point to the universal acceptance of certain legally binding rules prohibiting hostile activities against or using water resources and installations as a weapon.”<sup>129</sup> This assessment indicates a strong argument under which Daesh can be held in clear violation of international law. Understanding the legal framework of Daesh’s liability is essential if the international community seeks accountability in the long term.

### III. OBLIGATIONS OF DAESH AS AN ARMED NON-STATE ACTOR IN AN ARMED CONFLICT

There is a debate in international law as to what extent ANSAs such as Daesh are bound by International Humanitarian Law, such as Protocol II, and international law, such as the UNWC.<sup>130</sup> This is an important issue

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<sup>125</sup> Protocol II, *supra* note 122, art. 14. Frederick Lorenz emphasizes those Protocol II protections to water installations “does not apply to situations outside armed conflict, including terrorism.” Lorenz, *supra* note 21, at 15. The argument for Daesh satisfying the requirements for “armed conflict” above mere “terrorism” will be examined in Part III.

<sup>126</sup> Protocol II, *supra* note 122, art. 16.

<sup>127</sup> RIEU-CLARKE ET AL., *supra* note 98, at 219.

<sup>128</sup> Berlin Conference, *International Law Association’s Fourth Report Water Resources Law*, 44 (2004), [http://internationalwaterlaw.org/documents/intldocs/ILA\\_Berlin\\_Rules-2004.pdf](http://internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf).

<sup>129</sup> Patricia Wouters, Sergei Vinogradov, & Bjørn-Oliver Magsig, *Water Security, Hydrosolidarity, and International Law: A River Runs Through It*, 19 Y.B. INT’L ENVTL. L. 97, 126 (2009).

<sup>130</sup> Lorenz, *supra* note 21, at 18 (“International law was originally directed at state action; historically states have been the principal players on the international stage. But in recent years there has been increasing emphasis on individual (criminal) responsibility.”).

because modern conflict is increasingly characterized as “non-international”—lacking two or more state actors—and involving at least one ANSA. The growing consensus among international legal scholars is that non-state actors are subject to international law.<sup>131</sup>

This Part will analyze under which circumstances ANSAs are subject to IHL and international law. First, ANSAs are legally obliged by instruments of IHL, such as Protocol II, provided they meet the specific criteria of participating in an armed conflict, containing a developed organizational structure, and controlling territory. Second, there are several theoretical frameworks that use the foundation for IHL obligations to argue that ANSAs should be held to the broader body of treaty law. This Part will examine how Daesh might be accountable to the UNWC under the theory of de facto control of a population and other state-like functions.

#### A. ANSA Obligations Under International Humanitarian Law

An ANSA is bound by IHL if there is an armed conflict as defined by IHL, the group possesses a sufficiently developed structure, and the group has control of territory.<sup>132</sup> Under these criteria, Protocol II has been applied to non-state actors in Russia, Colombia, El Salvador, and Rwanda.<sup>133</sup> Daesh operations in both Syria and Iraq fulfill these three requirements; Daesh is therefore covered under IHL.

First, an armed conflict of non-international character is defined in Common Article 3 to the four 1949 Geneva Conventions as armed conflict that occurs “in the territory of one of the High Contracting Parties.”<sup>134</sup> There are no express minimum requirements as to the duration of the conflict or the intensity of the violence to be deemed an armed conflict.<sup>135</sup> IHL expert Frederick Lorenz argues that “the term ‘armed conflict’ does not

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<sup>131</sup> See generally THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT (Andrew Clapham & Paolo Gaeta eds., 2014).

<sup>132</sup> Bellal & Casey-Maslen, *Enhancing Compliance*, *supra* note 20, at 179. Criteria listed in Protocol II applies 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.” Protocol II, *supra* note 122, art. 1(1).

<sup>133</sup> Andrew Clapham, Human Rights Obligations of Non-State Actors in Conflict Situations, 88 INT’L REV. RED CROSS 491, 510 (2011).

