Fighting against the Islamic State: The Legal Challenges

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The appearance of the Islamic State on the global stage, marked in particular by the atrocities that it committed in Iraq and Syria, has led states and international organizations to recognize it as a threat in both the Middle East and beyond, and to take action on various levels to cope with the problem. The United States has conducted military strikes against the Islamic State in Iraq since August 2014. Various states, including Australia, the United Kingdom, Canada, and France, have since joined it to establish a coalition of over 60 countries in order to engage in operations in Iraq and aid Iraqi security forces. In September 2014, alongside Jordan, Qatar, Bahrain, and Saudi Arabia, the US began launching attacks against the Islamic State in Syria as well. This article offers a brief overview of the legal aspects of three core issues in the fight against the Islamic State: the legality of attacks on the organization in Iraq and Syria; the role of the International Criminal Court (ICC); and the problem of foreign fighters.

The Legality of Military Strikes against the Islamic State in Iraq and Syria

The international campaign against the Islamic State, which is known as "Operation Inherent Resolve,"[1] raises questions pertaining to the legal basis for employing military force against it. As clarified below, there is relatively broad consensus on the legality of military action in Iraq. On the other hand, the strikes in Syria have led to disagreements over the legal rationale of using force in that country.[2]

Article 2 (4) of the UN Charter stipulates the basic rule of *jus ad bellum* ("use of force") and prohibits "the threat or use of force against the territorial

integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The Charter's general ban on force, however, includes two clear exceptions to the rule: authorization by the Security Council pursuant to Articles 39 and 42, and self-defense (individual or collective) pursuant to Article 51. An additional exception, rooted in customary international law, is consent by a state to allow military actions on its territory. Disagreement exists, however, if additional exceptions, such as the use of force to prevent a severe humanitarian crisis (humanitarian intervention) can also be justified.

The Security Council has not authorized military strikes either in Iraq or Syria due to the international political dynamics among its members. Had such authorization been given, any further legal discussion regarding the legality of the military strikes would have been rendered moot, and the international legitimacy of the campaign would have been strengthened significantly.

The Military Campaign in Iraq

The primary legal basis for military action against the Islamic State in Iraq lies in Iraq's consent. A letter from the Iraqi Foreign Minister to the UN Secretary-General of June 2014[3] emphasized the security threat posed by Islamic State activity in Iraq, as well as the country's request to the international community for aid though military training, advanced technology, and weapons. An additional letter from the Iraqi Foreign Minister to the Security Council in September 2014[4] reported that the Islamic State established safe havens on Iraq's borders, where it trains for, plans, finances, and launches terrorist attacks on Iraqi territory, thereby endangering Iraqi citizens. It also emphasized that the government of Iraq, in accordance with international law and with due regard for complete national sovereignty, has requested the United States to lead international efforts to strike Islamic State sites and strongholds with its express consent. The Iraqi government's consent grants a solid legal basis for military actions in Iraq by the United States and the coalition of nations, as long as these meet with the concrete consent of Iraq in timing and scope.[5]

The Military Campaign in Syria

In contrast to the case in Iraq, the legal situation in Syria is more problematic. So far the Syrian government has not consented to military actions by foreign

nations on its territory, even though it benefits from strikes against the Islamic State, which is operating to overthrow the Syrian regime. One can argue that the Syrian regime has tacitly agreed to the strikes, as it cautiously avoids intervening or disrupting them. However, any justification of this type is controversial, especially when it attempts to offer legal justification for military actions in the sovereign territory of another state.

Another justification may lie in self-defense, as per Article 51 of the UN Charter. A position that prohibits self-defense against attacks initiated by a non-state organization was manifested in the advisory opinion issued by the International Court of Justice (ICJ) in 2004 with regard to Israel's security fence. Nonetheless, it seems that states reject this position, which is dubious, especially in a situation in which a non-state organization controls territory and essentially functions as if it was a state. Many states interpret the right of self-defense broadly and permit the use of military force against a non-state entity in another country's territory if that country is "unwilling or unable" to prevent the use of its territory for acts of terror.

