

RESEARCH ARTICLE

The international answer to the financing of contemporary Islamic terrorism

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ABSTRACT

In spite of losing control of all its territories in March 2019, ISIL continues to organize and claim responsibility for attacks around the globe. A reach this wide, unprecedented for any terrorist organization, was mostly possible due to ISIL's centralized funding of trillions of dollars. This paper compares ISIL's financing structure with that of its predecessors in terms of income sources and investment. The main difference with regards to sources of income is the considerably inferior place held by donations. At its prime, ISIL's financial success came from the "efficient" exploitation of lands and populations under their control. As a result, the previously-tried methods used to prevent international terrorist organizations from getting funding are insufficient. Once these territories were lost, it was necessary to adapt the strategy to the new phase of counter-terrorism. Therefore, this paper suggests using the notion of the international liability of private actors to stem the flow of income to ISIL. To do this efficiently, it is necessary to develop a method to identify those financiers who would be held liable, to examine in what capacity they would be held liable, and to specify what actions they would be held liable for. Finally, this paper briefly evaluates the current international strategy for combating terrorism financing and its efficiency.

Keywords: Financing, terrorism, ISIL, corporations, individual responsibility

العنوان: الاستراتيجية الدولية لمكافحة تمويل داعش

ملخص

على الرغم من فقدان داعش السيطرة على جميع أراضيها في مارس 2019، لا يزال التنظيم يعلن مسؤوليته عن الهجمات في جميع أنحاء العالم. إن إمكانية داعش الوصول إلى هذا النطاق الواسع لم يسبق له مثيل من قبل، ومن أهم أسباب هذه الإمكانية هو التمويل المركزي لتنظيم الدولة الإسلامية بتريليونات الدولارات. تقارن هذه الورقة هيكل تمويل تنظيم داعش بهيكل التنظيمات السابقة فيما يتعلق بمصادر الدخل والاستثمار، حيث يتضح أن الفرق الرئيسي من ناحية مصادر الدخل أن التبرعات حازت على المرتبة الأدنى في هذا الصدد فيعول نجاح تنظيم داعش المالي على طريقة الاستغلال «الفعال» للأراضي والسكان الخاضعين لسيطرتها. ونتيجة لذلك، فإن الأساليب التي سبق تجربتها والمستخدمه لمنع المنظمات الإرهابية الدولية من الحصول على التمويل ليست كافية. فمن الأجدر والضروري تكبيف الاستراتيجية مع المرحلة الجديدة من مكافحة الإرهاب فور فقدان هذه الأراضي. لذلك، تقترح هذه الورقة استخدام مفهوم المسؤولية الدولية للجهات الخاصة الفاعلة لوقف تدفق الدخل إلى تنظيم داعش. وللقيام بذلك بكفاءة، فمن الضروري وضع طريقة لتحديد الممولين وتشخيص بأي صفة سوف يلاحقوا قانونياً، و تحديد الأفعال التي تبرر هذه المسؤولية الدولية. أخيراً، تقيم هذه الورقة بإيجاز الاستراتيجية الدولية لمكافحة تمويل الإرهاب ومدى كفاءتها.

الكلمات المفتاحية: التمويل، الإرهاب، تنظيم داعش، الشركات، المسؤولية الفردية

1. INTRODUCTION

Afghanistan, Australia, Bangladesh, Belgium, Cameroun, Denmark, Egypt, France, Indonesia, Iraq, Kenya, Kuwait, Libya, Mali, Nigeria, Pakistan, New Zealand, the Philippines, Russia, Saudi-Arabia, Somalia, Syria, Tunisia, Turkey, the United States of America, and Yemen. This is a non-exhaustive list of states that suffered the adverse effects of the establishment of ISIL.

The Islamic State (IS), also known as the Islamic State in Iraq and the Levant (ISIL) or Daesh¹, is an international terrorist organization that first appeared in 2003 in Iraq. Founded by Abu Musab al-Zarkawi, ISIL claims that it follows an extremist Islamist ideology of the Jihadist Salafist school of thought. In 2014, ISIL declared the establishment of a caliphate spanning all the territories it controlled. In addition to controlling territories, ISIL controlled in excess of 2 trillion dollars in assets at the time, with an estimated annual income of 2.9 billion dollars.²

Throughout the organization's existence, ISIL persecuted both individuals and entire communities on the bases of race, gender, political affiliation, and religion.³ There is undisputed proof that ISIL soldiers have kidnapped civilians, raped women, and slaughtered children and adults, in addition to engaging in countless other atrocities. Furthermore, since it began exporting its efforts outside the territories under its control,⁴ ISIL has expanded the scope of organized terrorism and intensified its essence. The reach of this organization touched all continents, thousands of lives, and actively created an environment of fear.

However, ISIL's grip and resources have dwindled. In fact, ISIL lost control of all territories under its control, in 2019. Nevertheless, the fight against radical Islamic terrorism has not been won. If anything, the struggle seems more worrying and more unpredictable than before.⁵ It appears that one of the main reasons for the heightened efficiency of this new form of terrorist organisation is its centralised funding.⁶ However, its reliance on this central funding system may also be the key to its defeat. Without the renewed flow of funding that comes with the exploitation of the natural resources of territories under its control, the end of ISIL can be envisioned, provided that the international community has an effective and unified stance in preventing any other sources of finance to the organization. The fight against the financing of terrorism can, therefore, be seen as an effective countermeasure to this new form of international organized terrorism, on par with combatting the radical ideology itself.