<sup>134</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135.

<sup>135</sup> Bellal & Casey-Maslen, *Enhancing Compliance*, *supra* note 20, at 180.

include isolated attacks on water installations from terrorist groups,” and furthermore “international humanitarian law was not designed to cover terrorism or short-term criminal activity.”<sup>136</sup> In the present case of Daesh, the criteria of non-international armed conflict has been satisfied in both Syria and Iraq. Daesh has a sophisticated strategy of “clear and hold” wherein it has engaged in explicit armed conflict in the territories of both Iraq and Syria.<sup>137</sup> Daesh’s methodology suggests they operate less in the mode of “isolated attacks” traditionally attributed to “terrorist groups” identified by Lorenz as outside the scope of IHL. Therefore, Daesh fulfills the first requirement of engaging in armed conflict.

Second, a group must possess a sufficiently developed command structure in order for IHL to apply. Case law generated from the International Criminal Tribunal for the former Yugoslavia establishes that a “sufficiently developed structure” may be indicated by “the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; its ability to plan, coordinate, and carry out military operations, including troop movements and logistics.”<sup>138</sup> To that point, Daesh has a well-defined structure of government under the Caliph Abu Bakr al-Baghdadi, including the deputy of Iraq Abu Muslim al-Turkmani and deputy of Syria Abu Ali al-Anbari, both of whom oversee twelve governors and councils on intelligence, finance, and law, among many others.<sup>139</sup> Daesh therefore satisfies the second requirement of possessing a sufficiently developed control structure.

Protocol II creates the most stringent requirement. Namely, in order to bind an ANSA, such group must have “control of territory.”<sup>140</sup> There is disagreement over the amount of territory that an ANSA must control to fulfill this requirement.<sup>141</sup> A commentary published by the International

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<sup>136</sup> Lorenz, *supra* note 21, at 31, 46.

<sup>137</sup> Church, *supra* note 3, at 7. Daesh has employed a tactic to gain territory and control known as a “clear and hold” strategy. The “clear and hold” strategy is a counter-insurgency technique where military personnel clear an area of the enemy, then keep the area clear of opposition while winning over the support of the populace for the new government and its policies. Daesh has sought to change the minds of many people in their time of desperation by providing them with much needed services such as uninterrupted access to clean water, power, and employment. *Id.*

<sup>138</sup> Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, Judgment (Trial Chambers), ¶ 60 (Int’l Crim. Trib. for the Former Yugoslavia April 3 2008).

<sup>139</sup> Nick Thompson & Atika Shubert, *The Anatomy of ISIS*, CNN (Jan. 14, 2015), <http://www.cnn.com/2014/09/18/world/meast/isis-syria-iraq-hierarchy/>.

<sup>140</sup> Bellal & Casey-Maslen, *Enhancing Compliance*, *supra* note 20, at 184.

<sup>141</sup> Sylvian Vité, *Typology of Armed Conflicts in International Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69, 79 (2009).



Committee of the Red Cross claims that partial control triggers the Protocol II “territory” obligation as long as there is some degree of stability in that control.<sup>142</sup> Daesh has renamed the territory it has controlled through military force as a new “Islamic State” which it has defined outside of the traditional state borders. As of December 2015, Daesh controls large swaths of territory in Syria and Iraq along the Tigris and Euphrates watercourses.<sup>143</sup> The large amount of land that Daesh has “claimed” and maintained control over satisfies any reading of Protocol II’s requirement of an ANSA to have “control of territory.”

