

FRAGMENTATION IN TWO DIMENSIONS: THE ICJ'S FLAWED APPROACH TO NON-STATE ACTORS AND INTERNATIONAL LEGAL PERSONALITY

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*[Non-state actors have a profound and growing impact on international affairs. In light of their international influence, it is unsurprising that certain types of non-state actors have also been involved in high-profile international legal disputes. Yet, despite their relevance to international law, international lawyers have struggled to integrate non-state actors into the state-centric constructs of the discipline. This article analyses the decisions of one international legal body, the ICJ, that involve non-state actors. The article discusses the arbitrary and incoherent approaches taken by the Court when confronted with legal issues which bear upon the rights and obligations of various non-state actors and analyses the implications for states of the Court's problematic jurisprudence, arguing that international law is in a resultant state of fragmentation *ratione personae*. The article advances an alternative, coherent framework for addressing non-state actors which avoids the legal complications, ambiguities and lacunae caused by the current approaches and is more attuned to the realities of international life.]*

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[T]he progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.¹

I INTRODUCTION

‘Fragmentation’ has become the defining metaphor of early 21st century scholarship on international dispute settlement, encapsulating widespread anxiety about the implications of the proliferation of specialist international dispute resolution fora.² There exists a common concern that this proliferation is entrenching divisions between the different international legal issue-areas in a manner which undermines the coherence and interdependence of international law, leading to exclusion and inconsistency.³ We might call this type of fragmentation ‘horizontal fragmentation’ or ‘fragmentation *ratione materiae*’.

¹ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 178 (‘Reparations’).

² See, eg, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13 April 2006); Joost Pauwelyn, ‘Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands’ (2004) 25 *Michigan Journal of International Law* 903, 904–5; Gilbert Guillaume, ‘The Future of International Judicial Institutions’ (1995) 44 *International and Comparative Law Quarterly* 848, 861–2; Shane Spelliscy, ‘The Proliferation of International Tribunals: A Chink in the Armor’ (2002) 40 *Columbia Journal of Transnational Law* 143; Judge Stephen M Schwebel, ‘Address to the Plenary Session of the General Assembly of the United Nations’ (Address delivered at the UN Headquarters, New York, US, 26 October 1999) available from <<http://www.icj-cij.org>> at 23 May 2008; Judge Gilbert Guillaume, ‘Address by H E Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly’ (Address delivered at the UN Headquarters, New York, US, 26 October 2000) available from <<http://www.icj-cij.org>> at 23 May 2008. Compare the views expressed in the following articles: Jonathan Charney, ‘The Impact on the International Legal System of the Growth of International Courts and Tribunals’ (1999) 31 *New York University Journal of International Law and Politics* 697; Cesare Romano, ‘The Proliferation of International Judicial Bodies: The Pieces of the Puzzle’ (1999) 31 *New York University Journal of International Law and Politics* 709; Pierre-Marie Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (1999) 31 *New York University Journal of International Law and Politics* 791.

³ See, eg, Pauwelyn, above n 2, 904–5; Guillaume, ‘The Future of International Judicial Institutions’, above n 2.

This article examines a different type of fragmentation. Its concern is not with the separation of international *issue-areas*, but with the divisions between different types of international *actors* — a phenomenon we might call ‘vertical fragmentation’ or ‘fragmentation *ratione personae*’.

Non-state actors play a crucial role in today’s globally interdependent world. The actions of international organisations, multinational corporations, terrorist groups, non-government organisations (‘NGOs’), minority peoples and individual persons now permeate all areas of international life — from economics and trade to peace and security, and from human rights to the regulation of the natural environment. Countless commentators have remarked upon the changing nature of international relations and global power structures that have accompanied the ‘rise’ of non-state actors.⁴ One necessary consequence of this increase in the scope and intensity of international interaction is a correlative increase in international grievances, disputes and claims between non-state actors and states, and between different non-state actors.⁵ This article seeks to analyse the way in which one international dispute resolution body, the International Court of Justice, has sought to accommodate non-state actors within the international legal system.

Non-state actors pose particular challenges for international lawyers because they do not fit comfortably within the traditional, state-centric constructs of international law. The jurisdictional limitations on the ICJ are but one manifestation of this state-centrism. Notwithstanding these limitations, the ICJ has, since its inception, had to grapple regularly with the complexities posed by non-state actors.⁶ Whilst the Court has purported to develop international law in a manner that accommodates the realities of non-state actor influence,⁷ this article argues that it has done so haphazardly and arbitrarily. The Court has failed to develop a coherent conceptual framework for its approach to non-state actors and has demonstrated a lack of appreciation for the implications of its conclusions. Consequently, the Court’s jurisprudence has produced a fragmentation *ratione personae* of international law.

Part II of this article sets the scene for this analysis by seeking to place the issue of non-state actors in the context of broader debates within international legal theory concerning the nature of international legal personality (‘ILP’) and its implications for the role of the state. Part III analyses and critiques the ICJ’s jurisprudence with respect to international organisations and non-state groups including self-determination or liberation movements and terrorist groups. Part IV draws these developments together and considers some possible alternative

⁴ See, eg, Jessica Mathews, ‘Power Shift’ (1997) 76(1) *Foreign Affairs* 50; Anne-Marie Slaughter, *A New World Order* (2004); Christoph Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law?’ (1993) 4 *European Journal of International Law* 447; Oscar Schachter, ‘The Decline of the Nation-State and Its Implications for International Law’ (1998) 36 *Columbia Journal of Transnational Law* 7.

⁵ See generally Francisco Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (2004).

⁶ See, eg, *Reparations* [1949] ICJ Rep 174; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66 (‘*WHO Nuclear Weapons*’); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 (‘*Israeli Wall*’) and *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 (‘*Western Sahara*’).

⁷ See, eg, *Reparations* [1949] ICJ Rep 174, 178.

approaches for the international community and for the Court to better address the international legal challenges posed by non-state actors.

II PERSONALITY AND PARTICIPATION: THE THEORETICAL CONTEXT⁸

An understanding of the concept of ILP is indispensable to any international legal analysis of non-state actors. ILP may broadly be defined as ‘the concept lawyers use to identify a certain actor as a separate and independent entity’ in international law.⁹ The importance of ILP to the question of non-state actors cannot be overstated as it (at least partly) determines which actors are subject to the regulatory force of international law. It thus represents the boundaries of the international legal realm;¹⁰ the difference between inclusion and exclusion, silence and voice.¹¹ Some scholars see ILP as the ‘bridge’ by which non-state actors cross from the sphere of international relations into the sphere of international law.¹² The bridge metaphor provides a useful way of visualising the existence of a gap between the realities of international life and the rules of the international legal system in the context of non-state actor participation. This article discusses how that bridge has been constructed through the decisions of the ICJ and how it might be improved.

The implications of ILP are, however, far greater than its function as gatekeeper of the international legal realm. As this article will explore, the way in which ILP is conceived has profound consequences for the entire international legal order,¹³ including the nature and extent of limitations on state sovereignty, state rights over territory and the legality of the use of force.¹⁴ It is in part because of these far-reaching implications that ‘any discussion of legal personality almost necessarily opens the whole field of legal theory’.¹⁵ Accordingly, an understanding of international legal theory is critical to analysing the question of non-state actors and ILP.

This section briefly sets out the main theoretical approaches to ILP as adopted by international legal scholars over the centuries. At the risk of

⁸ The writing of this part of the article has been greatly assisted by the seminal work of Janne Nijman, whose treatise, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (2004), represents a comprehensive and thoughtful analysis of the major historical scholarly approaches to the theory of ILP. This part of the article does not seek to expand further on this well-tended territory — it merely provides the theoretical context for the subsequent analysis of the ICJ’s treatment of this issue.

⁹ *Ibid* 3.

¹⁰ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000) 31.

¹¹ Nijman, above n 8, 333.

¹² Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (2001) 25.

¹³ Nijman, above n 8, x.

¹⁴ Meijknecht, above n 12, 55.

¹⁵ David Derham, ‘Theories of Legal Personality’ in Leicester C Webb (ed), *Legal Personality and Political Pluralism* (1958) 1, 1.

oversimplification, the various approaches to ILP are grouped into three main schools of thought for heuristic utility.¹⁶

A *Positivism, Realism and State-Centrism*

The classical positivist and realist approaches to international law posit the state as the only subject of international law.¹⁷ The positivist world consists of autonomous, sovereign states and sovereignty is conceived of maximally, such that the only limitations on sovereignty are those to which states have consented via their ratification of treaties or their participation in the development of custom.¹⁸ Under this approach, the concept of ILP has negligible relevance beyond its application to states and little, if any, legal significance is accorded to non-state actors. Restorative scholars and realists such as Morgenthau thus conceived of ILP as a ‘shield’ against the corrosion of the supreme authority of the state.¹⁹

The problem with this approach is that it fails to accommodate adequately international legal developments in which ILP has been accorded to non-state actors. The historical attribution of ILP to international organisations²⁰ and individuals²¹ has discredited the theory that only the state can bear rights and duties at international law. Later editions of textbooks which adopt a positivist approach have acknowledged such developments, with the ‘new’ subjects being treated as limited exceptions²² — the theoretical implications of such structural changes tend to be ignored.²³ As Clapham notes, if international law has already expanded the range of actors which enjoy ILP, there is no reason in principle why the categories could not expand further.²⁴

For the purposes of this article, it is useful to conceive of state-centric, positivist approaches to ILP (and sovereignty) as representing one extreme on a spectrum of possible juridical approaches to non-state actors.

¹⁶ Note that I have not included a separate category of New Stream theorists and post-modern approaches to international legal theory. Whilst New Stream scholars have undoubtedly contributed much to our understanding of international law, for example through engaging in systemic critique and deconstruction, as Nijman notes that New Stream scholarship ‘has still not (expressly) addressed the re-thinking of the concept of ILP[,] ... [n]o “New constructive Approach” of ILP has been formulated yet’: Nijman, above n 8, 401–2 (emphasis in original).

¹⁷ Nijman, above n 8, 116–7.

¹⁸ Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (2nd ed, 1954) 288–9.

¹⁹ See Nijman, above n 8, 295.

²⁰ *Reparations* [1949] ICJ Rep 174, 179.

²¹ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* (1947) vol 22, 466.

²² See, eg, Michael Akehurst, *A Modern Introduction to International Law* (6th ed, 1987) 75.

²³ Nijman notes that many textbook writers simply dismiss this area as ‘controversial’ without grappling with the important theoretical issues involved: Nijman, above n 8, 345. See, eg, Akehurst, above n 22, 70.