The shift from unstructured terrorism, such as the auto-financing Al-Qaeda splinter cells, to organized and centrally-financed terrorism can be traced to 2001. Studying the Al-Qaeda model allows us to have a clear view on how this shift took place. In the late 1980s, Al-Qaeda's main source of income was donations from so-called "charitable organizations". Throughout the 1990s and early 2000s, Al-Qaeda received most of its income from Non-Governmental Organisations (NGOs) in Afghanistan and Pakistan.⁷

A similar phenomenon can be perceived in the schemes developed to allow the financing of the violence in Bosnia and Herzegovina, where NGOs appeared to be the gateway to financing the various groups' activities.⁸

Al-Qaeda's second most important source of income was individual donations, especially during the Osama Bin Laden era.⁹ Lastly, Al-Qaeda developed a lot of commercial activities through companies that were built or owned directly by its members.¹⁰ After 2001, NATO and the United States of America (hereafter "US") made serious efforts towards defeating Al-Qaeda which were largely fruitful. As a result, Al-Qaeda was decentralized, and so were its finances. Freezing donations and preventing the receipt of funding were sufficient to hinder the organization's capabilities.

ISIL's economic model is different, allowing centralized control and autonomy. It depended on two main sources of income, namely the exploitation of natural resources and extortion of the populations in territories under its control. Contrary to Al-Qaeda, it has had, until now, little to no dependence on donations. Simply using the strategy previously applied on Al-Qaeda would, therefore, be inefficient. A new strategy is needed to fight the financing of this new form of terrorist organization.

It seems difficult to develop a precise definition of "terrorism financing" in the absence of an exact definition of "terrorism".¹¹ Luckily, the beginnings of a definition can be found in the European Union (EU) directive 2015/849, as well as Article 11 of directive 2017/541 on the fight against terrorism, which states that the "financing of terrorism" may be defined as "the provision or collecting of funds, by any means, directly or indirectly, with the intent that they be used or knowing that they will be used, in full or in part, to commit, or to contribute to the commission of, any of the offenses referred to in Articles 3 to 10". When terrorist financing concerns one of the offenses referred to in Articles 3, 4 and 9 of Directive (EU) 2017/541, "it is not necessary that the funds are actually used, in whole or in part, to commit any of such offense or to contribute to the commission of such an offense, nor is it necessary for the offender to know for which offense or specific offenses the funds will be used."

The goal of this paper is identifying, in the light of the changes terrorism has seen since the establishment of ISIL, the appropriate international response to this new model of international terrorism financing. In order to reach this goal, this paper will first attempt to (2) identify the new sources of income of this international terrorist organization. Once these sources identified, this paper will suggest (3) an appropriate international reaction to these sources, through (4) the use of international liability of the individuals (5) responsible for the financing.

2. THE SOURCES OF ISIL'S INCOME

The minimal financial threshold required to commit acts of terror is rather low. The price of a knife,¹² a firearm,¹³ a cartridge, or even the

1 Al-Dawlah al-Islameya lel-Iraq wal-Sham (الدولة الإسلامية للعراق والشام).

2 J.-C. Brisard & D. Martinez, *Islamic State: The economy-based terrorist funding*, Thomas Reuters, p. 3.

3 *They Came to Destroy: ISIS Crimes Against the Yazidis*, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 2016.

4 The authors of the present article are of the view that since ISIL is not a recognized State according to International Law. Consequently, the vocabulary used in this article will mirror that opinion. For that reason, this article specifies that the territories are "under ISIL control" and not "ISIL territories", and that ISIL imposes "levies" not "taxes".

5 R. Callimachi & E. Schmitt, *Sri Lanka Attacks Signals ISIS's Widening Reach*, The New York Times, 25 April 2019.

6 FATF, *Financing of the terrorist organisation Islamic State in Iraq and the Levant (ISIL)*, 2015, www.fatf-gafi.org/topics/methodsandtrends/documents/financing-of-terrorist-organisation-isil.html

7 J. C. Brisard, *Plongée au cœur du financement de l'Etat Islamique*, Ecole de guerre, 7 March 2019.

8 *Ibid.*

9 A list of 20 donors from the Persian Gulf were found in 2004.

10 *Ibid.*

11 The only definition given by an international court was given by the Special Tribunal for Lebanon and was based on Lebanese domestic codes. It is currently the only international criminal court that has jurisdiction over terrorism.

12 A.J. Rubin & A. Breeden, *Assailant Near Louvre Is Shot by French Soldier*, The New York Times, 3 February 2017.

13 D. Cave, *New Zealand Shooting Suspect Is Charged With 50 Counts of Murder*, The New York Times, 3 April 2019.

price of the material necessary to manufacture an Improvised Explosive Device (or IED)¹⁴ does not constitute a heavy expense in most cases. However, maintaining a terrorist organization such as ISIL does not merely consist of preparing an attack. This type of direct spending appears to amount to only ten per cent of their budget.¹⁵ The other ninety per cent is indirect operational costs, expended for the infrastructure of ISIL itself. This means that the main bulk of the costs goes to propaganda, salaries, and recruitment, etc.