### B. ANSA Obligations Under International Law

While it is well established that ANSAs are accountable to the obligations of IHL if they meet the three criteria outlined in Protocol II, a more contentious question is whether they are held to similar obligations under treaty law more broadly. Some scholars have argued that ANSAs fall outside of the scope of state-created treaties as they are “neither intended, nor adequate, to govern armed conflict between the state and armed opposition groups.”<sup>144</sup> Treaties in general do not explicitly list non-state actors as applicable parties.<sup>145</sup> There are recent exceptions to this general rule in which non-state actors are explicitly bound in treaty text. However, the UNWC is not one such exception.<sup>146</sup>

Other scholars have argued that ANSAs are subjects under treaties and inherit the obligations created by treaties. Andrew Clapham, an influential scholar on international human rights, has noted that when treaties contain provisions to protect human rights, such as Article 10 of the UNWC, it is essential that ANSAs are bound. He argues that the strongest basis for applying human rights obligations to ANSAs is that “the foundational basis of human rights is best explained as rights which belong

<sup>142</sup> Bellal & Casey-Maslen, *Enhancing Compliance*, *supra* note 20, at 184.

<sup>143</sup> Helene Cooper, Matthew Rosenberg & Michael R. Gordon, *U.S. Is Willing to Use Attack Helicopters to Help Fight ISIS*, N.Y. TIMES (Dec. 9, 2015), <http://www.nytimes.com/2015/12/10/world/middleeast/islamic-state-ramadi-fight.html?ref=world&mtref=www.nytimes.com&gwh=2D9944FE41E635F8DAE1E02F9303CBEA&gwt=pay>. See also Sarah Almkhtar et al., *Efforts to Stem the Rise of the Islamic State*, N.Y. TIMES, [http://www.nytimes.com/interactive/2014/06/12/world/middleeast/the-iraq-isis-conflict-in-maps-photos-and-video.html?\\_r=0](http://www.nytimes.com/interactive/2014/06/12/world/middleeast/the-iraq-isis-conflict-in-maps-photos-and-video.html?_r=0) (last visited Feb. 20, 2016).

<sup>144</sup> Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, CAMBRIDGE STUD. INT’L & COMP. L. 54 (2002).

<sup>145</sup> Bellal et al., *ANSAs in Afghanistan*, *supra* note 19, at 64.

<sup>146</sup> See, e.g., *id.* at 65–67 (identifying treaties that identify non-state actors as subjects as Article 4 of the Optional Protocol to the Convention on the Rights of the Child and African Union Convention for the Protection and Assistance of Internally Displaced Person in Africa).

to the individual in recognition of each person's inherent dignity. The implication is that these natural rights should be respected by everyone and every entity."<sup>147</sup>

The most prominent argument for Daesh adherence to the broad body of international law is that ANSAs can be held accountable under the theory of performing de facto governmental functions over a population. In other words, treaty obligations apply to ANSAs when they "exercise elements of governmental functions and have de facto authority over a population."<sup>148</sup> The thrust behind the argument is that a chief purpose of human rights provisions such as Article 10 of the UNWC is to protect the people governed from the people governing them. Therefore, if a non-state actor assumes the functions of governance, it should be held to the same standards.<sup>149</sup>

This criterion for applying international law is in many ways a parallel application of the requirements for applying IHL to ANSAs through Protocol II.<sup>150</sup> Indeed, a 2006 UN report filed on Lebanon and Israel by a group of four special rapporteurs argued that ANSAs, in this instance Hezbollah, assumed international obligations to respect human rights when the group "exercises significant control over territory and population and has an identifiable political structure."<sup>151</sup> In other words, if an ANSA acts like a state, in so much as it has an internal political structure and controls territory, it should be held to the same obligations as a state.

Daesh fulfills the requirements of acting like a state by exercising de facto authority over populations in both Syria and Iraq. Under the leadership of Abu Bakr al-Baghdadi since 2013, Daesh has strategically gained large swaths of territory surrounding the Tigris and Euphrates watercourses.<sup>152</sup> In the territories they have conquered, Daesh has governed Iraqis and Syrians

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<sup>147</sup> Andrew Clapham, *Non-State Actors*, in INTERNATIONAL HUMAN RIGHTS LAW (Daniel Moeckli et al., 2014), 531, 533.