²⁴ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006) 61. See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 49.

B Natural Law and Anthropocentric Theories

If state-centric positivism represents one extreme, then theories based on natural law represent the other.²⁵ Natural law theorists posit the individual as the primary unit of international law, which is considered to be based on normative foundations of justice.²⁶ The role of the state is envisaged in terms of its obligations to uphold the fundamental rights of individuals through democratic entitlements.²⁷ Accordingly, natural law theorists tend to attribute ILP exclusively or primarily to individuals.²⁸ Interestingly, anthropocentric approaches to international law and to ILP have re-emerged in contemporary 'post-postmodern' attempts to reconstruct the individual subject as the empowered global citizen.²⁹

While natural law theories can serve as interesting intellectual projects, they have been criticised for being over-idealistic and for lacking sufficient basis in the reality of international relations.³⁰ It is for this reason that such approaches have tended to be eschewed in the context of actual disputes involving non-state actors. Nonetheless, as we shall see, appeals to natural law are often implicit in the approaches of at least some ICJ judges to non-state actors.³¹ Accordingly, an understanding of natural law theory remains relevant to contemporary analyses of non-state actor disputes in international law.

C Policy-Oriented and Pragmatic Theories

The final category is essentially a group of theorists who sit somewhere in between the extremes of positivism and natural law. Under the 'policy science' or 'law as process' approach taken by proponents of the New Haven School such as McDougal and Higgins, sovereignty is conceived of as a relative concept, encompassing both exclusive state rights as well as inclusive community

²⁵ In this regard, Koskeniemi's work on the structure of legal argument as constantly shifting between two extremes of realist 'apology' and idealist 'utopia' is particularly useful: see Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) 40–2.

²⁶ See, eg, Fernando Tesón, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53.

²⁷ See, eg, *ibid* 70–4; James Brierly, 'The Basis of Obligation in International Law' in Hersch Lauterpacht and Humphrey Waldock (eds), *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly* (1958) 1. For an excellent analysis of the way in which revisionist scholars in the interwar period conceived of ILP, see Nijman, above n 8, ch 3.

²⁸ See Nijman, above n 8, 243.

²⁹ See, eg, in the works of Franck: Thomas Franck, *The Empowered Self: Law and Society in the Age of Individualism* (1999); Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46. Nijman's own theory of ILP arguably also falls within this category: Nijman, above n 8, 457–73. Nijman bases her theory of ILP partly on Hannah Arendt's work relating to the human condition and political citizenship. While Nijman stresses that her own theory combines elements of realism and idealism, the naturalist foundation of her argument is manifest: 'we may re-conceive the concept [of ILP] as the capacity to speak and act, and, in a broader sense, the capacity to be a political participant, with a natural right to such participation': at 469 (emphasis added).

³⁰ See, eg, Friedmann's criticism of Scelle's argument that only the individual was the true international legal person: Wolfgang Friedmann, *The Changing Structure of International Law* (1964) 233–4.

³¹ See below Parts III(A)(2)(b) and III(B)(2)(b).

responsibilities — including responsibilities to non-state actors.³² McDougal saw little use for rigid concepts such as ILP, arguing that there was a need for international law to accommodate the interests of the whole range of participants in international power structures — both to protect their interests and to subordinate them to the authority of the law.³³

Although different legal methods and language were used, the approaches adopted by scholars such as Friedmann and Lauterpacht were similar in their pragmatic progressivism. Essentially, these scholars sought to develop international law progressively, albeit within established legal frameworks. They sought the expansion of ILP to encompass non-state actors in line with developments in treaty-making and state practice, and with the demands of international justice.³⁴ Both writers emphasised that ILP must encompass both rights *and duties* for non-state actors,³⁵ which in turn had important implications for the rights and duties of states.³⁶

D *Theory as Practice*

It can readily be seen from this brief survey of major theories that one's approach to the question of non-state actors and ILP is inextricably linked with one's broader theoretical approach to international law. One cannot take a stand on issues of ILP without implicating more fundamental concepts such as state sovereignty and the nature of international legal obligation.

As will be seen in the next part of this article, it is primarily in accordance with a functional, quasi-progressive approach that the ICJ has sought to accommodate non-state actors within the international legal system. Nijman rightly points out that this sort of pragmatic, entity-specific approach has led to a reduction in jurisprudential concern for the concept of ILP as a feature of international legal theory.³⁷ However, what this brief theoretical excursion has revealed is that *all* approaches to ILP necessarily have important theoretical and practical implications for international law.

III THE RESOLUTION OF NON-STATE ACTOR DISPUTES IN THE ICJ

The ICJ's jurisdiction is limited by its governing statute to contentious disputes between states and advisory opinions on legal matters submitted by the

³² Myres McDougal, 'Perspectives for an International Law of Human Dignity' in Myres McDougal et al, *Studies in World Public Order* (1960) 987, 1008–10; Rosalyn Higgins, 'The End of Sovereignty? Roundtable' (1994) 88 *American Society of International Law Proceedings* 73, 73–4.

³³ McDougal, 'Perspectives for an International Law of Human Dignity', above n 32, 1010. Higgins' argument is similar, though she is more comfortable in using the language of ILP as a legal concept for recognising new participants: see Higgins, 'The End of Sovereignty?', above n 32, 74; Higgins, *Problems and Process*, above n 24, 49.

³⁴ See, eg, Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1948) 64 *Law Quarterly Review* 97, 110; Friedmann, above n 30, 213–49.

³⁵ Friedmann, above n 30, 234, 247; Lauterpacht, 'The Subjects of the Law of Nations', above n 34, 438–9.

³⁶ Friedmann, above n 30, 213–16; Hersch Lauterpacht, 'State Sovereignty and Human Rights' (1950) in Elihu Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht* (1977) vol 3, 416, 430.

³⁷ Nijman, above n 8, 345.

UN and its specialised organs.³⁸ The fact that the world's pre-eminent international judicial forum is precluded from adjudicating disputes brought by or against the vast majority of non-state actors reveals the historical attitude of the international community towards the role of non-state actors. Notwithstanding the Court's limited jurisdiction, it has regularly been confronted with disputes involving non-state actors both within its advisory and contentious jurisdictions. As a result, the Court has made a number of findings which not only impact upon the rights and duties of non-state actors, but which, in some cases, affect fundamental tenets of international law. This part analyses and critiques the Court's approach in these contexts.

A *The Reparations Opinion, International Organisations and the Birth of ILP*

To understand the way in which the ICJ has attempted to accommodate non-state actors within the international legal system, it is critical to examine the Court's reasoning in the *Reparations* opinion.³⁹ In this case, the Court was asked to give an opinion as to, inter alia, whether the United Nations was a separate entity in international law and whether it had the power to espouse an international legal claim. This section discusses a number of issues relating to the nature, rights and duties of non-state actors which arise from the *Reparations* opinion and from other opinions of the Court concerning international organisations.

1 *The Court's General Approach to Non-State Actors*

Broadly speaking, the ICJ in the *Reparations* opinion set the tone for the Court's general approach to the issue of non-state actor participation within the international legal system:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.⁴⁰

It is clear from this paragraph that the Court's overarching approach was to be one of pragmatic, progressive development. However, the Court emphasised that the legal nature and rights of different subjects will differ — the rights of states being paramount.⁴¹ The Court was careful to ground these progressive developments in the realities and 'requirements of international life' and, in particular, in the 'activities of States'.⁴² The expansion of non-state actors would therefore appear to depend on the interests and needs of *states* to interact with non-state actors (but not vice versa). The Court was thus able to distance itself

³⁸ *Statute of the International Court of Justice* arts 34(1), 65(1).

³⁹ [1949] ICJ Rep 174.

⁴⁰ *Ibid* 178.

⁴¹ A point reinforced later in the Court's judgment: *ibid* 179.

⁴² *Ibid* 178.

from the extreme position that only states may be subjects of international law,⁴³ yet at the same time reinforce the dominant, positivist paradigm.

2 *The Court's Conception of ILP: Untangling the Complex Threads*

While the Court's broad approach to non-state actors was communicated effectively in its judgment, the Court's specific reasoning in relation to the concept of ILP is unclear. This lack of clarity is productive of two important problems which remain unresolved in the jurisprudence of the Court: (i) how can the concept of ILP be applied to *other* types of non-state actors (that is, what are the general *preconditions* for the possession of ILP)?; and (ii) what are the legal *consequences* that flow from the possession of ILP?

(a) *Preconditions of ILP*

In ascertaining whether the UN possesses ILP, the Court set out a number of relevant factors, including the nature of the organisation's functions and whether it has specialist organs that exhibit a separate will from its member states.⁴⁴ However, whilst such 'tests' may be capable of relatively straightforward application to determine whether other international organisations possess ILP, they are virtually useless when attempting to ascertain the ILP of other types of non-state actors. Unfortunately, the Court says little about the intrinsic nature of ILP, other than that the conferral of ILP upon the UN 'mean[s] ... that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims'.⁴⁵ It is not clear from this passage whether the capacity to possess international rights and duties, including the right to bring an international claim, is a *precondition for* or a *consequence of* the possession of ILP. Arguments can be made either way, but the judgment itself is unclear as to this seemingly fundamental point.⁴⁶ As Brownlie and others have pointed out, the test appears to be circular in that ILP is the capacity to possess rights and duties, yet it depends on the capacity to possess rights and duties.⁴⁷

The issue of ascertaining the preconditions for ILP is a point taken up again later in this article.⁴⁸ For now it is sufficient to note that, beyond identifying criteria specific to international organisations, the *Reparations* opinion is of little, if any, assistance in developing a useful framework for the legal recognition of non-state actors.

(b) *Consequences of ILP*

Whatever the general preconditions for possessing ILP may be, it is clear that the UN possesses it.⁴⁹ The Court was also clear in stating that the possession of

⁴³ See above Part II(A).

⁴⁴ *Reparations* [1949] ICJ Rep 174, 178–9.

⁴⁵ *Ibid* 179.

⁴⁶ See *ibid* 178–9, 182–4.

⁴⁷ Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 57; Clapham, above n 24, 64.

⁴⁸ See below Part IV(A).

⁴⁹ *Reparations* [1949] ICJ Rep 174, 179.