A central condition for self-defense by a state is an "armed attack" of sufficient intensity against it. There seems to be no doubt that in the case of Iraq, which has absorbed and continues to absorb murderous onslaughts by the Islamic State, the intensity is sufficient to legitimize individual self-defense and allow Iraq to launch strikes in Syria. When it comes to other states, however, the question is whether the actions of the Islamic State within Syria amount to an "armed attack" of required intensity against them, or, alternatively, justify their need to thwart an imminent "armed attack" under the framework of "anticipatory self-defense." Indeed, there are arguments for using an exception that enables the use of force in the territory of a foreign state to "rescue nationals abroad." However, this is a limited exception and one whose very existence and scope are in doubt. Despite these legal difficulties certain countries have justified their military activity in Syria against the Islamic State, inter alia, based on individual self-defense including anticipatory self-defense.[6]

The United States and the international community can try to justify their military operations under the notion of "collective self-defense," because they have acted on Iraq's request for assistance in fighting the Islamic State, i.e., one or more nations used force after being asked by the country attacked for assistance in defending itself. It seems that this is the principal legal justification used by the United States. In a letter dispatched to the UN

Secretary-General in September 2014, US Ambassador to the UN Samantha Power noted Iraq's explicit request that the US lead international efforts against the Islamic State, while justifying US military activity in Syria with the argument that the Assad regime has shown that it cannot and will not confront the Islamic State effectively itself.[7]

Nonetheless, the legal complexity of the matter may well have discouraged many countries from joining the coalition's endeavors in Syria.

The International Criminal Court (ICC)

The widespread crimes committed by the Islamic State in Iraq and Syria have increased the number of calls for intervention by the International Criminal Court. In April 2015, the Court's Prosecutor published a statement noting the crimes of unspeakable cruelty allegedly committed by the Islamic State – including mass executions, rape, torture, and persecution of ethnic and religious minority groups. These atrocities allegedly committed by the Islamic State constitute serious crimes of concern to the international community and threaten the peace, security, and well-being of the region and the world.[8] Yet despite this statement, the Prosecutor concluded that the Court has no "territorial jurisdiction" with regard to crimes committed in Iraq and Syria, because these two states are not party to the Rome Statute, which is the statute of the ICC. However, the Court may nevertheless exercise "personal jurisdiction" over perpetrators who are nationals of a state party, even without territorial jurisdiction. The information gathered by the office of the Prosecutor does indeed point to thousands of foreign fighters from member states such as Jordan, France, the United Kingdom, Germany, Belgium, the Netherlands, and Australia who have joined the Islamic State. The Prosecutor, however, noted that the Court's policy focuses on those "most responsible" for serious crimes, and that as of April 2015, the Islamic State was led militarily and politically by operatives who are nationals of Iraq and Syria. It was on this premise that the Prosecutor concluded that "the jurisdictional basis for opening a preliminary investigation into the situation is too narrow at this stage."

Despite this position, there are other ways to grant the Court jurisdiction over crimes committed by the Islamic State. The Security Council can refer situations to the Court even if they do not meet the ordinary conditions of jurisdiction, as occurred in the cases of Darfur[9] and Libya.[10] Despite the fact that political constraints in the Security Council, specifically, opposition by

Russia and China, prevent the adoption of such a resolution in the case of Syria, efforts can be intensified to adopt such a resolution at least with regard to Iraq. In addition, Iraq itself could join the Court's statute, which would thus grant the Court jurisdiction to investigate crimes conducted on its territory. In September 2015, there were reports on efforts by the former Prosecutor of the Court, Luis Moreno Ocampo, to grant the Court jurisdiction over the Yazidi community in Iraq.[11] Ocampo claimed that "ongoing genocide" was being committed against the Yazidi minority, and that the capture of foreign Islamic State leaders from a country which is signatory to the Rome Statute would provide necessary ground to open a criminal investigation. An easier way to grant jurisdiction to the Court over the Yazidi minority would be through an ad hoc declaration by Iraq directed specifically at the crimes committed against the Yazidis in the Sinjar region since August 2014 (when the attacks against them began). The Court has even expressed its willingness to investigate crimes by organizations affiliated with the Islamic State operating in Libya, a country in which the Court holds jurisdiction due to a referral from the Security Council in 2011.[12]