In order to meet all these expenses, ISIL has a diversified portfolio. The different sources of financing vary with the location, the requirements that need to be met, the investment opportunities, and the international context. Moreover, these sources are constantly evolving¹⁶ which makes tracking them often difficult. The main source of wealth for ISIL is straightforward and easily traceable as ISIL relies heavily on the conquest of territories and the exploitation of their natural resources. A study in 2015 found that oil revenue constituted 25% of ISIL's income, while natural gas constituted 14%, phosphates 10%, agriculture 7%, extortions 33%, and donations a mere 2% of ISIL's total income.¹⁷

The above stated difference between ISIL and Al-Qaeda's sources of financing is extremely apparent. Whereas the latter was mainly dependent on donations, the former's reliance on that source of funding is minimal. At first, Al-Qaeda's funding came mainly from NGOs mostly based in the Gulf States, such as Saudi Arabia, Kuwait, and Qatar.¹⁸ An example of such donations was seized in September, 2001, when a member of Al-Qaeda's upper command received a 2 million USD donation from the Gulf. The donor was subsequently sanctioned by the US Department of Treasury.¹⁹ In spite of ISIL's low reliance on donations in 2015, a watchful eye must be kept on that source of income. Since ISIL lost all territories previously under its control, their dependence on foreign donations might increase dramatically because its main source of revenue is no longer accessible.

According to the Financial Action Tax Force (FATF) 2015 report,²⁰ the main source of ISIL's revenue was the illicit exploitation of territories under its control, including "bank looting and extortion, control of oil fields and refineries and robbery of economic assets. Other sources include the donors who abuse Non-Profit Organisations (NPO's), kidnapping for ransom²¹ and cash smuggling (...) to new and emerging typologies, such as the extortion of goods and cash transiting territory where ISIL operates and grass-root funding strategies".

Each of the sources of income are analysed separately in the following paragraphs.

Illegal Activities: Many terrorist organizations use the profits made from petty crimes and other illegal activities.²² Over the

years, the involvement of terrorist groups and factions in illicit trade has become easily recognizable. The Chechen rebels, like Al-Qaeda and the Revolutionary Armed Forces of Colombia (or FARC), counterfeited CDs. For their part, ISIL, like the Irish Republican Army (or IRA) before it, trades mostly in cigarettes by imposing a levy on them or by transporting them. Similarly, in addition to the illegal trade in cigarettes, several French ISIL-affiliated terrorists were involved in the illegal trade of clothing and branded foot-wear. This is a recurring pattern with several foreign fighters who went to Syria in order to fight with ISIL.²³ Other schemes and illegal activities were also used, such as long-distance adoptions-related donations performed by a foreign terrorist fighter in order to bring material support and cash while going to Syria. It has been found that the foreign terrorist fighters in ISIL-controlled territories often got their money from robberies, drug trafficking, social benefits (like unemployment or different allowances) they continued receiving from their country of origin, defaulted consumer loans, money transfer to prepaid cards, and/or donations by family, friends, and supporters still in their country of origin.²⁴

Oil Production: What distinguishes ISIL's economic strategy is its use of territories under its control. Upon securing control of territories in Syria and Iraq, ISIL quickly took over several oilfields and refineries, as well as natural gas fields, in both countries, giving them access to phosphate, cement, and sulphur. ISIL then proceeded to extract oil and refine it, before selling the petroleum products in regional markets. Their offers were, it seems, particularly attractive due to the vastly discounted price. Using that model allowed ISIL to sell their products at about a quarter of market price,²⁵ generating around 2 million USD in profits per day.

Agricultural Revenues: ISIL also relied, although less heavily, on local agriculture to increase its revenue and satisfy the nutritional needs of its members. Due to the expanse of territories under ISIL's control, diverse products were planted, some of which were sold. Namely, controlling large parts of wheat and barley production in the region allowed ISIL to sell these products effectively, generating roughly 7% of their global revenue in 2014.²⁶

Antiquities: Another method by which ISIL attempted to exploit the territories under its control is smuggling local cultural artefacts on the black market. Iraq and Syria contained a plethora of archaeological and cultural artefacts, and ISIL is reported to have directly smuggled or extracted a levy from smugglers moving their products through ISIL-held territories.²⁷ National Geographic reported that ISIL and other illicit entities acting in the region made tens of millions of dollars in profits from antiquities stolen from Syria alone.²⁸ It should be noted that a precise estimate of the

14 S. Horwitz, *Explosives in New York and New Jersey were pressure cookers and pipe bombs linked to cellphones*, The Washington Post, 19 September 2016.

15 J. C. Brisard, *Plongée au cœur du financement de l'Etat Islamique*, Ecole de guerre, 7 March 2019.

16 L. Bindner, *Commerce illicite et financement du Terrorisme*, December 2016, CAT, p. 2.

17 *Le financement de l'Etat Islamique*, année 2015, CAT, mai 2016, p. 7.