ILP does not mean that the UN is to be equated with a state.⁵⁰ Rather, ‘the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice’.⁵¹ Reliance on the terms of the constitutive treaty in order to identify the rights and duties of the organisation is a logical starting point, as international treaties are a primary source of international law.⁵²

Further, ‘[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties’.⁵³ In practice, the dominant approach of the Court appears to be that international organisations possess those ‘implied powers’ necessary for the *effective achievement* of their *objects and purposes*.⁵⁴

The source of such implied powers is not expressly made clear, but it seems that the entity will enjoy certain rights which are implied *by operation of law*, as a consequence of the entity’s possession of ILP. In a later judgment concerning the implied power of the World Health Organization (‘WHO’) to address the legality of the threat or use of nuclear weapons, the Court seems to endorse this view: ‘*the necessities of international life* may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers’.⁵⁵ Thus it may be concluded that for entities possessing ILP, it is possible to imply the possession of certain rights (and arguably also certain obligations) on the basis of ‘the necessities of international life’. Whatever the precise meaning and scope of that phrase may be, it demonstrates that the Court is willing to appeal to natural law, or at least to general principles of law, in order to facilitate the participation of new actors on the international stage in a more

⁵⁰ Ibid 179–80.

⁵¹ Ibid 180.

⁵² *Statute of the International Court of Justice* art 38(1)(a).

⁵³ *Reparations* [1949] ICJ Rep 174, 182.

⁵⁴ Ibid 179: the members of the UN ‘have clothed it with the competence required to enable those functions to be *effectively* discharged’ (emphasis added). See also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* [1954] ICJ Rep 47, 57:

the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was *essential to ensure the efficient working of the Secretariat*, and to give effect to the paramount consideration of securing the *highest standards of efficiency, competence and integrity*. Capacity to do this arises by necessary intendment out of the Charter (emphases added).

This broad approach is to be contrasted with the minority position within the Court, expressed by Judge Hackworth in *Reparations* [1949] ICJ Rep 174, 198 (Separate Opinion of Judge Hackworth):

It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the *Charter* or in complementary agreements concluded by them. Powers not expressed cannot freely be implied. Implied powers flow from a grant of *expressed powers*, and are limited to those that are ‘*necessary*’ to the exercise of *powers* expressly granted (emphases added).

It should be noted that a more restricted approach appears now to have found favour with a majority of the Court: see *WHO Nuclear Weapons* [1996] ICJ Rep 66, 78–9.

⁵⁵ *WHO Nuclear Weapons* [1996] ICJ Rep 66, 79 (emphasis added). See also the Dissenting Opinion of Judge Koroma at 198: ‘I agree with the Court that because of the necessities of international life, it is accepted that international organizations can exercise implied powers, which are not in conflict with their constitution and are required to ensure their effectiveness’.

orderly and legally coherent manner.⁵⁶ This sort of international legal ‘gap-filling’ is nothing new in the jurisprudence of the Court, and it is arguably a useful judicial tool when it comes to ascertaining the rights and duties of non-state actors.⁵⁷ However, as will be seen from the Court’s subsequent treatment of non-state actors,⁵⁸ more attention must be paid by the Court to this process of law-making ‘by necessity’ if confusion and incoherence are to be avoided in this area.

As the Court in the *Reparations* opinion was able to answer the questions put to it by reference to the UN’s express and implied powers, the Court did not need to address the issue of the scope of the UN’s obligations under customary international law. The applicability to international organisations — and indeed to other non-state entities possessing ILP — of rights and obligations under customary international law remains a controversial and complex issue, unresolved in subsequent decisions of the Court. In *Interpretation of the Agreement of March 25 1951 between the WHO and Egypt*,⁵⁹ the Court held that the WHO was bound by customary obligations of good faith in the performance of its international functions,⁶⁰ stating that

[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.⁶¹

It may reasonably be concluded from this passage that, in addition to possessing rights and obligations expressly conferred by treaty and arising by necessary operation of law, ‘subjects of international law’ may also possess rights and duties at customary international law and in accordance with general principles of law.⁶²

This is an important finding, but it begs a number of questions: assuming the possession of ILP, which rules of general international law apply to which non-state actors? Are some rules applicable to all entities that possess ILP? How are such determinations to be made? Is the formation of such rules influenced by

⁵⁶ This may be what Tomuschat is referring to when he argues that international organisations must, like states, be ‘subjected to certain rules thought to be indispensable for maintaining orderly relations within the international community’: Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) 281 *Recueil des Cours de l’Académie de Droit International* 9, 135.

⁵⁷ See also Higgins, *Problems and Process*, above n 24, ch 13. Petersmann makes a similar point about the judicial development of general principles in the context of the WTO, stating that the judicial development of ‘general legal “principles” for the mutual balancing and progressive “optimization” of rules ... is of fundamental importance for the coherence, efficiency, and justice of legal systems’: see Ernst-Ulrich Petersmann, ‘From “Member-Driven Governance” to Constitutionally Limited “Multi-Level Trade Governance” in the WTO’ in Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006) 86, 100.

⁵⁸ See below Part III(B).

⁵⁹ (*Advisory Opinion*) [1980] ICJ Rep 73 (*WHO/Egypt Agreement*).

⁶⁰ *Ibid* 73, 92–3, 95.

⁶¹ *Ibid* 89–90 (emphasis added).

⁶² Consistent with my reading of the Court’s reference to ‘general rules of international law’, this phrase has been interpreted elsewhere to mean non-treaty sources of international law, that is, customary international law and general principles of law: see, eg, Clapham, above n 24, 65–8.

the practice of the relevant non-state actors, or is it purely a matter of state practice? How do customary or general international law rights and duties interact with rights and duties arising by ‘necessary implication’?

These are not abstract questions of purely academic importance. There is a lively debate, for example, concerning such questions as: are international organisations bound by customary obligations under international human rights and humanitarian law?⁶³ Can multinational corporations commit international crimes?⁶⁴ Can non-state actors use force giving rise to a right of self-defence?⁶⁵ Even under the relatively well settled law concerning international organisations, the scope of such customary rights and obligations is far from clear.

Despite its shortcomings, the Court’s approach to international organisations developed through its advisory opinions arguably provides at least a useful foundation for developing a coherent conceptual framework for non-state actors.⁶⁶ Unfortunately, the Court has not availed itself of this jurisprudence in its approach to other non-state actors.

B *Non-State Groups: From Self-Determination to Fragmentation*

This section considers how the Court has dealt with the concerns of another category of non-state actors, namely, ‘peoples’ possessing the right to self-determination.⁶⁷ The concern here is with the Court’s elucidation of the rights and duties of peoples in the context of its judgments on the subject of

⁶³ See, eg, *ibid* ch 4; Frédéric Mégret and Florian Hoffmann, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’ (2003) 25 *Human Rights Quarterly* 314; Mac Darrow, *Between Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law* (2003).

⁶⁴ See, eg, Clapham, *above* n 24, 237–70; Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (2004).

⁶⁵ On this issue, see below Parts III(B)(3) and IV(A)(2).

⁶⁶ A point I return to later in Part IV(A)(3) below.

⁶⁷ The literature on the topic of self-determination is voluminous, and a thorough analysis of the right, including its proper recipients and its precise content, is beyond the scope of this article. It will suffice to note that these issues have been the source of significant controversy. In particular, there is a lively debate concerning the existence of the principle of so-called ‘internal self-determination’, which may apply to sub-groups within the population of a state, such as minorities and indigenous peoples. See, eg, comments made by the Supreme Court of Canada in *Reference re Secession of Quebec* [1998] 2 SCR 217, [119]–[123]; Principle VIII in *Conference on Security and Co-operation in Europe: Final Act* 14 ILM 1292, 1295 (1975); *Conference on Yugoslavia Arbitration Commission (Opinion No 2)* 31 ILM 1497 (1992); Allan Rosas, ‘Internal Self-Determination’ in Christian Tomuschat (ed), *Modern Law of Self-Determination* (1993) 225; Hurst Hannum, ‘Rethinking Self-Determination’ (1993) 34 *Virginia Journal of International Law* 1, 62; Ian Brownlie, ‘The Rights of Peoples in Modern International Law’ in James Crawford (ed), *The Rights of Peoples* (1988) 1, 6; Antonio Cassese, *Self-Determination of Peoples* (1995) 349–51; Christian Tomuschat, ‘Self-Determination in a Post-Colonial World’ in Christian Tomuschat (ed), *Modern Law of Self-Determination* (1993) 1, 16–17; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) 146. *Contra* Higgins, *Problems and Process*, *above* n 24, 124. Without wanting to enter this debate, it is sufficient for the purposes of this article to note that the right of self-determination applies at the very least to ‘peoples’ being the entire population of a given territory. Irrespective of whether or not sub-groups, such as minorities and indigenous groups, enjoy the right to self-determination, this article maintains that such sub-groups are nonetheless *potential* subjects of international law by virtue of their possession of *other* international legal rights, and hence of ILP. This approach is developed further below at Part IV(A).

self-determination. The Court's decisions concerning the legal status of other 'groups', including terrorist and militia groups, are also analysed here.

1 *Post-Colonialism and Self-Determination*

The right of 'all peoples' to self-determination has its origins in the *Charter of the United Nations*,⁶⁸ from which it incrementally 'became enriched with hard substance, creating rights for colonial peoples and imposing corresponding duties on administering powers'.⁶⁹ In the context of decolonisation, the right was seen to inhere in peoples inhabiting an entire territory, exercisable as a political means to free themselves from colonial domination or other forms of alien subjugation by freely choosing their political status.⁷⁰ Support for the existence of this right gathered momentum from its inclusion in a further key General Assembly resolution⁷¹ and in the twin covenants on human rights.⁷² The ICJ first proclaimed the existence of the right to self-determination in 1971.⁷³ Subsequently, in *Western Sahara* opinion, the Court elaborated on the content of the right, noting that it 'requires a free and genuine expression of the will of the peoples concerned', which may be exercised in a number of ways.⁷⁴ The Court also emphasised the obligations incumbent upon the administering power to consult the relevant peoples in order to ascertain their political will, and the obligations on the international community to promote the realisation of the right.⁷⁵

The critical point to note is that the ICJ did not consider, nor has it since considered, the rights of the relevant peoples in terms of their possession of ILP. The fact that such peoples are clearly non-state actors and are identified as subjects possessing international legal rights must surely — at least according to the logic of the *Reparations* opinion — mean that peoples possess ILP.

⁶⁸ Arts 1(2), 73.

⁶⁹ Tomuschat, 'Self-Determination in a Post-Colonial World', above n 67, 1.

⁷⁰ See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, UN Doc A/RES/1514 (14 December 1960). See also *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called For under Article 73e of the Charter*, GA Res 1541 (XV), UN GAOR, 15th sess, 948th plen mtg, UN Doc A/RES/1541 (15 December 1960).

