

The Islamic 'State' Challenge: Defining the Actor

Written by Zeray Yihdego

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ZERAY YIHDEGO, JUN 24 2015

The Islamic State of Iraq and the Levant (ISIL/IS) threat poses crucial questions of public international law/relations, including, but not limited to: is it a terrorism threat? If not, what is it? Do we really need international law to combat the threat? What lessons can be learnt for international law and international actors from the (apparent causes of the) threat? And what needs to be done as a matter of urgency and strategy? This article does not try to engage with all these timely but complex questions; rather it is meant to invite a scholarly debate and reflection on the challenge of defining and understanding IS as an actor which may or may not have apparent legal or political implications.

Of course the world is currently faced with many serious threats and human security concerns including repeated (but ignored) immigrant deaths of high numbers in the Mediterranean Sea, the Nepal Earthquake, racial and homophobic tensions (in the US and South Africa for example), the Ukraine and Yemen crises. However, the rise of Islamic extremism with relatively strong conventional military capabilities in Syria, Iraq, and Libya, amongst other territories, is a unique and unprecedented threat in the 21st century which cannot be dealt solely with diplomacy, border controls or by deploying the police, nurses, medicine, and other forms of humanitarian assistance. This article argues that IS is neither a terrorist group, a quasi-state, nor a classic armed group; it is simply a regional extremist criminal organisation (RECO) with an army, territory (spanning from Syria to Iraq) and a capability to sustain the commission of grave international crimes, similar, but not identical, to Nazi Germany's SS. Characterising and defining IS is imperative for purposes of proper and accurate diagnosis of the problem without which a cure or a mitigating global action can be difficult to embark upon.

Definition of, and Responses to, Terrorism in General

Although there has been no uniform definition of international terrorism the various conventions and UN resolutions have reiterated certain (perhaps common) traits of the phenomenon. For example, the International Convention against the Taking of Hostages (Hostages Convention) 1979, as one of the known legal instruments on terrorism, under Article 1 (1), defines the actor and the offence of hostage taking as follows:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to *compel a third party*, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the *offence* of taking of hostages ("hostage-taking") within the meaning of this Convention (*italics mine*).

In contrast, the Arab Convention for the Suppression of Terrorism 1998 entered into force in 1999, in Article 1 sub (2), defines the word 'terrorism' as:

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a [sic.] national resources.

This regional Convention appears to be broader than the Hostages Convention as it refers, for instance, to 'collective

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criminal agenda', 'liberty and security', any motive and the desire to occupy people individually or collectively. However, similar to the 1979 Convention, it has described terrorism as a tactic of creating panic, in the context of domestic offence as clearly elaborated in Article 3 of the Convention.

Daniel O'Donnell (IRRC, 2006, 854-56) rightly observes almost all relevant (global and regional) instruments^[1] define or describe terrorism relating to incidents inter alia of hostage taking, murder, hijacking, harming people and spreading fear and insecurity, as domestic criminal offences, but require inter-state cooperation to suppress such transnational (or serious domestic but organised) crimes. It is of note, however, that Anthony Cassese et al (OUP, 2013, 146-57) consider international terrorism as an international crime, although the Rome Statute of the International Criminal Court (ICC) does not refer to such an offence as a distinct international crime.

Resolutions 1373 (2001) and 1516 (2003) of the United Nations Security Council (UNSC), which responded to the US and London attacks respectively, took the threat of terrorism beyond criminal law by considering it as a threat to international peace and security and by referring to states' right of self-defence (Warbrick & Yihdego, ICLQ, 666-676), although a closer look at the Resolutions might suggest that the solutions were mainly criminal (and also administrative) responses, including preventing finances and people from joining or supporting terrorist acts and groups, which arguably suggests that cases of terrorism are matters for law enforcement agencies rather than a state's armed forces (Gray, 2008). The International Court of Justice (ICJ) unconvincingly rejected the invocation of self-defence against non-state-actors also (*Wall Advisory Opinion*, ICJ Rep 2004 136). What this suggests is that the resort to military force against terrorist groups is controversial.