18 J.-C. Brisard and D. Martinez, *Islamic State : The economy-based terrorist funding*, Thomas Reuters, p. 3.

19 FATF, *Financing of the terrorist organisation Islamic State in Iraq and the Levant (ISIL)*, 2015, www.fatf-gafi.org/topics/methodsandtrends/documents/financing-of-terrorist-organisation-isil.html, consulted on 29 March 2019.

20 *Ibid.*

21 This was about 10 million dollars a month in 2014: <http://www.antimoneylaundering.com/2014/09/islamic-state-who-finances-isis-and-bank-risk-factors-for-terrorist-financing.html> in J.-C. Brisard and D. Martinez, *Islamic State : The economy-based terrorist funding*, Thomas Reuters, p. 3.

22 About 40 percent of the European terrorist attacks were at least partially funded by small crimes. R. Basra, P. R. Neumann, & C. Brunner, *Criminal Past, Terrorist Futures*, ICSR, October 2016-3.

23 *Illicit Trade Converging criminal networks*, OECD, April 2016, and L. Bindner, *Commerce illicite et financement du Terrorisme*, December 2016, CAT, p. 2.

24 FATF, *Financing of the terrorist organisation Islamic State in Iraq and the Levant (ISIL)*, 2015, p. 19.

25 A. Rasheed, *Oil smuggling finances Islamic State's new caliphate*, Reuters, 23 July 2014.

26 Food and Agriculture Organization of the UN (FAO), *Global Information and early warning system on food and agriculture (GIEWS)*, Special alert n°332, June 25, 2014.

27 FATF, *Financing of the terrorist organisation Islamic State in Iraq and the Levant (ISIL)*, 2015, p. 19.

28 H. Pringle, *ISIS cashing in on Looted Antiquities to Fuel Iraq Insurgency*, National Geographic, 2014.

profits made from these smuggling activities is not possible because the whole endeavour takes place on the black market with little to no tracing possible.

Banks: When ISIL took over Mosul, it is reported to have looted several branches of private and public banks, stealing an estimated 435 million USD in cash from the Central Bank of Iraq.²⁹ Around 20 Syrian and Iraqi financial institutions with operations in ISIL-held territory continued to operate in Syria. Those banks were identified by the US Department of Treasury and the European Union, who blocked ISIL's access by isolating the banks from most of the internationally-regulated financial system. In addition to these national efforts, the financial institutions themselves took steps to prevent banks in ISIL-held territory from accessing the international financial system. Namely, the Central Bank of Iraq issued instructions to the financial institutions incorporated in Iraq to prevent transfers from and to banks located in ISIL-held territory.³⁰

By the end of 2018, those banks in ISIL-held territories no longer operated, and those institutions that did contain financial traffic were very poorly structured. Transactions would operate in changing offices or as informal transfers, based solely on trust. This lack of infrastructure or regulation did hinder the banking system in the controlled territories. Unfortunately, it also created a fertile environment for undocumented and difficult-to-track transactions. What could be tracked, however, as ISIL was losing control over its territories, was an increase in large bank transfers to countries where ISIL members are relocating after leaving the Syrian and Iraqi territories, such as Afghanistan, Egypt, Libya, the Philippines, and the Sahel region. A bank was forced to pay considerable fines for breaching anti-money laundering legislations for supporting activities related to the Sudanese terrorist.³¹ This suggests that any bank currently cooperating or abetting ISIL members or their finances would be fined too.³²

Levies: ISIL claimed high "taxes", in other words imposed levies, on goods,³³ namely telecommunication companies, cash withdrawals from bank accounts, social welfare, roads, trucks entering Iraq (USD 200), Jordan or Syria (USD 800), borders checkpoints, and looted archaeological sites and, finally, instituted a protection fee for non-Muslim communities within territories under their control.³⁴

Certain reports suggest that ISIL limits itself to these old-fashioned revenue sources, like extortion and looting. According to the President of the CAT, ISIL avoids the use of new technologies, including dark-web purchases, since they are aware that they are monitored.³⁵ However, there are conflicting reports on the use of technology. As stated above, the use of pre-paid cards and internet donations from friends and family have been documented. Several Internet crowd-funding and grass-roots campaigns have also been documented as well as much fundraising through social media and Internet platforms.³⁶

A common factor in all the above sources of revenue is the need for revenue providers. Without buyers accepting ISIL's

discounted oil, no revenue could be obtained; without supporters abroad sending money through internet donations or wire transfers, no revenue could be made from the social media campaigns or the bank extortion operations. Therefore, for the financing of international terrorism, it is important to consider the reaction of the international community regarding the financiers and those who are financed.

3. INTERNATIONAL LEGAL STEPS AGAINST THE FINANCING OF TERRORISM

In order to analyse the international legal response to the financing of terrorism, it is important to observe the steps taken by the international community. These steps can be divided into two categories. The first category consists of non-physical measures, while the second consists of physical measures, both aiming to hinder or stop the receipt or use of any resources at ISIL's disposal.