⁷¹ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (24 October 1970).

⁷² Common art 1 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁷³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 31.

⁷⁴ *Western Sahara* [1975] ICJ Rep 12, 32.

⁷⁵ *Ibid* 33.

2 East Timor and the Fragmentation of Sovereignty

In *East Timor*,⁷⁶ the Court held that the right of peoples to self-determination is a right *erga omnes*, and is ‘one of the essential principles of contemporary international law’.⁷⁷ The Court ultimately found that it had no jurisdiction to hear the matter,⁷⁸ and accordingly did not examine the arguments made by Portugal on the merits of the case — that Australia had violated the rights of the East Timorese to self-determination by entering into a treaty with Indonesia for the exploitation of natural resources in the Timor Gap. However, a number of judges elaborated on these issues in their individual opinions. These judgments considerably enrich our understanding of the right to self-determination and, more generally, of the possibilities and implications for the international community entailed in the recognition of the rights of non-state actors.

(a) *Self-Determination, Participation and Multiple Sovereignties*

In his dissenting opinion, Judge Weeramantry considered in some detail the nature and implications of the right to self-determination. In His Excellency’s view, recognition of the right to self-determination entails the right to exercise elements of sovereignty over the relevant territory.⁷⁹ In particular, the right of all peoples and states to permanent sovereignty over their natural wealth and resources was considered to be ‘for any people, an important component of the totality of their sovereignty’,⁸⁰ and is inherently bound up in the right to self-determination.⁸¹ A number of judges⁸² affirmed that a further incident of the right to self-determination is the right of the peoples concerned to participation in decision-making which affects their interests,⁸³ including in relation to the exploitation of their natural resources,⁸⁴ and regarding the ascertainment of their wishes as to the matters in dispute before the Court.⁸⁵ These judges, in particular Judge Weeramantry, thus conceived of the right to self-determination broadly, as encompassing a range of sovereign rights subsisting over territory and resources exercisable against the entire international community.⁸⁶

⁷⁶ (*Portugal v Australia*) [1995] ICJ Rep 90.

⁷⁷ *Ibid* 102.

⁷⁸ *Ibid* 102, 105. The Court found that it could not exercise jurisdiction because a ruling on the merits would have, in its opinion, necessitated a ruling as to the legality of Indonesia’s conduct in entering into the treaty, but Indonesia had not consented to the Court’s jurisdiction.

⁷⁹ *Ibid* 200 (Dissenting Opinion of Judge Weeramantry).

⁸⁰ *Ibid* 197 (Dissenting Opinion of Judge Weeramantry).

⁸¹ *Ibid* 198 (Dissenting Opinion of Judge Weeramantry), where Judge Weeramantry relied on *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), UN GAOR, 17th sess, 1194th plen mtg, UN Doc A/Res/17/1803 (14 December 1962).

⁸² *East Timor* [1995] ICJ Rep 90, 135–8 (Separate Opinion of Judge Vereschetin), 222 (Dissenting Opinion of Judge Weeramantry), 238 (Dissenting Opinion of Judge Skubiszewski).

⁸³ Recall that the Court in *Western Sahara* held that the right to self-determination entailed the right of peoples to ‘consultation’ as to their political aspirations regarding the exercise of that right: see above n 75 and accompanying text.

⁸⁴ *East Timor* [1995] ICJ Rep 90, 222 (Dissenting Opinion of Judge Weeramantry).

⁸⁵ *Ibid* 135–8 (Separate Opinion of Judge Vereschetin).

⁸⁶ *Ibid* 181, 194, 197, 211 (Dissenting Opinion of Judge Weeramantry).

What is fascinating about these judgments is that they demonstrate that a number of different state and non-state actors can enjoy various sovereign rights and responsibilities exercisable over a single piece of territory. This situation of ‘multiple sovereignties’ demonstrates the relative and malleable nature of sovereignty and supports the argument that state sovereignty ‘is diminishing in importance as alternative sovereignties develop’.⁸⁷ In *East Timor*, foremost amongst these ‘alternative sovereignties’ is the sovereignty of a non-state actor, the East Timorese ‘peoples’, whose rights in relation to that territory impose profound limitations on the conduct of other states.⁸⁸ Such developments present a serious challenge to the absolutist conception of state sovereignty,⁸⁹ and necessitate a shift in thinking on the part of the international community about the very nature of sovereignty.⁹⁰

However we might seek to re-imagine the nature of sovereignty, the *East Timor* decision clearly demonstrates the potentially wide-ranging implications that the recognition of non-state actor rights can have. It also reminds us of the potential for vertical fragmentation — the emergence of new actors and new forms of rights and obligations could be problematic if their interrelationship is not clarified.

(b) *Non-State Actor Rights and the Enforcement of General Obligations*

Judge Weeramantry’s principled approach to the concept of rights and obligations *erga omnes*⁹¹ offers significant prospects for the inclusion of non-state actors in a manner which avoids unnecessary fragmentation.

Central to Judge Weeramantry’s argument were the following claims: (i) since rights *erga omnes* are rights which all states have a legal interest in fulfilling,⁹² a right *erga omnes* is ‘a series of separate rights *erga singulum*’

⁸⁷ Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (4th ed, 2003) 267.

⁸⁸ Ibid. See also Gerry Simpson, ‘The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age’ (1996) 32 *Stanford Journal of International Law* 255, 286: ‘International law can accommodate the various claims of the nation, the democratic polity, the indigenous group, the region, and the colony only when it appreciates the provisional and incomplete nature of all exercises of self-determination’.

⁸⁹ See above Part II(A).

⁹⁰ Some scholars argue in favour of ‘widening and enriching the possible meanings of sovereignty’ to accommodate such developments: Simpson, above n 88, 286. See also Dixon and McCorquodale, above n 87, 267. Others argue that we are tending towards the disappearance of sovereignty as a conceptual category altogether: see Philip Allott, *Eunomia: New Order for a New World* (1990) 329–30. An alternative possibility, articulated over half a century ago by Judge McNair in relation to the mandate system, is that in situations whereby a mandatory or administering power exercises control over a peoples, the unique conflation of rights and interests gives rise to a situation in which sovereignty is ‘in abeyance’ and will ‘revive and vest in the new State’ once the right to self-determination has been exercised: *International Status of South-West Africa* [1950] ICJ Rep 128, 150 (Separate Opinion of Judge McNair). An insightful analysis of Judge McNair’s ideas and their jurisprudential implications is contained in Nathaniel Berman, ‘Sovereignty in Abeyance: Self-Determination and International Law’ (1988) 7 *Wisconsin International Law Journal* 51, 76–9.

⁹¹ *East Timor* [1995] ICJ Rep 90, 172, 193–8, 200–16, 221–2 (Dissenting Opinion of Judge Weeramantry).

⁹² This was held by the Court in a now famous passage from *Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32.

opposable against every state;⁹³ (ii) these rights necessarily entail corresponding duties and obligations on the part of all states to respect those rights;⁹⁴ (iii) in particular, states have a legal duty ‘to abstain from any State action which is incompatible with those rights or which would impair or nullify them’;⁹⁵ (iv) such action would amount to a violation of the right to self-determination and a breach of the corresponding obligation, giving rise to judicial relief;⁹⁶ and (v) at least the administering power (and possibly any state)⁹⁷ may bring an action on behalf of the East Timorese in order to enforce these obligations against the violating state(s).⁹⁸

These arguments present significant possibilities for the litigation and representation of non-state actor interests under international law. Of particular importance in this respect is the translation of the recognised rights of one entity (here, the peoples of East Timor) into correlative duties binding upon other entities to respect those rights. Judge Weeramantry makes a compelling case that the recognition of the customary international law right to self-determination requires states to not merely act in accordance with specific directions or prohibitions contained in treaties, resolutions or declarations (as Australia argued).⁹⁹ Rather, as customary international law ‘by its very nature, consists of general principles and norms rather than specific directions and prohibitions’, the obligations to respect the right must be ascertained by reference to the underlying principles and rights concerned, and are therefore greater than the specific prohibitions and duties that may have been expressly itemised.¹⁰⁰

Understanding legal rights in this way makes it easier to envisage the imposition of ‘corresponding duties’ upon other non-state actors as well. If non-state actors (for example, peoples) are participants enjoying substantial rights under international law, then they may in principle surely be subjected to duties under international law;¹⁰¹ and if states are bound by customary law obligations to act in accordance with general/customary principles in their

⁹³ *East Timor* [1995] ICJ Rep 90, 172 (Dissenting Opinion of Judge Weeramantry).

⁹⁴ *Ibid* 205, 208–9 (Dissenting Opinion of Judge Weeramantry):

Corresponding to the rights so generated, which are enjoyed by the people of East Timor, *there are corresponding duties lying upon the members of the community of nations*. Just as the rights associated with the concept of self-determination can be supported from every one of the sources of international law, so also can the duties, for a right without a corresponding duty is no right at all: at 205 (emphasis added).

⁹⁵ *Ibid* 204 (Dissenting Opinion of Judge Weeramantry).

⁹⁶ *Ibid* 204, 215 (Dissenting Opinion of Judge Weeramantry).

⁹⁷ Judge Weeramantry argued this point in terms of the rules relating to standing before the ICJ, as propounded by the Court in *South West Africa (Ethiopia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319, 378 and *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6. In this context, Judge Weeramantry argued that Portugal had a greater ‘nexus’ to the East Timorese people (by virtue of its historical status as the former administering power) than did Ethiopia and Liberia in respect of South-West Africa in the *South-West Africa* cases, and that, accordingly, Portugal had a sufficient legal interest to derive standing. His Excellency’s reasoning, however, suggests that such an historical nexus would not be necessary to derive standing to enforce obligations *erga omnes*, as all states have a legal interest in the enforcement of such rights.

⁹⁸ *East Timor* [1995] ICJ Rep 90, 181 (Dissenting Opinion of Judge Weeramantry).

⁹⁹ *Ibid* 211 (Dissenting Opinion of Judge Weeramantry).

¹⁰⁰ *Ibid* 209–11 (Dissenting Opinion of Judge Weeramantry).

¹⁰¹ Recall the discussion of rights and duties attaching to international organisations possessing ILP at Part III(A)(2)(b) above.

dealings with non-state actors, then there is no reason in principle why such obligations cannot likewise bind non-state actors in their dealings with other entities, including other non-state actors.¹⁰² Such reasoning is even more compelling where the rights involved have an *erga omnes* character, as the corresponding obligations bind the entire international community. The logic of a priori excluding non-state actors from the possession of international rights and obligations thus becomes difficult to sustain.