<sup>148</sup> Bellal et al., *ANSAs in Afghanistan*, *supra* note 19, at 69.

<sup>149</sup> *Id.*

<sup>150</sup> *See supra* Part II.C.3.

<sup>151</sup> Special Rapporteurs Philip Alston, Paul Hunt, Walter Kälin, & Miloon Kothari, Implementation of GA Resolution 60/251 of 15 March 2006 Entitled "Human Right Council," ¶ 19, U.N. Doc. A/HRC/2/7 (Oct. 2, 2006). ("The Security Council has long called upon various groups which Member States do not recognize as having the capacity to do so to formally assume international obligations to respect human rights.")

<sup>152</sup> Holly Yan & Samira Said, *Floodgates Open as ISIS Bridges Victories Between Syria and Iraq*, CNN (Jul. 9, 2014), <http://www.cnn.com/2014/07/08/world/meast/syria-civil-war/>.

with punishment and reward systems, forcing people into submission or forcing people to leave.<sup>153</sup>

Daesh has express aspirations to represent a state encompassing more than an armed group, as exhibited by their call for Muslims to perform a global *hijrah* (religious migration) to join their new state with their family members.<sup>154</sup> Furthermore, as discussed in the previous Part, Daesh has a sophisticated internal political structure, complete with regional governors who oversee councils for finance, leadership, military, legal, intelligence, and media.<sup>155</sup> In all territories over which Daesh has seized control, they exercise de facto authority of the population with their own internal structure, thus satisfying the theoretical framework that would obligate them to respect human rights law and the relevant provisions of the UNWC.

The fundamental roadblock to using this framework to hold ANSAs as subjects to international law is that it requires states to acknowledge the legitimacy of the ANSAs' authority over a population. As Andrew Clapham writes, "it is well-known that neither governments nor international organizations will readily admit that rebels are operating in ways which are akin to governments."<sup>156</sup> Indeed, to bind Daesh under this framework would necessitate that Iraq, Syria, and the international community at large acknowledge that Daesh has assumed governmental functions in the areas in which it maintains territorial control. States are unlikely to recognize Daesh as a legal state because recognition could serve to legitimize its operation. And at the time of this writing, no state has indicated any interest in recognizing Daesh as a state.<sup>157</sup>

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<sup>153</sup> Aaron Zelin, *The IS of Iraq and Syria Has a Consumer Protection Office*, THE ATLANTIC (June 13, 2013), <http://www.theatlantic.com/international/archive/2014/06/the-isis-guide-to-building-an-islamic-state/372769/>.

<sup>154</sup> *Hijrah from Hypocrisy to Sincerity*, DABIQ ISSUE 3, Sept. 10, 2014, at 33 (from the Daesh magazine Dabiq, calling on Muslims to "rush to the shade of the Islamic State with your parents, siblings, spouses, and children. There are homes here for you and your families.").

<sup>155</sup> Thompson & Shubert, *supra* note 139.

<sup>156</sup> Clapham, *supra* note 133, at 502.

<sup>157</sup> President Barack Obama, Statement by the President on ISIL (Sep. 10, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1> ("ISIL is certainly not a state. It was formerly al Qaeda's affiliate in Iraq, and has taken advantage of sectarian strife and Syria's civil war to gain territory on both sides of the Iraq-Syrian border. It is recognized by no government, nor by the people it subjugates.").

#### IV. APPLICATION OF LEGAL OBLIGATIONS TO CASES OF DAESH CONTROL

This Part is designed to reiterate the legal obligations under domestic, Islamic, and international law triggered by Daesh control of watercourse installations. First, the Part will analyze Daesh control of the Fallujah Dam in Iraq. Second, it will analyze Daesh control of the Tabqa Dam in Syria. Third, it will consider the difficulties in implementing these obligations and potential systems of implementation.