3.1. Non-physical measures

As we stated above, Iraqi and Syrian banks provided instructions to restrain certain monetary movements to or from territories under ISIL control. This step considerably reduced the economic flow from which ISIL could benefit. On a much larger scale, the United Nations Security Council intervened on more than once to limit ISIL's financial resources. Resolution 2170, dated 15 August 2014, condemns any commercial transaction with terrorist groups, including ISIL, and, again, particularly in the oil sector. In addition, Resolution 2199, dated 12 February 2015, aimed to regulate the action of the Member States to dry up the resources of funding for ISIL and, particularly, in the oil sector. It condemns other actions of ISIL, such as hostages and art trafficking, and also asks the Member States to ensure that financial institutions are vigilant regarding bank operations. Resolution 2253, dated 17 December 2015, reiterated States' obligation to ensure that their nationals and persons in their territory do not make economic resources available to terrorist actors— which applied to both direct and indirect trade in oil, including modular refineries and related chemicals and lubricants, among other natural resources. The violation of any of these Resolutions would, in principle, result in sanctions, economic and otherwise, applied by all members of the United Nations.

Most recently, on 28 March 2019, the Security Council adopted a new resolution aimed at strengthening global efforts to combat the numerous and new ways that terrorist groups raise funds to finance their operations. This resolution orders all States to ensure that their domestic laws are sufficient to prosecute and penalize those responsible for directly or indirectly financing "terrorist organizations or individual terrorists for any purpose".

In spite of the binding nature of Security Council resolutions, and the strong language used therein, it seems certain countries continue to have commercial relations with ISIL and its members while others did not adequately prosecute their nationals or those residing on their territory for financing terrorism.³⁷ The UN did constitute a list of individual financiers of terrorism, containing the

29 T. McCoy, *ISIS just stole \$425 million, Iraqi governor says, and became the 'world's richest terrorist group'*, The Washington Post, 12 June 2014.

30 FATF, *Financing of the terrorist organisation Islamic State in Iraq and the Levant (ISIL)*, 2015, p.27.

31 J. C. Brisard, *Plongée au cœur du financement de l'Etat Islamique*, Ecole de guerre, 7 March 2019.

32 J. C. Brisard & D. Martinez, *Islamic State: The economy-based terrorist funding*, Thomas Reuters, p. 10.

33 Witnesses stated that a little pot of nutella would be around 10 euros, for example.

34 J. C. Brisard & D. Martinez, *Islamic State: The economy-based terrorist funding*, Thomas Reuters, p. 5., and FATF, *Financing of the terrorist organisation Islamic State in Iraq and the Levant (ISIL)*, 2015, p. 19.

35 J. C. Brisard, *Plongée au cœur du financement de l'Etat Islamique*, Ecole de guerre, 7 March 2019.

36 FATF, *Financing of the terrorist organisation Islamic State in Iraq and the Levant (ISIL)*, 2015, p. 24 and 25.

37 G. Kiourtsoglou & Dr. A. D. Coutroubis, *ISIS export gateway to global crude oil markets*, London Shipping Law Centre, Maritime Business Forum, 12 March 2015.

individuals' names, nationalities, places of residence -when known-, and the "charges" against them.³⁸

3.2. Physical measures

The international coalition of armed forces, including forces from 79 countries,³⁹ executed roughly 10,000 airstrikes in 2015 and 1220 in January 2019.⁴⁰ As previously elaborated, these attacks had a major impact on ISIL's income from natural resources.⁴¹ The first strikes targeted refineries that were immediately abandoned by ISIL. Unfortunately, local residents, in agreement with ISIL, continued to operate the refineries for the terrorist organization⁴². The strikes were also aimed at oil fields.

As a consequence of these strikes, ISIL's income decreased significantly. Before the large-scale strikes, in 2014, ISIL's oil production capacity was estimated at 60,000 barrels per day (or bpd)⁴³, which translated into an annual income of 1 billion USD. In the following year, the aforementioned "surgical" air strikes and the loss of territory caused ISIL's oil industry production to decrease to 40,000 bpd per day⁴⁴ and an annual income of 600 million USD.⁴⁵ In order to further lessen ISIL's income from oil, several governments have also taken steps to seize suspected ISIL oil products.⁴⁶

To compensate for this loss, ISIL raised the levies and tariffs imposed on the populations at its mercy. This is yet another indication of ISIL's adaptability and versatility, and the necessity of developing a theory allowing the international community to directly hold any entity that finances, directly or indirectly, ISIL, or any similar organization, personally and internationally responsible.

4. INTERNATIONAL RESPONSIBILITY FOR INDIVIDUALS FINANCING TERRORISM

Any legal system is by definition a closed body of rules. In other words, the rules of a legal system can only be interpreted according to the definitions accepted and contained within that legal system. It follows that only persons recognized by that legal system, or, in other words, its subjects, can be bound by the rules of that legal system. Applying that simple notion of legal philosophy to international law as a legal system, results in the application of international law only to subjects of international law. Traditionally, the only subjects of international law were states. That qualification was extended to international organizations, who needed to be subjects of international law, should they have any chance of succeeding in their objectives.

As stated above, most financiers of international terrorism, and particularly ISIL, are persons, be they corporations or physical persons. Traditionally, as such, international law would not apply to them. However, as subjects of national laws, they are subject to national criminal law and not to international law. Through international conventions containing criminal provisions, a third

type of responsibility can be identified: international criminal responsibility. In spite of its international nature, it is applicable to persons and not only to states and international organizations.