The desirability of developing an approach to non-state actor rights and obligations along these lines is highlighted further in the following section.

3 *The Israeli Wall Opinion and the Conceptual Crisis of Non-State Actors*

In *Israeli Wall*,¹⁰³ the ICJ was presented with an ideal opportunity to clarify the status of non-state actors within the international legal system. This section analyses the Court's opinion in that case and also touches on some of the Court's more recent jurisprudence with respect to non-state violence committed by irregular forces.

Israeli Wall was a dispute ripe with potential for fragmentation. The case involved a collision of different legal regimes each with its own potential application: *jus ad bellum* (and the law on self-defence), *jus in bello* (and the law of belligerent occupation), self-determination and human rights. Additionally, the dispute involved both state and non-state actors, each with its own interests and claims: the sovereign state of Israel (in occupation and control of Palestinian territory); the Palestinian peoples (enjoying the right to self-determination over the same Palestinian territory); individual persons (possessing human rights) and terrorist groups (carrying out acts of terrorism and violence against Israeli citizens). Accordingly, the Court was required to grapple with potential fragmentation in two dimensions: *ratione materiae* and *ratione personae*; horizontal and vertical; of subject-matter and of subjects. Regrettably, the Court failed to engage in a serious analysis of these complexities, and the law applicable to non-state actors is now in a state of conceptual confusion.

Israel had argued that its construction of the wall was consistent with its inherent right to self-defence under art 51 of the *UN Charter*.¹⁰⁴ Of particular importance was Israel's reliance on *Security Council Resolutions 1368*¹⁰⁵ and *1373*¹⁰⁶ of 2001.¹⁰⁷ In these resolutions, the Security Council explicitly recognised that acts of international terrorism constitute a threat to international peace and security, and affirmed the inherent right of states to self-defence in

¹⁰² It is not too great a step to argue, for example, that multinational oil and gas companies which extracted resources from the Timor Gap have themselves violated the right of the East Timorese to self-determination.

¹⁰³ [2004] ICJ Rep 136.

¹⁰⁴ Ibid 194.

¹⁰⁵ *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1368, UN SCOR, 56th sess, 4370th mtg, UN Doc S/Res/1368 (12 September 2001) ('*Security Council Resolution 1368*').

¹⁰⁶ *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (28 September 2001) ('*Security Council Resolution 1373*').

¹⁰⁷ *Israeli Wall* [2004] ICJ Rep 136, 194.

that context.¹⁰⁸ According to Israel, these resolutions supported its right to build the wall in exercise of its right to defend itself against terrorist attacks emanating from the occupied territories.¹⁰⁹

In a startlingly brief paragraph, the Court, after quoting art 51, dismissed this argument as follows:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack *by one State against another State*. However, *Israel does not claim that the attacks against it are imputable to a foreign State*.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, *the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory*. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has *no relevance* in this case.¹¹⁰

The Court relies on two separate arguments to support its conclusion, and I will deal with each in turn.

(a) *The Non-State Actors Issue*

The first basis on which Israel's self-defence claim was rejected was that the attacks were not committed by or imputable to a foreign state.¹¹¹ The Court here implies that the right of self-defence is exercisable only in response to an armed attack committed by another *state*. The Court suggests that right will only be triggered by an armed attack committed by non-state actors if that attack is 'imputable' to a foreign state.¹¹² This finding raises a number of important issues concerning the legal status of non-state groups, their legal relationship with states and the legal implications for states of their actions.

First, even if we were to accept that an armed attack by terrorist groups could only trigger a right of self-defence if it were imputable to a superior entity, there is no good reason why that entity must necessarily be a state, and why it could not in principle be the Palestinian peoples. Elsewhere in its judgment, the Court noted the widespread international recognition of the Palestinian peoples and their political representatives as an international entity and affirmed that they enjoyed certain rights under international law, including the right to self-determination over their territory.¹¹³ Yet, on the other hand, the Court refused to countenance the possibility that the Palestinian peoples possess international obligations for which they could be held responsible under

¹⁰⁸ *Security Council Resolution 1368*, above n 105, preamble; *Security Council Resolution 1373*, above n 106, preamble.

¹⁰⁹ *Israeli Wall* [2004] ICJ Rep 136, 194.

¹¹⁰ *Ibid* (emphases added).

¹¹¹ *Ibid*.

¹¹² *Ibid* 194.

¹¹³ *Ibid* 182–3. The Court held that this right had been breached by Israel's construction of the wall at 184.

international law.¹¹⁴ This, as Judge Higgins rightly pointed out, ‘is formalism of an unevenhanded sort’.¹¹⁵ If, hypothetically, the facts had revealed that the acts of terrorism could be ‘imputed’ to the recognised controlling entity of the Palestinian peoples, then why should that entity both evade legal responsibility and be shielded from defensive measures taken by victim states? The Court has essentially adopted a position whereby a political entity has substantial rights and powers under international law, but no responsibilities.

The issue of imputability raises a further issue which is important in the context of violent non-state groups. What is required for an act to be imputable to a foreign state? In *Nicaragua*, the Court held that attacks by non-state actors such as ‘armed bands, groups, irregulars or mercenaries’ could only trigger a right of self-defence if the attackers were acting under the effective control of another state, and if the attacks were of a sufficient gravity.¹¹⁶ This test has been much criticised for setting too high a threshold for state complicity in acts of violence by non-state groups, thus effectively restricting victim states’ ability to respond to such violence while shielding aggressor or host states.¹¹⁷ The need for these tests to be reviewed has taken on a heightened importance in the context of the contemporary global security threats posed by international terrorism and the surrounding concerns regarding the harbouring and sponsoring of terrorism by states.¹¹⁸

The Court has recently affirmed *Nicaragua* to the extent that it held that the conduct of non-state groups will only be attributable to a state for the purposes of the law of *state responsibility* where the particular acts committed by the group were carried out under the instructions of, or under the direction and control of, the assisting state.¹¹⁹ It remains unclear, however, whether the same strict test of imputability applies for the purposes of triggering a right of *self-defence* against a state which is complicit in non-state acts of force.¹²⁰ The Court again skirted around this issue in its 2005 decision concerning *Armed Activities on the*

¹¹⁴ Ibid 194.

¹¹⁵ Ibid 215 (Separate Opinion of Judge Higgins).

¹¹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 62–5, 103 (*‘Nicaragua’*). This section considers primarily the issue of control and imputability. On the problematic nature of the Court’s findings as to the gravity of the force required to constitute an armed attack, see Higgins, *Problems and Process*, above n 24, 250–1.

¹¹⁷ Sean Murphy, ‘Self-Defense and the *Israeli Wall* Advisory Opinion: An *Ipse Dixit* from the ICJ?’ (2005) 99 *American Journal of International Law* 62, 66; Higgins, *Problems and Process*, above n 24, 250–1; Abraham Sofaer, ‘Terrorism and the Law’ (1986) 64 *Foreign Affairs* 901, 919; Michael Reisman, ‘Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice’ (1988) 13 *Yale Journal of International Law* 171, 196.

¹¹⁸ See, eg, Jackson Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (2005) ch 5.

¹¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ [397]–[407] <<http://www.icj-cij.org>> at 1 June 2008. The Court explicitly rejected the ‘overall control’ standard applied by the ICTY Appeals Chamber in *Prosecutor v Tadić (Appeals Chamber)* Case No IT-94-1-A (15 July 1999) [115]–[146] (Judgment).

¹²⁰ Jörg Kammerhofer, ‘The *Armed Activities* Case and Non-State Actors in Self-Defence Law’ (2007) 20 *Leiden Journal of International Law* 89, 98–112.

Territory of the Congo.¹²¹ In that case, arguments were made to the effect that a lower standard — such as ‘complicity’, ‘tolerance’ or ‘support’ for terrorist or militia groups — would trigger the right of self-defence.¹²² These lesser forms of state involvement allegedly engaged in by the Democratic Republic of Congo were not addressed by the Court in the context of its consideration of Uganda’s self-defence argument.¹²³ However, elsewhere in the Court’s judgment, similar conduct by Uganda was considered only to constitute independent violations of international obligations relating to the non-use of force and non-intervention.¹²⁴ The Court’s silence in respect of this aspect of the self-defence claim, combined with its preference for adhering to the rigid and confusing characterisation of the different types of internationally wrongful acts involving force introduced in *Nicaragua*, suggests that the Court has implicitly endorsed the view that the same high standard of attribution for state responsibility applies to the imputation of non-state actor violence to a host state for the purposes of committing an armed attack.¹²⁵ Nonetheless, in light of the Court’s unwillingness to confront these issues clearly and directly, the extent of state complicity in international terrorism or other non-state armed violence that is required before the victim state can respond in self-defence has not yet been fully resolved.

The third controversy raised by the Court’s finding in *Israeli Wall* concerns the question of whether self-defence can be exercised against terrorist groups irrespective of their connection with a foreign state. The Court seems to assume that terrorist groups cannot themselves commit armed attacks and that acts of self-defence cannot legally be taken against terrorist groups as such in response to such attacks¹²⁶ — an assumption which seems to be echoed in the Court’s avoidance of this issue in *Armed Activities*.¹²⁷ However, as has been widely pointed out, nothing in the language of art 51 of the *UN Charter* mandates such

¹²¹ (*Democratic Republic of the Congo v Uganda*) (Judgment) [2005] ICJ <<http://www.icj-cij.org>> at 23 May 2008 (*Armed Activities*). The majority’s refusal to address this issue was criticised by other members of the Court: at [25] (Separate Opinion of Judge Kooijmans), [8]–[11] (Separate Opinion of Judge Simma). See also Guy Fiti Sinclair, ‘Don’t Mention the War (on Terror): Framing the Issues and Ignoring the Obvious in the ICJ’s 2005 *Armed Activities* Decision’ (2007) 8 *Melbourne Journal of International Law* 124, 128–32.

¹²² See, eg, *Armed Activities (Oral Pleadings of Uganda)* (18 April 2005) Doc CR 2005/7 [2005] ICJ [77]–[80] <<http://www.icj-cij.org>> at 23 May 2008. These arguments are dealt with thoroughly in Kammerhofer, above n 120, 101–6.

¹²³ *Armed Activities* [2005] ICJ [146]–[147] <<http://www.icj-cij.org>> at 23 May 2008. The Court held at [147] that:

the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.

