

DISCUSSION RESPONSE

## A Response to “Is the Islamic State a State?”

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Ralph asks “Is the Islamic State a State?” and his answer has three strings: First, he presents what he calls the *advocatus diaboli* opinion that all statehood requirements (territory, population, government) are fulfilled. Second, he explains the meaning of recognition as a requirement for the formation of a state. And third, he sets forth the legitimacy argument by concluding that because of the lack of the rule of law, the observance of human rights, or a certain degree of representativeness within the Islamic State (IS), statehood will be denied under International Law. I will counter with a factual and a normative argument as well as a comforting hypothesis.

## The Requirements of Statehood

I will start by pointing to the problem of applying the statehood criteria to an unclear factual situation focusing on the requirement of the “permanent population”.

IS is a criminal enterprise that either holds its residents hostage, kills those ideologically unsuitable who failed to escape the ring of terror, or scares the rest away with an onerous tax regime (see also “departure taxes”). There are estimates that placed the pre-war population in the relevant areas between 2,8 and 5,3 million. But since 2014 residents are fleeing in the millions from the jihadists in Syria and Iraq. The only people migrating to Syria into the “caliphate” are those willing to fight for IS. IS is in desperate need of experts and professionals, because every time they have taken over a new territory, residents and trained personnel have left. Consequently, it recently began headhunting specifically for engineers who can run oil equipment, fix electricity networks and provide medical care. Even fighters have begun leaving IS due to IS’s cash flow problems or their general disillusion.

Although, the requirement of a permanent population is generally not challenging and does not ask for a minimum number of people, it does ask for a *permanent* population, i.e. an element of stability.

The fighters hardly qualify as a stable population but rather as something that can be described as a nomadic terrorist enterprise. The caliphate looks more like a prison with those unable to escape as prisoners and the fighters as guards. A prison, as well organized, bureaucratic and effective as it may be, is not a state. Prisoners do not constitute a permanent population. Now, some authors argue that there is no word in

the Montevideo Convention about how freely a population must live on the territory in question... Can this be true?

Of course, at this point the German Democratic Republic (GDR) or Democratic People's Republic of Korea (DPRK) come into mind. In both cases, statehood was not questioned despite the fact that the population was/ is held hostage. The difference between this and the IS is that, in the case of the GDR and DPRK, statehood had been already established. As the failed-states-debate has shown, it is supposed to be quite difficult to lose statehood once it is achieved to protect the status quo.

Additionally, I have doubts that even if we put on our 3-elements-glasses, we could grant IS the status of a state. Military domination over a populated area (and some degree of governance) cannot suffice to grant statehood, and there is a very unsurprising reason for that conclusion: the 3 elements are linked to each other; the strongest link being between a population and the controlling authority. A population cannot be the mere object of a sovereign, but provides the rationality of the state's authority as such. A population must identify with the political polity.

### **The Normative Argument**

The legitimacy argument is popular: Conquering populated territory by infringing territorial sovereignty and integrity of Iraq and Syria, infringing the prohibition of the use of force and various human rights provisions can hardly be disregarded when judging upon the statehood of IS. Or with Koskenniemi: No statehood without legitimacy. The argument goes along these lines: If you want to play the

game, you must not only have your equipment ready (territory, population, government, capacity to enter into relations), you must also respect the rules of the game. However, the dilemma here is not a new one. In Derrida's words: "How are we to distinguish between the force of law of a legitimate power and the supposedly originary violence that must have established this authority and that could not itself have been authorized by any anterior legitimacy, so that, in this initial moment, it is neither legal nor illegal – or, others would quickly say, neither just nor unjust?" (Force of Law: The Mystical Foundation of Authority, 1989/1990).

Be that as it may, if we are to ask if IS has a legal status of a state under International Law, we need to respect the rules set up by International Law for statehood. International Law is the proverbial bouncer of the State Club. And it offers more than just 3 (or 4) elements. First, a status under International Law cannot be gained through forceful annexation of territory. And second, to achieve a territorial title, non-state-actors must prove a right to secession that demands first and foremost a people's right to self-determination. Self-determination is the right of a populace to decide upon its own destiny. It describes the link between a population and a political authority.

I want to stress two things: First, as already mentioned above, there must be a necessary link between people living within a certain territory and the authority controlling that territory in order to become a state. A state is never an end itself; it is a means of the people establishing it. Second and related to that, International Law sets the rules of the game and demands a right to statehood called self-determination. It goes without saying that the prison design of the IS does not qualify here.

## Entering the fight against IS on home turf

As a last finger exercise, I want to assume for a moment that IS fulfilled the statehood requirements and (despite overt and collective non-recognition) was a state. Are we all doomed? Or might it even be useful to think of IS as a state?

First and foremost, granting IS the status of a state makes Art. 51 UN Charter (UNC) directly applicable. Every armed attack launched and any imminent threat by IS triggers the right to self-defence. Of course, granting IS statehood makes it a subject of international law. But as unfortunate as this might be politically, there are legal advantages. As a state, IS must comply with the basic principles of international law (prohibition of the use of force, principle of non-intervention, respect of human rights, etc.). Non-compliance has legal consequences.

Without the statehood of IS, self-defence must be launched within the territories (even if not controlled anymore) of Iraq and Syria against a non-state actor, which causes the known problems for the state centric conception of International Law: consent of Syria, passive consent, self-defence against non-state actors, etc.

Sure, these problems can be solved for example by constructing a right to self-defence against a non-state actor and a duty to tolerate of the state concerned (or of course by defining IS as a de-facto regime). The finger exercise however, shows that even if International Law would qualify IS as a state (which it does not), International Law has fewer problems dealing with territorially ambitious non-state actors than with hit-and-run terrorists.

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