Foreign Fighters

The growing phenomenon of citizens from various countries enlisting for combat in Iraq and Syria (hereafter, "foreign fighters") has become one of the central concerns of the international community, especially among European nations. Estimates indicate more than 20,000 foreign fighters in Iraq and Syria, with about one fifth of them citizens of European nations. Foreign fighters, particularly those with significant combat experience, pose many dangers to their countries of origin after their return home, including the potential to provide ideological inspiration for further acts of terror.

Coping with the foreign fighter phenomenon is a direct continuation of the fight against world terror. Over the years, the UN has adopted conventions against terrorism, and several Security Council resolutions have been adopted on the topic. In 2014, the Security Council passed two central and binding resolutions on foreign fighters pursuant to Chapter 7 of the UN Charter. Resolution 2170,[13] passed in August 2014, continues the system of obligations of previous resolutions, and obligates countries to take action against the financing of terror, with special emphasis on oil fields, which provide economic revenue for operating terrorist organizations. The Security Council has expressed its readiness to include in the list of UN sanctions

those recruiting fighters, participating in the activities of the Islamic State, and/or financing or organizing the movement of foreign fighters. In addition, it called upon states to take measures to prevent foreign fighters from joining terrorist organizations and bring them to justice.

The term "foreign terrorist fighters" was defined for the first time in Resolution 2178[14] of September 2014: "foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict." The resolution mandates that the movement of foreign terrorist fighters along with the collection of funds for financing their activities, organization, or recruitment be defined as criminal offenses in domestic laws and regulations. In addition, the resolution obligates states to prevent foreign terrorist fighters from entering or passing through their territory and calls upon them to require airlines operating in their territories to provide advance passenger information to the appropriate national authorities, while calling for international cooperation on this matter.

On the state level, various measures have been employed to fulfill such international commitments. In Israel, for example, the Islamic State has been designated as a prohibited association,[15] and several citizens have been tried for traveling to and joining its ranks. Other states have adopted measures such as confiscating the passports of foreign fighters or stripping them of their citizenship. Still others have focused on programs to reintegrate them into the community.[16] Yet their positive aspects notwithstanding, Security Council resolutions and state legislation have received more than a little criticism, primarily out of fear that they will be exploited and lead to wide ranging violations of human rights.

Conclusion

The fight against the Islamic State presents significant legal challenges. The difficulty of justifying the use of force to deal with new threats in the international arena in the past decade demonstrates the importance of interpreting and adapting the law to a changing reality. The framework for the use of force and the right to self-defense was drafted in an era of wars between sovereign states. It no longer fully applies to the realities of today and most likely the foreseeable future, when prolonged and often indecisive armed conflicts against terror organizations based in and operating from

failed states accelerate humanitarian problems and pose a continuous threat to the security of multiple nations. As long as the fighting in Syria continues and additional states conduct military actions within the country against the Islamic State under the notion of self-defense, the interpretation of the right to self-defense in international law may evolve, including the central concept of "armed attack," and actually assist in the defeat of the Islamic State.

Another issue regards the International Criminal Court. In order to overcome the lack of territorial jurisdiction, states must increase intelligence efforts and assist the Court to exercise personal jurisdiction over senior leaders of the Islamic State, who are nationals of states party to the Court's statute. Bringing these senior figures to trial can assist in presenting a united front by the international community against the Islamic State and also in providing a role for international criminal law as a tool in the fight against crimes committed by organizations of Salafi jihadist Islam.

Nevertheless, the most effective solution seems to lie in the political international sphere, especially in the Security Council and its willingness to disentangle legal knots. The international effort to defeat the Islamic State while complying with international law and human rights requires the navigation of international politics with the goal of maximizing action to achieve this objective. This applies to military action permitted by the Security Council, the imposition of economic sanctions on Islamic State operatives or states that assist them, referral to the International Criminal Court, growing international cooperation with regard to sharing data, and the adoption of measures against terrorism.