¹²⁴ *Ibid* [160]–[165].

¹²⁵ *Ibid* [131]–[135], [146]–[147], [160]–[165]. This interpretation of the Court’s judgment is shared by Kammerhofer, above n 120, 103–4, 107.

¹²⁶ *Israeli Wall* [2004] ICJ Rep 136, 194.

¹²⁷ *Armed Activities* [2005] ICJ [147] <<http://www.icj-cij.org>> at 23 May 2008.

an interpretation.¹²⁸ Moreover, the Security Council resolutions relied on by Israel in *Israeli Wall* positively envisage the commission of armed attacks by terrorist groups and the right to respond to such attacks in self-defence.¹²⁹ According to this understanding of self-defence, at the very least, art 51 would in principle allow a state to take measures within its own territory to defend against acts of terrorism emanating from another state. Putting aside the issues of necessity, proportionality and Israel's de facto partial annexation of Palestinian territory, it is difficult to understand why the Court was unwilling to even contemplate the idea that Israel could take action within its territory to protect itself against acts of terrorism.¹³⁰

It is also arguable that art 51 would allow states directly to attack (in self-defence) terrorist infrastructure *in the territory of another state*. Whilst this point did not arise directly in *Israeli Wall*, it is really at the heart of the controversy over the scope of the right to self-defence in the context of terrorism,¹³¹ and Israel's arguments effectively warranted the Court's consideration of this whole issue. In any case, the issue was squarely before the Court in *Armed Activities*. Interpreting art 51 in this way would necessarily have implications for fundamental principles of international law, including sovereignty over territory, nonintervention, noninterference, state responsibility for the acts of non-state actors, self-defence and the use of force. Accordingly, the Court would have needed to have engaged in a nuanced re-conceptualisation

¹²⁸ *Israeli Wall* [2004] ICJ Rep 136, 215 (Separate Opinion of Judge Higgins), 230 (Separate Opinion of Judge Kooijmans), 242 (Declaration of Judge Buergenthal); Murphy, above n 117, 64; Ruth Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense' (2005) 99 *American Journal of International Law* 52, 58; Thomas Franck, 'Editorial Comments: Terrorism and the Right of Self-Defense' (2001) 95 *American Journal of International Law* 839, 840.

¹²⁹ See above nn 105–106 and accompanying text. This fact was recognised by a number of the judges in the case: *Israeli Wall* [2004] ICJ Rep 136, 230 (Separate Opinion of Judge Kooijmans), 242 (Declaration of Judge Buergenthal). In particular, Judge Kooijmans noted that: 'This is the completely new element in these resolutions. ... The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence': at 230. See also Christian Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defense in the *Wall Case*' (2005) 16 *European Journal of International Law* 963, 972–3; Murphy, above n 117, 67; Franck, 'Editorial Comments', above n 128, 840.

¹³⁰ *Israeli Wall* [2004] ICJ Rep 136, 194. In fairness to the Court, it noted in a subsequent paragraph dealing with the issue of 'necessity':

The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law: at 195.

However, this sentiment does not seem to square with the logic of the Court's narrow framing of the right to exercise self-defence under art 51. If Israel has the right and the duty to defend itself and its citizens, how can it do so effectively if it cannot take action against non-state security threats? Whilst the legality of Israel's construction of the wall can be impugned on grounds of proportionality, this was not the basis on which the Court rejected Israel's self-defence argument. Rather, the Court's treatment of the self-defence issue strongly suggests that, if defending the population requires taking forceful measures against non-state groups, states will in fact *not* have the 'right' to defend themselves.

¹³¹ This argument has attracted considerable scholarly support: see, eg, Franck, 'Editorial Comments', above n 128, 840–1; Tams, above n 129, 973; Wedgwood, above n 128. It is arguably also supported by recent state practice: see Tams, above n 129, 970–3. *Contra* Kammerhofer, above n 120, 99–101, 105–6.

of these concepts so as to clarify their interrelationship in the difficult context of international terrorism. However, the Court has repeatedly chosen to ignore these complexities altogether by flatly discounting the possibility that a state could take measures in self-defence against a terrorist group as such.

The ongoing confusion within this area of the law has, quite justifiably, sparked considerable frustration and debate within the international legal community.¹³² Whatever one's particular view on these matters may be, there is widespread acceptance that this is an area of international law in urgent need of development and clarification. Developments in state and Security Council practice reflect international attempts to deal with the contemporary 'realities of international life' as manifested in acts of international terrorism.¹³³ In contrast, the Court's outright dismissal of the *possibility* that terrorists or other armed non-state groups could be integrated into the framework of *jus ad bellum* demonstrates a disturbing inability to grapple with the legal regulation of security threats posed by non-state actors.¹³⁴

(b) *The Internal/External Attack Issue*

The Court's second argument regarding self-defence in *Israeli Wall* — that Israel could not exercise self-defence in response to a threat emanating from 'within' Israeli-controlled territory¹³⁵ — is also contentious with respect to its implications for non-state actors. The Court considered that such a situation was 'different' from that contemplated by *Security Council Resolutions 1368* and *1373*,¹³⁶ without elaborating on the nature and materiality of this alleged 'difference'. Judge Kooijmans agreed with the Court on this point, indicating that the relevant difference lay in the 'international' nature of the paradigm of

¹³² See, eg, Yoram Dinstein, *War, Aggression and Self-Defence* (2005); Franck, 'Editorial Comments', above n 128; Tams, above n 129; Wedgwood, above n 128; Murphy, above n 117; Sinclair, above n 121. Cf Kammerhofer, above n 120, 99–101.

¹³³ Tams, above n 129, 971–3 traces the history of state practice regarding state responses to terrorist threats. He notes that the stricter approach adopted by the Court in *Nicaragua* (which required that the attacks be imputable to the relevant state) was, though controversial, 'in line with the general hostility with which the international community responded to assertions, by Israel or South Africa, that cross-border incursions in pursuit of terrorists or insurgents could come within the scope of Article 51': at 971. However, he also notes that

a considerable number of states have, since the late 1990s, embraced the broader reading of Article 51 formerly maintained by Israel and South Africa. States that have exercised or asserted a right to exercise self-defence against armed attacks by non-state actors (even if their conduct could not be attributed to another state under the *Nicaragua* or *Tadic* tests) include Iran, Russia, and the United States, while Israel maintained its position. Crucially, other states have been far more inclined to accept these claims than was the case two decades earlier ... [Moreover] confronted with the 9/11 bombings, the international community has expressly confirmed that self-defence could be exercised against armed attacks not attributable (under the traditional restrictive test) to another state. ...

International practice since the late 1990s [thus] points towards a more liberal interpretation, pursuant to which Article 51 covers forcible measures directed against terrorist organizations operating on the territory of another state: at 971–3 (citations omitted).

¹³⁴ I return to this issue later at Part IV(A) below, where it is argued that the concept of ILP offers a more coherent jurisprudential alternative for dealing with this issue.

¹³⁵ *Israeli Wall* [2004] ICJ Rep 136, 194.

¹³⁶ *Ibid.*

terrorism envisaged in the resolutions — here, Israel's control over Palestinian territory meant that the terrorist acts were not truly 'international phenomena'.¹³⁷ In contrast, Judges Higgins and Buergenthal drew a material distinction between Israel's own territory and the Palestinian territory it controlled, holding that Israel's right to defend its own territory was not affected by virtue of the attacks having emanated from its controlled territory.¹³⁸

Arguably, both approaches somewhat miss the point. The situation is not black and white: it is not simply a question of international/non-international or sovereignty/no-sovereignty. The partial, relative nature of Israel's control coincides geographically and temporally with that of the Palestinian peoples, whose sovereignty in relation to that territory is likewise relative and incomplete.¹³⁹ The situation is neither completely international nor completely domestic. Like the former situation in *East Timor*, it is a situation of 'multiple sovereignties'.¹⁴⁰ Instead of grappling with this fragmentation by discussing the *interrelationships* between the different state and non-state actors or the *relative* applicability of the various legal regimes, the complexities are ignored in each judgment by resorting to one or the other side of the traditional binary oppositions. As a result, we are none the wiser as to the true rights and responsibilities of the various actors.¹⁴¹

The next part of this article examines more closely these issues relating to fragmentation and proposes a new conceptual framework for dealing with disputes involving non-state actors. It is argued that such an approach would accommodate the rights and responsibilities of non-state actors in a more coherent and realistic manner than the Court has been able to achieve in *Israeli Wall* and other cases.

IV NON-STATE ACTORS IN INTERNATIONAL DISPUTE SETTLEMENT: BEYOND FRAGMENTATION

The law of non-state actors, as reflected in the judgments of the ICJ, presently exists in a state of vertical fragmentation. This type of fragmentation occurs in two ways. The first cause is procedural: the exclusion, at the international level, of non-state actors from the majority of judicial dispute settlement fora naturally creates a state-centric bias in international law to a far greater extent than is merited by the realities of international life. The second cause is substantive, and is borne out clearly in the previous part of this article: when it has had the opportunity to develop the law relating to non-state actors, the ICJ has done so in a haphazard and arbitrary manner, applying different legal regimes to different

¹³⁷ Ibid 230 (Separate Opinion of Judge Kooijmans).

¹³⁸ Ibid 215 (Separate Opinion of Judge Higgins), 243 (Declaration of Judge Buergenthal).

¹³⁹ See Simpson, above n 88 and accompanying text.

¹⁴⁰ That is, different state and non-state actors are exercising various sovereign rights and responsibilities over the one piece of territory: see above Part III(B)(2)(a).

¹⁴¹ Some commentators have argued that the Court should have instead approached the issue on the basis that the applicable law was the law of belligerent occupation as *lex specialis*, which would have precluded a consideration of self-defence (an issue of *jus ad bellum*): see, eg, Tams, above n 129, 969–70, 975; Wedgwood, above n 128, 58–9. But this is a different type of obfuscation, albeit perhaps a more constructive one: the traditional legal categories cannot cope with the fragmented complexities of this unusual situation, so the law must transpose a new category; fight fragmentation with fragmentation.

entities without developing a coherent legal framework. These two causes are clearly related — a lack of procedural inclusion leads to patchy development which in turn leads to further marginalisation.¹⁴² Both of these issues are addressed below, starting with the second, which has been the focus of this article.

A *A New Conceptual Framework for Non-State Actors*

As alluded to above, one of the primary means by which the ICJ has produced a fragmentation *ratione personae* of international law is by applying different legal regimes to different entities.