##### A. *Daesh Control of Fallujah Dam*

In April 2014, Daesh seized control of the Fallujah dam in Iraq. Once they had control, Daesh immediately shut down dam operations depriving millions of people in downstream Shiite cities Karbala and Najaf of water access.<sup>158</sup> Within a week, Daesh suddenly reopened five of the ten barrage gates.<sup>159</sup> The effect destroyed 160 kilometers of downstream cropland.<sup>160</sup> The intent behind the water release was to “use water aggressively as a tool of destruction, targeting populations who live farther south.”<sup>161</sup>

Under Iraqi Law, per Article 7, Second, the state has a general obligation to protect its territories from becoming a base, pathway, or field for terrorist activities.<sup>162</sup> Furthermore, under Article 110, the federal government has the obligation to guarantee the rate of water flow and its just distribution inside Iraq.<sup>163</sup> The obligation to guarantee a “just distribution” is furthered by Article 114, Seventh, as a shared duty of federal and regional authorities. Daesh control of the Fallujah Dam triggers all of these obligations for the Iraqi government to “protect” the territory from Daesh erratic distribution of the water.

Under Islamic Law, which Iraqi law must comply with under Article 2, First, water is to remain a public resource.<sup>164</sup> Qur’anic scripture regards water as a common property and makes protection and regulation of watercourses central requests.<sup>165</sup> Hadith literature obligates Muslims to

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<sup>158</sup> Massih, *supra* note 11.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Article 7, Section 2, Dustūr Jumhūrīyat al-‘Irāq [The Constitution of the Republic of Iraq] of 2005.

<sup>163</sup> Article 110, Section 8, Dustūr Jumhūrīyat al-‘Irāq [The Constitution of the Republic of Iraq] of 2005.

<sup>164</sup> Article 2, Section 1, Dustūr Jumhūrīyat al-‘Irāq [The Constitution of the Republic of Iraq] of 2005.

<sup>165</sup> FOLTZ, *supra* note 70, at 2651–54.

maintain a common share of water and to not waste water even if on the bank of a large river.<sup>166</sup> Daesh violated these tenants of Islamic Law by cutting off water to the downstream cities of Karbala and Najaf. Furthermore, by subsequently flooding and destroying 160 kilometers of cropland, it again violated the tenet to use water responsibly. Under these tenets, the Iraqi state possesses the obligation to keep the Fallujah Dam managed in a way that maintains universal access.

Under Articles 7, 26, and 28 of the UNWC, to which Iraq has acceded, the state has the duty to protect the watercourses. Under Article 7, Iraq has the obligation to prevent significant harm to watercourses. Under Article 26, Iraq has the obligation to employ its best efforts to maintain and protect watercourse installations such as the Fallujah Dam. Under Article 28, in the event of a emergency situation created by human conduct, Iraq has the obligation to notify competent international organizations and take all practical measures to eliminate the harmful effects created by the emergency. Daesh control of the Fallujah Dam triggers all these UNWC articles. From a theoretical perspective, Daesh is accountable under these articles as a result of exercising *de facto* authority over the territory.

Under IHL, incorporated by Article 29 of the UNWC, both Iraq and Daesh have an obligation to prevent damage to the installation in the course of armed conflict. Under Protocol II, Articles 14 and 15 guarantee the universal right to water and prohibit the attack of watercourse installations. Protocol II obligates Iraq II to prevent Daesh attacks in order to preserve the infrastructure. Daesh satisfies the three requirements to be bound by IHL—participating in an armed conflict, possessing a developed structure, and controlling territory. Therefore, Daesh control of the Fallujah Dam violates Protocol II.

#### *B. Daesh Control of Tabqa Dam*

Early in 2013, Daesh captured the Tabqa Dam. The Euphrates' installation is a source of water and electricity for five million people, including residents of Aleppo, Syria's largest city.<sup>167</sup> Under Daesh control,

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<sup>166</sup> Wickström, *supra* note 64, at 100.