Most legal instruments on international terrorism emphasise the terrorising and intimidating and domestic criminal nature of the phenomenon and try to tackle and prevent it by disrupting or stopping the flow of financial, material and human resources; the use of defensive military force, as opposed to law enforcement measures (i.e. policing, prosecuting and surveillance), has also been debated in recent years.

Does IS Fit into the Broader Traits of Terrorism?

Recent UNSC Resolutions passed against IS broadly adopt post-9/11 approaches to the problem. The first response of the UNSC to the IS threat is to be found in Resolution 2161 (2014); the Council, referring to Al-Qaeda and its affiliates, The United Nations Global Counter-Terrorism Strategy which was adopted by General Assembly Resolution 60/288 in September 2006 (which strongly advocates the promotion and strengthening of existing legal instruments and mechanisms on terrorism) and the threat posed by terrorism, came up with a very long list of measures including the seizure of terrorist funds, listing of those who fund, finance and support terrorists, imposing arms embargoes against such groups and the strengthening of UNSC sanctions and terrorism bodies.

Similarly, the most recent UNSC Resolution 2199 (2015), adopted in February, reaffirmed 'that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed'. Acting upon Chapter VII they decided to take a wide-ranging measures including the prevention of (oil and other) resources from being used by IS, arms and the likes. Despite the recognition that 'terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all states, and international and regional organizations to impede, impair, isolate and incapacitate the terrorist threat' the Resolution does not clearly tell how IS resembles to, or differs from, Al-Qaeda and the like, either in the magnitude of their crimes or the way in which they have to be dealt with. What is clear, however, is that Resolution 2199 (similar to Resolution 2161) appears to be founded on the assumption that IS can be incapacitated, if not fully defeated, by drying up its funds and resources as overseen by the various UNSC Committees who have listed suspected terrorist backers and froze their bank and other assets.

Major powers, including the US, adopted similar approaches to characterise IS. In September 2014 President Obama stated that 'ISIL is a terrorist organization, pure and simple'. In the same speech he also clarified his country's position on the 'State' and religious claims of the actor as follows:

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ISIL is not "Islamic." No religion condones the killing of innocents, and the vast majority of ISIL's victims have been Muslim. And ISIL is certainly not a state. It was formerly al Qaeda's affiliate in Iraq, and has taken advantage of sectarian strife and Syria's civil war to gain territory on both sides of the Iraq-Syrian border. It is recognized by no government, nor the people it subjugates (*ibid*).

From this and several statements of states IS is a terrorist group like Al-Qaeda or Al-Shabab. Their use or abuse of religion, cruelty and disregard to law and morality make them the same as terrorist groups but with a different form or shape.

In sharp contrast, Audrey Cronin (Foreign Affairs, March/April 2015) submits that:

Though it [IS] uses terrorism as a tactic, it is not really a terrorist organization at all. Terrorist networks, such as al Qaeda, generally have only dozens or hundreds of members, attack civilians, do not hold territory, and cannot directly confront military forces. ISIS, on the other hand, boasts some 30,000 fighters, holds territory in both Iraq and Syria, maintains extensive military capabilities, controls lines of communication, commands infrastructure, funds itself, and engages in sophisticated military operations. If ISIS is purely and simply anything, it is a pseudo-state led by a conventional army (clarification added).

Undoubtedly, the Islamic State is not Al-Qaeda despite the fact that some elements of IS had links to Al-Qaeda in the past but formally split later (Weiss & Hassan, 2015: 20-26). IS controls cities, towns, refineries, and uses major conventional weapons including tanks to confront conventional armies of states with some degree of success (Phillips, 2014: 496). It was reported that more than eight million Iraqi's are under the control of IS. The simple question we should ask ourselves is: can we have a terrorist group which is armed with tanks and other major conventional weapons which is also confronting state armies? It may be argued that what matters is not their strength and the weaponry they use, rather their extremist objective and agenda (Phillips, 498). Al-Qaeda, for example, purports to:

(1) to establish Islamic regimes like the Taliban, based on Islamic religious law, in all the Arab states; (2) to free all Islamic lands from any Western presence or influence; and (3) to establish the "pious caliphate" (a pan-Arabic Islamic kingdom) over all the Muslim lands (International Encyclopedia, 2008).