First, the Court has willingly integrated international organisations into the international legal community via the concept of ILP, which it ascribes to organisations possessing certain characteristics.¹⁴³

‘Peoples’ are subjected to another legal regime — self-determination. This regime grants peoples important ‘sovereign’ rights over their territory, which may be breached by state conduct.¹⁴⁴ Yet it seems from *Israeli Wall* that when it comes to possessing obligations and responsibilities under general international law, peoples act with impunity.¹⁴⁵

Terrorists and other armed groups, on the other hand, are directly subject to no international legal regime at all. Notwithstanding their defining role in 21st century international relations, the Court is silent on their international legal status and obligations. They too, it appears, act with impunity in the eyes of the Court.¹⁴⁶

States, for the most part, are treated in isolation from these other actors. Their rights and duties, it seems, are subject to their own rules. They can attack one another, use force in self-defence and occupy territory, but only vis-à-vis one another.¹⁴⁷

When these actors collide with one another in the context of a legal dispute, the incompatibility of the different regimes becomes manifest — traditional conceptual categories (such as ‘sovereignty’, ‘responsibility’ and ‘international’) are challenged and legal complexity is produced (and ignored). The Court finds itself hamstrung, forced to make arbitrary decisions as to applicable legal regimes — decisions which bear little resemblance to the realities and requirements of international life. These realities demand a new conceptual framework for dealing with non-state actors.

¹⁴² In this regard, it is worth noting that numerous scholars have contended that the lack of standing of non-state actors before international courts and tribunals militates against a finding that such entities possess ILP. For the strict positivist position, that an absence of procedural rights to enforce claims (*jus standi*) means that the entity cannot possess ILP, see Hans Kelsen, *Principles of International Law* (2nd rev ed, 1966) 231; Jan Verzijl, *International Law in Historical Perspective* (1969) vol II, 3. A more contemporary advocate of the notion that *jus standi* is a prerequisite for the possession of ILP is Meijknecht, above n 12, 58–61.

¹⁴³ See above Part III(A).

¹⁴⁴ See above Parts III(B)(2)–(3).

¹⁴⁵ See above Part III(B)(3)(a).

¹⁴⁶ See above Part III(B)(3)(a).

¹⁴⁷ See above Part III(B)(3).

Like the issue of horizontal fragmentation, its vertical counterpart can arguably be managed through the development of a coherent framework, drawing on universally applicable principles.¹⁴⁸ In this sense, the approach developed in this part of the article, which draws on the work of a range of scholars as well as some of the ICJ's own early opinions, may be considered a rudimentary 'toolbox' for facilitating the participation of a range of non-state actors.¹⁴⁹ The fundamental tool in this toolbox is ILP.

1 *International Legal Personality*

While the ICJ's application of ILP in its opinions regarding international organisations was imperfect, the Court's generally progressive approach — which sought to accommodate developments in international relations by conferring on non-state actors legal rights and subjecting them to duties¹⁵⁰ — provides a useful foundation for a coherent framework.

Under the approach advocated here, however, ILP is not envisaged as a conceptual requirement or prerequisite to the possession of international rights and duties. Rather, it is simply a common *label* used to designate non-state actors which are directly subject to international legal rights and duties. Thus there are two requirements for an entity to enjoy ILP. First, that the entity has the *factual capacity* to possess certain international legal rights and duties. Second, that the international community has, by established processes of international law-making, *conferred* upon that entity, either explicitly or implicitly, certain legal rights and duties.¹⁵¹ These requirements are expanded upon below.

While the number and nature of rights and obligations of different actors will not be identical, each actor which possesses any such right or duty would possess ILP in an absolute sense. In this way, ILP would function as an 'index' of specific rights and duties under international law.¹⁵² While rights and duties are relative and may differ, the possession of ILP would serve as a common indicator of international legal status and participation, which may in turn indicate subjection to certain common responsibilities (for example, *erga omnes* norms).¹⁵³

¹⁴⁸ Cf International Law Commission, above n 2.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Reparations* [1949] ICJ Rep 174, 180.

¹⁵¹ This approach is similar to that of Meijknecht, above n 12, 61, 219, in that ILP is envisaged as an 'umbrella' concept consisting of specific substantive requirements. However, Meijknecht argues that the procedural right of standing before international dispute resolution fora (*jus standi*) is a third prerequisite for the possession of ILP: at 175–213. In contrast, this article argues that the procedural right of standing is unrelated to the concept of ILP in Part IV(B) below.

¹⁵² Daniel O'Connell, *International Law* (2nd ed, 1970) vol 1, 82.

¹⁵³ Interestingly, in this regard, my preferred usage of the concept of ILP is similar to one of the earliest recorded usages of the term by Gottfried Leibniz in the context of late 17th century medieval Europe. Leibniz sought to reconcile the realities of international power with the responsibilities necessary for the realisation of international justice through the concept of ILP. By attributing ILP to certain non-state actors, Leibniz sought to bring those actors within the regulation of the law of nations. That law could then both legitimise and circumscribe the exercise of international power. ILP meant 'legitimate participation' in international relations: see Nijman, above n 8, 76–80.

2 Factual Capacity

Clearly, if an entity is to possess international rights and duties, it must have the factual capacity to possess those rights and duties.¹⁵⁴ As a starting point, the entity must be sufficiently identifiable — it must be a ‘real, visible, identifiable component of society’.¹⁵⁵ For states, individuals, international organisations, NGOs and corporations, this requirement is satisfied relatively easily. But for peoples, minorities, indigenous peoples, terrorist organisations and other groups this issue takes on a greater relevance. Essentially, this would be a question of internal group composition. There would need to be, for example, some sense of identity and an organisational or representative structure.¹⁵⁶

Once the entity is identified, its potential rights and duties would be limited to those which it is realistically capable of bearing.¹⁵⁷ For example, artificial legal persons such as corporations and states could never be the victims of torture, but both are capable of committing torture via their responsible agents. Accordingly, such entities could never enjoy the right to be free from torture, but both have the capacity to be subject to international responsibility for the commission of torture.

The capacity requirement ensures that no identifiable non-state actor is a priori excluded from the field of potential participants within the international legal system. If an international organisation is capable of violating individual human rights, it is capable of being held responsible for such a violation;¹⁵⁸ if a terrorist group is capable of committing an armed attack against the territory of a state, it is capable of being the lawful subject of a proportionate response in self-defence.¹⁵⁹ In this way, rather than merely paying lip-service to the realities and requirements of international life as the Court has often done,¹⁶⁰ these realities and requirements become the primary foundations of the conceptual framework for accommodating non-state actors.

3 Recognition and Conferral of Rights and Responsibilities

Some scholars have suggested that capacity is the *only* prerequisite for possessing ILP.¹⁶¹ However, if this were the case, the concept would lose any

¹⁵⁴ The role of capacity takes on a central importance in the work of Clapham and Meijknecht: see Clapham, above n 24, 69–73 (‘We need to admit that international rights and duties depend on the capacity of the entity to enjoy those rights and bear those responsibilities; such rights and obligations do not depend on the mysteries of subjectivity’: at 68–9). See also Meijknecht, above n 12, 65–120.

¹⁵⁵ Natan Lerner, ‘The Evolution of Minority Rights in International Law’ in Catherine Brölmann, René Lefeber and Marjoleine Zieck (eds), *Peoples and Minorities in International Law* (1993) 77, 82–3.

¹⁵⁶ In this regard, Meijknecht’s detailed proposals in relation to minorities and indigenous peoples serve as a useful guide: see Meijknecht, above n 12, 65–120, 218.

¹⁵⁷ See Clapham, above n 24, 69–73.

¹⁵⁸ *Ibid* 71.

¹⁵⁹ Cf *Israeli Wall* [2004] ICJ Rep 136, 194, discussed above Part III(B)(3). In relation to the capacity of terrorist groups to violate international law, see also Clapham, above n 24, 38–41.

¹⁶⁰ As it did, for example, in the *Reparations* opinion: see above n 40 and accompanying text.

¹⁶¹ See, eg, Myres McDougal and Harold Lasswell, ‘The Identification and Appraisal of Diverse Systems of Public Order’ in Myres McDougal et al, *Studies in World Public Order* (1960) 3, 25; Clapham, above n 24, 68–9.

useful meaning and it would be impossible to identify which actors were subject to which rights and duties. In order to translate a non-state entity from the field of international relations into the field of international law, it must be the subject of some act of legal recognition by the established law-making authorities — namely, the international community of states.¹⁶² In this respect, states would retain their law-making authority as envisaged in the *Reparations* opinion,¹⁶³ and the recognition of new subjects would depend upon the law-making activities of states — that is, states' ratification of treaties and their international practice both vis-à-vis one another and vis-à-vis non-state actors.¹⁶⁴

This brings us to the most critical issue: ascertaining which rights and duties attach to which entities. In addressing this issue, this section draws upon the earlier discussion of the sources of international legal rights and duties in the context of the Court's advisory opinions on international organisations,¹⁶⁵ and on the discussion of the correlativity of rights and duties by Judge Weeramantry in *East Timor*.¹⁶⁶

First, an entity bears all rights and obligations which are conferred upon it directly by an international treaty. For example, an international organisation possesses powers specified in its constituent treaty¹⁶⁷ and individuals possess rights under human rights instruments.¹⁶⁸

Second, an entity would be subject to the corpus of rules and principles under general international law in so far as they apply to that entity.¹⁶⁹ This might entail the development of customary norms solely applicable to a specific entity,¹⁷⁰ or the broadening of an existing principle through customary practice. An obvious example of this would be the widening scope of the right to self-defence to encompass threats posed by terrorist groups, as discussed earlier.¹⁷¹ Furthermore, general international rights and obligations may simply 'fix upon' non-state actors in so far as they possess the factual capacity to bear them.¹⁷² In this respect, it is important to recall Judge Weeramantry's discussion of the correlativity of rights and duties.¹⁷³ The fact that certain entities (for example, individuals, peoples and minorities) possess rights under customary international human rights and humanitarian law may give rise to corresponding obligations upon certain other entities (such as states, corporations, international organisations and terrorist groups) to respect those rights, but only to the extent

¹⁶² Meijknecht, above n 12, 34, 216.

¹⁶³ See above n 42 and accompanying text.

¹⁶⁴ This is the approach taken by Clapham, above n 24, 28–9. See also Anthony Clark Arend, *Legal Rules and International Society* (1999) 176.

¹⁶⁵ See above Part III(A)(2)(b); *Reparations* [1949] ICJ Rep 174; *WHO/Egypt Agreement* [1980] ICJ Rep 73; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* [1954] ICJ Rep 47; *WHO Nuclear Weapons* [1996] ICJ Rep 66.