<sup>167</sup> Pearce, *supra* note 9.

the Tabqa's reservoir Lake Assad was dramatically emptied, causing blackouts in Aleppo for an average of sixteen to twenty hours a day.<sup>168</sup>

Under the *Mejelle*, the French Mandate, and Act No. 31 of Syrian Law, the government has an obligation to prevent Daesh control of the Tabqa Dam. Under the *Mejelle*, water is forbidden from becoming the absolute property of any person.<sup>169</sup> Under the French Mandate, watercourses are to remain alienable and imprescriptible.<sup>170</sup> Act No. 31 mandates that watercourses are a public good and are to remain protected from depletion.<sup>171</sup> Therefore, Syria has the obligation to prevent Daesh from depleting the Lake Assad reservoir and assuring that the Tabqa Dam remains a public good. The Syrian Constitution, specifically the Introduction and Article 114, obligates the state to maintain peace and prevent any force that threatens general safety.

Under Islamic Law, with which Syrian law must comply under Article 2 of the constitution, water is to remain a public resource.<sup>172</sup> Qur'anic scripture regards water as a common property and makes protection and regulation of watercourses central requests.<sup>173</sup> Hadith literature obligates Muslims to maintain a common share of water and to not waste water even if on the bank of a large river.<sup>174</sup> Daesh violated these tenants of Islamic Law by depleting the Lake Assad reservoir behind the Tabqa Dam. The Syrian state under these tenants possesses the obligation to keep the Tabqa Dam managed in a way that maintains universal access.

Under Articles 7, 26, and 28 of the UNWC, which Syria has ratified, the state has the duty to protect the watercourses. Under Article 7, Syria has the obligation to prevent significant harm to watercourses. Under Article 26, Syria has the obligation to employ their best efforts to maintain and protect watercourse installations such as the Tabqa Dam. Article 28 obligates Syria to, in the event of an emergency situation created by human conduct, notify competent international organizations and take all practical measure to eliminate the harmful effects created by the emergency. Daesh control of the Tabqa Dam triggers all of these articles. From a theoretical perspective,

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<sup>168</sup> *Id.*

<sup>169</sup> Salamé & Karouf-Gaudig, *supra* note 45, at 5.

<sup>170</sup> Stephan, *supra* note 39, at 3.

<sup>171</sup> Salamé & Karouf-Gaudig, *supra* note 45, at 5–10.

<sup>172</sup> DUSTUR JUMHURIYYA AL 'ARABIYYA AL-SURIYYA [CONSTITUTION] Feb. 24, 2012, art. 2 (Syria).

<sup>173</sup> FOLTZ, *supra* note 70, at 2651–54.

<sup>174</sup> Wickström, *supra* note 64, at 100.

Daesh will be accountable to respect these articles when exercising de facto authority over the territory.

Under International Humanitarian Law, incorporated through Article 29 of the UNWC, both Syria and Daesh have an obligation to prevent damage to the installation in the course of armed conflict. Articles 14 and 15 of Protocol II guarantee the universal right to water and prohibit the attack of watercourse installations. Protocol II obligates Syria to prevent Daesh attacks in order to preserve the infrastructure. Daesh satisfies each of the three requirements necessary to be bound by IHL; it participates in an armed conflict, possesses a developed structure, and controls territory. As such, Daesh control of the Tabqa Dam violates Protocol II.