These aims remained aspirational rather than real.

In contrast, the Islamic State's objective, which is to create a Caliphate in Syria and Iraq or beyond, is arguably less ambitious, well-planned and relatively real and imposed upon millions; the way in which they are executing their aims and objectives is by committing continuous and sustained crimes against humanity, war crimes and arguably genocide as a recent UN report and others recognise (*The Economist*, 2014, 412(8900): 19-20). This raises the question as to whether a group which is able to commit such widespread and *sustained* international crimes can fit into the characteristics of a terrorist group. It must also be noted that unlike Al-Qaeda which basically and primarily targets western interests, IS targets everyone ranging from Syrians, Iraqis, Egyptians, and Jordanians to Japanese, Nigerians and most recently Ethiopians and Eritreans. Their Jihad does not seem to be limited to western 'Christian' (or similarly developed) states at all.

Furthermore, while most people regardless of their religion, ethnicity and citizenship condemn in principle acts of terrorism, it is widely reported (BBC, Sep 1, 2014) that IS has not only attracted thousands of foreign Jihadist fighters but also sympathy from some quarters of the Muslim world; this is notwithstanding the fact that Muslim leaders and countries have denounced (Global Research, Aug 24, 2014) their actions and Islamic countries, Iraqi and Syrian militias and other members of community are battling them using airpower or on the ground; Gulf and other Islamic states are also arming and financing those who are battling IS in front lines.

The rise of IS is complex. There appears to be a Sunni-Shia divide and other geo-political factors and actors that must be taken into account in fully understanding IS (Weiss & Hassan, 41-47). It can be said that IS was born out of post-invasion Iraq and the Arab Spring in Syria, and therefore it is a rebel group fighting for change whatever that

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change might be (Gerges, 2013: 389-426). What is obvious, however, is that IS is fundamentally different from the classical armed groups who fight their own government (Bilkova 2014: 41). Firstly, they are not fighting a specific government as they are interested in creating a regional power-like entity. They are also different from classical terrorist groups (which might include Al-Qaeda, Al-Shabab and others), despite their use of terrorist tactics as one among other tactics; their objectives, actual capacity, level of criminality and their adaptability to modern technology and the use and abuse of the internet make them distinct from terrorist groups.

Is IS a de Facto State or Something Else?

If not a terrorist group or a classic armed group can they be classified as a de facto state as their name suggests? Andrew Coleman (2014) poses serious questions of statehood, recognition, and compliance with international law relating to IS. In principle, public international law requires an entity to have a relatively permanent population, territory, effective government and the capacity to do business with other states independently of the wishes of other states. These are the core, but not certainly the only, requirements for statehood under international law as often inferred from the 1933 Montevideo Convention on the rights and duties of states (135 LNTS 19 (1936)), which is universality recognised as customary international law (Shaw, 2014: 142-48). However, other legal requirements such as the right to self-determination of peoples and the ban on the use of force in international relations (excluding the right to self-defence of a state in response to prior military attack) have crucial implications for a lawful (or unlawful) creation of an entity as a state (Shaw, 2014 149, 170). Applying Article 1 of the various statehood requirements of the aforementioned Convention i.e. population, territory, government and independence, it may well be argued that most, if not all, requirements are satisfied by IS; it controls large territories of Syria and Iraq, it appears to have a proper and effective leadership (for its military, economic, propaganda and criminal activities), and millions of people are living under its rule and control. However, it is obvious that it does not have its own external independence or sovereignty as it took over the territories of legitimate sovereign countries, Syria and Iraq by force and intimidation.