Ergo, Professor Lauterpacht⁴⁷ concluded that individuals were subjects of international law, even though they did not have procedural rights in certain international tribunals.⁴⁸ The individual's quality as a subject of international law is affirmed by their quality as the victim of an international criminal offense and by the individualization of the penalty in international criminal law. So, on the one hand, in international law, a State can be a victim of aggression, and the aggressing State would be liable for damages for breaching international law. On the other hand, in international criminal law, individuals could be victims of an international crime, and, if they were to commit an international crime, they would personally be held criminally responsible and serve the appropriate jail sentence.

The *Teheran* case is a good example of how individuals have long been responsible for acts but "protected" by State responsibility.⁴⁹ Thus, the development of individual international responsibility is mostly pursuant of international criminal and international humanitarian law, and was originally customary. Thus, piracy⁵⁰ and slavery⁵¹ can be taken as crimes for which individuals were held directly responsible, pursuant to International law. The Nuremberg Tribunal emphasizes that an individual may be individually responsible, even if they are acting as a part of a State organ.

As subjects of International law, individuals and corporations must obey the rules of that legal system. The pertinent rule for the current study is the International Convention for the Suppression of the Financing of Terrorism of 1999. Article 5 of the aforementioned convention states:

- “1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.
2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.
3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.”

Therefore, it is obvious that individuals can be held responsible

38 By resolution 2368(2017) the Security Council imposes individual targeted sanctions (an asset's freeze, travel ban, and arms embargo) upon individuals, groups, undertakings and entities designated on the ISIL (Da'esh) & Al-Qaida Sanctions List. The Sanctions List currently contains the names of 262 individuals and 83 entities and was last updated on 1 May 2019.

39 <https://theglobalcoalition.org/en/>

40 <https://www.statista.com/statistics/693263/monthly-airstrikes-in-iraq-and-syria/>. Consulted on 1 April 2019.

41 Cf. p. 1.

42 G. Kiourtsoglou & Dr. A. D. Coutroubis, *ISIS export gateway to global crude oil markets*, London Shipping Law Centre, Maritime Business Forum, 12 March 2015.

43 *Syria, Iraq Oil Controlled by Islamic State Group*, Associated Press, 25 September 2014.

44 *Le financement de l'Etat Islamique*, année 2015, CAT, May 2016, p. 10.

45 *Ibid.*

46 Kurdistan and Iraq, for example. FATF, *Financing of the terrorist organisation Islamic State in Iraq and the Levant (ISIL)*, 2015, p. 6.

47 Sir Hersch Lauterpacht QC (16 August 1897 – 8 May 1960) was a Polish-British lawyer and judge at the [International Court of Justice](http://www.internationalcourtofjustice.org/).

48 H. Lauterpacht, *The subjects of international law* in A. Bianci, *Non-State Actors and International Law*, 2009, p. 145.

49 ICJ, *United States Diplomatic and Consular Staff in Tehran*, United States of America v. Iran, 24 May 1980.

50 Geneva Convention of the Law of the Sea, 1958, articles 14 and following.

51 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Geneva, 1956.

under international law for the financing of terrorism. Unlike the Nuremberg Tribunal, contemporary criminal courts recognize the personal responsibility of all individuals and not just of senior officials. While the International Criminal Tribunal for Rwanda (ICTR)⁵² is more reluctant, the International Criminal Tribunal for the former Yugoslavia (ICTY) confirms this theory.⁵³ Thus, the mere executioner of an international crime may be held responsible. A distinction must be made at this point, that the financing of terrorism is not an international crime *per se*. The main debtor of the international obligation in the aforementioned is the State, but the State is obliged to prosecute and hold liable all those who finance terrorism in its territory. This distinction might be seen as a first, superficial obstacle to the individual liability of those who finance international terrorism.

Although international criminal courts only have jurisdiction over international crimes, they aren't competent in terrorism matters because international terrorism has not been added to the list of international crimes. Therefore, international criminal courts aren't competent in terrorism matters. However, because of article 25 of the above-mentioned convention, the International Court of Justice has jurisdiction over cases relating to the financing of terrorism. Naturally, national courts have jurisdiction over the financing of terrorism too, according to the rules governing the international jurisdiction of its domestic courts.⁵⁴

French courts could serve as an interesting example of such domestic courts. Currently, the French justice system has a lot of different cases regarding terrorism. These cases do not exclusively concern the financing of terrorism. They concern also terrorist attacks, accomplished or attempted; departures to Syria; and even revenants from that region. In spite of such heterogeneous cases, certain patterns are clear. Recent studies about jihadists leaving France for Syria found that forty-seven per cent of them do not hold any educational degree.⁵⁵ Eighteen per cent have a form of a professional education certificate, and twenty-four per cent have the French equivalent of a high school degree. In the 137 cases studied, 131 were men, while only 6 were women.