¹⁶⁶ See above Part III(B)(2)(b).

¹⁶⁷ *Reparations* [1949] ICJ Rep 174, 180.

¹⁶⁸ For example, where the individual is subject to the jurisdiction of a state party to the *ICCPR*.

¹⁶⁹ See above nn 60–62 and accompanying text.

¹⁷⁰ Arend, above n 164, 177.

¹⁷¹ See above Part III(B)(3)(b).

¹⁷² Clapham, above n 24, 19, 30.

¹⁷³ See above Part III(B)(2)(b). In respect of international organisations, this view is shared by Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (5th ed, 2001) 459.

that these latter entities are capable of bearing the corresponding obligations and subject to the nature of the right and the generality at which it is expressed.¹⁷⁴ In this respect, *erga omnes* and *jus cogens* norms may come to play an important role in regulating the conduct of non-state actors.¹⁷⁵

Finally, to the extent that there are gaps in the legal order, the Court could resort to the implication of rights and duties upon entities possessing ILP on the basis of ‘the necessities of international life’ as it has done on previous occasions.¹⁷⁶

4 *Advantages of a Universal Framework*

Whilst this approach necessarily leaves many specific details unresolved, it is submitted that it provides a coherent conceptual framework for dealing with disputes involving non-state actors. Importantly, by recognising that non-state actors can possess rights and responsibilities in accordance with principles of general international law, this approach would go some way towards restoring an appropriate balance between rights and obligations of states and non-state actors.¹⁷⁷ By basing these rights and obligations on the twin-footing of capacity and recognition/conferral, this approach is in keeping with the Grotian promise of the progressive yet realistic development of international law¹⁷⁸ — a promise affirmed by the Court in the rhetoric of its *Reparations* opinion,¹⁷⁹ but long since abandoned.

B *Overcoming the Procedural Hurdle: A Presumption of Access*

As to the procedural causes of vertical fragmentation, which are related to the lack of standing of non-state actors before judicial dispute settlement fora, the obvious solution is to ‘change the rules’ and to democratise access. Unfortunately, this solution is also the least realistic, given the obvious reluctance of states in this regard. Nonetheless, it is argued that adopting the above framework for approaching the substantive rights and duties of non-state actors could also lead to some advancements on the procedural front.

As discussed earlier,¹⁸⁰ the Court in the *Reparations* opinion held that the UN possesses ILP, meaning, *inter alia*, that it ‘has capacity to maintain its rights by bringing international claims’.¹⁸¹ Read in isolation, this statement seems to suggest that the right to espouse an international claim is an *inherent* consequence of the possession of ILP. Yet, the Court then went on to support the existence of such a right by reference to the implied powers doctrine,¹⁸² holding that the effective performance of the organisation’s functions and the attainment

¹⁷⁴ In support of this view, see Clapham, above n 24, 83, 85–7; Tomuschat, ‘International Law’, above n 56, 134–5. See generally Higgins, *Problems and Process*, above n 24, 53–5.

¹⁷⁵ As to *jus cogens* norms and non-state actors, see Clapham, above n 24, 87–91. Regarding *erga omnes* rights and obligations, see above Part III(B)(2)(b).

¹⁷⁶ See above Part III(A)(2)(b).

¹⁷⁷ A balance which, if ever present, was undermined by the Court in the *Israeli Wall* opinion: see above Part III(B)(3)(b).

¹⁷⁸ See above nn 34–36 and accompanying text. See also Nijman, above n 8, 457–8.

¹⁷⁹ See above Part III(A)(1).

¹⁸⁰ See above Part III(A)(2)(a).

¹⁸¹ *Reparations* [1949] ICJ Rep 174, 179.

¹⁸² As to the implied powers doctrine, see above Part III(A)(2)(b).

of its objectives necessitated that it be able to enforce its rights on the international plane.¹⁸³ Nonetheless, it is eminently arguable on the basis of the Court's reasoning that such a right *does* arise as an inherent consequence of the possession of ILP. If, as the Court held (and as is argued here), ILP entails the possession of international legal rights and duties, and the *effective* enjoyment of legal rights necessitates the right to bring a claim to ensure the enforcement of those rights, then all entities possessing ILP have, *prima facie*, the inherent power to espouse an international claim.

The Court in the *Reparations* opinion was not suggesting that the UN had a right to bring a contentious claim in any *particular* forum (and certainly not in the ICJ):

Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the Statute.¹⁸⁴

Importantly, then, these customary rights to espouse claims exist independently of any procedural right of standing (*jus standi*) before any particular tribunal. The Court thus appears to have recognised not only that procedural incapacity is *not* a bar to the possession of ILP and of international rights and duties more generally,¹⁸⁵ but also that non-state actors may, *as a matter of principle*, enjoy the specific right to espouse an international claim notwithstanding their lack of standing before particular fora.¹⁸⁶ The *Reparations* opinion may thus be seen as an endorsement of the view that ILP entails the right to a voice within the international community — irrespective of who is willing to listen.

Viewed in this way, we might speak of a *presumption of standing* before international bodies for all entities possessing ILP. Such an approach would entail a number of benefits.¹⁸⁷ First where standing is not restricted or is

¹⁸³ *Reparations* [1949] ICJ Rep 174, 183–5.

¹⁸⁴ *Ibid* 177.

¹⁸⁵ This approach, in which rights are held to exist irrespective of the availability of a remedy, is supported by numerous eminent scholars: see Higgins, *Problems and Process*, above n 24, 53; Clapham, above n 24, 29, 31, 55, 57, 74, 267; Hersch Lauterpacht, 'The Subjects of International Law' in Elihu Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht* (1970) vol 1, 279, 286–7.

¹⁸⁶ This might be seen as an application of the implication of rights and duties upon entities possessing ILP on the basis of 'the necessities of international life', that is, in order to render existing rights more effective: see above Parts III(A)(2)(b) and IV(A)(3). Clapham, above n 24, seems to support this view in his argument that corporations are subject to international human rights obligations at the suit of individual claimants. His approach to ILP 'appeals to the effectiveness principle. If international law is to be effective in protecting human rights, everyone should be prohibited from assisting governments in violating those principles, or indeed prohibited from violating such principles themselves': Clapham, above n 24, 80.

¹⁸⁷ Generally speaking, Petersmann advocates the inclusion of non-state actors within international dispute resolution fora, arguing that such a development would enhance the international rule of law: see Ernst-Ulrich Petersmann, 'Dispute Settlement in International Economic Law — Lessons for Strengthening International Dispute Settlement in Non-Economic Areas' (1999) 2 *Journal of International Economic Law* 189, 238–9.

restricted to entities with ILP, non-state actors that possess ILP will be presumed to have standing. As the right to bring a claim should be conceived of broadly,¹⁸⁸ it may be particularly beneficial to non-state actors in ‘semi-judicial and political’ fora, allowing groups ‘to make their problems, often relating to the way they are treated by their own State, known to international organs and the world community’.¹⁸⁹ Second, a conceptual shift towards a presumption of access might increase the pressure on states to alter rules of standing in bodies which currently restrict standing to states. Finally, it would enhance the potential for litigation at the domestic level, especially in states which directly incorporate principles of international law into their domestic legal systems. A good example of this is the current wave of litigation before US courts being brought against transnational corporations for complicity in international crimes and human rights abuses under the *Alien Tort Claims Act 1789*.¹⁹⁰

V CONCLUSION

The Court in the *Reparations* opinion was right to note that ‘[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights’,¹⁹¹ and perhaps because of this there will always be a necessary degree of fragmentation or divergence in respect of the rights and duties of different types of actors. Nonetheless, this article has argued that the ICJ, when faced with disputes involving non-state actors has adopted an unnecessarily haphazard and incoherent approach to the development of international law, resulting in its fragmentation *ratione personae*.

The discussion of the theoretical approaches to non-state actors in Part II revealed that one’s approach to non-state actors necessarily has important implications for fundamental principles of international law. It stands to reason then, that an incoherent approach to non-state actors would have undesirable consequences not only for non-state actors, but for the international legal system as a whole. The subsequent analysis of ICJ judgments revealed the truth of this logic: the Court’s unwillingness and inability to grapple with the legal complexities of an international environment that is heavily influenced by non-state actors has consequently muddied the waters of fundamental concepts such as state sovereignty, rights over territory and self-defence.

In an age in which the security strategies of many powerful states are constructed around the threats posed by non-state actors,¹⁹² in which many international organisations and even multinational corporations exert more power on the international plane than do many individual states, and in which individuals and diverse non-state political communities continue to articulate claims in relation to rights, territory, autonomy, self-governance and recognition, it is surely time for international lawyers to consider more seriously the means by which international law can engage with subjects other than states. The failure

¹⁸⁸ See above n 184 and accompanying text.

¹⁸⁹ Meijknecht, above n 12, 211.

¹⁹⁰ 28 USC § 1350 (2006). For an overview of the operation of this statute in the context of non-state actor law suits, see Clapham, above n 24, 252–65.

¹⁹¹ [1949] ICJ Rep 174, 178.

¹⁹² See, eg, National Security Council, US, *The National Security Strategy of the United States of America* (2002) <<http://www.whitehouse.gov/nsc/nss.pdf>> at 23 May 2008.

to meet these challenges will surely undermine the relevance of international law as a means for both facilitating and regulating the exercise of international power in the 21st century.

What this article has attempted to demonstrate is that a more effective and less fragmented approach to non-state actors does not require an overhaul of the international legal system — in fact, the international community already possesses the juridical ‘tools’ necessary for achieving these objectives. Returning to the notion that there is a conceptual ‘bridge’ which allows a non-state actor to cross from the field of international relations into that of international law, we might say that that bridge is in need of repair, and that ILP, as an index of international rights and duties, is the most important tool with which to repair it — or perhaps even to reconstruct it.

Readers may legitimately disagree with the tools which this article has advocated for dealing with these issues, and may be concerned that the devil is, so to speak, in the detail of the proposals that have been put forward. However, this article will have achieved much of its purpose if it succeeds in alerting international lawyers to the complex problems produced by the ICJ’s fragmented jurisprudence on non-state actors and in prompting them to think more seriously about these issues and to debate the best way forward. It is hoped that developments along these lines may bring us closer to an international legal order which actually fulfils ‘the requirements of international life’¹⁹³ as well as the demands of international justice.

¹⁹³ *Reparations* [1949] ICJ Rep 174, 178.