Most importantly, the way in which they established their authority and existence is through extreme violence and cruelty against minorities (e.g. the Yazidis in Iraq, Coptic Egyptian and Ethiopian Christians in Libya), civilians (including journalists, aid-workers and immigrants) and enemy combatants. They do all these contrary to international law (Phillips 2014: 496), the sense of humanity and also the religion they rely on (as expressly articulated by Muslim scholars in an open letter written to the IS leader, Abu Bakr Al-Baghdadi). Without going into the polemics of this debate it is worthy of referring that all aspects of their rise and operations defeat the core values of the international legal order including self-determination, the ban on the use of armed force, war crimes, genocide and crimes against humanity. The use of such unprecedented crimes as a strategy in an open and abhorrent fashion rules out the possibility of considering the rights and duties of IS as an international actor which includes entitlements arising from statehood.

It may be argued that we have undemocratic governments in the world and so IS will not be completely different from some existing dictatorial regimes (Coleman, 2014). The difference between IS and some of the undemocratic states we have in the world is that the former is openly and grossly engaged in killings, beheadings, demolition of historic sites and culture and thus should not be compared to states which suppress human rights of their people. The latter, even if they should not be tolerated, do not target every citizen of the world on the basis of religious ideology, they do not totally undermine international law and most, if not all, have not taken control over the territory of other sovereign states. For this reason IS must not be considered as a de facto state. If the Turkish Republic of Northern Cyprus was denied statehood and recognition for statehood because of the use of illegal military force to create such an entity how can IS be a candidate to such entitlement which comes with huge responsibility?

Conclusions and Thoughts

The conclusions which can be drawn from the above are the following: First, IS is not a terrorist group. The international community must therefore clearly define this actor in light of its peculiar characteristics so that a response may be better formulated. It is unhelpful to put everything including IS in to the terrorism box as rightly characterising a regional or global threat will have real legal and political implications.

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Secondly, IS appears to be a *Regional Extremist Criminal Organisation* ([R]ECO) with a conventional army, logistics, intelligence, and propaganda wings, but fundamentally different from transnational organised criminal organisations which are always profit rather than religious, ethnical or political ideology driven (see UN Convention on Transnational Organised Crime, 2000). IS will not be the first to be named as an ECO, however, the Nazi SS, even if in a different historical, ideological and political context, was declared criminal organisation by the Nuremberg Tribunal some decades ago (Nuremberg Judgement, 1946: 481), although it was divisive whether the entire Nazi regime rather than the SS should have been declared criminal.

Thirdly, what this connotes is that IS, different from terrorist groups or organisations, has acquired the ability to mobilise thousands of fighters and impose its will on millions, which is broadly comparable to the abilities of sovereign states. Such a characterisation should inform the debate surrounding the legal responses including the total rejection of this ECO as a de facto authority, rebel or terrorist group and the use of force against them. It is doubtful, moreover, that an ECO can enjoy a belligerent status either as such a status expects readiness to play within internationally recognised rules of behaviour—IS totally rejects all aspects of existing international law values ranging from humanitarian law, the respect for human life, dignity and decency to that of freedom of religion and expression.

Finally, does this definitional dilemma suggest that international law is (ir)relevant to defeat this ECO which continues to shock the consciousness of mankind? The answer to this question may be to the negative or to the affirmative: it may well be argued that this is a new and unprecedented situation/threat and so any response, whether spontaneous or well-thought, against the ECO is legally, politically and morally justified. In other words, law ought not be invoked to constrain any unilateral/collective responses by states and non-state-actors. On the contrary, and perhaps the strongest argument is that, while IS is a new and very dangerous threat to humanity, it should and can be tackled within existing international legal and institutional frameworks, the UN collective security framework in particular—collective thinking and behaviour is (often, but not always) lawful, legitimate and credible and, most importantly, less likely to lead to replacing one ECO with another ECO with a different name.

Notes

[1] For a list of global and regional terrorism instruments see here (accessed 30 May, 2015).

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