The average age was around 24 to 26. Forty percent came from "priority neighbourhoods". As M. Hecker stated, "*The fact that such a large proportion of the observed people come from priority neighbourhoods shows that many individuals convicted of acts of terrorism come from disadvantaged backgrounds. Their cultural capital is also particularly weak*". He adds, "*it is hardly surprising that people are struggling to enter the labour market. Information was obtained on the professional background of 124 persons convicted of terrorism. Unemployment and precarious jobs are dominating*". He states, "*The cases of radicalized persons with fragilities related to traumatic situations experienced during their young years seem to be sufficiently numerous*". The median income is around a thousand euros per month, and only one

person in the pool had a very high income, due to drug trafficking. This poverty is relative, though, because the property seized during searches seems disproportionate to their income. This might indicate that some of them have hidden incomes, sometimes derived from illicit activities. On the other hand, forty-eight percent had a clean record. There were four major sources of finances for the terrorist efforts in the cited study. Thirty-seven percent was by support of a jihadist network, twenty-seven percent personal savings, twenty-one percent criminality and fifteen percent through the resources of their family members, who did not necessarily support the cause itself. The amounts are relatively modest, ranging from a few hundred to a few thousand euros.

As for reasons to go to Syria, the aforementioned study showed that they vary greatly. Certain people went to Syria in the hopes of impressing a woman or finding a partner, others due to their personal beliefs. The range of motivations is as large with regards to financing terrorism. Most cases today in France, regarding the financing of terrorism, are about those two percent of donations.⁵⁶ For these few cases, an international judicial response would be disproportionate and too expensive.

Another factor that influences different motivations for financing terrorism is the different kinds of actors. Private and public corporations have been known to take advantage of ISIL's low prices and buy material such as cement or even arms from ISIL.⁵⁷ In 2001, the International Law Commission (ILC) proposed Draft Articles on the International Responsibility of States for Internationally Wrongful Acts.⁵⁸ Non-mandatory, this proposal was far from recognizing the criminal responsibility of the State. Therefore, in the current state of positive law, only physical persons can be held responsible for the violation of international criminal law.⁵⁹

The most serious crimes are often committed in the name of the State, but its criminal responsibility cannot be accepted in international or domestic law. The major difficulty comes from the need to impute criminal acts to (legal) persons. Indeed, these acts are committed in the name of the state but by individuals. These are either protected by immunities or are not yet imbued with the status of subjects of international law. To this extent, it is very important to identify the status of international corporations in international law to consider the possibility of an international judicial response.

5. INTERNATIONAL RESPONSIBILITY FOR CORPORATIONS FINANCING TERRORISM

A Latin adage suggests that corporations cannot commit crimes: *societas delinquere non potest*. History is, however, rife with examples of big corporations acting in ways that are criminally reprehensible.⁶⁰ It is not surprising, then, that a corporation directly or indirectly financing a terrorist organization, an organization that

52 TPIR, *Akayesu*, 2 September 1998, TPIR-96-4, §631 : « Due to the overall protective and humanitarian purpose of these international legal instruments, however, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted. The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command, of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts. The objective of this approach, thus, would be to apply the provisions of the Statute in a fashion which corresponds best with the underlying protective purpose of the Conventions and the Protocols ».

53 TPIY, *Mucić and others - "Camp de Čelebići"*, 16 November 1998, IT-96-21, §377.

54 Criminal law is most often territorially applied.

55 M. Hecker, *137 nuances de terrorisme, les djihadistes de France face à la justice*, IFRI, April 2018, p. 21.

56 *Ibid.*

57 S. Seelow, *Financement du terrorisme par Lafarge : mode d'emploi*, Le Monde, 30 April 2018.

58 Available on <http://hrlibrary.umn.edu/instreet/Fwrongfulacts.pdf>.

59 Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nuremberg 1947, p. 223. « *crimes against international law are committed by men, not by entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced* ».

60 The *Zyklon B* case during the Second World War, Total in Birmanie in the 1990, or Primark for not respecting human rights.

by definition ignores all concepts of human rights, would incur criminal liability. That liability would fall onto the corporation itself and, personally, on those running it. An example of such a corporation is the multinational company that made regular payments, for years, of protection money to the FARC, in exchange for ensuring the “security” of the company. This type of scenario also occurred in the areas held by ISIL, and even their cement was bought by a French corporation.

The main problem is that the international community does not have a unified definition for an enterprise that includes national, multinational, and transnational entities.⁶¹ It follows, then, that each kind of corporation is considered differently depending on its internal legal order. Their criminal liability also changes, depending on the legal order in question. In an attempt to solve that problem, since 2011 the UN Human Rights Council has been endorsing the UN Guiding Principles on Business and Human Rights. Around the same time, the OECD embraced its updated Guidelines for Multinational Enterprises (MNE), incorporating a human rights chapter. These two documents provide clarity, demanding that companies respect human rights across their operations and value chains.⁶² Unfortunately, those rules are not binding and are only considered soft law, but governments can encourage corporations to respect the values contained therein.⁶³

Different corporations have been held accountable for different crimes. The oil company Total was held criminally responsible in France for marine pollution for its damage with the *Erika* ship.⁶⁴ Even if The Netherlands did not have jurisdiction over the famous *Shell*⁶⁵ case, their courts have significant opportunities to give an effect to rules of public international law in cases of transnational litigation, either on the basis of public international law as incorporated into national law or as part of the applicable foreign law: “*The most important limitation to the application of public international law as direct basis for decision will be that many norms in the sphere of human right law (...), courts have not accepted that they allow for direct judicial application or that they allow for application at all in a dispute between private parties*”.⁶⁶ It follows that Dutch courts will have jurisdiction in cases against a multinational corporation by a foreign plaintiff based on the Lugano Convention or Dutch domestic private international law.