### C. *Mechanisms of Enforcement*

The ability to hold Daesh accountable from a legal perspective will not be easily achievable. Indeed, during the twentieth century, the world saw the “massive victimization of innocent people,” much of which “could be described as a clear violation of international humanitarian law.”<sup>175</sup> However, in “most cases the perpetrators of these crimes have not been held accountable for their actions.”<sup>176</sup>

A potential long-term strategy for holding Daesh accountable for numerous violations of international and domestic law is the creation of a special tribunal. One starting point for developing a Daesh Tribunal is the principles proposed in the “Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes” (Chautauqua Blueprint).<sup>177</sup> Chief prosecutors of various international criminal tribunals developed the proposed Tribunal in the Chautauqua Blueprint.<sup>178</sup> The Chautauqua Blueprint calls for a domestic Tribunal, with international elements: “It would be complementary to the ordinary criminal and military courts of Syria, which would prosecute lower level perpetrators, and to an international tribunal if one were to be established or given jurisdiction to prosecute the highest level perpetrators.”<sup>179</sup> The same concerns considered

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<sup>175</sup> Lorenz, *supra* note 21, at 18.

<sup>176</sup> *Id.*

<sup>177</sup> M. CHERIF BASSIONI ET AL., THE CHAUTAUQUA BLUEPRINT FOR A STATUTE FOR A SYRIAN EXTRAORDINARY TRIBUNAL TO PROSECUTE ATROCITY CRIMES 1, 1 (2013).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

by the drafters of Chautauqua Blueprint are present in Daesh situation.<sup>180</sup> As such, the intricacies of incorporating international elements in the domestic contexts of both Iraq and Syria should be duplicated for a potential special Daesh Tribunal.

A short-term strategy to hold Daesh accountable may be best achieved outside of the legal context. A potentially successful strategy for NGOs and other concerned actors would be to advertise the numerous violations of law that Daesh has committed. As much of the initial success of Daesh has been based on media and Internet propaganda, this could be a useful counter-strategy for the U.S. and its allies. It might hinder Daesh recruitment efforts and showcase the inherent hypocrisy of their “Islamic” mission. Furthermore, now that it has come into force, publicizing Daesh’s violations of the rights guaranteed in detail by the UN Watercourses Convention should also be an effective tool to help coordinate the international intervention and protect Syrian and Iraqi watercourses. The water security element should not be neglected in a comprehensive strategy to deal with Daesh.

#### V. CONCLUSION

State actors have clear legal obligations to prevent Daesh control of watercourse installations. There are explicit obligations created under Iraqi law, Syrian law, and Islamic Law to protect universal access to installations along the watercourses of the Tigris and the Euphrates. Under international law, the UN Watercourses Convention obligates states to protect watercourses generally. Under International Humanitarian Law, Protocol II and customary international law create obligations to protect water installations in times of armed conflict.

Although these state obligations exist, the likelihood that Syria and Iraq will fulfill their obligations in the short term is doubtful. With regards to Daesh, its only obligation as an ANSA arises under the IHL requirements of Protocol II and customary international law. Although we may identify some emerging trends in customary international law, this potentially may be the first instance of ANSA control of extensive territory and watercourses. Thus, the process to hold Daesh accountable will be very slow. Daesh is in

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<sup>180</sup> The drafters of the “Chautauqua Blueprint” were concerned with how to hold individuals from all sides of the conflict who committed “serious violations of the laws and customs of war” liable in a manner that was transparent and ultimately viewed as “legitimate” to those who suffered. *Id.* at 25–30.



direct violation of the UNWC, but under the current model of international law, any application of the legal framework to these violations is purely theoretical. Daesh control of watercourse installations violates domestic law in both Syria and Iraq, as well as several provisions of Islamic Law.

International law has historically viewed states as the only relevant actors in times of peace and conflict. In this positivist system, states are the only actors that can consent to principles of law. As such, states are the primary obligation holders. Experiences in recent decades reveal that this assumption fails to capture the political reality that non-state actors are relevant and harmful actors on the international stage. By failing to acknowledge non-state actors as legal actors, the international law framework has failed to consistently hold non-state actors accountable for human rights violations. The gap between reality and the law has perhaps never been more visible than in the context of Daesh. International law must develop the necessary nuances to hold Daesh, and similar actors, accountable for their flagrant violations. This change is vital not only for the legitimacy of the larger system, but also for the individual lives hurt most by the lack of accountability.