Notes

1 United States Central Command, October 15, 2014, http://www.centcom.mil/en/news/articles/iraq-and-syria-ops-against-isil-designated-as-operation-inherent-resolve.

2 For additional details, see Louise Arimatsu and Michael N. Schmitt, "Attacking 'Islamic State' and the Khorasan Group: Surveying the International Law Landscape," *Columbia Journal of Transnational Law Bulletin* 53 (2014): 1-29.

3 Letter dated June 25, 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/440, June 25, 2014, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_440.pdf.

4 Letter dated September 20, 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, U.N.

Doc. S/2014/691, September 20, 2014, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf.

5 See for example Britain's position with regard to the military actions against the Islamic State in Iraq, September 25, 2014, https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil.

6 See for example the speech by President Barack Obama on September 10, 2014, which includes a variety of statements on military intervention in Iraq against the Islamic State and the feasibility of similar activity in Syria, inter alia, based on collective self-defense (aid to Iraq), individual self-defense (the defense of American citizens), and anticipatory self-defense (the growing threat beyond the nations of the region, including the United States), https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1. See also Britain's legal claim for self-defense in its attack on Islamic State operatives in Syria: "David Cameron: Britain Mounted Fatal Air Strikes in Syria," *The Telegraph*, September 8, 2015, http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11848600/David-Cameron-Britain-mounted-fatal-air-strike-in-Syria-live.html. Following the deadly terror attacks in Paris on November 13, 2015, French Foreign Minister Laurent Fabius said that France's decision to launch retaliatory airstrikes on the Islamic State stronghold of Raqqa in Syria was an act of "self-defense." See Ben Doherty, "France Launches 'Massive' Airstrike on ISIS Stronghold of Raqqa," *The Guardian*, November 6, 2015, http://www.theguardian.com/world/2015/nov/16/france-launches-massive-airstrike-on-isis-stronghold-in-syria-after-paris-attack.

7 Letter dated September 23, 2014 from the Permanent Representative of the United States of America to the United Nations and addressed to the Secretary-General, U.N. Doc. S/2014/695, September 23, 2014, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf.

8 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, April 8, 2015, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-08-04-2015-1.aspx.

9 Security Council Resolution 1593, U.N. Doc. S/RES/1593, March 31, 2005, http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf.

10 Security Council Resolution 1970, U.N. Doc. S/RES/1970, February 26, 2011, http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf.

11 "Former ICC Prosecutor Recognizes Yezidi Genocide," *RUDAW*, September 2, 2015, http://rudaw.net/english/kurdistan/020920151. See also "Former ICC Prosecutor Pushes for Yazidi Genocide Case," *Reuters,* September 2, 2015, http://www.reuters.com/article/2015/09/02/us-mideast-crisis-yazidis-icc-idUSKCN0R21NQ20150902#GvFsbJIbTEQDTSbF.97.

12 Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), International Criminal Court Website, May12, 2015, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-12-05-2015.aspx .

13 Security Council Resolution 2170, U.N. Doc. S/RES/2170, August 15, 2014, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2170 (2014).

14 Security Council Resolution 2178, U.N. Doc. S/RES/2178, September 24, 2014, http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf. See also "Policy Brief, Responding to Foreign Terrorist Fighters: A Risk-Based Playbook for States and the International Community," Global Center on Cooperative Security, November 2014, http://www.globalcenter.org/publications/responding-to-foreign-terrorist-fighters-a-risk-based-playbook-for-states-and-the-international-community/.

15 On September 3, 2014, Israel's Minister of Defense, Moshe (Bogie) Ya'alon, declared the Islamic State a prohibited association; see Digest of Publications 6872, September 7, 2014, p. 7922, http://index.justice.gov.il/Units/Reshomot/publications/Pages/OfficialGazette.aspx.

16 For additional details, see "Treatment of Foreign Fighters in Selected Jurisdictions: Country Surveys," Library of Congress (Law Library), http://www.loc.gov/law/help/foreign-fighters/country-surveys.php.