In the US, “*corporations can commit almost any kind of tort that individuals can commit, and are liable for the acts of their agents and servants in the same degree as natural persons are liable for the acts of their servants and agents*”.⁶⁷ The penalties mostly involve monetary fines or punitive damages, but the corporation can also be ordered to cease some activities or undertake certain actions. They can also simply be liquidated. In the US legal system, corporations can be held responsible for

violations of human rights’ norms that apply to private actors and when they are complicit with government officials to commit human right violations.⁶⁸ Most of the American jurisprudence on the matter concerns torture, but the cases show that corporations can be brought to justice for violation of international obligations.⁶⁹

The International Convention for the Suppression of the Financing of Terrorism⁷⁰ also accepts that corporations can commit criminally reprehensible acts by financing terrorism. All Signatory States should follow that same opinion, though, as shown above, this is not the case.

6. CONCLUSION

There seems to be a dichotomy between some international obligations on the financing of terrorism and the resulting international liability. Even though this was a subject of debate for a time,⁷¹ international courts are quite clear, nowadays, in their Statutes that they have no jurisdiction over corporations.⁷² However, art. 46-C of the Protocol of Molabo would give jurisdiction to the future African Court of Justice over corporations.⁷³ We can, therefore, hope that this position taken by transnational and international jurisdiction is evolving.

Finally, it would seem that there is, currently, no efficient international response in place that would allow the international community as a whole to end the financing of terrorism. The UN leaves that question to the domestic legislation of its Member States, inviting these States to organize the prosecution of the financing of terrorism. Although somewhat underwhelming, this position does prevent the burial of the international jurisdictions under a mountain of small terrorism-financing cases that should remain within the sole jurisdiction of domestic courts. This should not hinder an international coordinated response with regards to the actions and liability of big multinational or transnational corporations, as their leverage in any one State might be an obstacle for any true measures to be taken by that State.

In conclusion, as international terrorism changes in form and the way it presents itself, the evolution of international law is becoming necessary. Fortunately, the current legal landscape is promising and contains notions, such as the personal liability of the actors, that would allow for an efficient evolution in the direction of a safer, more coordinated world. In order to take advantage of this promising landscape, there is a need to fund studies that compile and analyse the treatment of terrorist cases in their respective legal orders, these would provide valuable data for orchestrating the international efforts. Court watch⁷⁴ in France is an example of one such study, aiming to provide «up-to-date information», aiding counter-terrorism efforts as well as «assist[ing] human rights advocacy on counter terrorism judicial practice ».

61 F. Bellivier, M. Eudes, & I. Fouchard, *Droit des crimes internationaux*, LGDG, p. 252.

62 J. G. Ruggie, *Holding business to account*, OECD, 2015.

63 F. Bellivier, M. Eudes, & I. Fouchard, *Droit des crimes internationaux*, LGDG, p. 254.

64 CA, Paris, 30 March 2010, n° 08/022. See F. Bellivier, M. Eudes, & I. Fouchard, *Droit des crimes internationaux*, LGDG, p. 255.

65 US District Court for the Southern District of New York, *Ken Wiwa v. Royal Dutch Petroleum Comany*, On the 1st of May 2019, the Dutch court has ruled that it has jurisdiction to determine whether Shell was complicit in the Nigerian government’s execution of the Ogoni Nine, and that can be an « important precedent » for global human rights cases. K. Hodal, *Dutch court will hear widow’s case against Shell over deaths of Ogoni Nine*, The Guardian, 1 May 2019.

66 A. Nolkemper, *Litigation Against MNCs : Public International Law in the Netherlands*, in *Liability of Multinational Corporations under International Law*, M. T. Kamminga & S. Zia-Zarifi, Kluwer Law International, p. 281.

67 W.M. Fletcher, et al. *Fletcher Cyclopedia of the Law of Private Corporations*, Vol. 10, rev. Ed. (1993), section 4877, pp. 337-338.

68 B. Stephens, *Litigation Against MNCs : the US*, in *Liability of Multinational Corporations under International Law*, M. T. Kamminga & S. Zia-Zarifi, Kluwer Law International, p. 224.

69 Superior Court of California, *Doe v. Unocal Corp.*, BC 237 980 and BC 237 679, 14 September 2004.

70 Available on <https://www.un.org/law/cod/finterr.htm>.

71 A. Clapham, *The questions of jurisdiction under international criminal law over legal persons : lessons from the Rome conference on an International criminal court*, p. 143 and following.

72 Article 5 ICTY, article 6 ICTR and article 25 ICC.

73 F. Bellivier, M. Eudes, & I. Fouchard, *Droit des crimes internationaux*, LGDG, p. 257.

74 For more information about the organisation see <https://antiterrorisme-droits-libertes.org>.

Such studies would open the door for an international convention uniforming the definitions and sanctions relating to the financing of international terrorist organisations and decreasing the disparities in the solutions proposed by different legal orders. Moreover, this international cooperative effort can strengthen hard law instruments' mobilisation of the concept of international

liability of transnational entities. This would fill the final remaining gap in the international response to the financing of international terrorism by avoiding the potential *de facto* immunity enjoyed by transnational entities due to differences in rules governing the jurisdiction of national courts.